

PAY FOR PLAY IN COLLEGE ATHLETICS: WHY COST OF ATTENDANCE?

*Danielle Day**

Abstract

There is an ongoing dialogue about the most desirable model for compensation of collegiate student-athletes. The central question is whether the current model—capping compensation at cost of attendance—is the best method for all parties involved. Other options include establishing a National Collegiate Athletic Association-wide grant-in-aid cap, implementing a free market for student-athlete compensation, or allowing student athletes to be paid by third parties for use of their name, image, and likeness. In recent years, state legislatures forced the NCAA to consider revising its rules to permit these kinds of payments from third parties. This Note argues Congress or the NCAA should revise current rules and regulations to create a meaningful statutory definition of cost of attendance and implement a more effective regulatory structure to limit manipulation of individual institution’s cost of attendance, while complying with the Ninth Circuit’s intent to limit compensation to education-related expenses. This option, compared to a free market or allowing payments from third parties, is a middle ground allowing student-athletes to be compensated for the maximum of their educational expenses, but not in over-the-top amounts that would put the entirety of college sports in jeopardy.

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* Danielle Day is an Associate at Stoll Keenon Ogden, PLLC in Lexington, Kentucky. She contributes to the Labor, Employment, and Employee Benefits practice group. She earned a Bachelor of Art degree in Political Science and Psychology from University of Kentucky, where she was a two-time team captain on the women’s swim team and won a Division I NCAA Championship in the 200 yard backstroke. She then earned a juris doctor from the University of Florida Levin College of Law. Danielle would like to thank Professor William H. Page for his support during the writing and editing process. She would also like to thank her husband, Sam, for his patience and support during law school.

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INTRODUCTION

As the years have passed, the debate about the best model for compensation of college student-athletes has grown. These debates typically focus on the same few models: establishing a National Collegiate Athletic Association (NCAA)-wide grant-in-aid cap, implementing a free market for student athletic compensation, and allowing student athletes to be paid by third parties for use of their name, image, and likeness (NIL). This debate reached the courts in *O'Bannon v. NCAA*,¹ where the Ninth Circuit capped grant-in-aid, the total amount of an athletic scholarship for student athletes, at “cost of attendance.”² Cost of attendance (COA), broadly defined and poorly regulated, is each school’s estimate of what it costs to attend their school for the fall and spring semesters.

This Note will argue that best model for compensation of college student-athletes is to reform the meaning and implementation of COA. It should be reformed to comply with the Ninth Circuit’s intent, to base grants-in-aid on educational expenses. Implementing a more meaningful

1. 802 F.3d 1049 (9th Cir. 2015).

2. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d at 1074.

statutory definition of COA in combination with increasing the regulation of COA calculation will allow COA to act in accordance to its intended use as a true estimate of educational expenses for student-athletes. This Note is divided into three main sections. Section I examines the *O'Bannon* decision; Section II explores the history and current status of COA, and Section III discusses each of the commonly proposed alternative compensation models in relationship to this Note's preferred model, reformed COA.

I. THE *O'BANNON* DECISION

In 2009, Ed O'Bannon, a former college basketball player, brought a suit against the NCAA and the Collegiate Licensing Company (CLC) arguing that certain NCAA-imposed restrictions functioned as illegal restraints of trade under Section 1 of the Sherman Act.³ O'Bannon had recently discovered that a video game character looked just like him, down to the jersey number and college represented, even though he had not given the company permission to use his NIL.⁴

A. *District Court Decision in O'Bannon*

After a fourteen-day trial, the district court concluded, "that the NCAA's rules prohibiting student-athletes from receiving compensation for their NILs violate[d] Section 1 of the Sherman Act."⁵ To reach this conclusion, the court first determined that "the NCAA's rules impose[d] a restraint on competition."⁶ In anti-trust cases, restraints on competition are acceptable as long as they are justified.⁷ For a restraint to be justified the proponent of it must show that "the anticompetitive aspects of the challenged practice outweigh its procompetitive effects."⁸ The NCAA proposed four procompetitive purposes to justify the challenged restraints, but they only satisfied their burden on two of the four.⁹ Those two were "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism and . . . integrating academics and athletics."¹⁰ The burden then shifted to the Plaintiffs to show that these two procompetitive purposes could have been achieved

3. 15 U.S.C. § 1 (2012); *O'Bannon*, 802 F.3d at 1055.

4. *O'Bannon*, 802 F.3d at 1055.

5. *Id.* at 1056; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

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

7. *See id.*

8. *See id.* (internal quotations omitted) (quoting *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003)).

9. *Id.* at 1004.

10. *Id.* at 1005.

through less restrictive alternatives than the NCAA prohibiting student-athletes from receiving compensation for their NILs.¹¹

The court ultimately implemented two of the Plaintiff's proposed less restrictive alternatives.¹² The first required that the NCAA allow schools to give their student-athletes stipends up to the school's full cost of attendance and the second required the NCAA to allow schools to hold in trust "a limited and equal share of its licensing revenue to be distributed [after] student-athletes . . . leave college or their eligibility expires."¹³

To start its analysis, the court discussed each of the NCAA-imposed restraints challenged in *O'Bannon*: (1) the restraint on student-athletes receiving compensation for use of their NIL; (2) the cap for an athletic scholarship being a full grant-in-aid that—at the time of *O'Bannon*, athletic scholarship was limited to tuition, fees, room, board, and books; (3) the cap on each student-athlete's total financial aid, including outside aid, at cost of attendance;¹⁴ (4) the prohibition on compensation to student-athletes from third parties for athletic performance, skills, or ability related to athletics; (5) the limit on compensation from off-campus jobs to an amount commensurate with a non-athlete who completed the same work; and (6) the bar keeping student-athletes from endorsing any product or service regardless of whether they are being compensated.¹⁵

To justify the challenged restraints, the NCAA had to assert reasons that the procompetitive benefits of the restraints outweighed the anticompetitive aspects. The NCAA's four reasons were: (1) the preservation of amateurism that promotes consumer demand for college football and basketball;¹⁶ (2) maintenance of the competitive balance that also promotes consumer demand;¹⁷ (3) integration of athletics and academics;¹⁸ and (4) increasing the number of opportunities for games to schools and student-athletes.¹⁹ The NCAA met their burden of proof for both the preservation of amateurism and the integration of athletics and academics procompetitive purposes by showing that the procompetitive benefits of the restrictions outweighed the anticompetitive aspects.²⁰

Accordingly, the burden shifted to the Plaintiffs to propose less restrictive alternatives to the challenged restraints.²¹ The less restrictive

11. *Id.* at 1004 (internal quotations omitted).

12. *O'Bannon*, 7 F. Supp. 3d at 1008.

13. *Id.* at 1005.

14. *Id.* at 971.

15. *Id.* at 972.

16. *See id.* at 973.

17. *Id.* at 979.

18. *O'Bannon*, 7 F. Supp. 3d at 979–80.

19. *Id.* at 981.

20. *Id.* at 999.

