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The National Collegiate Athletic Association Cartel: Why it Exists, How it Works, and What it Does

Allen R. Sanderson[1,2,3] · **John J. Siegfried**[1,2,3]

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Abstract In this essay we consider why American colleges and universities participate in big-time commercialized intercollegiate sports, and how sports came to play such a prominent role on American college and university campuses. We also review how the National Collegiate Athletic Association (NCAA) developed as a body to regulate player safety and transformed itself into an economic regulator, the means by which the NCAA attempts to maintain its control, increase revenues, and reduce costs for college sports programs. We also examine how the organization succeeds in the face of institutional characteristics that imply that its cartel activities would be doomed. Finally, we speculate on what changes might be on the horizon for the NCAA and college athletics.

Keywords Cartel · Market power · National Collegiate Athletic Association

The Party seeks power entirely for its own sake. We are not interested in the good of others; we are interested solely in power, pure power.

George Orwell, *1984*

✉ John J. Siegfried
john.siegfried@vanderbilt.edu

[1] University of Chicago, Chicago, IL, USA

[2] Vanderbilt University, Nashville, TN, USA

[3] University of Adelaide, Adelaide, Australia

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1 Introduction

This essay describes the National Collegiate Athletic Association's (NCAA) economic cartel: why it exists; how it works; what it does; the effects that it has on its member institutions; and its likely future. But first, we ask why it is worthwhile to rehash yet again the cartel activities of the NCAA (Koch 1973; Fleisher et al. 1992).

The answer is simple: power and money. The revenues are large,[1] and arise principally from television broadcast rights that have soared since the 1984 landmark US Supreme Court decision (*Board of Regents of the University of Oklahoma v. NCAA*, 468 US 85) that stipulated that big-time commercialized intercollegiate athletic competition is subject to the 1890 Sherman Antitrust Act.[2]

The irony of this explosion of broadcast riches that poured mostly into about 100 university athletic departments and NCAA headquarters is that the 1984 Court decision ended an agreement among America's colleges that had restricted the supply of college football games that would be available for broadcast; the restricted supply pushed the price of broadcast rights to a level above the competitive price. One would have expected the end of that arrangement to reduce prices and revenues, which did occur immediately after the decision (Siegfried and Burba 2004).

But revenues quickly reversed. The short-lived decline in broadcast revenues to about one-third the 1983 level was followed by three decades during which broadcast revenues left the initial post-1984 dip in their dust (Carroll and Humphreys 2016; Zimbalist 1999, p. 101). Several things caused this explosion in revenue: Some were orchestrated by the NCAA and its member institutions; some were a result of evolving demographics; and others emanated from rapidly changing broadcast technology.[3]

Although many people predicted that after 1984 broadcast rights would decline sharply toward the marginal costs of airing college football games, about a quarter million dollars at the time (Siegfried and Burba 2004), they failed to appreciate the

[1] In nominal dollars, the median intercollegiate athletics program among the 128 largest [defined later as Division I, Football Bowl Subdivision (FBS)] generated $48 million in 2015, which was 110% more than the median of $23 million in 2004 (Fulks 2016, Table 2.1). Aggregate revenue for college football teams at 2072 institutions rose from $1.89 billion in 2003 to $4.66 billion in 2014; for basketball it rose from $1.13 billion in 2003 to $2.68 billion in 2014 (Equity in Athletics Data Analysis, US Department of Education 2017, accessed January 22, 2017, https://ope.ed.gov/athletics/Trend/public/#/answer/6/601/trend/-1/-1/-1/-1).

[2] Consistent NCAA revenue and expense data are available only since 2004. The share of NCAA Division I FBS institutions' (defined later) total intercollegiate athletics revenues (including within university transfers) accounted for by NCAA and conference distributions (mostly broadcast rights fees) and direct broadcast revenues increased from 14% in 2006 to 23% in 2015 (Fulks 2008, Table 3.27, 2016, Table 3.14).

[3] For a more detailed examination of broadcasting and how it has affected professional sports leagues, the NCAA, and individual universities, see the authors' complementary essay in this issue: "The Role of Broadcasting in National Collegiate Athletic Association Sports". By 2015, broadcast rights constituted about 23% of the revenue received for intercollegiate sports by the largest 128 college sports programs. Ticket sales were 19% of revenues, cash contributions were 20%, and institutional subsidies were 18% (Fulks 2016, Table 3.14).

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rapid growth of television networks that demanded football game content, and the degree to which college football demand is regional, which preserved market power for regional conferences. Prior to 1984, ABC and CBS—which held the rights to televise Saturday intercollegiate football—had been airing simultaneous regional contests rather than a single game broadcast nationally. The greater appeal of Southeastern Conference (SEC) games in the American South and of Big Ten matchups in the "rust belt" must have been enough to boost advertising receipts by more than the extra cost of airing multiple games.

Interest in college sports, especially football, is regional in part because many alumni of colleges and universities reside relatively close to their alma maters,[4] and they and the current students constitute a substantial base demand for television broadcasts, as well as for live attendance. After 1984, the largest conferences (called "power conferences")[5] began to expand in order to solidify their regional dominance. Starting with the Big Ten's addition of the Pennsylvania State University (Penn State) in 1990, all five dominant conferences added teams during the 1990s and 2000s.

The 1984 Court decision dissolved the NCAA's single football television contract. After a brief period of confusion during which home and visiting teams for some games each sold "exclusive" rights to the same game to different broadcasters, a duopoly emerged. The College Football Association (CFA), formerly an internal NCAA lobbying group, negotiated television rights for teams in the SEC, the ACC, and the Big Eight (which has since evolved into the Big-12), plus Notre Dame and Penn State, which were two successful independents at the time. The Big Ten and Pac-10 joined to offer networks an alternative television package. This duopoly was not challenged by antitrust authorities, but eventually proved to be unstable. The CFA dissolved in 1995 amidst internal wrangling over increasingly lucrative revenue shares (Siegfried and Burba 2004). The Big Ten and Pac-10 had separated in 1990, for similar reasons.

Since 1995 each of the five power conferences has negotiated television broadcast rights on behalf of its members. They have been able to parlay the regionally parochial sports interests of their fans and the growing number of broadcast networks that seek game content (e.g., Fox and ESPN) relative to the number of conferences that offer games into an ever growing financial bonanza. As a result, by 2015 the 65 teams in the power conferences were each earning $20 to $35 million annually from television broadcast rights (Alsher 2017).

The powerful intercollegiate athletics programs have taken other steps to diminish any semblance of economic competition that may have existed a few decades ago. In 2007, as the outcome of a settlement that ended an antitrust suit between the National Invitation Tournament (NIT) and NCAA, the NCAA purchased the NIT, thereby ending its modest competitive threat to the NCAA's

[4] As of 1 year after graduation, based on nine US geographic regions, between 71 (New England) and 88 (Pacific)% of recent college graduates live in the same region as the college from which they graduated (Sasser 2008).

[5] The five power conferences are: the Atlantic Coast Conference (ACC); the Southeastern Conference (SEC); the Big Ten Conference (Big Ten); the Big-12 Conference (Big-12); and the Pac-12 conference (Pac-12).

