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Relevant Market Definition and Multi-Sided Platforms After *Ohio v. American Express*: Evidence from Recent NCAA Antitrust Litigation

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The treatment of multi-sided platforms in antitrust litigation has received increasing attention lately, as evidenced by the *Ohio v. American Express Co.* litigation.[1] The potential implications of the Supreme Court's recent decision have garnered interest from legal scholars, litigators, and economists alike, particularly those actively involved in antitrust issues. Some have cautioned that the ruling represents the gutting of antitrust law,[2] while others have maintained that its scope is limited and unlikely to effect a broad change in antitrust jurisprudence.[3] To illuminate the potential nature of parties' multi-sided platform arguments in future litigation, this article details how the multi-sided platform argument was addressed in *In re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation*

[1] 138 S. Ct. 2274 (2018).

[2] *See* Lina M. Khan, *The Supreme Court just quietly gutted antitrust law*, Vox, July 3, 2018, https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony [https://perma.cc/GT25-HF5S] (on file with the Harvard Law School Library); Tim Wu, *The Supreme Court Devastates Antitrust Law*, N.Y. Times, June 26, 2018, https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html [https://perma.cc/T3U5-VXZ4] (on file with the Harvard Law School Library).

[3] For a spirited discussion on the matter, see Washington Bytes, *Will the Supreme Court's Amex Decision Shield Dominant Tech Platforms From Antitrust Scrutiny?*, Forbes, July 18, 2018, https://www.forbes.com/sites/washingtonbytes/2018/07/18/antitrust-enforcement-of-dominant-tech-platforms-in-the-post-american-express-world/#1a1857032f76 [https://perma.cc/86QA-MNKG] (on file with the Harvard Law School Library).

(*NCAA GIA*),[4] and the implications of the argument for future litigation. In *NCAA GIA*, plaintiffs challenge the National Collegiate Athletic Association ("NCAA") cartel's restriction on athlete compensation at cost-of-attendance ("COA") and its prohibition on payment in exchange for athletic participation. The *NCAA GIA* case involves two key issues that lie at the forefront of current antitrust interest in anticompetitive conduct: (1) the use of monopsony power to restrain wages, and (2) the complication of relevant market definition by indirect network externalities that often characterize multi-sided platforms.

This article further argues that the Supreme Court's decision in *American Express* has effectively abrogated in part its previous opinion in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*[5] with regard to claimed cross-platform effects. *American Express* did this by neutering a key procompetitive justification that the NCAA continues to offer for its restraint on athlete compensation, namely its effect on consumer demand for "amateurism." This article investigates whether the presence of claimed indirect network effects sufficiently support the position that colleges and universities that engage in intercollegiate athletics represent multi-sided platforms. The purpose of this article is not to analyze the economic merits of the Supreme Court's decision with respect to relevant market definitions involving multi-sided platforms, but rather, to investigate its interpretation in the NCAA antitrust litigation and its implication for the seminal *Board of Regents* case.

I. The NCAA GIA Litigation

In the *NCAA GIA* litigation, the claimed existence of indirect network effects prompted the NCAA's antitrust expert, Professor Kenneth Elzinga, to conclude that NCAA colleges and universities are multi-sided platforms, opining that:

> "A college or university is a multi-sided platform, similar to [the example offered of the relationship between readers and advertisers in magazine publishing], but in the case of colleges and universities, there are multiple constituencies that include at least student-athletes in each of their respective sports, non-athlete students, alumni, coaches and athletic staff, faculty, other staff, the community in which the school is located, and, if it is a public institution, the state."[6]

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[4] No. 14-md-02541-CW, 2018 WL 4241981 (N.D. Cal. Sept. 3, 2018).

[5] 468 U.S. 85 (1984).

[6] Expert Report of Kenneth G. Elzinga at 33, *NCAA GIA*, No. 4:14-cv-02758 (N.D. Cal. Mar. 21, 2017), ECF No. 374-7.

The apparent confounding of direct and indirect network effects notwithstanding, the NCAA initially did not rely on Professor Elzinga's opinion of colleges and universities as multi-sided platforms, taking the position that the Ninth Circuit's decision in *O'Bannon v. National Collegiate Athletic Association*,[7] which relied on a single-sided market definition, controls.[8] Because the plaintiffs had already moved for summary judgment on the market definition issue, as previously defined in *O'Bannon*, no genuine material issue of fact remained. This resulted in the district court's summary adjudication of the market definition issue in the plaintiffs' favor.[9] The court then excluded Professor Elzinga's testimony regarding the multi-sided market definition on the basis that the testimony had been rendered irrelevant by the court's prior ruling.[10]

Subsequently, the Supreme Court issued its decision in *American Express*, which addressed the effect of multi-sided platforms on relevant market definition in antitrust cases.[11] Based on this precedent, the NCAA argued that "the *American Express* decision validates key aspects of Dr. Elzinga's opinions that this Court excluded and squarely calls into question whether the Court erred in declining to even consider at trial Dr. Elzinga's arguments on the relevant market and anticompetitive effects."[12] The district court then invited both sides to present their arguments on the matter at a pre-trial conference in July 2018.[13]

On the eve of the trial, which commenced on September 4, 2018, the court issued its order concluding that the *American Express* decision had no effect on the court's prior rulings in the *NCAA GIA* litigation and re-affirmed its exclusion of Professor Elzinga's opinion on market definition.[14] The district court found that "Dr. Elzinga's opinions regarding a multi-sided market definition are excluded as irrelevant in light of the Court's

[7] 802 F.3d 1049 (9th Cir. 2015).

[8] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at 7 (N.D. Cal. Mar. 28, 2018).

[9] *Id.* at 8.

[10] *NCAA GIA*, Case Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1948593, at 3 (N.D. Cal. Apr. 25, 2018).

[11] *See* Ohio v. American Express Co., 138 S. Ct. 2274, 2285–90 (2018).

[12] Defendants' Response on Admission of Dr. Elzinga's Testimony at 8, *NCAA GIA*, MDL Docket No. 4:14-md-02541-CW (N.D. Cal. July 2, 2018), ECF No. 862.

[13] *See NCAA GIA*, Case No. 14-md-02541-CW (N.D. Cal. July 2, 2018), ECF No. 863.