21. *Id.* at 1004 (citing *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 n.4 (9th Cir. 1991) (citations omitted)).

alternatives had to be virtually as effective at serving the same objective without significantly increasing the cost.²² The Plaintiffs proposed three less restrictive alternatives.²³ They suggested that the NCAA could:

(1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.²⁴

The court ultimately required the NCAA to implement two changes to their rules. The first was allowing each NCAA school to increase the value of an athletic scholarship, including stipends, but the court did not permit the cap to be lower than each institution's COA.²⁵ The court found that "there is no evidence that this cap will significantly increase costs; indeed, the NCAA already permits schools to fund student-athletes' full cost of attendance."²⁶ Although the NCAA had previously permitted schools to provide athletic scholarships up to COA, schools typically limited their scholarships to tuition and fees, room and board, books and supplies.²⁷ Increasing the grant-in-aid cap to COA did increase the financial burden on athletic departments because it required schools to raise the minimum scholarship amount to full COA.²⁸ Increasing the minimum scholarship automatically increases the bottom line of any athletic department.

In addition to raising the grant-in-aid cap, the NCAA had to allow member schools or conferences to "offer[] to deposit a limited share of licensing revenue in trust for their Division I football and basketball recruits, payable when they leave school, or their eligibility expires."²⁹ The NCAA could cap the amount a school could put in the trust, but it could not be less than \$5,000 per year per athlete.³⁰ The court found that no "procompetitive goals [would] be undermined by allowing modest

22. *Id.* at 1004–05 (citing *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148 (9th Cir. 2001)).

23. *Id.* at 982.

24. *O'Bannon*, 7 F. Supp. 3d at 982.

25. *See id.* at 1008.

26. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1075 (9th Cir. 2015).

27. *Id.* at 1054.

28. *How Colleges Figure "Cost of Attendance,"* COLL. DATA, <https://www.collegedata.com/resources/pay-your-way/how-colleges-figure-cost-of-attendance#:~:text=As%20dictated%20by%20Congress%2C%20the,reflect%20changes%20to%20these%20costs> (last visited Mar. 27, 2019).

29. *O'Bannon*, 7 F. Supp. 3d at 1008.

30. *Id.*

payment[s]” from a trust.³¹ During the trial, a witness for the NCAA testified that the effects of payments to student-athletes would be minimized if the payments were capped at a few thousand dollars a year.³² The court also permitted the NCAA to enforce existing rules and adopt new ones to keep current student-athletes from monetizing the trusts while enrolled in college.³³

B. Ninth Circuit Court Decision

On appeal, the Ninth Circuit affirmed the district court’s conclusion that the NCAA is subject to antitrust scrutiny and emphasized that the NCAA is required to comply with the Sherman Act.³⁴ It also affirmed the district court’s holding that the NCAA’s “existing compensation rules violate[d] Section 1 of the Sherman Act” by employing regulations that were “more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.”³⁵ The Ninth Circuit vacated the portion of district court’s ruling permitting the NCAA to allow member schools to pay certain student-athletes using deferred compensation but otherwise, it affirmed the district court’s holding increasing the grant-in-aid cap.³⁶

1. Increase the Grant-In-Aid Cap to Cost of Attendance

In affirming an increase to the grant-in-aid cap, the Ninth Circuit found that “[t]he district court did not clearly err [by finding that it] would be a substantially less restrictive alternative to the current compensation rules.”³⁷ The evidence presented during the trial demonstrated there would likely be little effect on a student-athlete’s amateurism by increasing the grant-in-aid cap to cost of attendance.³⁸ Dr. Mark Emmert, President of the NCAA, testified that the extra money given to student-athletes would still go towards “legitimate costs to attend school.”³⁹

The court’s focus on the effect of this change on student-athlete’s amateurism was rooted in *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*.⁴⁰ In that case, the United States Supreme Court found that the NCAA plays a critical role in maintaining amateurism in college sports and gave the NCAA “ample latitude” to

31. *Id.*

32. *Id.*

33. *Id.*

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

35. *Id.* at 1075–76, 1079.

36. *Id.* at 1079.

37. *Id.* at 1074.

38. *Id.* at 1074–75.

39. *Id.* at 1075 (internal quotations omitted).

40. *O’Bannon*, 802 F.3d at 1073.

perform that task.⁴¹ It held that NCAA student-athletes must not be paid to preserve the “character and quality of the product.”⁴² The product, as defined by the Court, was college football.⁴³ Maintenance of this product could not be achieved through unilaterally accepted rules, therefore the NCAA was needed to create rules that enabled the product to exist.⁴⁴ The NCAA’s continued commitment to limiting payments to student-athletes to only those related to legitimate education-related expenses is within the “ample latitude” given to them by the Court.⁴⁵

No evidence was presented in the district court to show that raising the grant-in-aid cap would affect consumer demand for collegiate sports or that it “would impede student-athlete’s integration into their academic communities,” two of the procompetitive benefits of the NCAA’s restraints.⁴⁶ The Ninth Circuit affirmed the increased grant-in-aid cap because it was substantially less restrictive than the previous NCAA-imposed restraint on grant-in-aid while maintaining the amateur status of student-athletes and retaining consumer demand.⁴⁷

At the time, neither the district court nor the Ninth Circuit focused on the details of COA other than its obvious relationship to educational expenses. The courts’ narrow focus on COA’s clear relationship to educational expenses came from “the NCAA’s own standards, [that] student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”⁴⁸ Although, in theory, COA includes only education-related expenses therefore continuing student-athlete’s amateurism,⁴⁹ neither of the courts looked at the inadequacies of the current COA calculation or regulation procedures.⁵⁰

2. Deferred \$5,000 Trust

The district court found that a “viable alter[n]ative to allow[ing] students to receive NIL cash payments”⁵¹ was to provide, in the form of a trust upon graduation or expiration of eligibility, \$5,000 per athlete per year of athletic participation.⁵² The Ninth Circuit did not agree that this

41. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

42. *Id.* at 102 (internal quotations omitted).

43. *Id.* at 101.

44. *Id.* at 102.

45. *O’Bannon*, 802 F.3d at 1079 (citing *Bd. of Regents*, 468 U.S. at 120).

46. *Id.* at 1075.

47. *Id.* at 1074–75.

48. *Id.* at 1075.

49. *Id.*

50. *Id.* at 1079; *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

51. *O’Bannon*, 802 F.3d at 1076.

52. *O’Bannon*, 7 F. Supp. 3d at 1008.

was a less restrictive alternative because the payments would not be tethered to educational expenses.⁵³ The NCAA's continued effort to limit payments to student-athletes to only those related to their educational expenses has been recognized as within the "ample latitude" to maintain the "product" of college football.⁵⁴ This court did not "agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand."⁵⁵ The district court found that these deferred cash payments would promote amateurism as effectively as not paying student-athletes, but the Ninth Circuit disagreed pointing to the district court's failure to consider that "not paying student-athletes is *precisely what makes them amateurs*."⁵⁶ "The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."⁵⁷

In considering whether the trust fund alternative would be "virtually as effective" at promoting amateurism, the standard for a less restrictive alternative, the Ninth Circuit described the evidence seen by the district court as "threadbare."⁵⁸ Rather than directly supporting a \$5,000 trust fund, the evidence simply demonstrated that making large payments to student-athletes would "harm consumer demand [for college sports] more than smaller payments would."⁵⁹ The NCAA admitted evidence addressing whether payments of \$200,000 or \$20,000 would affect consumer demand for college sports "[i]nstead of asking whether making small payments to student-athletes served the same procompetitive purposes as making no payments."⁶⁰ In fact, Neal Pilson, the NCAA's broadcasting industry expert,⁶¹ was pushed to produce a reasonable number for payments to student-athletes.⁶² He finally replied, "I [will] tell you that a million dollars would trouble me and \$5,000 wouldn't."⁶³ On review, this court emphasized that this testimony was the main evidentiary support for the district court's \$5,000 minimum.⁶⁴

53. *O'Bannon*, 802 F.3d at 1076.