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lucrative "March Madness" basketball tournament. The NAIA (National Association of Intercollegiate Athletics, which governs about 250 very small athletics programs) has been marginalized, and women's basketball has been brought under control of the NCAA.[6] Because many big-time university sports teams play in locations where there is limited competition for live gate attendance and their devoted fans exhibit relatively inelastic demands, the teams can exploit their market power in pricing and implement price discrimination to maximize gate receipts as well.

While the power conferences solidified their market power, technological developments have increased the relative value of televising events that viewers prefer to watch live: "breaking news," and live sporting events. Many fans prefer to watch a sporting event in real-time rather than recording it to view later and skipping over the commercials; and viewers cannot easily avoid the commercials in live sports broadcasts. This increases the relative value of advertising on live events, and thereby allows price increases that further bolster broadcast revenues.

The consequence of these changes has been to create a college commercial sports enterprise that now measures aggregate revenues in the billions and compensates head coaches and some athletic directors in the millions.[7] Gross revenues of intercollegiate athletics programs have grown to such large proportions that an enterprise that was once largely a peripheral activity on college campuses no longer goes unnoticed. Media reporters, columnists, faculty, and the student-athletes themselves have begun to question the distribution of the largesse. Protests have been lodged about the unfairness of coaches and athletic administrators receiving salaries that are far in excess of what they could earn in their next-best employment opportunities and that are at least partially earned on the backs of players, many of whose families are economically challenged. Players have attempted to unionize in order to bargain for more compensation and better health insurance coverage. Others have questioned the absence of challenges to the cartel agreement that limits player compensation (Sanderson and Siegfried 2015a, b) and allows conferences to sell broadcast rights collectively. And recently, a series of privately initiated antitrust actions have been lodged against the NCAA's continued operation as if it believed that it were exempt from the nation's antitrust laws.

The next sections briefly review the history and evolution of the NCAA, and describe the theoretical and empirical underpinnings of the NCAA's economic cartel.

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[6] The Association for Intercollegiate Athletics for Women (AIAW) governed women's college and university sports from 1971 through 1982, after which the NCAA organized women's championship tournaments in most sports, and the AIAW discontinued operations.

[7] *USA Today* reported on October 26, 2016, that 36 college head football coaches earned over $3 million each in 2016. The median head coach in the SEC earned $4.1 million. The highest football coach salary nationally for 2016 was earned by Jim Harbaugh (at the University of Michigan) $9 million, followed (in order) by Nick Saban (Alabama) $6.9 million, Urban Meyer (Ohio State) $6.0 million, Bob Stoops (Oklahoma) $5.5 million, and Jimbo Fisher (Florida State) $5.2 million. In basketball, Mike Krzyzewski (Duke) topped the list at $7.3 million, followed by John Calipari (Kentucky) at $6.6 million and Rick Pitino (Louisville) at $6.0 million.

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2 Why Do Colleges and Universities Participate in Commercialized Intercollegiate Sports?

One of the unique aspects of American "exceptionalism" is the operation of big-time commercialized sports by colleges and universities. How so many of the world's leading research and teaching institutions came to host commercialized sports programs that generate over $8 billion annually (Fulks 2016, Table 3.1)—more than the annual revenues of the National Basketball Association—is an interesting tale, especially because there is no evidence that intercollegiate athletics helps to create and disseminate knowledge.

This is especially curious because providing entertainment for sale is not an institutional purpose in the charter of any of the universities that collect substantial revenues from intercollegiate sports. When Clotfelter (2011) had a research assistant examine the websites of 52 large universities, the assistant found only four that even mentioned athletic programs in their public mission statement. And while about 400 do operate commercial intercollegiate athletics programs, the vast majority of colleges do not. The presence of big-time athletics is even more surprising in light of the loose governance connection between them and their host institutions that may expose their hosts to substantial risk to their academic reputations (e.g., Southern Methodist, the University of North Carolina-Chapel Hill, Baylor, Penn State, among others).

Moreover, only a score of the colleges with big-time athletics programs reap net financial gains (before capital costs and some indirect costs are considered) from them. If this occurred in manufacturing, there would surely be steady exit. Yet 63 of the leading 100 college football programs from 1920 were still among the largest 100 sports programs in 2010. Of the leaders in 1920, 28 are liberal arts colleges, all but four of which continue to field football programs absent scholarships; eight are in the Ivy League, which does not have athletic scholarships. Only two major universities have dropped big-time football over the past century: Washington University (St. Louis), and the University of Chicago (Clotfelter 2011, pp. 49–50). Before we dismiss the big-time sports programs of our leading universities as a colossal mistake, we need ask why they have persisted so long while operating mostly in the red.[8]

Clotfelter (2011, p. 15) identified four roles for intercollegiate athletics on college campuses: (1) a consumer good that students and alumni value, which assists with student recruiting; (2) a business enterprise that serves as an entrepreneurial outlet; (3) an instrument for universities to build support from constituencies; and (4) an educational role, as intercollegiate sports may promote courage, effort, fortitude, discipline, and teamwork and foster grace in winning and losing.

[8] This and the succeeding eight paragraphs are taken from Sanderson and Siegfried (2015a), updated and revised, and used by permission of the American Economic Association.

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Most Americans believe that intercollegiate athletics raises money for their host institutions.[9] NCAA data, however, reveal that in spite of a lucrative gross revenue stream, only 24 of the 128 top-level (FBS) universities earned an operating surplus on intercollegiate athletics in 2015 (Fulks 2016), which was a typical year, and only a portion of those operating surpluses were transferred to the academic side of their universities.

The University of Texas-Austin is an example of a university where athletics is profitable. In 2013, it earned a net of about $20 million on gross sports revenues of $163 million (Kirk 2014). But, at most universities funds flow in the opposite direction. In 2013 *USA Today* reported that over $1 billion of student tuition moved annually *to* athletics departments in support of intercollegiate sports (Berkowitz et al. 2013). Rutgers University, for example, subsidized intercollegiate athletics to the tune of $27 million in 2010, while it froze compensation over the rest of the university to save $30 million in the wake of the global financial crisis. By 2013, Rutgers' annual subsidy had grown to $47 million (Sargeant and Berkowitz 2014): about $1400 for each Rutgers undergraduate, sports fan or not.

Overall, the fraction of athletics revenues that came from the non-athletics part of universities in 2013 was 20% at the 128 top football playing universities, 71% at the next 120 largest football playing universities, and 77% at big-time sports universities that do not play football.[10] The amounts that are redirected from academic to athletic purposes at all but two dozen of the colleges and universities that play big-time commercialized sports are remarkable at a time of legislative cutbacks in state support for public universities and frequent complaints about rising tuition that students and their families are asked to pay.

How have several hundred of the top athletics departments persuaded their university presidents and trustees to continue devoting scarce general funding to intercollegiate sports? When they incur financial losses on athletics, universities seem to "double-down": They spend even more on salaries for coaches and improving physical facilities, rather than viewing losses as a signal to redeploy assets and efforts. Several possibilities could explain this surprising behavior:

First, intercollegiate athletics might attract greater appropriations from state legislators concerned about their constituents' perceptions of the public universities in their states, especially in view of the fact that the median voter in almost every state is *not* a college graduate,[11] and might be more interested in the flagship state university's football or basketball team than in its library or faculty research. Humphreys (2006) found that among 570 public universities, those with big-time football receive about 8% more taxpayer funding than comparable universities

[9] Based on a Knight Commission (2006) survey, 78% of Americans believe intercollegiate athletics is profitable.

