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Reforming College Sports and a Constrained, Conditional Antitrust Exemption

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This paper argues that intercollegiate athletics is at a turning point. The status quo is not stable and change is coming. This change can move college sports further toward commercialization and quasi-professionalism or it can endeavor to reinforce the historical vision of college sports as an amateur activity subordinated to the educational mission of U.S. colleges. The former path will lead to increasing academic scandals, widespread financial insolvency and diminishing support for Olympic sports and Title IX. The latter path, while not without its own challenges, may succeed in restoring a proper balance between athletics and academics. Copyright © 2016 John Wiley & Sons, Ltd.

Intercollegiate athletics has long been caught in the nether world between professional and amateur sport. As a hybrid and immensely popular system run by the NCAA, intercollegiate athletics has been critiqued as ethically hypocritical, educationally corrosive, materially exploitative and economically unsustainable. Political and legal pressure has been building over the last ten years to reform the system. Such reform will ultimately require a choice between the professional and amateur models, or a bifurcation wherein a select group of a few dozen schools chooses a professional paradigm while a thousand-plus schools opt for the official NCAA vision of academically centered, amateur athletics. After considering the arguments for a market-oriented reform toward professionalism, this article will argue for an educationally based reform accompanied by a constrained and conditional antitrust exemption for the NCAA or an alternative governing body.

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INEQUALITY AND FINANCIAL STRAIN

To understand the dimensions of the paradigmatic choice confronting college sports, it is necessary first to consider the economic pressures it faces. At least since the National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma Supreme Court decision in 1984, as intercollegiate athletics has become more and more commercialized and the financial stakes have sharpened for participating schools, there has been a clear trend toward greater revenue inequality. This inequality is making it increasingly expensive and untenable for the vast majority of schools, even those in Division I, to pursue athletic glory.

With the NCAA's longstanding national TV policy struck down in 1984, schools and conferences were left to fend for themselves. The NCAA television cartel was broken. The leading football colleges and conferences were cut free, and the weaker football colleges lost the protection of the previous NCAA plan.

Table 1. Revenue Inequality among the Approximately Top 150 Athletic Programs, 1962–1997

Year	Top school/average school
1962	1.81
1970	1.92
1980	2.48
1989	3.04
1995	3.29
1997	3.48

Sources: Mitchell Raiborn, *Financial Analysis of Intercollegiate Athletics.* Kansas City: NCAA, 1970; M. Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs, 1970–1977, 1978–1981, 1981–1985, 1985–1989.* Overland Park: NCAA, 1978, 1982, 1986, 1990; Daniel Fulks, *Revenues and Expenses of Intercollegiate Athletic Programs, 1993.* Overland Park: NCAA, 1994; D. Fulks, *Revenues and Expenses of Division I and II Intercollegiate Athletic Programs, 1995, 1997.* Overland Park: NCAA, 1996, 1998.

The data in Table 1 illustrate the revenue distributional impact of the 1984 Supreme Court decision and the conference restructuring of the 1990s. During the 18 years between 1962 and 1980, there was a steady increase in relative revenue inequality across the top 150 college athletic programs, with the ratio of the top revenue program to the average (mean) revenue program increasing by 0.67 points. During the next 17-year period, 1980–1997, the ratio increased at a 50% faster rate or by 1.00 points.

It is also noteworthy that the Supreme Court ruling was largely coincident with the explosion in popularity of cable television in the United States. Whereas in 1980 there were 15.5 million cable TV homes (or 19.9% of TV households), and by 1990 there were 52 million cable TV homes (or 56.4% of TV households). As is well known, cable television added a second revenue stream (monthly subscription fees) to the traditional advertising stream, and, hence, its expansion helps to explain the rapid growth in television contracts for the elite football conferences in Division I.

Other factors promoting inequality include: the Bowl Championship Series (BCS), the Football Championship Playoff (FCP), skewed revenue distributions from the NCAA, the emergence of conference-owned regional sports channels and the explosion of network conference television contracts. Since its inception in 1998 through 2014, the BCS allowed for preferential bowl access and sharply differential revenues to flow to the six original BCS (aka, automatic qualifier or AQ) conferences. The FCP extends the unequal distribution of revenues flows, but it roughly triples the amount of money distributed.