[14] *NCAA GIA*, Case No. 14-md-02541-CW, 2018 WL 4241981, at 6 (N.D. Cal. Sept. 3, 2018).

summary adjudication of market definition, and as unreliable, under Federal Rule of Evidence 702 and *Daubert*."[15]

In its order, the court offered perhaps the first glimpse into the effect of *American Express* on lower court jurisprudence. Using *American Express* as the lodestar to guide its inquiry into platform multi-sidedness, the court evaluated the economic opinions offered by the NCAA's expert, focusing on three primary characteristics: (1) similarity of transactions, (2) simultaneity of interactions, and (3) the horizontal/vertical nature of the restraint.[16] This article focuses on the first two characteristics. While observing that the expert in *NCAA GIA* opined that the multi-sidedness in that case involved a cross-platform relationship between the pricing to one constituency and the participation volume of the college's various other constituencies, the court pointed to analytical deficiencies that condemned the expert's opinion as unreliable under Rule 702.[17] Specifically, the court found that the NCAA's expert did not:

1. "identify what product the universities offer to each of their constituencies;"[18]
2. explain "how any product is 'priced' to each constituency;"[19]
3. "explain what he means by or how he determines 'participation' and 'volume';"[20]
4. "describe what 'value' he is referring to or indicate how that can be measured;"[21]
5. "identify or describe the relevant economic interactions between the members of the numerous constituencies and the platform;"[22]
6. "identify the timing or relationship of any such interactions to other interactions within the claimed platform;"[23] or
7. "examine any economic data at all to quantify, test, evaluate, or confirm any of the economic relationships upon which his proposed multi-sided relevant market is predicated"[24]

The court's ruling clarifies and perhaps alleviates some concerns regarding the burden of proof imposed upon plaintiffs and defendants in antitrust cases where the market definition involves multi-sided platforms. A

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[15] *Id.* at 6.
[16] *See id.* at 3–5.
[17] *See id.* at 5.
[18] *Id.* at 4.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 5.

significant concern among economists and legal experts has been that defendants would be able to leverage expert testimony to claim the existence of such platforms and impose a Sisyphean burden on plaintiffs, while absolving defendants of any obligation to perform an analysis of the impacts of price changes among various agents.[25] Considering the often-asymmetric access to information facing the parties in such litigation, placing the entire burden of proof on the plaintiffs to define the relevant market in the presence of claimed multi-sidedness would represent a significant hardship that could isolate defendants from antitrust scrutiny. Professor Daniel Rubinfeld, the NCAA's antitrust expert in the previous *O'Bannon* litigation,[26] previously raised this issue, commenting that:

> If the defendant has the data or other information that are necessary for the alternative hypotheses to be well specified, then it may be appropriate to make it easy for the plaintiff to shift the burden of production to the defendant.[27]

The court's order regarding the admissibility of expert evidence proffered by the defendants' antitrust expert in *NCAA GIA* clarified that the party offering an opinion as to the existence of multi-sided platforms and its effects on relevant market definition must perform an economic analysis to support that position beyond mere *ipse dixit* assertions.[28] In doing so, the court referenced the law review articles cited in *American Express* to emphasize that "presence and degree of the economic relationships discussed in that case present an empirical issue."[29] The decision in *NCAA GIA* clarifies that the burden of investigating that empirical issue and the accompanying analysis to illuminate the multi-sided nature of the platform(s) falls upon the party advancing that argument. Simply "throwing stones" at a single-sided relevant market definition without the support of analytical rigor in rebuttal failed to carry that critical burden for the NCAA's expert.

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[25] Michael T. Goldstein, *Ohio et. al. v. American Express Co. et. al.: Antitrust Implications for Healthcare Entities*, A.B.A. HEALTH ESOURCE, Nov. 28, 2018, https://www.americanbar.org/groups/health_law/publications/aba_health_esource/2018-2019/november2018/antitrust/ [https://perma.cc/8XFJ-72UD] (on file with the Harvard Law School Library).

[26] *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

[27] Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1061 (1985).

[28] *NCAA GIA*, Case No. 14-md-02541-CW, 2018 WL 4241981, at 6 (N.D. Cal. Sept. 3, 2018).

[29] *Id.* (internal quotation marks omitted).

The district court's order deftly navigates the channel between the Supreme Court's *American Express* decision and prior precedent in cases involving empirical analysis, while avoiding any inconsistencies with either. Indeed, the district court's order regarding expert testimony is supported by decisions from the Supreme Court and lower courts. To explain why, I begin with a brief review of the *American Express* case.

II. Relevant Judicial Precedent

A. Ohio v. American Express

In *United States v. American Express*, both sides agreed that credit card networks represent two-sided platforms that serve two distinct sets of consumers, merchants, and cardholders.[30] The district court explained that "[b]y facilitating transactions between merchants and their cardholding consumers, the general purpose credit and charge card [GPCC] systems that are the subject of this litigation function as two-sided platforms."[31] The court agreed with the Government that "this two-sided platform comprises at least two separate, yet deeply interrelated, markets: a market for card issuance . . . and a network services market."[32] American Express did not dispute the two-sided nature of the platform.[33] Rather, it argued that, contrary to the Government's characterization of the relevant product market as general purpose credit and charge card network services, "the market should be defined by reference to 'transactions' so as to account for both sides of the credit card platform."[34] Because neither side disputed the existence of two-sided platforms, the issue before the court was whether the plaintiffs had met their burden of addressing such characteristics in its market definition.[35] In its decision, the district court found that "plaintiffs have appropriately accounted for the two-sided features and competitive realities that affect the four major firms operating in the GPCC card network services market—as distinguished from the card issuance market . . . ."[36]

The Second Circuit reversed, finding that the district court's focus on the network services market "erroneously elevated the interests of merchants

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[30] 88 F. Supp. 3d 143, 154 (E.D.N.Y. 2015), *rev'd*, 838 F.3d 179 (2d Cir. 2016), *aff'd*, 138 S. Ct. 2274 (2018).

[31] *Id.* (internal quotation marks omitted).

[32] *Id.* at 151.

[33] *See id.* at 155.

[34] *Id.* at 174.

[35] *See id.* at 168–69.

[36] *Id.* at 171.

above those of cardholders."[37] Holding that the Government bore the burden to show that Amex's non-discrimination provisions adversely affect competition as a whole in the relevant market, the Second Circuit held that the effects on both sides of the platform, cardholders and merchants, should be considered.[38]

The Supreme Court affirmed the Second Circuit's decision, finding that American Express's antisteering provisions do not violate antitrust law because the two-sided market for credit-card transactions should be analyzed as a whole.[39] The question before the Court in *American Express* was:

> "Under the 'rule of reason,' did the Government's showing that Amex's anti-steering provisions stifled price competition on the merchant side of the credit-card platform suffice to prove anticompetitive effects and thereby shift to Amex the burden of establishing any procompetitive benefits from the provisions?"[40]

In other words, in a case where no dispute exists among the parties regarding the existence of multi-sidedness in defining the relevant market, is the demonstration of anticompetitive effects on one side sufficient, or must the analysis consider the net effect on all sides? The Supreme Court largely opted for the latter, holding that it "will analyze the two-sided market for credit card transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects."[41]

The *NCAA GIA* litigation represents an altogether different situation. There, only defendants' expert offered the multi-sided platform argument and did so without performing any economic analysis to support that theory. In excluding that opinion, the district court recognized that the burden lies with the party proffering the argument to support it with evidence beyond mere assertion.[42] Simply proposing a hypothesis without adequate evidence does not shift the burden onto the challenging party to disprove it by attempting to prove the negative.