[10] These percentages, and all other NCAA data that are reported here, are limited to intercollegiate athletics programs and exclude intramural and club sports. The 128 FBS universities (defined later) have the largest intercollegiate athletics budgets; the 120 Football Championship Subdivision (FCS) universities (also defined later) have the second largest budgets.

[11] In some states—e.g., West Virginia, Louisiana, and Arkansas—the median voter has not even *attended* college (Gaguin and Ryan 2014, p. 194, and US Census Bureau, "American FactFinder—Results", *factfinder.census.gov*). Retrieved 2017-01-23.

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without football; participation seems to matter more than success on the field. Alexander and Kern (2010) found that intercollegiate basketball has a similar effect.

Second, intercollegiate athletics may boost private donations. A dozen or so studies have explored the effects of big-time intercollegiate athletics on contributions to colleges: some find no effect, while others report a modest positive gain (for much more detail, see Getz and Siegfried 2012). Playing in football bowl games appears to stimulate the most contributions. Because most of the incremental donations are steered to athletic departments (Anderson 2012), however, it is not clear whether this effect produces much benefit to universities in general, or, indeed, reduces donations to the general fund.

Third, high-profile sports programs, like other campus amenities, may attract more applicants and thus additional enrollment, which is especially beneficial if fixed-cost facilities (e.g., dormitories) are underutilized. Some anecdotes suggest that winning is linked to applications. For example, in 1983 North Carolina State experienced a 40% rise in undergraduate applications after unexpectedly winning the NCAA men's basketball championship. A recent systematic study (Pope and Pope 2009) confirms that participating in post-season games generates student interest in a university, but the gains are modest and fleeting.

Evidence indicates that simply having a big-time sports program matters more for student recruitment than does the success of the teams, and football seems to matter more than basketball, perhaps because it is played during the college application season. Additional spending on intercollegiate athletics may alter the mix of institutions to which high school seniors apply and which one they attend, but there is no evidence that intercollegiate athletics increases overall college enrollments—beyond the important but small effect of increasing the chances of some of the athletes themselves attending college (Getz and Siegfried 2012, p. 359).

Fourth, spending on sports programs resembles an "arms race" (Frank 2004; Hoffer et al. 2014): Successful athletic programs bid aggressively for high-profile coaches and often improve their physical facilities to lure recruits. Small differences in spending can yield large advantages in recruiting and subsequently in winning. Unsuccessful programs have little choice but to ratchet up spending, or they may fall even farther behind in the competition for players and coaches, with devastating effects on their revenues. Thus, the net positive revenues of a few dozen teams steadily drive up costs for all competitive teams, with the result that overall revenues are static because the investments by all teams cancel each other, which requires universities with already unprofitable intercollegiate athletics programs to increase further internal subsidies.[12]

Even if participation in intercollegiate sports affects state appropriations, stimulates private donations, and/or boosts student applications, that is insufficient by itself to justify subsidizing intercollegiate athletics. For example, if the purpose of investing in intercollegiate athletics is to increase contributions, one would need to demonstrate that spending an incremental $1 million on the salary for a coach

[12] While the median revenue that was generated from intercollegiate sports increased by 110% from 2004 through 2015 at the 128 largest programs, expenses rose by 129% at the same programs (Fulks 2016, Table 2.1).

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generates more than $1 million in additional donations, and, further, that it stimulates more donations than would spending that money on traditional university fund-raising efforts for other worthwhile endeavors. The same argument applies to intercollegiate athletics as a means of attracting state funding and student applications.

Fifth, many colleges and universities set tuition well below the level that is sufficient to cover operating expenses. They selectively admit students with specific talents and characteristics (including financially successful parents), and hope that some of them mature into appreciative multi-millionaires who later are willing to share their good fortune with their alma maters (Hoxby 2014). To enhance the prospects that the more successful graduates remember them during estate planning, the institutions invest in creating and maintaining emotional ties. They organize alumni cruises, send faculty to talk to local alumni clubs, and sponsor "homecoming" events that often feature a football game.

The challenge to the presidents of the universities is to weigh on the margin the value of funds that are devoted to directly and immediately improving teaching and research against the prospective value of a more visible and successful intercollegiate athletics program that might eventually attract sufficiently larger donations to the non-athletic side of the institution, such that when discounted, generate an even greater boost to teaching and research. Of course, a number of prominent institutions have successfully pursued ties with their alumni without big-time commercialized sports: e.g., California Institute of Technology, Johns Hopkins, New York University, and Washington University (St. Louis), as well as the entire Ivy League.

Finally, football especially may affect *academic* status in higher education. Through its role in grouping colleges into conferences, football can affect how the public perceives specific institutions within higher education. An institution's sports rivals publicly specify its peers as worthy adversaries, perhaps academically as well as athletically; peer academic assessment scores vary considerably more among than within football conferences (Lifschitz et al. 2014). Conference realignments that add universities with lower academic standards than the incumbents can even reduce the educational status of the original conference members.

3 A Short History of College Sports

By 1860, there were about 200 mostly small, private, religiously affiliated colleges and universities in the United States. The number grew dramatically after the Morrill Act of 1862 created the federal land-grant system that spawned large state universities, which today field most of the big-time intercollegiate football and basketball programs. As colleges and universities grew rapidly in both number and size during the last third of the nineteenth century, competition for students intensified. Sports programs were a means to attract more students.

Rowing was the first sporting contest between students at different colleges: Harvard met Yale on Lake Winnipesaukee in 1852. In 1859 Amherst played Williams in the first intercollegiate baseball game. The first intercollegiate

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basketball game that used the now-familiar five players on each team occurred in 1896, when the University of Chicago defeated the University of Iowa.

The development of intercollegiate football is more complicated: The rules changed over time, morphing it from a game that was akin to soccer into one that was similar to rugby, and eventually into what is now American football. The first intercollegiate game was played in 1869 between Princeton and Rutgers. Important rules changes occurred in the 1880s, when the rugby scrum was replaced by a snap from scrimmage, teams were given three tries to gain at least five yards, and blocking was allowed. To facilitate the determination of a first down, lines were drawn on the field at five-yard intervals, as is still the practice today (though the first down yardage has doubled).

Violence in the game intensified in 1888, when tackling below the waist was legalized, leading to a tactic in which blockers interlocked arms and ran together into defenders. A version of this tactic was called the Flying Wedge because the players gave themselves a running head start before the ball was snapped.

Interest in football increased steadily, so that by the 1890s gate receipts had risen to serious levels. Harvard built the first permanent college football stadium in 1903, with a capacity of 31,000 fans. Many other universities followed. Once fixed costs were invested, steady revenues became indispensable to pay the mortgage. Chicago was the first university to pay its football coach, when it lured Amos Alonzo Stagg from his volunteer coaching position at Springfield College in 1892. By 1905 Harvard's football coach earned about the same as its president. Today head football coaches at big-time programs routinely earn more than anyone else on campus.

4 Development of the National Collegiate Athletic Association[13]

From 1890 through 1905, over 300 college and university students died as a result of injuries that were sustained playing intercollegiate football (Zimbalist 1999, p. 8). News reports about collegiate football deaths and injuries threatened to undermine its continued popularity. This prompted President Theodore Roosevelt to summon to the White House representatives from then football powerhouses Harvard, Yale, and Princeton. The President extracted from them a promise to change the rules to reduce the violence that emanated from the game.