Revenue distribution data prior to 2000 is scarce and that which is available is generally tabulated with different metrics than what has been available since 2000. It is therefore difficult to get an accurate picture of how much inequality has increased over the decades. Further, because of inconsistent and incomplete accounting practices within athletic departments and the fact that a good deal of revenue and cost information is treated as proprietary, it is impossible even today to achieve a full and accurate picture of the extent of inequality. Nonetheless, it is possible to compile pieces of information from the periodic *NCAA Revenues and Expenses* reports[1], the EADA reports and other sources to assemble a broad outline of the trends and the status quo in revenue inequality among FBS programs.

In Table 1 above, we presented data on the highest to average revenue ratio for roughly the top 150 athletic programs between 1962 and 1997. It depicted a clear trend toward greater inequality with some acceleration in the trend after the 1984 Supreme Court decision. The post-2003 data is for the FBS (128 schools in 2014–2015), and it refers to the highest to the median revenue ratio. With the skewed revenue distribution that prevails in the FBS, the mean will typically be considerably above the median, so these two data series are not comparable.

Although the top/average revenue ratio series ends in 1997, it is possible to extend the trend through 2003 by reference to NCAA data for football and men's basketball programs. Table 2 shows that the ratio of the highest revenue program from football and men's basketball to the average revenue program steadily increased from 3.56 in fy1997, to 3.66 in fy1999 and to 3.89 in fy2003.

After 2003, the average (mean) program is no longer reported; only the median is reported. As shown in Table 3, the ratio of the highest to median in both football and basketball continues its steady ascent between fy2004 and fy2014.[2]

Finally, consider the numbers for entire athletic programs during 2004–2014 in Table 4. They indicate that while relative inequality has stabilized (as defined by the top to median athletic program), the absolute amount of inequality (the dollar difference between the top and median program) has continued to grow rapidly.

Table 2. FBS Football and Men's Basketball Revenue, 1997–2003

	High	Average	Ratio (high/avg)
1997	$37 400 000	$10 500 000	3.56
1999	$44 700 000	$12 200 000	3.66
2003	$67 300 000	$17 300 000	3.89

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Table 3. FBS Football and Men's Basketball Revenue, 2004–2014 (millions of dollars)

Fy	Median generated revenue	Top generated revenue	Top / median	Top - median
Football 2004	8.3	46.2	5.6	37.9
2010	16.2	93.9	5.8	77.7
2014	21.7	151	7.0	129.3
Men's Basketball				
2004	3.2	16.5	5.2	13.3
2010	4.8	25.9	5.4	21.1
2014	5.8	40.6	7.0	34.8

This pattern of inequality is underscored by considering the decile breakdown of revenues in football and men's basketball within the 124 FBS schools in fy 2014. In football, 40% of the programs had revenues below $7.56 million in fy 2014, while in basketball 40% had revenues below $3.2 million. Meanwhile, even the bottom half of FBS schools are trying to remain competitive and expanding their athletic spending. The average athletic spending per student athlete in FBS went from $63 000 in 2004, to $85 000 in 2008, to $105 000 in 2012 and to $116 000 in 2014.

Accordingly, the median FBS athletic programs run a substantial and growing operating deficit. As depicted in Table 4, these operating deficits (median net revenues) have grown steadily from $5.9 million in 2004 to $14.7 million in 2014. In 2013–2014, only 24 athletic programs showed an operating surplus, and this was before counting the bulk of capital costs (which an NCAA study separately estimated to average over $20 million per year per FBS school) as well as certain indirect costs.[3]

The current financial situation for the NCAA, then, is particularly tenuous. On the one hand, as a few dozen schools rake in tens of millions of dollars of additional revenue,[4] the remaining schools in FBS and throughout Divisions I, II and III, are experiencing increasing subsidies to athletics during a period of budgetary stringency. On the other hand, star athletes at the leading programs witness the new copious inflows of revenue and feel cheated by their below-market compensation and the absence of a true college education. This perceived exploitation, in turn, has led to a variety of actions and litigations.

CALLS FOR REFORM AND INITIAL EFFORTS

Largely in response to the Keller, O'Bannon and Jenkins legal suits as well as the now aborted attempt by the football players at Northwestern to unionize, the NCAA has reorganized itself to allow for modest reform to benefit athletes materially. These reforms include: in 2014, the NCAA allowed for expanded food service for athletes and for multi-year scholarships (banned since 1974) to return, and, in 2015, it reintroduced cost of attendance stipends in Division I, and basically allowed the Power Five conferences within FBS of Division I to chart their own financial course. These reforms will only exacerbate the trend toward growing inequality and school subsidies to athletics.