The district court's expectations in *NCAA GIA* with respect to the type of evidence of multi-sidedness that suffices to shift the burden onto the

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[37] United States v. American Express Co., 838 F.3d 179, 204 (2d Cir. 2016), *aff'd*, 138 S. Ct. 2274 (2018).

[38] *Id.* at 205.

[39] Ohio v. American Express Co., 138 S. Ct. 2274, 2287 (2018).

[40] Brief for the Petitioners and Respondents Nebraska, Tennessee, and Texas at ii, Ohio v. American Express, 138 S. Ct. 2274 (2018) (No. 16-1454).

[41] *American Express*, 138 S. Ct. at 2287.

[42] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 4241981, at 2 (N.D. Cal. Sept. 3, 2018).

opposing side finds strong support in judicial precedent regarding the use of empirical analysis. Courts have applied a burden-shifting framework, much as courts do when analyzing an anticompetitive restraint under the rule of reason,[43] to adjudicate the reliability of expert analysis that relies on quantitative methodology. Once the analysis proffered by one side's expert has met initial standards of admissibility, the burden shifts to the opposing expert to demonstrate the initial analysis' shortcomings.[44] For example, an oft-used refrain used by experts critiquing a regression model is that one or more key variables were excluded, rendering the analysis unreliable.[45] Indeed, we observe the same logic in multi-sided platform arguments offered in the NCAA GIA litigation, where one expert can argue that, because one or more platform agents were not included in the analysis, the relevant market definition is flawed.[46] However, both the Supreme Court and lower courts have held that the burden lies with the party claiming a variable has been "left out" to include it and demonstrate its effects on the analysis.[47]

B. Judicial Precedent Where Empirical Analysis is Used

In *Bazemore v. Friday*,[48] petitioners, who included employees of the North Carolina Agricultural Extension Service (NCAES), filed suit against various state and local officials alleging racial discrimination by the NCAES in violation of the Constitution and federal statutes that included Title VII of the Civil Rights Act of 1964. Applying regression analysis, the petitioners offered statistical evidence of racial disparities in salary.[49] The Fourth Circuit upheld the district court's refusal to accept petitioners' statistical analysis as proof of discrimination, reasoning that "factors, other than those included in petitioners' multiple regression analyses, affected salary, and

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[43] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 834 (2009); *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015) (stating that "[c]ourts typically rely on a burden shifting framework to conduct th[e] balancing" of anti-competitive and pro-competitive effects).

[44] *See O'Bannon*, 7 F. Supp. 3d at 985.

[45] *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* THE NATIONALS ACADEMIES PRESS, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 305–06 (3d ed., 2011).

[46] *See NCAA GIA*, 2018 WL 4241981, at 2; *see also* Expert Report of Kenneth Elzinga, *supra* note 6, at 10.

[47] *See infra* Section II.B.

[48] 478 U.S. 385 (1986).

[49] *See id.* at 401–02.

that therefore those regression analyses were incapable of sustaining a finding in favor of petitioners."[50] The Fourth Circuit stated that "[a]n appropriate regression analysis of salary should . . . include all measurable variables thought to have an effect on salary level."[51]

The Supreme Court unanimously reversed, finding that "it is clear that a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case."[52] Critically, the *Bazemore* Court emphasized defendants' burden in responding to plaintiffs' evidence:

> "Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of—statistical or otherwise—to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites."[53]

The Court thus clarified that mere declaration without analytical rigor does not serve as adequate rebuttal. Following this precedent, the Second Circuit explained that:

> "We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis."[54]

Simply put, once plaintiffs' initial burden has been met, if the defendant's expert contends that a regression analysis has omitted a key variable, the defendant's expert must also show how including that variable in the regression affects the analysis with respect to the key outcome of interest.[55] If defendants hypothesize that the inclusion of a variable that reflects the employee experience would explain, at least in part, a salary disparity otherwise attributed to race or gender, they bear the burden of demonstrating the effect empirically.

Likewise, the D.C. Circuit held that:

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[50] *See id.* at 394 (describing the Fourth Circuit's reasoning).

[51] Bazemore v. Friday, 751 F.2d 662, 672 (4th Cir. 1984), *aff'd in part, vacated in part*, 478 U.S. 385 (1986).

[52] *Bazemore*, 478 U.S. at 400 (internal quotation marks omitted).

[53] *Id.* at 403 n.14.

[54] Sobel v. Yeshiva Univ., 839 F.2d 18, 34 (2d Cir. 1988).

[55] This assumes, of course, the existence of available data. This observation is not meant to suggest that Plaintiffs may withhold available data then criticize the opposing party for failing to make use of that same data Plaintiffs have withheld. It also certainly does not suggest that

> "Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by plaintiffs' statistics. . . . The logic of *Bazemore*, however, dictates that in most cases a defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate nondiscriminatory selection criterion."[56]

These arguments are also consistent with the D.C. Circuit's earlier holding that "when a defendant claims that a specific factor was sufficiently objective to permit quantification, the defendant's failure to present alternative statistics incorporating the factor will severely undermine its rebuttal."[57]

These cases illustrate that the court's order in *NCAA GIA* referenced above is well-grounded in legal precedent. Mere *ipse dixit* arguments do not carry the day where empirical analysis is required. Once the claimant has presented a one-sided relevant market definition, a rebuttal expert for the defense bears the burden of showing that a multi-sided platform exists and that both sides should be included in the market. This mirrors the burden of proof when a rebuttal expert challenges a regression model on the basis that a relevant variable has been excluded. Assuming the initial analysis has met the standards of admissibility, the rebuttal, the court explained, must not only identify the missing variable, but also present the relevant analysis including that variable.[58]

The district court's order in NCAA GIA with respect to multi-sided platforms should at the very least assuage some concerns that courts will levy the entire burden on plaintiffs and absolve defendants of presenting analytical evidence in rebuttal. I now examine the specific issues that the court raised.

III. Multi-sided Platform Analysis in *NCAA GIA* Litigation

In *American Express*, the Supreme Court explained that the credit card companies represent two-sided platforms that offer different products to two different groups "who both depend on the platform to intermediate between

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[56] Palmer v. Shultz, 815 F.2d 84, 101 (D.C. Cir. 1987).

[57] Seger v. Smith, 738 F.2d 1249, 1287 n.33 (D.C. Cir. 1984).

[58] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 4241981, at 5 (N.D. Cal. Sept. 3, 2018).

them."[59] "For credit cards that interaction is a transaction."[60] While the NCAA's expert left the number of platform sides undefined, the focus of the NCAA's argument in the *NCAA GIA* litigation has been the effect on end-consumer demand from abolishing the cap on athlete compensation collusively set by NCAA cartel members.[61] In other words, the claimed cross-platform interaction occurs between athletes and fans, whose demand, the NCAA claims, would be affected by this cap's removal.[62] The ostensible reason given is that fans prefer "amateurism"[63] and, though actual prices may not change if it were removed, fan demand would decrease in its absence.