Further impetus for reform arose from the death of a Union College player in 1905, who died after being hit by the New York University offensive line. NYU's chancellor witnessed the event and resolved to end the violence. He gathered delegates from 62 colleges to consider reform; they formed the Intercollegiate Athletic Association of the United States (IAAUS) and appointed a rules committee, which introduced a rule that required at least six offensive players to be on the line of scrimmage at the snap of the ball, thereby ending the Flying Wedge.

A formal organization with rulemaking authority was necessary to reduce the mayhem in football, since violence led to victories, and winning attracted fan interest, attendance, and gate receipts. Individual teams in such a prisoners' dilemma game confronted a dominant strategy of continuing the violence if allowed

[13] A more comprehensive history of the development of the NCAA is in Grant et al. (2008).

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to do so. No team would unilaterally refrain from dangerous practices because that would lead to the worst possible outcome, even though continued violence seemed likely to reduce overall demand for intercollegiate football. Teams would agree to abandon dangerous practices only with assurance that their opponents would follow suit. From its very beginning, collegiate football's self-regulatory organization was concerned with the economics of the sport via a fundamental application of a game theoretic dominant equilibrium.

In 1906, 39 colleges and universities ratified the IAAUS constitution. It prohibited payments to students based on athletic skills, banned player recruitment, limited player eligibility to 4 years, and excluded former professional players. In 1910, the organization changed its name to the National Collegiate Athletic Association (NCAA); by 1911 it had 95 members and had become entrenched as the self-regulatory body that supervised collegiate athletics.

While the first set of IAAUS bylaws specified that students not be paid for their playing services, it expressed no concern as to whether coaches or universities profited from sport. In 1922, the NCAA banned payments (including scholarships) to students for participating in sports, but a relaxation of the rules in 1935 instituted athletic-related scholarships for players.

The next significant changes in NCAA rules occurred in the aftermath of World War II. To better control costs, which were at risk of consuming the growing revenues collected by universities from their athletic enterprise, the NCAA adopted a "sanity code" that forbade any compensation to players.[14] This reinstated the ban on athletic scholarships. However, by 1951 athletic scholarships returned to stay. While player compensation has been restricted to a grant-in-aid since 1951, player costs were not really under control until 1973, when limitations on the number of scholarships (but not the number of players on a team) were instituted. Football was initially restricted to 105 scholarships, which was lowered to 95 in 1978 and, in 1992, reduced to the 85 that are allowed today.

To ease student-athletes'[15] adjustment to college, first-year students were ineligible to play in NCAA championships from 1939 through 1968. As a cost-cutting measure, in 1968 they became eligible to participate in all sports except football and basketball. Four years later football and basketball also allowed first-year students to play, further reducing costs.

In 1973 the NCAA divided into Divisions I, II, and III. Division I includes large universities that compete at the highest level in most sports; Division II institutions are usually smaller, compete at an intermediate level, and offer limited scholarships; Division III colleges offer no athletic scholarships. In 1978 Division I was further split into three groups for governing football: Football Bowl Subdivision (FBS) at present 128 universities whose teams compete at the highest level, Football Championship Subdivision (FCS) for about 120 teams that compete at a lower level; and about 100 teams that field competitive basketball teams, but do not play football. Division I is not subdivided for the governance of sports other than

[14] The concept was that it was "insane" to pay players, when their services could be acquired free.

[15] Walter Byers began the practice of calling the players "student-athletes" in 1951, when he became Executive Director of the NCAA, in order to justify their continued unpaid amateur status (Byers 1995).

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football. In addition to the approximately 350 Division I teams, there are about 300 currently in Division II and 450 in Division III.

The NCAA has regulated college sports since its inception, but its interest in economic matters intensified after World War II.[16] The shift from player safety to efforts first to control costs and subsequently to expand revenues occurred after football playing rules were stabilized and player safety was improved. The interest in containing costs by limiting player compensation and the number of scholarships intensified as expanded revenues tempted universities to spend their new-found largesse on competition for players in what is a zero-sum rent-seeking game. Once costs were under control, attention turned to expanding revenues.

Intercollegiate sports revenues expanded rapidly after World War II because of a confluence of independent events. First, the G.I. bill increased college enrollment by more than a million students per year from 1940 to 1950, which increased spectator demand for college and university sports. Second, the post-war baby boom increased the demand for college and university sports as the population of teenage boys and young men spiked during the 1960s. Third, the rapid post-war expansion of television receivers added broadcast demand to the steadily growing demand for live attendance.

In 1940 the University of Pennsylvania (Penn) started to televise its home football games. By 1950 Penn was receiving $150,000 for annual broadcast rights; but in 1951 the NCAA decided to prohibit televising college football games because the availability of a game on television might reduce live gate receipts (of both the televised contest and other games). With so much money at stake, Penn refused to stop televising its games, whereupon the NCAA threatened to expel it by having Penn's opponents refuse to play the Quakers. With its entire season at risk, Penn retreated. To stabilize college football broadcasting, in 1952 the NCAA began a "Television Plan," which lasted 32 years. It was an agreement among members to televise only a single Saturday afternoon game each week and restricted the number of appearances by a team. The value of the restricted television broadcasting rights rose rapidly over succeeding decades. When combined with "March Madness" (the NCAA national men's basketball tournament), broadcast revenues hit $91 million annually in 1984 (Raiborn 1986),[17] the year of the Supreme Court's *Board of Regents* decision.

The first intercollegiate basketball championship was the 1938 NIT. The next year the NCAA initiated a competing tournament. For many years the two tournaments competed for teams. Eventually, the NCAA prohibited a team that was invited to its tournament from participating in the NIT under threat of penalties,

[16] The NCAA's constitution declares its basic purpose to be to "maintain intercollegiate athletics as an integral part of the educational program" of colleges (NCAA Constitution, Article 1.3.1), which is sufficiently vague as to reveal nothing about its actual goals. The NCAA's website claims it is "dedicated to the well-being and lifelong success of college athletes." But the "well-being of college athletes" could be interpreted to involve the maximization rather than control of their compensation.

[17] For 2016, *Forbes* estimates TV related revenue, including "both rights fees and, for the conferences with network ownership stakes, estimated profit shares" for the 10 Division I conferences, including the SEC, the Big Ten, the Big 12, the Pac 12, the ACC, the American, the Big East, the Mountain West, Conference USA, and the Mid-American as $1.38 billion, an increase by a factor of 15 over 32 years (Smith 2016).

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which precipitated an antitrust challenge from the NIT for a collective boycott. Just before the scheduled trial in 2005, the NCAA purchased the NIT and has since run it as a tournament for teams that are not invited to March Madness. The NCAA's 3-week basketball tournament has been a huge financial success: It attracted $771 million dollars in annual broadcast rights fees in 2016, with a newly signed contract elevating that to $1.1 billion per year. A small amount of the tournament's television rights fees fund NCAA operations. The remainder is distributed to the teams that participate in the tournament.

5 Basic Principles of the NCAA

The two principal components of the NCAA's economic cartel operations that emerged in the wake of World War II are an agreement to: (1) limit the compensation and demand for the most essential input to games: players; and (2) restrict the number of games that are available for sale to broadcast networks. The former reduces costs relative to what their level would be in a competitive player market, while the latter enhances broadcast revenues compared to their competitive level. The result is a large financial surplus for intercollegiate athletics, with a corresponding opportunity for other claimants such as coaches and administrators to tap into the excess.