When capital expenses and indirect costs are included in the accounting analysis, the number of college athletic programs running a true surplus in any given year dips to under ten. Many economists argue that most FBS schools have profitable athletic programs, but they do not show a surplus because there is no market discipline to contain costs. The second part of the contention is accurate. College athletic programs do not have stockholders who demand to see a profit at the end of every quarter in order to boost the price of the stock; rather, they have stakeholders (boosters, alumni, students, sponsors, media companies) who demand to see victories. The consequence is that the cost side is paid little attention and programs' athletic directors spend freely on facilities, coaches, recruitment, tutors and travel to build winning teams. Absent a competitive labor market for the athletes, the money that would otherwise go to athletes goes instead into other aspects of the program. The typical pattern is that ADs' objective is to maximize wins and the vast majority of programs run in deficit.

Table 4. Athletic Programs, 2004–2014 (Millions of Dollars)

Fy	Median generated revenue	Top generated revenue	Top / median	Top - median	Median net revenues
2004	22.9	103.9	4.5	81	-5.9
2010	35.3	143.6	4.1	108.3	-9.4
2012	40.6	163.3	4.0	122.7	-12.3
2014	44.5	193.9	4.4	149.4	-14.7

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A word of clarification is in order here. It is common for more than half of FBS football teams (55% in 2013–2014) and roughly half of FBS men's basketball teams (50% in 2013–2014) to run an operating surplus.[5] That is, a surplus before capital and certain indirect costs are included. But typical FBS athletic programs support 15 to 30 sports, virtually all of which run a substantial operating deficit. When all the sports are considered together (i.e. when the entire athletics department budget is considered), on an operating basis in a typical year there are roughly 20 FBS programs showing a surplus and roughly one hundred showing a deficit.

The massive amounts of new television money that have poured into the ACC, SEC, Big 12, Big 10 and PAC-12 (Power Five) conferences provide the necessary resources for roughly half of their 66 universities to cover the added expenses from the 2014 and 2015 reforms. The remaining 60-odd schools will have either to accept growing deficits or they will have to opt out of the arms race of top-level intercollegiate athletics. Those schools facing larger athletic deficits, in turn, will have the options to (i) raise student activity fees, (ii) cut back financial aid[6] or substitute loan aid for grant aid, raising further student debt, or (iii) otherwise reduce the academic budget.

Thus, the current state of finances and operations of intercollegiate athletics is in flux, in the red and not sustainable. Change will come. The only question is whether college administrations, the NCAA (or another governing body) or the U.S. Congress will take part in deliberately shaping this change or they will allow the laissez-faire process that has been unfolding to continue.

The recent Northwestern University case, wherein the Chicago district of the National Labor Relations Board (NLRB) first opined that scholarship football players are employees and could unionize, and then the national NLRB asserting that it did not have jurisdiction, left the players without the possibility of unionizing. But in its decision the national NLRB made a call to the U.S. Congress to clarify the institutional structure of college sports. In particular, the NLRB made three key observations: (i) intercollegiate athletics was in a transitional phase in 2015, (ii) allowing unionization would have engendered systemic instability by permitting the 17 private colleges out of 128 FBS schools in fy 2015 to unionize, and (iii) there was a need to resolve the labor market issues and academic tensions in the current system.

The NCAA has been responding, with various degrees of alacrity and seriousness, to the call for reform ever since its founding in December 1905. Whatever reforms it has promulgated have failed to reverse the tides of academic hypocrisy, commercialization, inequality and financial loss. Through various internal restructurings, the NCAA has functioned essentially as a trade association of ADs, coaches and conference commissioners. Further, it has been consistently dominated by the power conferences within DIA or FBS. The 2015 Convention decision to allow the Power Five conferences to legislate autonomously on certain economic matters underwrites this control, while it begins a more decisive bifurcation of the NCAA into two distinct groups of colleges. As long as a smaller and smaller group of athletically successful colleges increasingly dominate the NCAA, the Association is even less able than it has been historically to implement meaningful reform.