As the district court correctly observed in *NCAA GIA*: "[i]n this litigation, the market participants and their interactions are nothing like what the Supreme Court observed in the context of credit-card transactions in *American Express*. There is no simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes 'only one product.'"[64] This observation is noteworthy for at least two reasons. First, it illuminates the court's reluctance to stray beyond the limits of the Supreme Court's opinion in *American Express* by generalizing multi-sidedness to platforms that do not meet the criteria definitive of credit card networks. Second, it identifies two *sine qua non* characteristics that multi-sided platforms must demonstrate, in the district court's view, to align themselves to the precedent in *American Express*: simultaneous transactions and proportional consumption. I address these seriatim.

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[59] 138 S. Ct. 2274, 2280 (2018) (citation omitted).

[60] *Id.*

[61] *NCAA GIA*, 2018 WL 4241981, at 5; *see also* Defendants' Motion for Summary Judgment and Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment at 40, *NCAA GIA*, No. 4:14-cv-02541 (N.D. Cal. Sept. 29, 2017), ECF No. 704.

[62] *See NCAA GIA*, 2018 WL 4241981, at 5; *see also* Rebuttal Report of Kenneth G. Elzinga at 13–14, *NCAA GIA*, No. 4:14-cv-02758 (N.D. Cal. May 16, 2017), ECF No. 327-13.

[63] *See* 2018–19 NCAA Division I Manual § 12.02.14 (2018), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/YQA4-QXQ4] (defining "student-athlete" as "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program"); *id.* § 12.1.2 (describing different events that can lead to a student-athlete losing her amateur status).

[64] *NCAA GIA*, 2018 WL 4241981, at 4.

A. Nature of Transactions

In *American Express*, the Court explicitly defined credit card networks as a special case of two-sided platforms known as "transaction platforms" whose key feature is that "they cannot make a sale to one side of the platform without simultaneously making a sale to the other."[65] In other words, a credit card sale cannot occur without a simultaneous interaction between a consumer, the intermediary platform (e.g., Visa, Mastercard, American Express), and the merchant. This cross-platform relationship between agents fundamentally differs from the relationships among market participants in the NCAA collegiate model. As American Express observed in its brief opposing the petition for certiorari:

> "[N]o conflict exists with *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 5 (1984), which analyzed a rule limiting the number of football games colleges could license for television broadcast. *NCAA* is not on point—neither the NCAA, which imposed the rule, nor the product at issue (intercollegiate football games) is two-sided. Rather, the case involved conventional one-sided vertical distribution— the colleges (upstream) selling rights to broadcast football games to the television networks (downstream), which broadcast those games to viewers (the end-consumer)."[66]

Certainly, athletic contests do not require the simultaneous participation of both competitors and fans to occur. While paying fans affect the revenues generated by universities, contests can occur in the absence of fan participation. A further distinction is that the NCAA's own bylaws prohibiting athletes from benefiting from their own name, image, and likeness ("NIL") rights[67] and receiving compensation above COA[68] obviate the multi-sided platform argument in intercollegiate athletics. These NIL rights accrue to the NCAA organization and its member institutions. For example, if a consumer purchases a licensed product such as an Alabama Crimson Tide football jersey, the platform (university), or the NCAA obtain the licensing revenue, not the athlete. As American Express correctly observed in its opposition brief, this transaction reflects a one-sided vertical distribution.[69] The athlete, whose compensation is capped at the COA and who has

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[65] 138 S. Ct. at 2280.

[66] Brief for American Express in Opposition at 19, Ohio v. American Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454).

[67] *See* 2018–19 NCAA DIVISION I MANUAL, *supra* note 63, § 12.5.2.2.

[68] *Id.* § 2.13.

[69] Brief for American Express in Opposition, *supra* note 66, at 19.

rescinded NIL rights in exchange for athletic eligibility, does not participate directly in that sale.

Unlike in *American Express*, where the Court noted that a credit card network "cannot sell transaction services to either cardholders or merchants individually,"[70] universities can do so freely. An athletic scholarship extended to a prospective student recruit does not hinge on a simultaneous individual transaction with any downstream fan(s). Likewise, when a university sells tickets, concessions, or box seats to fans, the transactions do not require the simultaneous participation of athletes in the sale.

In *American Express*, the Court also stated that "the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it and is more valuable to merchants when more cardholders use it."[71] This is also clearly not the case in intercollegiate athletics. On the athlete side, NCAA regulations on head-count sports (e.g., football and basketball) cap the number of scholarships that can be offered, and hence effectively the roster sizes. In equivalence sports, the number of scholarships offered, which are generally partial, is limited by the funds available for that sport. Thus, just as in the academic market, unmet demand exists for the university-"platform" on the student side. While athletic programs benefit from more athletes and demand for those positions exists, the cross-platform benefit to the fans from increased numerosity on the athlete side is weak at best. Fans and donors desire successful athletic programs, with little, if any, focus on roster size beyond that required to field a successful team.[72]

Likewise, the benefits to athletes from increasing the number of athletic program fans or the size of the student body are limited at best. If athletes benefited from large fan bases, schools like Duke University, which has a student body of approximately 6,000 undergraduates and a basketball facility, Cameron Indoor Stadium, that is among the smallest among Power 5 conference members,[73] would likely not achieve the basketball recruiting

[70] 138 S. Ct. at 2286.

[71] *Id.* at 2281.

[72] *See, e.g.*, Megan Gambino, *The Science of Being a Sports Fan*, SMITHSONIAN.COM, Mar. 25, 2013, https://www.smithsonianmag.com/innovation/the-science-of-being-a-sports-fan-9227430/ [https://perma.cc/D4BX-MY4W] (on file with the Harvard Law School Library).

[73] *See* Mike Waters, *Five facts about Cameron Indoor Stadium as Syracuse basketball prepares to face Duke*, SYRACUSE.COM, Feb. 21, 2014, https://www.syracuse.com/orangebasketball/2014/02/five_facts_about_cameron_indoor_stadium_as_syracuse_basketball_prepares_to_face.html [https://perma.cc/W6PH-6VW3] (on file with the Harvard Law School Library).

success it does. Just as with newspapers, the indirect effects, defined as existing "where the value of the two-sided platform to one group of participants depends on how many members of a different group participate,"[74] from one side are weak, if existent at all. Athletes, particularly highly-recruited ones, have expressed their preferences for programs that offer them the highest likelihood of achieving success, not necessarily for programs that have the largest number of fans.[75] Such weak indirect network effects not only support the district court's order in *NCAA GIA*, but also indicate that, even if universities that participate in intercollegiate athletics were multi-sided platforms, both sides need not be considered. As the Supreme Court observed in *American Express*, "it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor."[76]

The Supreme Court's rejection of the newspaper advertising market as a platform subject to multi-sided analysis bears particular relevance to the NCAA antitrust litigation. In *NCAA GIA*, the NCAA's expert proposed that it is helpful to consider magazine publishing to describe the general principles of two-sided markets because "[t]he magazine is the platform that serves both readers and advertisers."[77] The expert then used the magazine market as an analogy for his claim that a university's athletic teams are multi-sided platforms, opining that:

> "Public fans of the university's athletic teams are also a relevant constituency, as are broadcasters, who in a fashion analogous [to] the description of magazines, operate a two-sided platform, themselves, serving viewers (including public fans of the university's teams) and the broadcaster's advertisers."[78]

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[74] *American Express*, 138 S. Ct. at 2280.