At the beginning of the agreement to sell college football television rights collectively, the NCAA limited broadcasts to just one game per week, which created an artificial scarcity of games. Bids for the rights escalated rapidly, with the three over-the-air networks chasing just a single source of game content. After the US Supreme Court ended the broadcast rights agreement in 1984, the number of televised games increased rapidly, and rights fees per game plummeted to less than a third of the level that they had been under the plan (Siegfried and Burba, p. 807). But fees recovered quickly, as new technologies to record and play televised shows without advertisements increased the relative value of advertising on broadcasts that viewers preferred to watch live, especially sports.

In contrast to professional sports leagues that contain player costs by revenue sharing (which reduces the rewards for winning), penalties on "excessive" payrolls (a payroll tax), limits on aggregate payrolls (a payroll cap), and limits on individual player compensation that are negotiated with players' unions, colleges have agreed among themselves through the NCAA simply to limit player compensation to a grant-in-aid: essentially, a tuition scholarship plus room and board. Because no players' union or collective bargaining agreement is involved in the decision, the result of such policies is not protected from antitrust laws by the 1935 National Labor Relations Act, as compared to the methods that the professional leagues use to limit compensation and that are exempt from the antitrust laws.

One should ask why the players accept only a grant-in-aid to work in an essentially full-time job. The answer lies partially in the assistance that is provided by the National Football League (NFL) and the National Basketball Association (NBA) to colleges and universities by reducing the paid alternatives that are

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available to talented young players. Since 1990 the NFL has refused to employ players who are fewer than 3 years past high school.[18] And since 2006, the NBA has declared players who are less than a year out of high school ineligible for its entry level draft, which has consequently created the "one-and-done" college basketball phenomenon. These restrictions are negotiated as part of the collective bargaining agreements of the professional players' associations, and therefore are insulated from antitrust liability.

These professional league policies have drastically reduced the viable paid options that are available to young athletes. Other than play for college teams as a first-year student, elite basketball players might play professionally overseas for a year, but few have done so. Some basketball players enter the NBA's development league, but they can potentially attract considerably more attention as university stars in March Madness than they could ever hope to create in the development league.

Football players do not have even that option, because American-style football is not played outside North America. Neither Arena Football nor the Canadian Football League are attractive alternatives. Thus, if young elite athletes want to continue to develop their physical skills and attract the attention of professional talent scouts, they have no alternative but to attend a big-time university sports program.

In return for providing colleges with a labor force that is willing to work without pay, the professional leagues secure free employee training. They do not have to fund extensive development leagues, such as those that exist in baseball and ice hockey. Moreover, the age restrictions on players that enter the NFL and NBA mean that players stay on entry-level contracts, compensation for which is limited by union-league collective bargaining agreements, until a higher age (one more year for basketball, three more years for football). This implies that players in their early-to-mid twenties, in the prime of their careers, can become free agents only at a higher age than they might have otherwise, saving their employers a substantial amount of player compensation. The ban on younger players also reduces the risk to professional teams from immature players whose poor behavior might sully the league's reputation, or of contracting with injury-prone players.

Unsurprisingly, in large part because it would violate antitrust laws, head coaches' and athletic directors' compensation is not limited by the NCAA (although in the 1990s some assistant basketball coaches' salaries were temporarily subject to a $16,000 ceiling). Nor does the NCAA control what an institution spends on athletic facilities, such as stadiums, locker rooms, or training facilities. The NCAA does, however, limit recruiting costs in order to help preserve the benefits that flow to those whose compensation is not restricted.

[18] Prior to 1990 the NFL required entry-level players to wait until their high school class was 4 years beyond graduation to be eligible to be employed in the league.

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6 NCAA Cartel Operations: Surmounting Four Significant Challenges

Every cartel must overcome four significant challenges: the difficulty of reaching agreement; the potential erosion of cartel profits by either non-price competition or member cheating; the deterrence of new entry that is attracted by the prospect of sharing the cartel profits; and the possibility that some members view the specific distribution of the cartel benefits as inequitable. The NCAA is no exception.

6.1 Reaching Agreement

The NCAA must reach agreement among potential cartel participants to restrict games and broadcast output so as to elevate price above its competitive level, and also to adhere to a maximum amount paid to the players. Achieving agreement can be especially difficult when cartel members are heterogeneous. Colleges and universities face different athletic program costs and have divergent goals. Costs differ among them because private and public universities face different opportunity costs of offering a grant-in-aid to a student-athlete,[19] and institutional objectives diverge because colleges and universities differ significantly in terms of emphasis on teaching, research, and public service, among other things.

Small selective liberal arts colleges usually field a wide array of intercollegiate athletics teams so as to provide opportunities for students who are recruited primarily as students, not athletes. Small liberal arts colleges subsidize all of their sports programs, from intramurals to intercollegiate competitions. The programs are part of the amenities that they provide students.

Large state universities, in contrast, usually field fewer athletics teams than do liberal arts colleges, excluding many sports that do not generate much revenue. Big-time programs focus on money-making sports—football and men's basketball—with only a few also able to turn a profit, or at least minimize losses from women's basketball, men's ice hockey, and baseball.

Even within the now six separate NCAA football governance categories, substantial differences remain. Stanford, Northwestern, and Vanderbilt are each in a power conference, along with Washington State, Nebraska, and Mississippi State. These two sets of institutions are quite different in terms of tuition, student characteristics, emphasis on faculty research, academic programs offered, and public service responsibilities. The differences can create cost differences as, for example, an athletics scandal at Stanford or Northwestern has vastly different consequences for the institution's academic reputation than would a similar scandal at an institution with less academic reputation at stake. Moreover, tuition at the private universities that were listed first is more than double the tuition at the public universities in the second group. At some universities grants-in-aid are charged to the athletics department, while at others they are not. With such differences among

[19] In addition to differences in the cost of a grant-in-aid to universities with different levels of tuition and fees, those institutions with excess capacity face only the marginal cost of enrolling an additional athlete on a grant-in-aid, while institutions that are at capacity face losing the average net revenues from a non-athlete when they add a scholarship athlete.

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members, it is remarkable the NCAA has coalesced for over 60 years as a vibrant cartel.

Reaching and maintaining an agreement among competitors to reduce competition in the sale of broadcast rights and in the acquisition of player talent would normally also face the considerable difficulty of likely antitrust challenges. But the NCAA has been able to avoid charges of conspiring to control compensation of its players by perpetuating an image of the players as "student-athletes" rather than as employees. And after the 1984 Supreme Court's *Board of Regents* decision that voided the NCAA's nationwide broadcast cartel, there has been no subsequent challenge to the collective sale of broadcast rights on a smaller scale at the conference level.

6.1.1 Controlling Non-price Competition

Second, the cartel must protect its economic rents that are earned as a consequence of the agreement from erosion either by non-price competition or cheating on the agreement. Because excess profits are earned on each unit sold, cartel members are tempted to advertise, improve service, innovate, or otherwise expend funds in an effort to add unit sales at the expense of rivals; all of this can be described as non-price competition. If all cartel members confront similar incentives, such non-price competitive efforts may cancel out. Eventually the only thing that changes as a result of the quest for more sales is that the cartel members' costs rise and profits fall.