54. *Id.* at 1062 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02, 120 (1984)).

55. *Id.* at 1076.

56. *Id.*

57. *Id.* at 1078.

58. *Id.* at 1076–77.

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

60. *Id.*

61. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 969 (N.D. Cal. 2014).

62. *O'Bannon*, 802 F.3d at 1078.

63. *Id.*; see also *O'Bannon*, 7 F. Supp. 3d at 983.

64. *O'Bannon*, 802 F.3d at 1078.

Anecdotal evidence was brought comparing public dislike of increasing baseball salaries to the future of college athletics if student-athletes are permitted to make more money.⁶⁵ Increasing student-athlete pay was also compared to the period after professional athletes were first allowed to compete at the Olympics, which had previously been composed of only amateurs.⁶⁶ When the court considered that there was still a large consumer demand for both professional baseball and the Olympics, it was not convinced by the analogies that large payments would have a profound impact on the amateurism and decrease consumer demand for college sports.⁶⁷

In the end, the Ninth Circuit vacated the portion of the district court's injunction requiring the NCAA to permit member institutions to provide a portion of revenue to student-athletes in the form of a trust upon leaving college or their eligibility expiring.⁶⁸ Otherwise, it affirmed the requirement that the NCAA raise the grant-in-aid cap to COA, allowing schools to distribute stipends up to COA to their student-athletes.⁶⁹

II. COLLEGIATE COST OF ATTENDANCE

A. *History of Cost of Attendance*

Since its creation, COA has not been the subject of much controversy.⁷⁰ Established by the Higher Education Act of 1965 (HEA), Congress capped the maximum amount that a student could take out in federally-insured loans from private lenders; a cap that was the same regardless of the institution attended.⁷¹ The Pell Grant System, established in 1972, created new loans that covered the difference between COA and a student's Estimated Family Contribution.⁷² COA for these loans was based on each student's personal expense, not on the individual institution's estimated cost.⁷³

By 1976, Congress expanded the use of COA to include federally-backed student loans, the loan limits were still based on each student's

65. *Id.* at 1077.

66. *Id.*

67. *Id.*

68. *See id.* at 1079.

69. *Id.*

70. *See* Kim Dancy & Rachel Fishman, *Cost of Attendance: More Than Tuition*, NASFAA (Nov. 29, 2016), https://www.nasfaa.org/news-item/10511/Student_Aid_Perspectives_Cost_of_Attendance_More_Than_Tuition [<https://perma.cc/2W5R-LZSB>].

71. Kim Dancy & Rachel Fishman, *A Legislative History: Why is Cost of Attendance so Complicated?*, NEW AM. (May 4, 2016), <https://www.newamerica.org/education-policy/edcentral/more-than-tuition-2/> [<https://perma.cc/UZ7H-PKVE>] (hereinafter NEW AM.); 20 U.S.C. § 1075.

72. *Id.*

73. *Id.*

individual expenses.⁷⁴ When the HEA was reauthorized in 1980,⁷⁵ the basic standards for COA had been established, but minor amendments were made.⁷⁶ In 1986 when the Reagan administration attempted to adjust the needs analysis formula for federal student loans to decrease federal student aid spending, the Democratic-majority Congress restricted any and all regulation of COA calculation by the Department of Education.⁷⁷ As a result, each school's financial aid office, not the federal government, has complete discretion over the calculation of their school's COA.⁷⁸

When the HEA was reauthorized as the Higher Education Opportunity Act (HEOA), it mandated that "each postsecondary institution in the United States that participates in the Title IV student aid programs . . . post a net price calculator on its Web site that uses institutional data to provide estimated net price information to current and prospective students and their families based on a student's individual circumstances."⁷⁹ To assist the postsecondary institutions with this requirement, the National Center for Education Statistics (NCES), Office of Postsecondary Education (OPE), and the IT Innovation Solutions Corp. partnered to create a fully functional net price calculator available to all Title IV postsecondary institutions for use on their institutional websites.⁸⁰

B. *Defining Cost of Attendance*

COA is generally defined as the average cost to attend a specific college for a single academic year, including both fall and spring semesters.⁸¹ It typically includes tuition and fees, room and board, books and supplies, transportation, and personal expenses.⁸² On the Free Application for Federal Student Aid (FAFSA) website, COA is simply defined as the "total amount it will cost you to go to college each year."⁸³ In addition to the items included above in the generally accepted definition, FAFSA describes COA as including loan fees, dependent care, and personal computer allowances, if applicable.⁸⁴

74. *Id.*

75. *Id.*

76. Dancy & Fishman, *supra* note 70.

77. *Id.*

78. *See id.*

79. *Net Price Calculator Information Center*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/ipeds/report-your-data/resource-center-net-price> [<https://perma.cc/9EF7-D9KX>] (Mar. 5, 2019).

80. *Net Price Calculator Template*, INOVAS, <http://www.inovas.net/Projects/Project/21> [<https://perma.cc/TS9D-U96U>] (last visited Apr. 15, 2021).

81. COLL. DATA, *supra* note 28.

82. *Id.*

83. *Cost of Attendance*, FAFSA, <https://studentaid.gov/help-center/answers/article/what-does-cost-of-attendance-mean> [<https://perma.cc/2JLU-QJ2E>] (last visited Mar. 27, 2019).

84. *Id.*

To keep up with changes in these costs, COA can be updated yearly, but each school determines how often their COA is updated.⁸⁵ Schools can calculate multiple COAs based on the most common student circumstances, like whether the student is in-state or out-of-state or by the type of housing the student chooses.⁸⁶

In practice, each school has discretion as to which categories to include in their COA and how they determine an accurate cost for each category.⁸⁷ The page on the NCAA website dedicated to Questions and Answers about COA emphasizes the discretion of each school in calculating their own COA.⁸⁸ In response to questions related to the variation in amount, timing, and method of distribution of COA stipends to student-athletes, the NCAA's answers remain focused on each school's discretion in calculating their COA.⁸⁹

In 2010, Congress updated the statutory definition of Cost of Attendance, they defined Cost of Attendance as including:

(1) tuition and fees normally assessed a student carrying the same academic workload as determined by the institution, and including costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study;

(2) an allowance for books, supplies, transportation, and miscellaneous personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer, for a student attending the institution on at least a half-time basis, as determined by the institution;

(3) an allowance (as determined by the institution) for room and board costs incurred by the student which--

(A) shall be an allowance determined by the institution for a student without dependents residing at home with parents;

(B) for students without dependents residing in institutionally owned or operated housing, shall be a standard allowance determined by the institution based on the amount normally assessed most of its residents for room and board;

85. See Jake New, *More Money ... If You Can Play Ball*, INSIDE HIGHER ED (Aug. 12, 2015, 3:00 AM), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes> [<https://perma.cc/JG96-TXZZ>].

86. COLL. DATA, *supra* note 28.

87. Dancy & Fishman, *supra* note 70.

88. *Cost of attendance Q&A*, NCAA (Sept. 3, 2015), <https://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> [<https://perma.cc/6575-AGW2>].