TWO PATHS TO MEANINGFUL REFORM

Marketization

There are two possible paths to meaningful reform: (i) toward marketization and professionalism or (ii) toward educationally centered athletics and amateurism. The first is embodied in Jeffrey Kessler's antitrust suit, filed in the Third Circuit, on behalf of Martin Jenkins against the NCAA. It claims that the NCAA functions as a cartel that artificially and injuriously colludes to preclude the development of a labor market for college athletes and to prevent them from receiving fair compensation given their revenue contribution to the school. If successful, Kessler's suit would compel a marketization of labor markets in intercollegiate athletics. While this suit has much economic logic to commend it, it only makes sense in my judgment if it is accompanied by a separation of big-time intercollegiate sports from the university. Such a schism, in turn, would have serious consequences for the maintenance of college sports as we know them.

If an open labor market forms within college sports, it will engender several intractable problems. First, while acknowledging that today's top college football and men's basketball teams do exploit their star players (some have marginal revenue products of well above $1 million,[7] but they receive full scholarships valued in the range of $30 000 to $70 000 annually), introducing a labor market would be a complicated affair. For instance, the average FBS football team has 85 full scholarship players and 35 walk-on players. The majority of the scholarship athletes probably

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produce a value well inferior to the value of their scholarships. A few dozen produce a value close to their scholarship value. The starters probably produce a value from a little above to far in excess of their scholarship value. (Of course, the scholarship value itself only holds if the athletes are truly being educated and if they receive a degree—two conditions that are not often met.) So, given this variation in player value, how will labor market rules be constructed to fairly reward each player. Will the AD negotiate individually with each player, with the result that each high school prospect ends up talking to and bargaining with a dozen or more schools? Will the prospective stars be allowed to have parents or lawyers or agents in the room to assist them? Or will there be rules that constrain how the negotiations unfold? And, if there are rules, what will they be and who will set them?

Second, to the extent that such a labor market for players does function, how will the resulting player incomes affect the student culture at the university? The NCAA Constitution states clearly that the student–athlete is to be integrated into the general student body. Having players deriving incomes of hundreds of thousands of dollars or millions of dollars would even more clearly create two classes of 'students' at the school.

And how would the introduction of market forces impact college culture more generally? As a rule, once a student is admitted and matriculated into the university, the market mechanism is not used to allocate resources among students. Students enroll in popular classes according to their major, their class, their subject preparation or by random selection. Professors do not use a market mechanism to determine who enters the class. That is, professors do not hold an auction to see which students are willing to offer the most money to buy their way into the class.

Further, if we are to pay football and basketball players, does that mean that, beyond minimal stipends, we will also begin to pay thespians in school plays, first violinists in school orchestras or ballerinas in school dance performances? In short, introducing a labor market for big-time sports is likely to be very disruptive on a variety of levels to the educational culture and finances of U.S. colleges.

Third, as noted above, the median operating deficit of FBS athletic programs in fy 2014 was over $14 million. The corresponding figure in the rest of Division I was over $11 million.[8] These numbers leave out large capital expenditures, so that the actual deficit or university subsidy can typically surpass $20 million or $30 million annually—and it has been growing over time. Hence, the question naturally emerges: if FBS programs are going to begin paying some athletes millions of dollars a year in salaries (along with social security, unemployment, workmen's compensation and other benefits) and others hundreds of thousands of dollars, where is the money going to come from? One partial source of funds is clear: today college coaches are paid for the value of the athletes they recruit. The top paid college coaches are compensated on a par with their counterparts in the NFL and NBA, yet the their teams generally generate one-fourth to one-tenth as much revenue. These discrepancies would not make sense in a normal market; they only make sense in college sports because compensation to the players is artificially suppressed. So, if the athletes were paid a salary, head and assistant coaches' (and ADs') salaries would come down, but only after a transition period as current multiyear contracts play out. A similar dynamic would obtain with stadiums, arenas, fitness facilities, tutoring buildings, etc. There would be less need to invest in these auxiliary attractions, because schools would be able to bid for athletes directly with higher compensation. But here too, these facilities have already been built and financed with long-term bonds. Money will not be freed up until these bonds are paid off. The upshot is that some funds will become available to help defray the higher costs of athletes with an open labor market, but these funds will only become available gradually over time. In the protracted interim, there will a significant new cost burden that falls on athletic programs.

It seems probable that this marketization process would ultimately result in the formation of a professional, minor league in both men's basketball and football. The competitive forces fostering the drive to success will compel higher salaries, higher costs and greater commercialization. Further, the continuation of various tax preferences that currently go to college sports (e.g. no payroll taxes for players, tax exempt debt issuance for facility construction, favorable UBIT interpretations, considering purchase of seats as 'donations' with 80% deductibility, inter alia) will come under greater scrutiny and heightened political pressure for their elimination. Academic fraud will proliferate, and schools will find it in their increasing interest to end the charade of amateur and educationally centered college athletics.