Opportunities for the use of non-price competition to attract additional unauthorized television broadcast sales by individual teams are non-existent because broadcasts are vividly transparent. But on the labor side of operations there are many opportunities for individual cartel members to deviate from the agreement. Intense recruiting can feed the egos of high school players, their families, and their coaches. Better training and playing facilities, luxurious locker rooms, better culinary experiences, special academic tutoring, travel to attractive locations for non-league games, and the professional marketing and promotion of successful players who seek recognition can all sway a 17-year-old's college or university choice. The possibilities for overdosing on complementary recruiting devices are vast, and have been known even to extend to cash payments, phony jobs, benefits to family members, and escort services for prospective players or their family members.

When direct price (salary) competition is prohibited, non-price competition will increasingly affect prospective players' choices about which institution to attend. The effect of a larger role for non-price competition in player decisions affects competitive playing balance among teams, but the direction is unclear. In addition to the many small non-price benefits that universities use to compete for players, the existing system of capped compensation for players bestows tremendous recruiting advantages to prestige programs with a history of winning and of producing professional athletes, and with coaches with substantial name recognition. Institutions such as the University of Santa Clara or the University of Maine face an uphill battle recruiting against the University of Alabama in football or the

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University of Kentucky in basketball, with the latters' high-profile programs and coaches.

How cash compensation would affect competitive balance depends on the relative preferences of various talented players for monetary compensation versus their perceived value of the non-cash benefits of playing for various institutions. Since there must be at least some talented players who favor cash, eliminating the cap on player compensation would be likely to divert some players to universities that had no chance at attracting them with just program prestige and up-to-date facilities.

Even if competitive balance were to decline, demand may not. Intercollegiate athletics currently is popular despite a high degree of imbalance. The demand for dominant teams and the enjoyment that fans of non-dominant teams get when their team occasionally upsets an elite team may outweigh the value of more competitive balance (Coates et al. 2014). After all, it is the elite teams that create an opportunity for other teams to be "dragon slayers". A more serious challenge to maintaining demand could arise if players were to receive cash compensation. The demand for college sports may depend, at least in part, on the very fact that the players aren't paid and are perceived primarily as "students."

6.1.2 Preventing Cheating

A successful cartel must protect its profits from erosion by cartel members that cheat on the agreement. Cartel participants face an incentive to defect on the agreements on number of games played, broadcast output, and maximum player pay. Prices that exceed a competitive level create an inherent incentive for cartel members to violate the agreement because each extra sale at an elevated price earns excess returns. Attracting more sales for an expenditure that is less than the expected above-normal return is a profitable move. If all cartel members defect, however, the restriction on output necessary to support the elevated price evaporates.

To deter cheating, it must be detectable so that it can be punished and thereby discouraged, which is why defectors act secretly. Of course it is impossible to broadcast or even play college football games in secret. Such a violation would immediately garner retribution. In sports, where two teams are necessary to produce a game, punishment can be certain and severe, as the offending team's scheduled opponents can refuse to play the cheater. *Competitors can drive a defector's output to zero*. The punishment can be intensified further if the NCAA coordinates an all-sports boycott of the offending institution, thus raising the cost of cheating and putting pressure on an institution to stick to agreement parameters.

In contrast, cheating on the agreement to restrict player compensation and limit recruiting expenses is more difficult to monitor. Because it is much easier to conceal illicit payments to players and to provide benefits indirectly (e.g., in cash, to friends or relatives, or as payment for a fake summer job), and it is virtually impossible efficiently to monitor hundreds of thousands of contacts between coaches and

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prospective players, violating the labor cost control rules of NCAA cartel operations is more likely.[20] But it does not jeopardize the overall agreement as directly as does cheating on broadcast limits, because the amounts at stake in each transaction are much smaller.

The temptation to defect on the agreements depends on balancing the value of the expected advantage that the defection creates against the expected cost of being caught, which depends on the combined likelihood of being caught *and* the severity of punishment if caught. Stigler (1964) observed that the probability of defecting depends on the number of cartel participants because the effect of cheating in cartels with many participants is difficult for other members to detect when it is widely dispersed. Because over 200 NCAA Division I football teams compete for elite high school football players, and over 300 compete for premier basketball players, it would seem that the NCAA cartel would swiftly collapse from violations of the agreements on compensation and recruiting.

To minimize the prospects of such an outcome, the NCAA employs an investigation staff to identify and evaluate claims of cheating on cartel rules. Almost all of these claims involve player recruiting, compensation, or academic eligibility. The NCAA also relies on rival teams to discover improprieties and report them, which many do because the punishment of rival team violations can improve the competitive record of the whistleblowers.

The real bite in the likely cost of cheating comes not from a high probability of detection, however, but instead from the severity of penalties that the NCAA can levy, including bans on post-season football or basketball play and the corresponding loss of financial and marketing benefits of such appearances, as well as restrictions on the number of scholarships, and thereby team strength, that are allowed in future years. In extreme cases, the NCAA can even close a program for a period.[21]

Moreover, penalties can be extended to cover sports other than those where the violations occurred. For example, in 1981 when NBC offered the CFA a 4-year $180 million football broadcasting contract, the NCAA threatened expulsion of all 62 CFA institutions for all sports if the CFA accepted the offer. The CFA backed off. With such severe punishments carrying large financial and reputational implications, the expected cost of cheating can be large in spite of a small chance of a violation's being detected, thus overcoming the effect of a large number of participants that Stigler thought would undermine any agreement.

[20] The latest example of blatant recruiting violations occurred in September 2017, when federal authorities revealed details of corrupt schemes involving footwear manufacturers, coaches at premier NCAA basketball programs, and financial advisors. Allegedly, large cash payments moved from footwear company executives and financial advisors to coaches and players with the intent of steering prospective NBA players to certain college programs and eventually to representing the footwear brands and hiring the financial advisors.

[21] In 1987 and 1988 the NCAA imposed the "death penalty" on the football program at Southern Methodist University because of "a lack of institutional control," when it discovered that athletic department employees were assisting in providing cash payments to players. In 1952–1953 the NCAA closed the University of Kentucky's men's basketball program because of complications that arose from some players' accepting payments from gamblers to shave points in games.

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The incentive to cartelize has proven irresistible in big-time college sports. Demand by television networks for live-game content is relatively inelastic, in part because the alternatives that are available to television networks are not attractive—e.g., Saturday afternoon reruns of old sitcoms, or jewelry, weight loss, or cosmetics infomercials—and in part because live television content commands higher advertising rates. Professional leagues are reticent to compete against colleges by airing games on Saturdays, the traditional day for college games, for fear of threatening their 1961 Congressional broadcasting cartel exemption from the Sherman Act.

Because the costs that are associated with fielding a college sports team are primarily fixed, including stadium and player costs, any extra broadcasting or ticket revenue is largely additional net income for a university.[22] A high fixed-to-variable costs ratio also favors agreement in order to avoid a broadcasting price war or player bidding war, since in such circumstances rights prices could be cut substantially or player costs elevated significantly and still leave revenues comfortably covering variable costs.