[75] This can be observed from the fact that Duke University, for example, has a small alumni and fan base relative to much larger state universities yet routinely garners among the top basketball recruits. *See, e.g.*, Eric Boynton, *Zion Williamson says choosing Duke was a 'business decision,'* GoUpstate.com, Jan. 22, 2018, https://www.goupstate.com/news/20180121/zion-williamson-says-choosing-duke-was-business-decision [https://perma.cc/6ZQ9-57N5] (on file with the Harvard Law School Library); Donnovan Bennett, *Inside the real reasons why R.J. Barrett chose Duke*, Sportsnet, Nov. 23, 2017, https://www.sportsnet.ca/basketball/nba/r-j-barrett-ncaa-duke-2019-nba-draft-top-prospects/ [https://perma.cc/LHP5-K43D] (on file with the Harvard Law School Library).

[76] *American Express*, 138 S. Ct. at 2286.

[77] Expert Report of Kenneth G. Elzinga, *supra* note 6, at 30–31.

[78] *Id.* at 28 n.87.

But because the reader-advertiser relationship in magazines is effectively the same as that in newspapers,[79] the NCAA's expert's argument represents an analogy that that the Supreme Court expressly rejected when it found that such a market should be analyzed as one-sided:

> "[I]n the newspaper-advertisement market, the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. Because of these weak indirect network effects, the market for newspaper advertising behaves much like a one-sided market and should be analyzed as such."[80]

The logical dependencies are clear: Magazine platforms and newspaper platforms exhibit the same relationships between readers and advertisers.[81] University platforms are analogous to magazine platforms which serve readers and advertisers.[82] Newspaper advertising should be analyzed as a one-sided market.[83] Thus, it follows that university platforms should be analyzed as one-sided. Far from offering support for the NCAA expert's claim that universities are multi-sided platforms, the *American Express* decision expressly rejects it.

B. Proportional Consumption

In *American Express*, the Court observed that the proportional nature of the exchange in credit card networks requires that "whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder."[84] The Court cited an article on payment card interchange fees, which explained that "[b]ecause cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional."[85] Simply put, the proportionality condition requires the transubstantiation of multi-sided par-

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[79] *See* Simon P. Anderson & Jean J. Gabszewicz, *The Media and Advertising: A Tale of Two-Sided Markets*, (Handbook of the Economics of Art and Culture, Elsevier, Core Discussion Paper 88, 2005) ("Magazines and newspapers are founded on a similar business model and derive much of their revenue from the advertisements they carry.").

[80] *American Express*, 138 S. Ct. at 2286 (citation omitted).

[81] *See* Anderson & Gabszewicz, *supra* note 79.

[82] *See* Expert Report of Kenneth G. Elzinga, *supra* note 6, at 30–31.

[83] *See American Express*, 138 S. Ct. at 2286.

[84] *Id.*

[85] *Id.* (citing Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 583 (2006)).

ticipation into a single transaction. Each transaction represents a one-to-one match between cross-platform agents, hence the reference to multi-sided platforms as "matchmakers."[86]

In *NCAA GIA*, this condition fails. With respect to intercollegiate athletics, the *NCAA GIA* litigation focuses on two team sports: football and basketball.[87] In these cases, each game may represent a single transaction. Because of the cooperative nature of team competition, the consumption is far from proportional. Indeed, the extent of spectator participation is indeterminate. On the athlete side, multiple agents, i.e. players, are required to consummate the transaction. On the spectator side, the number of agents, i.e. the fans who attend, could be zero. Regardless of participation levels from either athletes or fans, the price athletes must pay remains the same: they must forego NIL rights and direct compensation to participate in intercollegiate games.[88]

The divergence of intercollegiate athletics from the proportional consumption mechanism that characterizes credit card networks as the multi-sided platforms can be observed through downstream consumers' homing behavior. Fans, particularly alumni of institutions with successful teams in their sport of interest, generally single-home to a significant degree,[89] meaning that they commit resources primarily to one program.[90] That is, they

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[86] David S. Evans & Richard Schmalensee, Matchmakers: The New Economics of Multisided Platforms (2016).

[87] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 4241981, at 1 (N.D. Cal. Sept. 3, 2018).

[88] Certainly, one may observe that fans drive revenues and such revenues are often used as indirect compensation to athletes in the form of more luxurious facilities. A discussion of the substitution of indirect for direct compensation is beyond the scope of this Article.

[89] *See* David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses, in* Oxford Handbook on International Antitrust Economics 15 (Roger Blair & Daniel Sokol, eds. 2015) ("An economic agent single-homes if she uses only one platform in a particular industry and multi-homes if she uses several.").

[90] *See* Judith Aquino & Mila D'Antonio, *There's No One More Loyal Than a Sports Fan*, Consumer Strategist, Apr. 2015, https://www.ttec.com/articles/theres-no-one-more-loyal-sports-fan [https://perma.cc/53T4-MZMR] (on file with the Harvard Law School Library). Single-homing on other platforms that have been characterized as multi-sided can be observed, for example, when consumers purchase and play on one video gaming platform, such as Microsoft Xbox, to the exclusion of others, or from the seller side, where developers only create games for a particular platform (such as Halo for Xbox or Zelda for Nintendo). With respect to college sports, fans of the University of Alabama are unlikely to also be fans of rival schools such as Louisiana State University, Auburn University, or the University of Florida.

likely do not apportion allegiance among various universities except to the degree required by the adversarial nature of a sport, because watching one's favorite team play a football game requires simultaneously watching the opposing team. Such allegiance can be observed through consumption decisions: season-ticket purchases, paid memberships on individual fan message boards, the purchase of sporting goods with a university logo, and so on. On the other side of the platform, college athletes exclusively single-home among university-platforms, and the NCAA erects barriers to platform-switching through its transfer restrictions. Athletes can only play for one school, and the NCAA imposes significant transfer restrictions, such as the one year in residence requirement, where an undergraduate athlete must sit out of competition for one year after transferring.[91] In some cases, coaches explicitly prohibited transfers to in-conference institutions by refusing to sign transfer releases.[92]

However, as Professors David S. Evans & Richard Schmalensee observe in regard to credit card networks, "[i]n the cases of payments, consumers and merchants both generally use several payment platforms and therefore multi-home in this sense."[93] This important distinction underscores the differences between universities and multi-sided credit card networks. In the latter category, merchants seek out consumers for their goods. In that sense, they are motivated to multi-home, that is, accept more credit card platforms

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Unlike the video game platform scenario, the adversarial nature of competitive sports requires that some multi-homing occur as fans who watch their team play must also watch the opposing team. However, although fans' demand may vary when their team plays against a rival school or a strong opponent versus a weaker one, the favorite team remains the demand driver. With respect to purchases of apparel, the single-homing becomes even more apparent.