Whether the emerging professional leagues, severed from their educational ties to the university, will diminish the iconic branding associated with college sports is another matter of concern. While the new minor league teams could continue to play at university

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facilities and attempt to elicit the interest of existing fans and boosters, the leagues may devolve into little more than minor league associations in the public's minds. While media pundits have argued stridently on both sides of this branding issue, the reality is that no one knows how the public will react.[9]

Perhaps even more troubling is that the financial support that the big-time football and men's basketball programs currently contribute to the Olympic sports and to women's sports will be gone. Olympic sports in all three divisions will lose funding as will the implementation of Title IX. Thus, while there is a certain logic to opening a labor market for college athletics, there are many reasons to resist this development.

Reinforcement of Educationally Centered Amateur Athletics

A major factor that facilitated, accelerated and deepened the commercialization of college sports was the 1984 Supreme Court decision in Oklahoma v. NCAA. The majority of justices in that case ruled that the commercial activities of the NCAA were subject to antitrust law and that the NCAA's existing national television contract with ABC, CBS and TBS was an illegal restraint of trade. The ruling set the stage for subsequent conference contracts with the television networks, a mergers and acquisitions phase of conference growth which redrew geographical conference lines to maximize the value of media deals, and heightened incentives to compromise academic integrity in pursuit of athletic glory.

One logical way to confront this tendency toward the subordination of academics to athletics is to revisit the major source of the post-1984 commercialization juggernaut: the antitrust treatment of college sports. By legislating a partial and conditional antitrust exemption for the governing body of college sports, it would be possible not only to blunt the incentives that are corroding academic integrity, but also to arrest the runaway expenses that are burning a deep hole in the pockets of athletic programs, and, therefore, also of university budgets.

That is, on the condition that the governing body enacts certain reforms to promote academic integrity and the fair treatment of athletes, the governing body would be granted an antitrust exemption in certain commercial areas and in others that overlap between commercial and academic areas. Because the Sherman Act was designed to focus only on commercial decisions, it is very difficult to apply it to activities that are a hybrid with both commercial and noncommercial effects as is the case with many NCAA policies. Most of the former and current antitrust lawsuits filed against the NCAA fall in this hybrid, gray space—where the key question is whether the rules such as controlling compensation to athletes, compensation to coaches, the value of athletic scholarships, etc., are necessary in order to protect the separation between college and professional sport. There are no clear cut balancing tests or other mechanisms to make these policy judgments cleanly. The answers end up depending on the judgment of the particular court and not on any clear objective standards.

This pattern is illustrated clearly in the September 2015 ruling of the Ninth Circuit of Appeals in O'Bannon. The NCAA appealed the district court decision by Judge Wilken who had ruled that there were two less restrictive ways that the NCAA could still maintain amateurism and yet improve the compensation of athletes, to wit: first, by allowing member schools to offer scholarships that included a cost of attendance allowance, and, second, by allowing member schools to offer a deferred payment to athletes of up to $5000 annually for use of their names, images and likenesses (NILs). Judge Jay Bybee, Judge Gordon Quist and Chief Judge Sidney Thomas heard the NCAA's appeal and ruled that the NCAA did not have to allow a deferred NIL payment to athletes because it would amount to pay for a non-educational function and would violate the norms of amateurism. To arrive at this conclusion, Judge Bybee and Judge Quist opined that consumers of college sports would lose interest in the product if athletes received NIL payments, even on a deferred (payment not made until after they left college) basis. Curiously, they made this judgment without any solid empirical evidence whatsoever. Applying the same logic, the judges would have concluded that if college sports had been based on a system of slavery and if the consumers found this appealing, that slavery would have been legal as far as the antitrust laws are concerned. They compounded their error by never engaging in a balancing test regarding the anti- and pro-competitive aspects of the NCAA's prohibition on NIL payments to athletes.[10]

A limited antitrust exemption in the hybrid space between professionalism and amateurism would seek to define clearly those actions of the NCAA which could not be questioned under the Sherman Antitrust Act on the grounds that they are controls necessary to achieve the priority purposes of higher education in the conduct of intercollegiate athletics as an extracurricular activity.