Research on cartels finds that trade associations often help coordinate anti-competitive agreements, especially when there are large numbers of potential cartel members (Fraas and Greer 1977; Hay and Kelley 1974). Thus, it is natural that the interest of the NCAA, initially formed to improve player safety and coordinate playing rules, migrated to the control of costs and expansion of revenues. Absent the pre-existing organization, it may have proved impossible for hundreds of institutions to organize for the purpose of expanding revenues and cutting costs as the NCAA successfully did. The NCAA may be *the* classic case of a trade association orchestrating a cartel for its members' economic benefit, while simultaneously touting a "moral high ground" image that it is pursuing a lofty goal: the enhancement of the "student-athlete" experience.

6.2 Deterring New Entry

The third challenge that a successful cartel must confront is to prevent erosion of its monopoly profits by new entrants that are attracted by its success. The NCAA's Division I FBS, which attracts almost all the substantial revenues, has been quite successful in fending off potential entrants. There are many major universities without a commercialized intercollegiate athletics program (e.g., University of Chicago, MIT, Emory, Carnegie-Mellon) that could try to enter the big-time, as did Michigan State successfully in the 1950s and Louisville, Houston, and Boise State accomplished more recently.

But entry generally has not been a source of new competition for the NCAA's elite sports universities because the programs that have upgraded were already NCAA members and had agreed to abide by the cartel rules. Moreover, upgrades are hampered by NCAA requirements on the capacity of playing facilities, a minimum number of games played against Division I teams that are hard to schedule, recent

[22] The fixed-cost nature of the sports production function also encourages expanding the length of the regular sports season, and the addition of ever more post-season games.

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minimum attendance levels, a minimum number of scholarships that must be awarded (raising costs for entrants), and a minimum number of sports in which the institution must participate.[23]

Only 14 universities have gained NCAA Division I status since 2000. The challenge of acquiring access to one of the five power conferences, to football bowl games, or to March Madness are additional hurdles that face new competitors. In October 2016 two recently successful football programs—the University of Houston and Brigham Young University—were both denied entry to the Big-12 conference even though they both fit its geographic profile and the Big-12 had only 10 teams at the time.[24]

6.3 Distributing the Spoils Fairly

The fourth challenge to a successful cartel is to satisfy its members that the fruits of their efforts are distributed equitably. In some cases, this can be daunting, as various members may have diametrically opposed views about what is "fair." Those who do not contribute to the output (e.g., teams whose games are not televised) are likely to favor more equal distribution, while those who do produce the output (those chosen to appear on televised games because they attract more viewers) are likely to favor a distribution principle based on production.

All potential competitors must share in the spoils to some extent, because even those whose output is constrained to zero to reduce industry supply contribute to elevating price. If any team or group of teams receives less than they believe they could make by competing independently, they may bolt the agreement, which would create problems for the surviving cartel members.

In order to distribute the benefits of its national broadcast rights cartel from 1951 through 1983, the NCAA first used some of the revenues to cover the association's operating costs, so all members were relieved of having to pay dues. It also limited the number of annual television appearances for each team because most of the revenue was distributed to institutions based on appearances. Limiting the appearances of teams forced a wider distribution of the broadcast revenues. But the wider distribution also limited the revenues that accrued to those teams that spent the most on their athletic programs, attracted the most attention, and felt that they deserved a greater share. This eventually led the universities of Georgia and Oklahoma successfully to sue the NCAA for perpetrating a cartel to market college football's television broadcast rights (the 1984 Supreme Court's *Board of Regents* decision).

When the CFA began to negotiate football broadcast contracts on behalf of three of the power conferences and a few independents in 1984, it boosted annual base payments to $50,000 to each team to foster loyalty from teams that did not expect to

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[23] In addition, a 1972 amendment to the 1964 Civil Rights Act (Title IX) mandates that to promote gender equity educational institutions spend proportional amounts on women's athletics as on men's, thereby increasing the costs of upgrading men's programs by more than just the expenditures on those programs themselves.

[24] The primary argument against conference expansion is the need to divide shared (mostly broadcasting) revenues among more institutions.

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appear on television frequently. The CFA had to rely more on carrots (money) than sticks (punishment for defecting) to maintain cartel stability because it could not impose draconian penalties on defectors as the NCAA could. Even so, Penn State left the CFA in 1990, followed by Notre Dame in 1991. And from 1984, the SEC persistently negotiated an ever increasing share of CFA revenues on the basis that it contributed the most attractive games to the CFA inventory. Unable to secure a share of broadcast rights revenues that it deemed "fair" based on its perceived contribution to the product, in 1996 the SEC finally left the CFA in favor of an independent broadcast contract with CBS, which effectively ended the CFA.

College football and basketball scheduling also provides a means of sharing the wealth beyond the premier teams that networks select for appearances.[25] This helps to placate institutions whose teams are not selected to appear on television. Because all conference schedules consist of fewer games than the NCAA maximum, teams usually schedule two to four non-conference games in football and 10–12 non-conference games in basketball each year. Some of these are popular rivalries against elite teams in other conferences, but some are against weaker teams (often in the FCS in football) that are unlikely to warrant television appearances on the basis of their traditional talent levels.

These latter games are all home games for the dominant teams so they can include the games in their season-ticket packages at prices that exceed what would be justified by the individual matchup. Visiting teams are paid a lump sum that exceeds what they could have expected to earn at their (usually smaller) home stadiums or arenas if they had scheduled a two-game home-and-home series, but is less than the receipts that the dominant home team can generate at its larger stadium or arena.[26] Both teams in "purchased" games gain financially, and the perennial powerhouse usually gets a win that may help it to qualify for post-season play. Once in a while the underdog team upsets the powerhouse, which generates immense publicity for the former.

7 How Will Change Arrive, If it Ever Does? Internal Reforms and Lawsuits

In what may have been an attempt to head off more drastic changes in the intercollegiate sports business model, in April 2014 the NCAA's Division I voted to allow its members to offer unlimited meals and snacks to their athletes, spawning a new intercollegiate competition in food provision.[27] Subsequently, the NCAA altered its organizational structure to allow the five premier college athletic

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[25] The NCAA, CFA, Big Ten/Pac-10 and now individual conferences all left the selection of the particular games to broadcast to the networks in order to increase the value of the broadcasting rights.

[26] Such a "side payment" in a cartel is called a "true-up" in the standard cartel literature (Marshall and Marx 2012).

[27] This change was provoked by University of Connecticut basketball player Shabazz Napier's announcement on national television immediately after the Huskies won the 2014 national collegiate men's basketball title that he frequently went to bed hungry because of NCAA restrictions on "excess food."

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conferences and Notre Dame to operate under a different set of rules than other teams.[28] This allows conference teams to provide additional benefits to their scholarship athletes that would be harder for other teams to afford, such as compensation up to the "full cost of attendance" at each institution.

Other proposals under consideration include a requirement that schools shift from the 1-year guaranteed length of a grant-in-aid instituted in 1973 to multi-year scholarships. At present, most grants-in-aid are not automatically renewable from year to year, although since 2012 a few individual institutions and the universities in the Big Ten have acted unilaterally to offer multi-year grants-in-aid.