[91] *See* 2018–19 NCAA Division I Manual, *supra* note 63, § 14.5.

[92] *See, e.g.*, Kellis Robinett, *Receiver Corey Sutton fighting Kansas State for his scholarship release*, The Wichita Eagle, June 1, 2017, https://www.kansas.com/sports/college/big-12/kansas-state/article153670459.html [https://perma.cc/3RSH-VMHQ] (on file with the Harvard Law School Library). However, in June 2018, the NCAA changed the transfer rule to eliminate the "permission-to-contact" process. *See* Michelle Brutlag Hosick, *New transfer rule eliminates permission-to-contact process*, NCAA, June 13, 2018, http://www.ncaa.org/about/resources/media-center/news/new-transfer-rule-eliminates-permission-contact-process?DB_OEM_ID=27900 [https://perma.cc/ZD2G-J5TH] (on file with the Harvard Law School Library). Once an athlete has indicated an intent to transfer, the university's compliance office has two days to enter their name into the "transfer portal." *See id.* Other schools may contact an athlete in the portal, and the athlete may transfer without obtaining a release from her/his current university. *See id.* However, the athlete is still subject to the conference's transfer rules. *See id.*

[93] *See* Evans & Schmalensee, *supra* note 89, at 34.

to ensure the sale. Consumers also multi-home because different cards may offer benefits with regard to purchases from certain merchants (e.g., US Bank's REI Visa card or American Express' Delta Airlines card).[94]

Nonetheless, despite these differences and the district court's summary adjudication under Rule 702 excluding the NCAA expert's opinion that colleges and universities represent multi-sided platforms, the multi-sided argument has apparently survived. It has done so through legal disguise as a procompetitive justification, thus advancing to step two of the rule of reason. As I discuss in the next section, its survival has been predicated upon several factors, including the Supreme Court's *Board of Regents* decision. I argue, however, that this precedent has been abrogated in part by the *American Express* decision, specifically with respect to the use of consumer demand for amateurism as a procompetitive justification.

IV. Multi-sidedness Reborn as a Procompetitive Justification

The multi-sided platform argument's survival through re-branding has benefited from a general lack of clarity in antitrust law regarding what constitutes a procompetitive justification, as evidenced by the variety and surfeit of such arguments in litigation.[95] Both in *O'Bannon*[96] and, at least initially, in *NCAA GIA*,[97] defendants offered a series of claimed procompetitive justifications for collusive restraint that prohibits direct compensation to athletes beyond the COA. While these justifications received significant

[94] *See* Chris Kissell, *Do I Have Too Many Credit Cards?*, U.S. News, Apr. 17, 2018, https://creditcards.usnews.com/articles/do-i-have-too-many-credit-cards.

[95] *See, e.g.*, John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 Ind. L.J. (forthcoming 2019) ("In recent years, defendants have attempted to avoid liability by arguing variously that their restraints of trade created a 'healthier market' by facilitating the launch of an online ebook platform, preserved "amateurism" and promoted 'competitive balance' in college sports, promoted the "health and welfare" of horses, helped pay for 'uniforms and newly painted trucks,' integrated college academics and athletic programs, responded to an 'inherently anticompetitive' government-agency action, increased access to Ivy League colleges for financially needy students, promoted student-body diversity, enhanced the defendant's 'market penetration,' helped to limit conflicts of interest among employees, ensured the 'undivided loyalty' of National Football League team owners, helped to fund cemeteries' task of resetting grave memorials that 'have settled or shifted,' and many more.").

[96] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1072 (9th Cir. 2015).

[97] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 4241981, at 2 (N.D. Cal. Sept. 3, 2018).

attention in the previous *O'Bannon* case, including trial testimony, they were largely abandoned during *NCAA GIA*. In its March 2018 order on cross-motions for summary judgment, the district court addressed the nine procompetitive justifications offered by the Defendants.[98] Of these nine, the only two that survived summary judgment were whether the challenged NCAA rules serve Defendants' asserted procompetitive purposes of (1) integrating academics with athletics, and (2) preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.[99]

Judge Wilken granted summary judgment on six claimed procompetitive justifications, finding that defendants did not attempt to meet the burden of providing "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists."[100] Defendants also presented another, namely that "colleges must price participation in activities, including athletics, to provide an 'optimal balance' for different constituents."[101] The court also granted summary judgment on this issue, observing that defendants had attempted to characterize their expert's opinion on multi-sided platforms as representing a procompetitive justification.[102] Importantly, the court noted that "this purportedly new justification seems largely to overlap with Defendants' two remaining *O'Bannon* justifications of integrating academics with athletics."[103] This observation highlights the court's acknowledgement of the superficial metamorphosis of the multi-sided platform argument, excluded in summary judgment, into the claimed procompetitive justification of preserving consumer demand for amateurism that has survived to trial. The argument's form has indeed changed, but the substance remained the same. As the Ninth Circuit observed in *O'Bannon*, substance is what matters, and antitrust laws are not to be avoided by "clever manipulation of words."[104]

In rejecting the parties' cross-motions for summary adjudication of the question whether the NCAA's challenged restraint enhances the popularity of its product by promoting amateurism, the District Court in the *NCAA*

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[98] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 1524005, at 10 (N.D. Cal. Mar. 28, 2018).

[99] *Id.* at 11.

[100] *Id.* at 10 (quoting Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)).

[101] *Id.* at 11 (citation omitted).

[102] *Id.*

[103] *Id.*

[104] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1065 (9th Cir. 2015) (quoting Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 21–22 (1964)).