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A fundamental function of the NCAA is to maintain a clear line of demarcation between college sports as an extracurricular activity secondary to the academic responsibilities of students and professional sports which require a time and effort priority on athletics excellence and revenue production inappropriate for a non-profit educational institution. Actions that should be considered the legitimate functions of a non-profit national intercollegiate athletics governance association typically include, among others, those that (i) control the cost of athletics (athletic programs are heavily subsidized by student fees and general funds) so the support of athletics programs do not damage the ability of the institution to support its primary academic programs, (ii) prevent the operation of varsity sport programs from conflicting with student academic responsibilities (e.g. control of sport schedules so they do not conflict with class attendance, restriction of athletic participation for students not performing academically, limiting time spent on sport activities in order to allow sufficient time for study, etc.) and (iii) protect the health and welfare of college athletes (e.g. provision of insurance, protections related to return to play following injury).

Some of these actions also have commercial implications and will be the target of antitrust lawsuits. A limited antitrust exemption that applies only to these legitimate categories of controls will enable higher education institutions to collectively enact needed reforms without fear of legal liability and is both justifiable and necessary. Such antitrust lawsuits represent huge costs for legal representation, participation in court cases and payment of damages. These funds would otherwise be available to advance the NCAA's and its member institutions' non-profit educational purposes.

In what follows, I first elaborate on what areas might be granted an antitrust exemption and then on the conditions the governing must follow to qualify for the partial exemption.

Potentially Exempt Areas

First, the NCAA would be exempt from imposing limits on the salaries paid to head football and men's basketball coaches, which often exceed the salaries of the universities' presidents by a factor of five to ten.[11] Over one hundred and ten college football and basketball coaches received salaries exceeding \$1 million in 2014; three dozen exceed \$3 million, and fifteen exceed \$4 million. The highest paid coach was Nick Saban at Alabama with a salary of \$7.2 million plus potential bonuses of \$700 000. His contract is guaranteed with increases through the 2021–2022 season. Saban's staff earned an additional \$5.2 million in salary in 2014. Thus, total football coaching compensation at Alabama before handsome benefits and rich perquisites exceeded \$13 million. Perquisites generally include free use of cars, housing subsidies, country-club memberships, private jet service, exceptionally generous severance packages and more.[12] The coaches also have handsome opportunities to earn outside income via apparel or sneaker endorsements, the lecture circuit, summer camps and book contracts. In 40 states the head football or basketball on a college team makes more than the governor.[13]

Back in 1924, Centenary College in Shreveport, Louisiana, the nation's first liberal-arts college west of the Mississippi, was denied accreditation by the Southern Association of Colleges and Schools, because the school placed an 'undue emphasis on athletics.' The primary evidence of Centenary's misplaced priorities by the Southern Association was that the college paid its football coach more than it paid its college president. The next year the football coach was fired, and the college gained accreditation.[14]

In more recent times, Bear Bryant, the legendary head football coach at the University of Alabama (1958–1982), adhered to a firm policy of always keeping his salary \$1 below that of the school president. Bryant believed that it was symbolically important for the university president to be paid more than the head football coach.[15]

Defenders of multimillion-dollar head coaches' salaries are wont to repeat the mantra: 'Coaches' compensation packages are driven by market forces.' Fair enough, but what drives the market forces? It is clear that the market for coaches is sustained by several artificial factors: (i) no compensation is paid to the athletes, (ii) intercollegiate sports benefit from substantial tax privileges, (iii) no shareholders demand dividend distributions or higher profits to bolster stock prices at the end of every quarter, (iv) athletic departments' are nourished by university and statewide financial support, and (v) coaches' salaries are negotiated by athletic directors whose own worth rises with the salaries of their employees.

In a normal competitive market, college football and basketball coaches would not be getting compensated almost at the same level as NFL and NBA coaches. The top 32 college football programs generate revenues in the \$35 million to \$150 million range; the revenue range for NFL teams is \$296 million to \$620 million.[16] The top 30 college men's basketball teams generate revenue roughly in the \$10 million to

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$40 million range, while NBA team revenues go from $110 million up to $293 million. Thus, NFL team revenues are 8.4 times college football teams revenues at the lower end and 4.1 times at the top end; and, NBA team revenues are 11 times those in college basketball at the lower end and 7.3 times greater at the top end. Yet the compensation packages of college and professional coaches in football and basketball are strikingly similar.