But these changes fall well short of a free competitive labor market for college athletes (Sanderson and Siegfried 2015a, b), which is the goal of several contemporaneous lawsuits. First, there is the 2009 complaint in *O'Bannon v. NCAA*, which was decided by a San Francisco federal trial court in August 2014. Ed O'Bannon, a player on UCLA's last national championship basketball team, argued that after players leave college they should share revenues from the commercial use of their image; the NCAA asserts lifetime control over those rights. The case grew to include also the television broadcast rights of players while they are in college. US District Court Judge Claudia Wilken ruled in *O'Bannon* that the NCAA's agreement to cap player compensation at the level of a grant-in-aid violates Section I of the Sherman Act because it is collusion in restraint of trade.

To complicate matters, however, Judge Wilken suggested that a compensation cap that was set above the current level of grants-in-aid (by $5000) might withstand legal scrutiny. Her ruling[29] was appealed, and the Ninth Circuit Court of Appeals[30] agreed that the NCAA cap on player compensation is indeed illegal, but stipulated that the "full cost of attendance" (as used for general financial aid awards) rather than $5000 should be the maximum compensation allowed student-athletes. Either of these decisions in essence caps player compensation *by the courts*, and renders irrelevant the NCAA agreement. On October 3, 2016, the US Supreme Court declined to hear an appeal. The current status of this decision is confused.

The confusion that *O'Bannon* has created in the market for college football and men's basketball players may be resolved by two subsequent cases that are moving through the same Ninth Circuit in California. One suit originally filed on behalf of former football running back Shawne Alston requests that he be paid the earnings that he might have received from West Virginia University if it had not colluded with other universities to restrict his pay to a grant-in-aid. In 2016, that case was consolidated in California with similar cases and certified as a class action.

In February 2017, plaintiffs in the Alston case and the NCAA reached a settlement for $209 million to cover the additional amount that Alston and his colleagues might have been paid if "full cost-of-attendance" had been used as the basis for grants-in-aid, as the Ninth Circuit decided was allowed. The question of

[28] This action essentially added a new, sixth division to the NCAA for football governance purposes.

[29] *O'Bannon v. NCAA*, 7 F.Supp. 3d 955 (2014); available at http://s3.documentcloud.org/documents/1272774/obannon-court-decision.pdf.

[30] *O'Bannon v. NCAA*, 802 F.3d 1049 (2015).

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whether *any* player compensation cap is permissible remains in dispute in the Alston case, however, and is scheduled for trial in late 2017.

To add fuel to the fire, in March 2014, prominent sports labor attorney Jeffrey Kessler filed a separate lawsuit (Farrey 2014) on behalf of Martin Jenkins, a former Clemson football cornerback, and two University of Wisconsin athletes against the NCAA.[31] Kessler asks only for an injunction to end collectively imposed restrictions on player pay. These cases are now in San Francisco District Court under Judge Wilken's supervision.

It is impossible to forecast the eventual outcomes of these cases, but the precedents from two earlier NCAA legal defeats—the 1984 television broadcast rights cartel case, and a 1998 assistant basketball coaches' wage-fixing case[32]—suggest that the NCAA is in risky territory with respect to its agreement to limit player compensation to a grant-in-aid. These pending lawsuits have the potential to cause changes beyond the small steps that were recently taken by the NCAA.

What might happen if Alston wins the remaining issues in his case, or if Jenkins ultimately prevails and elite college athletes can sell their services in a truly competitive market? With many aggressive coaches, it is inevitable that with no pay limit, some universities will offer their better players financial incentives to stay on their team, and will include cash in offers to new recruits. As some teams do so, others will follow. Worsening financial conditions will probably cause some universities to drop out of big-time intercollegiate athletics. The roster size of many football and basketball teams is likely to shrink in order to free-up some revenue to pay the stars. A victory by either Alston or Jenkins probably ends the NCAA's current business model. Concurring with this view, NCAA President, Mark Emmert, said recently that if Kessler won his lawsuit, it would "blow up college sports" (Strauss 2014).

Also holding the possibility of blowing up the NCAA business model for college sports as we currently know it is the wide-spread scandal involving corruption in the recruitment of premier men's college basketball players to play for particular teams, to represent particular footwear brands when they turn professional, and to work with certain financial advisors that was unfolding in late September 2017. With the FBI and US attorneys involved in the allegations, the stakes in this mess exceed previous NCAA rules violation scandals, and may have consequences involving prison time for employees of many high-profile colleges and universities.

[31] The plaintiff in the case is Jenkins, but the name usually mentioned is his attorney Kessler, because he is a formidable legal opponent in sports labor law. Kessler was involved in the case that led to free agency for NFL players.

[32] The NCAA used to fix the salaries of some assistant basketball coaches, but a 1998 Court of Appeals ruling held that this limit was collusion in restraint of trade; this was an antitrust violation that cost the NCAA a judgment of $66 million (*Law v. National Collegiate Athletic Association*, 134 F.3d 1010 [10th Circuit 1998]).

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8 What Does the Future Hold?

If the legal challenge to the NCAA's collective agreement to limit the pay for players is successful, at least initially expenditures that have been absorbing the rents are unlikely to diminish because of multi-year contracts. Revenues could increase to cover some of the additional costs of paying star players, but it is difficult to predict the shape of the broadcasting landscape 20 or even 10 years into the future, as technological change is likely to restructure it and the amount and distribution of revenues faster than that. Whether changes will lead to higher or lower rights fees that are earned by colleges is unknown. Alternative technological routes to access live sports programming or that block advertisements may undermine the current value of television broadcast rights.

As player pay begins to increase if the pay cap is relaxed, the costs of big-time athletics programs will rise; and demand may wane as fans lose interest because of the very fact that the players are compensated, and the myth of the "student-athlete" is exposed. If this happens, the surpluses for the 20–25 programs that currently run a positive balance before capital and indirect costs are charged could start to fade, while the subsidies from general university funds to intercollegiate athletics at institutions currently reporting a loss increase.

University presidents will have to confront difficult questions: "How much is too much of a subsidy? When do the external benefits from fielding a competitive FBS football or a March Madness tournament basketball team begin to fall short of the contemporary value of the research and teaching sacrificed to support the team financially?"

Yet another worry for college presidents with big-time athletics programs should be the possibility of entry into the most lucrative segment of their sports empires. In January 2017, Don Yee (NFL player Tom Brady's agent) announced a new professional football league of four teams that will employ 18–22 year old men who don't qualify for college or who don't want to wait to earn money as players (Futterman 2017). Such a player development league, if successful, could siphon some of the better players from colleges and universities and divert some of the demand for college football to development league football. While a small startup league of four teams is no worry to the NCAA, it could eventually grow into a serious threat. A recent proposal to develop a pay-for-play college basketball league using Historically Black College and University teams that would withdraw from the NCAA could present a similar threat to NCAA basketball revenues (Hruby 2017).

Unless Congress were to intervene so as to legalize the continuation of the NCAA's cartel behavior that limits player compensation by exempting it from antitrust statutes, which is not beyond a possibility because of the political risks for Congressional representatives who would otherwise be explicitly or implicitly voting to change college athletics forever, it seems unlikely that the organization of big-time commercialized intercollegiate athletics 10 years from now will resemble today's arrangements.

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Alternatively, it is not beyond the realm of possibility that the NCAA's umbrella control might be replaced by a subset of programs—just the five power conferences—that dictate the rules of big-time commercialized college athletics, while allowing other colleges and universities to fend for themselves. Such a development might meet antitrust concerns because it ostensibly increases competition among college and university football conferences.

Either way, anyone who is interested in college football should get ready for change.

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