GIA, citing to the deposition of NCAA survey expert Dr. Bruce Isaacson, ruled that:

> "Defendants have presented sufficient evidence in support of the two procompetitive effects found in O'Bannon to create a factual issue for trial. This includes a survey of consumer preferences, which led Defendants' expert Dr. Bruce Isaacson to conclude that fans are drawn to college football and basketball in part due to their perception of amateurism."[105]

Dr. Isaacson's explained his opinion in his rebuttal report to plaintiffs' expert Dr. Hal Poret, opining that:

> "The results of my survey are also counter to the conclusion that permitting additional compensation to student-athletes would not impact consumer demand for college sports. On the contrary, the results of my survey indicate that various forms of compensation and benefits provided to student-athletes (particularly unlimited payments) are opposed by a substantial percentage of fans, and that amateurism is an important reason why fans are drawn to college football and college basketball."[106]

This opinion simply reflects the repackaged doppelganger of the NCAA's multi-sided platform theory that the Court rejected in summary judgment. Indeed, Professor Elzinga, who proffered the subsequently-excluded "university as a multi-sided platform" theory, offered a virtually identical opinion to Dr. Isaacson in claiming that removing the collusive restraint that caps athlete compensation at COA would reduce a university's cross-platform demand for the athletic product:

> "[I]f a college or university were to change the "price" on the side of the platform that represents student-athletes such that they are no longer amateurs, that will exert a negative effect on demand for participation in the platform by other constituencies (i.e., other sides of the multisided platform) including students, alumni, and non-university affiliated fans, and reduce the value of the college athletics model to all participants, including student-athletes."[107]

Echoing the arguments above, another NCAA expert, Professor James Heckman, also offered an additional variation on effectively the same multi-sided platform argument by opining on the nature of indirect network effects:

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[105] *NCAA GIA*, 2018 WL 1524005, at 9.

[106] Rebuttal Report of Dr. Bruce Isaacson at 75, *NCAA GIA*, No. 4:14-cv-02758 (N.D. Cal. May 16, 2017), ECF No. 303-2 (emphasis added).

[107] Expert Report of Kenneth G. Elzinga, *supra* note 61 at 14 (emphasis added).

> "The effects of athletes receiving significant increases in compensation could entail further *feedback effects* until a new equilibrium is achieved . . . For example, *a decrease in viewership* will further decrease athletic budgets, which in turn will further decrease spending on tutoring, which in turn will further erode the student component of the student-athlete connection, which in turn would further erode the amateurism nature of college athletics, leading to additional *decrease in viewership*, etc."[108]

The language used by the NCAA's experts to claim a pro-competitive justification to the NCAA's restraint reflects the common description of interactions among agents in multi-sided platforms where "[t]here exists a *feedback loop* between the two sides."[109] Simply put, the argument advanced by the NCAA and its experts is that some consumers will cease to watch college sports, not because of any tangible price increases—indeed, Professor Elzinga offers the term "price" in quotation marks—but rather because their preference for NCAA amateurism, despite its shifting definitions, would cause the product to have less "value" to them if athletes were directly compensated beyond COA.

Defendants' multi-sided market theory of intercollegiate athletics has apparently survived summary adjudication and been re-branded as a pro-competitive justification that the NCAA supported through the Isaacson survey and additional expert testimony. By masking the multi-sided argument as a pro-competitive justification, the NCAA has preserved the ability defend its restraint by offering qualitatively the same argument in step two of the rule of reason analysis despite its rejection by the court in step one. This ability of the multi-sided argument to escape summary adjudication has been aided the breadth of arguments permitted as procompetitive justifications, as evidenced by the opacity of the term "value." As described subsequently, the concept of value has a clear meaning in the context of multi-sided platforms. That meaning is no less clear in the context of the

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[108] Expert Direct Examination Declaration of Professor James J. Heckman at 14, *NCAA GIA*, No. 4:14-cv-02758 (N.D. Cal. July 11, 2018), ECF No. 986-2 (first emphasis added).

[109] David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, *in* PLATFORM ECONOMICS: ESSAYS ON MULTI-SIDED BUSINESSES 2, 10 (David S. Evans ed., 2011) (emphasis added); *see also id.* at 24 ("The link between the customers on the two-sides affects the price elasticity of demand and thus the extent to which a price increase on either side is profitable . . . These positive feedback effects may take some time to work themselves out . . . ."); Evans & Schmalensee, *supra* note 88, at 44 ("There is a membership externality when the value received by agents on one side increases with the number of agents—or some related measure of their aggregate value—participating on the other side . . . This phenomenon results in the well-known positive feedback loop.").

consumer welfare standard according to which courts currently adjudicate alleged anticompetitive conduct.

A. The Consumer Value Concept

In multi-sided platforms of the type analyzed in *American Express*, the proportional nature of the transaction informs the network effects that influence the pricing mechanism.[110] If a credit card system lowers the price (e.g., by increasing benefits or decreasing annual fees) to cardholders, their usage of the platform will increase. This, in turn, increases the number of transactions on the merchant side, and, as result, their value of that same payment platform. It is important to note that, in this context, the term value has a specific meaning. In their example of network effects in two-sided newspaper platforms, Professor Benjamin Klein et al. explained that:

> "$\partial PA/\partial QR$ and $\partial PR/\partial QA$ are the cross (network) effects, or how much the value of advertising to advertisers increases with increasing quantities of readers and how much the value of the newspaper to readers increases with increasing quantities of advertising."[111]

The change in value is translated as the *change in the transaction price that agents on one side of the platform are willing to pay for an increase in the number of agents on the other side*. In payment card systems, "[t]he value of the payment system to merchants depends on the volume of transactions made by cardholders."[112] That is, merchants would be willing to pay a higher fee to use a card system that results in a greater number of transactions by cardholders. Likewise, other things equal, cardholders would be willing to pay a higher price (e.g., higher annual fee) or accept fewer cardholder benefits) if more merchants accepted the card. In other words, value is defined as the price that platform agents are willing to pay to participate in it.

With this definition of value in mind, it becomes immediately apparent that the purported multi-sided platform theory offered by the NCAA's experts predicts the exact opposite of what we would expect to occur in such platforms. Given the downward-sloping demand curve that characterizes normal goods, we expect demand to increase as price falls, all other things equal. If that price is lowered to negative levels, i.e., athletes receive compensation beyond the cost of attendance, we would expect the fall in price to yield increased athlete demand. We should then observe that increased de-

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[110] Ohio v. American Express Co., 138 S. Ct. 2274, 2286 (2018).

[111] Benjamin Klein et al., *Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees*, 73 ANTITRUST L.J. 571, 578 (2006)).

[112] *Id.* at 584.

mand on one side of the platform results in increased demand on the other side, i.e., more fans. Yet, the NCAA's experts predict that increasing the price to college athletes by reducing their compensation increases the quantity of college sports sold to downstream fans. But increasing the price to athletes by collusively restricting their pay results in less demand, as observed by the stream of players declaring early for professional drafts. A court has rejected a similar argument to the one offered by the NCAA's experts on the basis that it violates "perhaps the most fundamental principle in economics," finding that:

> "Increasing the price of one HRB DDIY product in the simulation, TaxCut Online Basic, appears to increase the quantity of the product sold, holding other variables constant. This anomaly violates the fundamental economic principle that 'demand curves almost always slope downward,' which holds that, all other things being equal, consumers buy less of a product when the price goes up."[113]

Indeed, it should be readily obvious that, if NCAA members truly believed that directly compensating athletes for play would result in decreased fan demand that made schools worse off, schools that behave rationally would decide not to engage in such compensation.