89. *Id.*

(C) for students who live in housing located on a military base or for which a basic allowance is provided under section 403(b) of Title 37, shall be an allowance based on the expenses reasonably incurred by such students for board but not for room; and

(D) for all other students shall be an allowance based on the expenses reasonably incurred by such students for room and board;

....

(12) for a student who receives a loan under this or any other Federal law, or, at the option of the institution, a conventional student loan incurred by the student to cover a student's cost of attendance at the institution, an allowance for the actual cost of any loan fee, origination fee, or insurance premium charged to such student or such parent on such loan, or the average cost of any such fee or premium charged by the Secretary, lender, or guaranty agency making or insuring such loan, as the case may be.⁹⁰

Between these diverse definitions of COA and the broad discretion given to schools, it is difficult for institutions to accurately calculate an average COA.⁹¹ Students come from different locations with diverse socioeconomic statuses and home lives that affect their individual COA.⁹² Even without these unavoidable variables, each student has unique needs and preferences depending on their way of life.⁹³ Finding a single balanced COA that is appropriate for the “average” student seems impossible.⁹⁴

One study found that more than one-third of schools underestimated actual living expenses by more than \$3,000 and 11% of institutions overestimated by more than \$3,000—meaning close to half of the COAs calculated by institutions are off by a significant margin.⁹⁵ This can have a big impact on both student-athletes who get COA as a stipend and non-athletes living off student loans in the full COA amount, the cap for federal student loans.⁹⁶

90. 20 U.S.C. § 1087II (2010).

91. See Dancy & Fishman, *supra* note 70.

92. *Id.*

93. *Id.*

94. See *id.*

95. Jill Barshay, *Underestimating the True Cost of College*, U.S. NEWS (June 1, 2015, 11:58 AM), <https://www.usnews.com/news/articles/2015/06/01/underestimating-the-true-cost-of-college>.

96. See *id.*

The study also showed that the hardest group for institutions to accurately calculate COA for is the 50% of college students who live off campus, away from their parents and do not use dining hall plans for food.⁹⁷ Within athletics, inaccuracy for such a large portion of student-athletes could lead to problems both for the student-athlete, who needs the stipend to pay for rent and food, or the athletic department, who may be putting unnecessary strain on the budget with mistakenly high COA distributions.

A student's actual COA varies, depending on many things including transportation, textbook prices, and family environment. Each of these variables depends on real-life situations that can change in an instant.

C. Implications of the Grant-In-Aid Cap Being Cost of Attendance

1. Lack of Consistency in Calculation and Regulation

In addition to the lack of consistency in defining COA, there is also a lack of consistency in regulating individual school's COA calculations. Critics of the current system worry athletics departments improperly influence the entire school's COA to benefit athletes, which harms the average student. Previously, variance in COA between institutions was not controversial, as it was attributable to actual differences in the cost of living in different cities and states. Generally, COA did not fluctuate from year to year at a single institution. Nonetheless, once COA became part of the collegiate athletics landscape, the variance became increasingly controversial. "The NCAA estimated at the time that the stipends would increase aid amounts by about \$2,500 per athlete, or about \$30 million a year across all programs," an estimate that fell short for many institutions due to recent sizable increases in COA.⁹⁸ The NCAA still refers all questions about changes in COA to the individual institutions.⁹⁹ Individual schools can have a major impact on their COA due to the broad discretion given to them by statute and the continuing deference given by the NCAA.¹⁰⁰

Since COA was adopted as the grant-in-aid cap in 2015, many schools COA has increased significantly.¹⁰¹ For example, the University of Georgia (UGA) recently increased the transportation costs and miscellaneous expenses portions of their COA.¹⁰² Coincidentally, academic scholarships that are typically available to non-athletes at UGA

97. *See id.*

98. New, *supra* note 85.

99. FAFSA, *supra* note 83.

100. *See* New, *supra* note 85; *see also* NEW AM., *supra* note 71.

101. New, *supra* note 85.

102. *Id.*

did not include either of these sections.¹⁰³ Increases in the portions of COA not covered by academic scholarships have become more common since COA was adopted as the grant-in-aid cap.¹⁰⁴ Increases in these portions of COA increase the total value of an athletic scholarship without increasing the total value of an academic scholarship, a manifestation of the competing pressures on financial aid by athletic departments to increase COA or to decrease COA as to not to scare prospective students with a high COA.¹⁰⁵ “[U]nless the stipends become standardized in some way, full cost-of-attendance numbers could rise . . . [.]”¹⁰⁶

2. Use as a Recruiting Tool

The NASFAA is worried about COA stipends being used as a recruiting tool and whether that use will lead to COA increases due to increased pressure on financial aid from athletic departments.¹⁰⁷ This worry is supported by college coaches blatantly stating that they use their COA in recruiting. By way of example, University of Alabama’s (“Alabama”) head football coach said “he was concerned about the large discrepancies that existed between individual colleges’ full cost-of-attendance numbers.”¹⁰⁸ Alabama’s COA stipend, \$3,463 for the 2014-2015 school year, was in the middle of the Southeastern Conference (SEC), while Auburn University’s COA stipend was over \$5,000 for the same year.¹⁰⁹ After Saban’s comments, Alabama increased its COA to \$5,386 for out-of-state students and \$4,172 for in-state students—one of the highest COA stipends in the country.¹¹⁰

The pressure exerted by athletic departments on financial aid offices to increase the COA originates from an athletic department’s need to attract the top high school recruits.¹¹¹ Athletic departments want to bring in the best recruits—especially in football and men’s basketball—because those sports generate the most revenue.¹¹² The general

103. *Id.*

104. Hillary Hoffower, *College is more expensive than it’s ever been, and the 5 reasons why suggest it’s only going to get worse*, BUS. INSIDER (June 26, 2019, 10:23 AM), <https://www.businessinsider.com/why-is-college-so-expensive-2018-4> [<https://perma.cc/U9AB-HAPX>].

105. *Id.*

106. *Id.*

107. New, *supra* note 85.

108. *Id.*

109. *Id.*

110. *Id.*

111. Elton Alexander, *New NCAA rule adds money to athletic scholarships, but can strain athletic budgets*, CLEVELAND.COM, https://www.cleveland.com/sports/college/2015/05/new_ncaa_rule_adds_money_to_at.html [<https://perma.cc/C5D2-9BYB>] (Jan. 11, 2019).

112. Victoria Lee Blackstone, *How Much Money Do College Sports Generate?*, ZACKS

assumption is that the higher an individual school's COA is, the more likely a recruit will be interested in going there.¹¹³ The head football coach at Pennsylvania State University (Penn State), James Franklin, admitted that he is going to use Penn State's high COA in recruiting.¹¹⁴ He plans to use COA in the same way he uses his football players' graduation rates, to compare Penn State's COA to other school's COAs to show recruits that Penn State is at the top.¹¹⁵

At UGA, Mark Richt, the head football coach at the time, said in a speech to UGA football fans, "We've been very creative in getting our number to a good spot."¹¹⁶ Richt later said there were "some things that can be done in a creative way that is well within the rules that can get us in pretty good shape on [the COA] front."¹¹⁷ David Ridpath, Professor of Sports Administration at Ohio University, agrees that financial aid offices are likely getting creative with COA estimates in response to pressures from coaches, but it is unlikely that any rules are being broken.¹¹⁸

Although these adjustments and recalculations seem fishy,¹¹⁹ they likely happened before 2015, when the grant-in-aid cap was set to COA, except in the other direction.¹²⁰ Before COA was established as a grant-in-aid cap, schools wanted their COA as low as possible to attract potential nonathletes who may have been dissuaded by a high COA estimate.¹²¹ The *O'Bannon* court seemed unaware that COA is susceptible to manipulation.¹²² The rules are rarely broken by these manipulations because there are barely any rules to be broken.¹²³

III. SUGGESTED ALTERNATIVES AND THEIR IMPLICATIONS

The discussion in the following sections examines the benefits and shortcomings of the most popular alternatives to the current grant-in-aid model. These alternatives range from minor changes to increase consistency in COA, to major changes, like allowing a free market for collegiate athletes, that allow athletes to get "fair" market price for their

(Jan. 28, 2019), <https://finance.zacks.com/much-money-college-sports-generate-10346.html> [https://perma.cc/E65V-FKXN].