What is wrong with this picture? Basically, it is that the coaches are being paid the value created by the players they recruit. Much recruiting is done by assistant coaches and much of the allure of the recruitment effort has to with the school's history and brand and its facilities. Moreover, the coaches' bloated compensation packages are almost all economic rent. That is, they are being paid way beyond what they would have to be paid to induce them to offer their labor in the college coaching market. If the Nick Sabans and John Caliparis of the college coaching world did not coach in an FBS program, their next best alternative employment opportunity likely would be coaching at FCS or Division II or III, or high school. Thus, if the NCAA placed, say, a $400 000 limit on coaches' compensation packages, it would not affect the quality of coaching or the level of intercollegiate competition one iota. Stated differently, it would not affect the allocation of coaching resources or diminish the entertainment value of college sports. Further, it would address the Bear Bryant concern of sending a twisted signal to undergraduate students about the importance of the college president or the professoriate relative to the head football or basketball coach.

A second exempt policy would be the size of FBS football teams. FBS football teams are allowed 85 scholarships. Sixty (or fewer) would do fine.[17] NFL teams have a maximum active roster of 45, plus a maximum inactive roster of eight additional players.[18] The average FBS team has 35 walk-ons plus 85 scholarship players—a 120 players in all![19] If football scholarships were cut to 60, the average college would probably save close to $1.5 million annually[20]—easily enough to finance an average FBS soccer team plus an average FBS golf team, or an FBS tennis team plus gymnastics team, and have several hundred thousand dollars left over.[21] Even assuming the number of walk-ons would not increase with the lower scholarship limit, the average squad size would still be over 90. Is there a rational coach who would dare to argue that 90-plus players on a football team are inadequate?

A third exempt policy would be restrictions on the payment of salary to athletes for the performance in their sport. Athletes could continue to receive full scholarships for participating on their team, along with a cost of living allowance and other elements to be discussed shortly, but they could not be paid directly for what they do on the football field or basketball court. This is basically the concept of amateurism (i.e., no compensation for *playing* a sport) that is applied by the AAU and other amateur sports organizations in the United States.

Other areas of exemption that lean more toward the academic integrity end of the spectrum include restrictions on weeknight football and basketball games, the length of competitive seasons, the number of in-season and out-of-season practice and game hours per week and academic eligibility standards, inter alia.

Conditions for Granting Partial Exemption

One can imagine a variety of conditionality stipulations geared toward insuring that athletes are treated fairly and that academic fraud is, if not extirpated, minimized. For the NCAA or an alternative governing body to be granted a partial antitrust exemption, the association would have to enact and implement certain pro-educational reforms. A suggested, non-inclusive list follows.

Initial eligibility standards need to be strengthened. Since the 2003 sliding scale was introduced, it is possible for athletes to gain full initial eligibility and still receive a zero score on standardized tests by raising their grade point average to a 3.5.[22] If, however, the high school rigs the athlete's classes and teachers to achieve this GPA, then the initial eligibility standard is a mockery. Similar issues apply to the continuing eligibility standards and to the APR metric. New, more meaningful standards need to be set and become conditions for the antitrust exemption.

The governing body should also be required to put in place appropriate due process procedures for all schools, administrators and athletes who are accused of transgressions prior to penalizing them.

Athletes rights must be fortified. Health and safety protections as well as broader injury insurance coverage should be instituted. Allowable scholarships should be expanded to include cost of attendance and deferred publicity rights income, and athletes should have the right to work with counsel or an agent prior to deciding upon entering a professional draft or participating in a sports league combine. All academic support programs for athletes should be removed from the athletics department and put entirely under academic control. Transfer athletes should not lose a year of eligibility.

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The national championship football playoff system, inaugurated in 2014–2015, generates more than $600 million in revenue, over three-fourths of which is distributed to the Power Five conferences. This skewed distribution, at once, enhances the financial incentives toward victory at any cost and, importantly, diminishes funding for Olympic sports and women's sports throughout the NCAA's three divisions. All national championships except the FBS football playoff are controlled by the NCAA. A condition for receiving a partial antitrust exemption should be to bring the football playoff into the fold.

Other conditionality reforms might include whistleblower protection, Title IX compliance and defined controls over game scheduling.

CONCLUSION

This paper has argued that intercollegiate athletics is at a tipping point. The status quo is not stable and change is coming. This change can move college sports further toward commercialization and quasi-professionalism or it can endeavor to reinforce the historical vision of college sports as an amateur activity subordinated to the educational mission of U.S. colleges. The former path will lead to increasing academic scandals, widespread financial insolvency and diminishing support for Olympic sports and Title IX. The latter path, while not without its own challenges, may succeed in restoring a proper balance between athletics and academics.