For example, suppose that additional pay beyond COA entices high-profile athletes, who would have declared for the National Basketball Association draft before exhausting their eligibility, to play in the NCAA or to extend their NCAA career. In market characterized by multi-sided platform(s), the athletes' increased demand would draw additional fans. This, of course, is consistent with the fact that universities compete on compensation for coaches[114], who are then expected to recruit top athletes to the university. Certainly, it is well documented and recognized that universities seek to attract athlete demand to their platform by providing recruiting incentives including facilities, dorms with enhanced amenities, and the like.[115] The argument the NCAA proffers is that such indirect compensation does

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[113] United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 68 (D.D.C. 2011).

[114] *See* Jim Baumbach, *Special report: College football coaches' salaries and perks are soaring*, NEWSDAY, Oct. 4, 2014, https://www.newsday.com/sports/college/college-football/fbs-college-football-coaches-salaries-are-perks-are-soaring-newsday-special-report-1.9461669 [https://perma.cc/F2L3-Q4E7] (noting that Andrew Zimbalist, an economics professor at Smith College who specializes in sports, said that "[s]chools justify these salaries on the grounds that it's a competitive marketplace, that they have to pay to get a good coach") (on file with the Harvard Law School Library).

[115] *See, e.g.*, Will Hobson & Steven Rich, *Colleges spend fortunes on lavish athletic facilities*, CHICAGO TRIBUNE, Dec. 23, 2015, https://www.chicagotribune.com/

not reduce fan demand, yet directly compensating athletes would do so. Paradoxically, the NCAA's position appears to be that direct compensation to athletes, which would increase athlete demand, would actually *lower* fan demand. This is despite the fact that increased compensation to coaches is justified on the basis that it increases athlete demand for a university and thus *increases* fan demand.

B. Implications for NCAA v. Board of Regents

The Supreme Court's decision in *American Express* and its subsequent interpretation in *NCAA GIA* have significant implications on current and potential future antitrust litigation regarding the NCAA's model of amateurism. In the seminal *Board of Regents* case, the Supreme Court found that

> "to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like . . . [T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes . . . ."[116]

As evidenced by the observation that the prohibition on athlete payment contributes to the fan-enhancing character of college sports, the Supreme Court's opinion is predicated upon the existence of a relationship between athletes and downstream consumers (sports fans). In the Court's description, this relationship represents a network effect such that the price paid by athletes on one side affects not only their own demand but also the cross-platform demand of consumers. Indeed, what the *Board of Regents* Court assumed to hold is that, if athletes receive payment such that the price they pay for participation in intercollegiate athletics is lower or negative (i.e. they receive a net payment), the demand of sports fans for the product, intercollegiate competition, will decline.

Though not expressly stated, as the concept of multi-sidedness is relatively new, the *Board of Regents* Court's assumption relies on an implied multi-sided theory of the market for intercollegiate athletics. That is, the Court's underlying assumption was that the universities act as platforms that, through horizontal agreement, allow the product to exist, and that

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sports/college/ct-athletic-facilities-expenses-20151222-story.html [https://perma.cc/C4XD-2CSE?type=image] (on file with the Harvard Law School Library).

[116] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

product exists because of participation by both athletes and fans. But, for this position to remain consistent with the *American Express*, the products' existence requires simultaneous participation and simultaneous consumption by both athletes and fans. As discussed previously, neither condition holds in intercollegiate athletics. Further, it is clear that if a product were to exist even in the absence of substantial fan demand, as it does in many sports, then the relevant market definition is one-sided. As the court explained in *American Express*, if indirect network effects are weak or non-existent, then the market should be analyzed as one-sided.[117] Thus, claimed cross-platform effects should not be used either in the relevant market definition or as a procompetitive justification because the such a justification does not affect the relevant market in question. Procompetitive justifications are analyzed with respect to the relevant market where the restraint is imposed, not on some other market subject to a separate analysis.

It is useful, then, to revisit the relevant market definition adopted by the district court in *NCAA GIA*, which reflected the previous market definition from *O'Bannon*. The *O'Bannon* trial court found that:

> "[T]he evidence presented at trial established that [Football Bowl Subdivision ("FBS")] football and Division I men's basketball schools compete to recruit the best high school football and men's basketball players in a relevant market for a college education combined with athletics. In exchange for educational and athletic opportunities, the FBS and Division I schools compete 'to sell unique bundles of goods and services to elite football and basketball recruits.' . . . [T]his market, alternatively, could be understood as a monopsony, in which the NCAA member schools, acting collectively, are the only buyers of the athletic services and NIL licensing rights of elite student-athletes."[118]

It is clear from the court's definition that the relevant market involves the interaction between football and basketball athletes and FBS and NCAA Division I schools. Consistent with this market definition and the observation that the claimed interaction between athletes and downstream consumers does not meet the standards for multi-sidedness established by the Supreme Court in *American Express*, the *NCAA GIA* court rejected expert testimony that the relevant market definition should encompass the plat-

[117] Ohio v. American Express Co., 138 S. Ct. 2274, 2286 (2018).

[118] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 1524005, at 1 (N.D. Cal. Mar. 28, 2018) (citing O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 965–68, 973, 986–88, 993 (N.D. Cal. 2014)).

form-fan interaction.[119] As such, the district court's ruling indicates that the commercial relationships between NCAA members and fans occur in an entirely separate market, which is subject to its own analysis. There is no basis to conclude that an anticompetitive restraint in one market can be offset by a claimed procompetitive justification in an entirely different market. Accordingly, the NCAA's claimed justification that amateurism fosters consumer demand is irrelevant for the purpose of assessing the anticompetitive effects on its members' horizontal restraint on competition.[120]

V. Conclusion

It seems clear, then, that if the relevant market is properly limited to the one-sided exchange between athletes and the university-platform for the former's athletic labor, the restraint on compensation is no longer affected by any claimed procompetitive justification of preserving downstream consumer demand. As such, after *American Express*, the claim that the restraint on athlete compensation under the NCAA's collegiate model can be justified as preserving the popularity of the product has been rendered moot and should not be considered as a procompetitive justification.

[119] In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig. (*NCAA GIA*), Case No. 14-md-02541-CW, 2018 WL 4241981, at 6 (N.D. Cal. Sept. 3, 2018).

[120] Indeed, this point also affects the distributive effects that the NCAA claims result from its restriction on athlete compensation. One defense of NCAA amateurism has been that the profits from "revenue" sports of football and basketball are used to fund athletic scholarships in other sports, thereby increasing output. Whether this is true is irrelevant to the antitrust argument and does not serve as a procompetitive justification. This is because, as the NCAA has agreed, the relevant market in both *O'Bannon* and *NCAA GIA* has been limited to football and men's and women's basketball. As such, in these cases, both the restraint and any claimed procompetitive justifications should be analyzed *in only this market*. Positing that output may be increased in some other as-yet-undefined market that has not been analyzed offers no justification for an anticompetitive restraint in the relevant market at issue.