113. New, *supra* note 85.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. New, *supra* note 85.

120. See Patrick Michael Tutka & Dylan Williams, *The Expensive Truth: The Possible Tax Implications Related to Scholarship and Cost of Attendance Payments for Athletes*, 27 J. LEGAL ASPECTS SPORT 145, 146 (2017).

121. See *id.* at 145.

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

123. See New, *supra* note 85.

athletic achievements. This Note argues that the best solution is to stick with the current model of compensation, with COA as the grant-in-aid cap, while reforming COA calculation and regulation to increase consistency between schools and to ensure the calculations accurately represent educational expenses, as the Ninth Circuit intended.

A. *Stick with COA as the Grant-in-Aid Cap, but Alter Procedures to Increase Consistency*

Moving forward, this Note suggests creating a consistent method of calculation for COA and increasing transparency of how COA is calculated. A method that would allow COA to remain directly related to educational expenses, that would implement publishing requirements to increase transparency to the public, and that would increase regulation of both the calculation and publishing of COA.

Starting in 2015, many NCAA schools distributed stipends to their student-athletes in amounts equal to the school's COA,¹²⁴ but this method of student-athlete compensation has created issues related to the calculation and regulation of COA.

1. Consistent Calculation

The most obvious issue with using COA as the cap for grant-in-aid is the faulty method of COA calculation. Neither congressional nor NCAA legislation provides a consistent formula for COA calculation.¹²⁵ Instead, each school's financial aid office is given broad discretion, allowing them to include or exclude the various COA categories suggested by the legislation.¹²⁶ This leads to variation in COAs between similarly situated¹²⁷ schools and even between the same school in different years.¹²⁸ Between a lack of definitive method of calculation and the discretion given to financial aid offices, COA is often not an accurate representation of the actual COA for a student to attend that school. Whether the COA is higher or lower than the student needs, this faulty calculation leads to extra stress either on the student, who needs more

124. See, e.g., Blair Kerkhoff & Tod Palmer, *They're not paychecks, but major college athletes got extra scholarship stipends for first time this school year*, KAN. CITY STAR (June 30, 2016, 1:44 PM), <https://www.kansascity.com/sports/college/article86062792.html>.

125. See FAFSA, *supra* note 83.

126. *Federal Cost Data for Students Living at Home Are Significantly Understated*, INST. FOR COLL. ACCESS & SUCCESS (May 24, 2016), <https://ticas.org/accountability/federal-cost-data-students-living-home-are-significantly-understated/> [<https://perma.cc/B9NV-2XT5>].

127. See COLL. DATA, *supra* note 28.

128. Vincent Tuminiello II, *The Changing Face of College Athletics: O'Bannon and Cost of Attendance*, MARTINDALE (Feb. 13, 2018), https://www.martindale.com/legal-news/article_taylor-porter-brooks-phillips-llp_2505989.htm.

money, or on the athletic department, who is distributing unnecessarily high stipends to their student-athletes.

Legally, COA calculation and its relationship to educational expenses is the method's greatest strength. As currently defined, COA is technically comprised of "educational expenses,"¹²⁹ satisfying the NCAA requirement that payments to student-athletes are directly related to educational expenses.¹³⁰ To preserve amateurism within college sports, courts allow only payments related to education expenses, the main reason they chose COA as the grant-in-aid cap.¹³¹ In reality, as COA becomes more important, this poorly regulated measure will shift from a measure of educational expenses towards a representation of a school's athletic stature. The statutory definition and calculation methods for COA need to be reformed.

The relationship between the payment and education expenses is important because it allows student-athletes to remain amateurs while still being paid; any payments not related to educational expenses impede the student-athlete's amateurism.¹³² In both the district court and Ninth Circuit *O'Bannon* decisions, the limited explanation surrounding the choice of COA as the grant-in-aid cap focused on its clear relation to educational expenses.¹³³ Those decisions did not discuss, as I have here, the reality of COA calculation; that broad discretion is given to individual schools to calculate COA without any regulation. In practice, at schools like UGA and Alabama, COA has risen sharply since it was designated as the grant-in-aid cap.¹³⁴

Instead of allowing schools to calculate their own COA, there should be required COA calculations, whether passed by Congress or the NCAA, that establish a standardized set of categories and methods for calculation. These reforms would alleviate many of the issues surrounding COA calculation as they relate to concerns of amateurism. This guidance for

129. See 20 U.S.C. § 1087ll (2010).

130. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1075 (9th Cir. 2015).

131. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014); *O'Bannon*, 802 F.3d at 1076; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 119 n.65 (1984) (citing *Bd. of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n*, 546 F. Supp. 1276, 1309 (W.D. Okla. 1982)).

132. See *O'Bannon*, 802 F.3d at 1075.

133. *Id.* at 1075 (noting "the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses"); *O'Bannon*, 7 F. Supp. 3d at 977 ("The NCAA's former president, the late Walter Byers, testified during his 2007 deposition, for instance, that the NCAA's decision to remove incidental expenses from the grant-in-aid coverage in 1975 was not motivated by a desire to increase consumer demand for its product.").

134. See New, *supra* note 85.

COA calculation would keep true to the court's intent of limiting student-athlete payment to education-related expenses.

2. Increased Transparency

These new regulations, wherever they come from, should also increase transparency by requiring each school to publish a breakdown of each of their COA categories on their website, including where they got their estimates.¹³⁵ This detailed breakdown will lead to more accurate COA calculations because the category totals would be smaller and easier to adjust.¹³⁶ The transparency would be taken further by requiring each school to post their exact COA construction policy on its website, including how the number is calculated and how frequently their COA will be updated.¹³⁷ Requiring individual institutions to post the discrete details COA calculation at their school would give the NCAA, athletic department, student-athletes, and nonathletes a better idea of what COA truly represents. A final suggestion for increasing consistency requires each school to use two sources to calculate each discrete COA category, including the average of the two in the final calculation.¹³⁸ Under this method, schools would be required to list both of their sources for each category of COA, allowing potential students, athletes, and nonathletes, a deeper understanding into the makeup of their school's COA. These requirements, in addition to the reformation of the statutory definition, would increase COA consistency between years at the same school and between similarly situated schools.

Another improvement necessary for COA to become an effective grant-in-aid cap is increased regulation by either the Department of Education or the NCAA. Since the 1980's, when Congress took regulatory control over COA out of the Department of Education's hands, COA has played an increasingly important role in the college education of both athletes and nonathletes.¹³⁹ Over the years there is no doubt that schools have manipulated their COA to meet their needs and that it has become more prevalent since COA became the grant-in-aid cap for athletic departments, yet no rules are being violated.

3. Nationwide Regulation

Allowing the Department of Education or the NCAA to regulate COA calculation would provide the consistency that is desired by many across

135. Brittany Hackett, *Cost of Attendance: Is More Standardization Needed?*, NASFAA (June 27, 2017), https://www.nasfaa.org/news-item/12477/Cost_of_Attendance_Is_More_Standardization_Needed_8_30_-_9_30_am [https://perma.cc/R33M-3LW2].

136. *See id.*

137. *See id.*

138. *Id.*

139. Dancy & Fishman, *supra* note 70.

the NCAA.¹⁴⁰ Two main methods of regulation have been suggested. The first is to provide a large-scale algorithm or COA calculator for use by each school's financial aid office.¹⁴¹ Nationwide use of a single calculator would allow each school's financial aid office to base their COA on an underlying database with consistent, but relevant data for each U.S. county.¹⁴² This method has been already adopted on a small scale by schools who have already put a COA calculator specific to their school online.¹⁴³ In fact, a country-wide COA calculator has already been created by a team using the MIT cost-of-living calculator based on data from the Department of Housing and Urban Development, Department of Agriculture, and Bureau of Labor Statistics.¹⁴⁴ This method, compared to the other methods, would involve more regulation of the underlying calculator than of calculated COA.

The second suggested method of regulation is to establish a limited number of permitted ways to define and calculate COA.¹⁴⁵ Each institution could choose the method which they felt fit best for them, but they would be required to list the method chosen wherever their COA is posted.¹⁴⁶ This method would provide more flexibility than a single COA calculation, but it would provide more guidance than our current system.

Through consistent statutory calculation, increased transparency, and increased regulation, COA could become what the courts intended it to be, a meaningful indicator of how much it costs to attend fall and spring semesters at each NCAA institution. As Nick Saban said, “[w]hen we don’t have a cap that makes it equal for everybody, it really goes against everything . . . we’ve tried to do for parity [in the NCAA].”¹⁴⁷

B. *Free Market in College Athletics*

The most commonly discussed alternative compensation model for collegiate athletics, especially in the past few years, is allowing athletes to be paid, either by a third party or their school, in amounts unrelated to their educational expenses. There are two types of pay-for-play supporters, those who advocate for a completely free market¹⁴⁸ and those

140. *Id.*

141. Emma Kerr, *What to Know About a College's Net Price Calculator*, U.S. NEWS (May 8, 2019, 12:05 PM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2019-05-08/what-to-know-about-a-colleges-net-price-calculator>.

142. *Id.*

143. *Id.*

144. Barshay, *supra* note 95.

145. See Dancy & Fishman, *supra* note 70.

146. See *id.*

147. New, *supra* note 85.

148. Madisen Martinez, *Should College Student-Athletes Be Paid? Both Sides of the Debate*, COLLEGEEXPRESS (Mar. 20, 2017), <https://www.collegexpress.com/articles-and-advice/athletics/blog/should-college-student-athletes-be-paid-both-sides-debate/> [<https://perma.cc/Z5T8-WAW6>];

who advocate for allowing student-athletes to earn money from third parties for use of the student-athletes NIL.¹⁴⁹ The flaw in these alternatives, compared to sticking with COA as the grant-in-aid cap, is the extraneous and likely large payments a few student-athletes would receive at the cost of all other student-athletes losing their opportunity to participate in college athletics.

1. Advantages of a Free Market in College Athletics

Due to the time commitment that collegiate sports demand from student-athletes—far more than forty hours per week on athletic-related activities alone—supporters of the free market promote its ability to establish a fair market value for each athlete.¹⁵⁰ In addition to their usual demands, the student-athletes are typically required to be away from school while participating in competitions.¹⁵¹

A few student-athletes generate a large amount of revenue that does not get distributed back to them, but is instead distributed to staff members and used to fund most of a school's nonrevenue sports.¹⁵² Under a free market model, the few student-athletes who do generate revenue could get a portion of that revenue instead of receiving the same amount as every other student-athlete.

Finally, advocates of a free market model argue that the NCAA already allows student-athletes to get paid for their performances through Olympic Medal payments, especially international athletes who may

Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [<https://perma.cc/Z4H5-J47W>]; Dave Anderson, *Top 10 Reasons College Athletes Should Not Be Paid*, LISTLAND (Mar. 17, 2016), <https://www.listland.com/top-10-reasons-college-athletes-not-be-paid/> [<https://perma.cc/KL7L-4RSV>].

149. Reid Carlson, *NC Congressman to Introduce Bill To Allow NCAA Athletes to Profit*, SWIM SWAM (Mar. 11, 2019), <https://swimswam.com/nc-congressman-to-introduce-bill-to-allow-ncaa-athletes-to-profit/> [<https://swimswam.com/nc-congressman-to-introduce-bill-to-allow-ncaa-athletes-to-profit/>]; Brian Murphy, *NCAA must allow players to profit from name and image, NC Republican's new bill says*, NEWS & OBSERVER (Mar. 7, 2019, 6:00 AM), <https://www.newsobserver.com/sports/article227181209.html>; Solomon, *supra* note 151; Will Hobson & Emily Guskin, *Poll: Majority of black Americans favor paying college athletes; 6 in 10 whites disagree*, WASH. POST (Sept. 14, 2017), https://www.washingtonpost.com/sports/colleges/poll-majority-of-black-americans-favor-paying-college-athletes-6-in-10-whites-disagree/2017/09/14/27fa5fc2-98df-11e7-87fc-c3f7ee4035c9_story.html?noredirect=on&utm_term=.3c33f2e62c57 [<https://perma.cc/Z5UK-B7CY>].

150. See Martinez, *supra* note 151; Anderson, *supra* note 151.

151. Martinez, *supra* note 151; see also Solomon, *supra* note 151 (referencing a 2015 survey in which Division I men's basketball players said during their season they were away from campus on average 1.7 days a week and missed 2.2 classes).

152. Martinez, *supra* note 151.

receive large sums of money for one performance.¹⁵³ Since 2001, the NCAA has allowed U.S. athletes to accept money for medals at the Olympics, and in 2015, the exception was expanded to international athletes.¹⁵⁴ Joseph Schooling, a member of Singapore's Olympic Team in 2016 and an Olympic gold medalist, got \$740,000 from Singapore for earning his gold medal.¹⁵⁵ Under the current NCAA rules, Schooling can keep that money and still compete as an NCAA athlete.¹⁵⁶ In addition to the Olympic Medal exception, the NCAA also allows tennis players to be considered amateur as long as they made less than \$10,000 in earnings before competing in college tennis.¹⁵⁷ These exceptions support a transition to a completely free market because that exists at the Olympic level; countries may pay athletes whatever they see fit as a reward for earning an Olympic medal.

2. Disadvantages of the Free Market in College Athletics

In comparison, skeptics of a free market believe “paying athletes would distort the economics of college sports in a way that would hurt the broader community of student-athletes, universities, fans[,] and alumni.”¹⁵⁸ A free-market in college athletics would strongly affect student-athletes collegiate athletics experience as well as put unimaginable financial pressures on athletic departments.¹⁵⁹

Free market payments would shift the focus of recruits away from a school's total package to only the amount of money they could offer the recruit.¹⁶⁰ Currently, recruits focus on team culture, athletic support, and academic support, because these things allow student-athletes to be successful in their sport, classroom, and community. Implementing a free market would distract recruits while they are making these already stressful decisions. The reformed COA model would allow recruits and student-athletes alike to be compensated for their true costs of attending school with their grant-in-aid, while allowing the “universities, fans, and alumni” to remain as engaged in college sports as they have always

153. Solomon, *supra* note 151; Jon Solomon, *NCAA prez concerned by Texas swimmer paid \$740K for winning Olympic gold*, CBS SPORTS (Sept. 8, 2016, 7:08 PM), <https://www.cbsports.com/college-football/news/ncaa-president-concerned-by-texas-swimmer-paid-740000-for-winning-olympic-gold/> [<https://perma.cc/T23Y-967Q>] [hereinafter CBS SPORTS].

154. CBS SPORTS, *supra* note 156.

155. *Id.*

156. *Id.*

157. Solomon, *supra* note 151.

158. Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/opinion/pay-college-athletes.html?module=inline> [<https://perma.cc/5VAG-78VT>].

159. *See id.*

160. *See id.*

been.¹⁶¹ Adding free-market money to the mix would not only affect recruiting but would increase the number of transfers between schools.¹⁶² Instead of transferring to a school because it is a better fit, student-athletes would transfer simply for a bigger paycheck.¹⁶³

Additionally, implementing a free market would put college athletes in similar situations to professional athletes who deal with holdouts, create unions, and are subject to lockouts by their league. Between pulling athletes' focus away from the complete package and having to deal with business implications of a free market, a free market would add more distractions to what is supposed to be a time focused solely on athletic performance and success in the classroom.¹⁶⁴

Not only would money cause issues in recruiting, with transfers, and creating more distractions, but student-athletes would also have to pay taxes.¹⁶⁵ If student-athletes received salary and no scholarship, they would have to pay taxes and may end up with barely enough to cover tuition, especially for out-of-state athletes.¹⁶⁶ For many out-of-state athletes, the resulting payment from a "full scholarship" would be much less than is required to maintain housing and other necessities during the school year. Also, athletic departments would have increased costs because instead of money going straight to tuition, room, and board within the institution, it would spend money which would be taxed and the student-athlete would end up with barely enough to cover tuition.

In addition to concerns about the effect of money on student-athletes, most schools could not financially sustain a free market. Under our current model, with a cap on payments to student-athletes, only twenty of the almost 1,000 athletic departments in the country are profitable,¹⁶⁷ with most of those being athletic departments at Division I schools.¹⁶⁸ Adding large and unpredictable annual payments to men's basketball and football players would not be feasible and "[o]ne of the first things the colleges will cut is the other sports at the school."¹⁶⁹

161. *See id.*

162. *See* Martinez, *supra* note 151.

163. *See id.*

164. Anderson, *supra* note 151.

165. *See* Martinez, *supra* note 151.

166. *Id.*

167. McDavis, *supra* note 161.

168. Anderson, *supra* note 151; Theodore Ross, *Cracking the Cartel*, NEW REPUBLIC (Sept. 1, 2015), <https://newrepublic.com/article/122686/dont-pay-college-athletes> [<https://perma.cc/S9H8-YHGE>].

169. Anderson, *supra* note 151; *see also* McDavis, *supra* note 161 (This article noted that in 2015, North Dakota State University paid COA stipends to sixteen sports adding a \$600,000 annual expense to the athletic department's books. Six days later, their rival school, University of North Dakota (UND) followed suit and distributed COA stipends to many of their athletes. Within two years, UND had cut five of their sports teams.).

The University of Wyoming, who adopted the COA stipend policy in 2015, called for a budget reduction one year later.¹⁷⁰ Without a \$4 million government subsidy, nonrevenue teams likely would have been cut.¹⁷¹ Both Ohio State Athletic Director, Gene Smith, and Chancellor at the University of Wisconsin, Rebecca Black, have publicly acknowledged the likelihood that athletic departments would have to cut teams to keep up with free market payments to basketball and football players.¹⁷² Eventually, Olympic sports, which typically do not bring in revenue, would no longer be associated with colleges and a new system would need to arise for athletes to pursue elite level training. The U.S. could be forced to adopt a model similar to that of most other countries where club sports are run adjacent and unattached to the university system. In contrast, the reformed COA model would allow all sports, revenue-generating or not, to remain attached to the schools across the country because it would only cause minor shifts in athletic department's budgets, instead of requiring they allocate large amounts to the few revenue-generating student-athletes.

3. Conclusion

Skeptics and supporters all agree that the market surrounding NCAA men's basketball and football is massive, but these parties disagree on where that money should go. Supporters of a free market argue that the few revenue-generating athletes should benefit by receiving a salary of an amount determined by the free market, but skeptics focus on the opportunities that revenue provides for athletes in nonrevenue-generating sports to participate in college athletics.¹⁷³ Legally, implementing a free market in college athletics would violate an important principle established by *NCAA v. Board of Regents* by expanding payments to student-athletes beyond educational expenses and therefore disrupting their amateur status.¹⁷⁴ In addition, these payments may ruin the association between college sports and academics, a key part of the consumer demand for college sports.¹⁷⁵

Under the reformed COA model, the Olympic Medal exception would still exist and permit exceptional athletes to compete and excel on both the college and international stage. This exception promotes participation

170. McDavis, *supra* note 161.

171. *See id.*

172. *Id.*

173. Martinez, *supra* note 151.

174. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

175. *Id.* at 101–02 (“The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.”).

by elite athletes in their respective college sport and promotes their home country on the international stage. Encouraging these athletes to participate in college sports elevates the level of play within college sports making it more exciting for consumers. Only a small group of revenue-generating athletes would miss out on the opportunity to capitalize on that revenue, but if those athletes were interested in generating revenue, they could choose to play professionally instead of collegiately. Time demands on student-athletes would not be curbed by implementing a free market and under the reformed COA model, without outside monetary influences, student-athletes would be able to spend their time focused on academic and athletic success. Implementing a free market for college sports would benefit the few athletes who generate revenue while destroying the opportunity for nonrevenue sports athletes to play their sport within collegiate athletics.¹⁷⁶

C. Third-Party Payments for NIL Use

The NCAA could also decide to allow student-athletes to be paid only by third parties for the use of their NIL. Currently, NCAA bylaws forbid student-athletes or their employers from using their NILs to promote businesses to take advantage of the student-athlete's reputation.¹⁷⁷ The *O'Bannon* court determined that a market for athlete NILs would exist, considering that the "Name & Likeness" provisions in the right to telecast contracts are key provisions for broadcasting the most popular college basketball and football games on television.¹⁷⁸ The court found not only was there a market for NILs in broadcast, but also for videogames, rebroadcasts, and advertisements.¹⁷⁹

Mark Walker, a congressman from North Carolina, recently proposed a new bill in Congress: the Student-Athlete Equity Act.¹⁸⁰ This bill would alter the definition of a qualified amateur sports organization to allow payments from third parties¹⁸¹ to the 99.4% of collegiate athletes who will not go on to play professionally.¹⁸² Condoleezza Rice, former chair of the NCAA's Commission on College Basketball, endorsed allowing student-athletes to profit from the use of their NIL as long as the NCAA establishes some regulations.¹⁸³ In addition to support from people within

176. McDavis, *supra* note 161.

177. 2020–21 NCAA Division I Manual, Art. 12 Amateurism and Athletics Eligibility, NCAA (Aug. 1, 2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/7CH8-GH47>].

178. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 969 (N.D. Cal. 2014).

179. *Id.* at 970–71.

180. Carlson, *supra* note 152.

181. *Id.*

182. Murphy, *supra* note 152.

183. *Id.*

college sports, 66% of Americans are in favor of allowing players to make money from third parties for the use of their NILs.¹⁸⁴ An alternative to free-for-all use of individual athlete's NILs would be a clearinghouse with a licensing staff to negotiate deals on behalf of all student-athletes, like in professional leagues.¹⁸⁵

In September 2019, California signed a bill into law that permits college athletes to get paid for their NIL from third parties for activities like endorsement deals, sponsorships, and autograph signings.¹⁸⁶ The catch—the law does not go into effect until 2023—gives the NCAA and maybe even the federal legislature more than three years to iron out the details.¹⁸⁷ The bill even contains a clause allowing it to be amended if the NCAA changes its policies.¹⁸⁸

After the California bill was signed into law, third-party payments for NIL became a more mainstream conversation throughout college athletics. By October 2019, the NCAA Board of Governors voted to change its policies.¹⁸⁹ Their policies now give all student-athletes the opportunity to benefit from their NILs, however the legislation is currently being drafted and there were no details released.¹⁹⁰ Members of the Board of Governors along with members of the working group on NIL payments emphasized the complexity of the issue and the importance of developing a solution that works for all of the NCAA's members and all of the student-athletes.¹⁹¹

The California bill is now one of many bills in state legislatures creating rules and regulations for third-party payments for student-athlete's NILs.¹⁹² More than 38 states have now introduced bills regarding payment of student-athletes for use of their NIL.¹⁹³ The

184. Solomon, *supra* note 151; Hobson & Guskin, *supra* note 152.

185. Solomon, *supra* note 151.

186. Will Hobson & Ben Strauss, *The California governor signed a law to let NCAA athletes get paid. It's unclear what's next*, WASH. POST (Sept. 30, 2019, 11:08 AM), https://www.washingtonpost.com/sports/colleges/california-lawmakers-voted-to-let-ncaa-athletes-get-paid-its-unclear-whats-next/2019/09/10/80d0a324-d3e6-11e9-9343-40db57cf6abd_story.html [https://perma.cc/9MVP-UYHM].

187. *Id.*

188. *Id.*

189. Emily Caldwell, *Change to name, image, likeness policy will ultimately require new federal law*, OHIO ST. NEWS (Dec. 3, 2019), <https://news.osu.edu/change-to-name-image-likeness-policy-will-ultimately-require-new-federal-law/> [https://perma.cc/VQP3-NXGU].

190. *Id.*

191. *Id.*

192. Reid Wilson, *California Inspires Other States to Push to Pay College Athletes*, THE HILL (Oct. 4, 2019, 6:00 AM), <https://thehill.com/homenews/state-watch/464268-california-inspires-other-states-to-push-to-pay-college-athletes> [https://perma.cc/MX7N-RTFM].

193. Gregg E. Clifton and John G. Long, *State Name, Image and Likeness Laws With July 1st Effective Dates Continue to Grow*, NAT'L L. REV. (May 7, 2021), <https://www.natlawreview.com/article/state-name-image-and-likeness-laws-july-1st-effective-dates-continue-to-grow>

processes, procedures, and effective dates of these laws vary by state, with five states passing laws effective July 1, 2021.¹⁹⁴ For ease of application, the NCAA would rather have a singular piece of federal legislation regulating third-party payments for student-athlete's NILs rather than a separate piece of legislation for each state.¹⁹⁵ Nevertheless, Mark Emmert, President of the NCAA, confirmed he will encourage the Board of Directors of the NCAA to approve guidance on third-party payments for student-athlete's NIL before the previously-discussed July 1st effective date of five related state laws.¹⁹⁶ To date, the NCAA has not provided any foreshadowing of the processes and procedures involved in the guidance considered by the Board of Directors.

In addition to the complications state or federal legislation could bring, this alternative compensation model could lead to commercial exploitation of the student-athletes. In *O'Bannon*, the court noted 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."¹⁹⁷ Currently, this option is not legally viable because the payments would be unrelated to educational expenses. Under the reformed COA model, student-athletes would receive a stipend in an amount equal to the full and accurate costs of attending their school, without outside influences like sponsors distracting them from academic or athletic success.

D. Continue with the Current Model

The final suggestion is to keep the current model and allow high school recruits that would rather be paid to play somewhere other than college sports. Successful high school athletes who would rather be paid can always choose to become a professional athlete instead of a college student-athlete. Talented high school athletes in any sport can go professional by joining a professional league abroad or within the U.S.,¹⁹⁸

[<https://perma.cc/EQ9M-KS86>].

194. *Id.*

195. Dan Wolken, *NCAA president Mark Emmert: We need help from Congress on athlete name, image, likeness*, USA TODAY (DEC. 11, 2019, 3:57 PM), <https://www.usatoday.com/story/sports/college/2019/12/11/ncaa-president-mark-emmert-wants-congress-aid-name-image-likeness/4401102002/> <https://perma.cc/MFS9-Z3GY>].

196. Dan Murphy, *NCAA President Mark Emmert pushing for NIL action before or near July 1*, ABC NEWS (May 8, 2021 10:59 AM), <https://abcnews.go.com/Sports/ncaa-president-mark-emmert-pushing-nil-action-july/story?id=77574711#:~:text=NCAA%20president%20Mark%20Emmert%20pushing%20for%20NIL%20action%20before%20or%20near%20July%201,-ByDAN%20MURPHY&text=That%20date%20coincides%20with%20when,likeness%20for%20the%20first%20time>.

197. Murphy, *supra* note 152; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

198. McDavis, *supra* note 161.

but typically a college scholarship is worth more than the potential payments as a professional athlete.¹⁹⁹ The “going pro” option is there, regardless of the sport, but has always been the route less traveled by the most successful high school athletes. Barring a major change by a professional league in their rules regarding athletes transitioning directly from high school to professional, the status quo of NCAA dominance will remain. Reformation of the COA process would provide a balanced environment for student-athletes; one where they can succeed both internationally and within collegiate athletics while getting their education and actual living expenses paid for.

CONCLUSION

Based on *O’Bannon*, COA calculation and regulation, as well as the benefits and pitfalls of the proposed alternatives, the best compensation model for college athletes is to reform COA calculation and regulation. This option, compared to a free market or allowing payments for NIL, is a middle ground by allowing student-athletes to be compensated for the maximum of their educational expenses, but not in over-the-top amounts that would put all of college sports in jeopardy. In allowing college athletics to retain its relationship with colleges, the reformed COA maintains a key part of consumer demand for college sports because the student-athletes will be compensated for true educational expenses without being overcompensated. Courts have worried that overcompensation will lead to disengagement of fans and alumni of all sports. Implementing a more rigid statutory calculation of COA, in combination with increasing the transparency and regulation of COA will move it towards its intended use as a true estimate of educational expenses for student-athletes.

199. Martinez, *supra* note 151.