Furthermore, this paper has suggested that a significant role in restoring this balance can be played by having Congress craft a constrained and conditional antitrust exemption for intercollegiate athletics. Without congressional action, the court system will equivocate without producing clarity. In addition to uncertainty, the status quo will perpetuate the exploitation of athletes and the undermining of academic integrity. It will also waste hundreds of millions of dollars on needless litigation. The plaintiff's bill alone through the district court proceedings in O'Bannon was $46 million. The NCAA is responsible for that sum as well as its own, and much larger, legal expenses on the case. A congressionally conferred, conditional and constrained antitrust exemption will provide a clear, productive way forward and in the process will, at once, blunt incentives to academic fraud and fortify college finances.

NOTES

1. Daniel Fulks, *NCAA Revenue and Expenses Report, 2002–2003*. Indianapolis: NCAA, 2005; Daniel Fulks, *NCAA Revenue and Expenses Report, 2004–2006*. Indianapolis: NCAA, 2008; Daniel Fulks, *NCAA Revenue and Expenses Report, 2004–2010*. Indianapolis: NCAA, 2011, 2013, 2015.
2. Dan Fulks, Revenues and Expenditures, op. cit., 2015.
3. Ibid. Jonathan Orszag and Peter Orszag, "The Physical Capital Stock Used in Collegiate Athletics," Report to the NCAA, April 2005.
4. Although, as I write in October 2015, the NCAA data is not in for years subsequent to fy 2014, it is clear from the arc of the regional television contracts of the Power Five conferences that the inequality will become appreciably more acute in the coming years. As an example, the SEC distributions to member schools in May of 2014 was $20 million, increased to $30 million in 2015, and will likely be $40 million in 2016.
5. *NCAA Revenues and Expenditures Report* of 2015, p. 29.
6. With rising tuitions, federal student loans grew from $400 million in 2005 to over $1 trillion in 2013. This situation is increasingly burdensome on low and middle income students. The prospect of diminishing student loans in an era of rising tuitions is daunting for prospective students and threatening to college admissions.
7. Curiously, Andrew Schwartz, perhaps the principal proponent among economists for a market-oriented reform, has estimated that the MRP of star college athletes in football and men's basketball is only about $100,000. If this were true, the top paid college athletes would receive an after-tax (federal income tax and fica tax, but not any state income tax) income of around $60,000. This is a lower value than the nominal value of a full-ride scholarship at private universities. See http://nytschoolsfortomorrow.com/gallery/schools-for-tomorrow-0/2015-videos.
8. These and other figures, if not otherwise noted, come from the most recent *NCAA Revenues and Expenditures Report* of 2015.
9. Among those who don't know are the judges in the Ninth Circuit Court of Appeals. The fact that they relied on a poorly designed survey by the NCAA and off-the-cuff remarks by Neal Pilson, and ignored some more robust historical evidence in the Olympics, Major League Baseball and tennis, inter alia, should inspire little confidence in their judgment in the O'Bannon case. The flimsy empirical and dubious legal reasoning in its review of the district court's ruling in O'Bannon, however, promises to keep this matter open for some time to come, especially if it is left to the courts to decide.
10. The ruling further overlooked the fact that the AAU, the USGA and other amateur sport organizations have considerably looser rules to define amateurism. These rules essentially proscribe compensation for playing the sport, not for activity such as endorsements off the playing field.
11. In a sample of forty-five Division I public universities, Duke economist Charles Clotfelter found that between 1986 and 2007, the average compensation of full

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professors rose 30%, while that of university presidents grew 100%, that of head basketball coaches jumped 400%, and that of head football coaches increased 500%. (Clotfelter, unpublished research. Clotfelter had full data on basketball salaries for twenty-two schools and on football salaries for forty-five.)

12. One eye-popping severance clause appeared in the contract of Mike Sherman, Texas A&M's football coach, who, if terminated, would have been paid $150,000 a month for the remainder of his contract that would have amounted to a $7.8 million golden handshake.
13. In a 41st state, New Hampshire, the head ice hockey coach earns more than the governor.
14. James Johnson, "The suicide season," *Shreveport Times*, September **4**, 2008.
15. Allen Barra, *The Last Coach: A Life of Paul "Bear" Bryant* (New York: W. W. Norton, 2005).
16. The revenue estimates for NBA and NFL teams come from the 2015 *Forbes* annual reports. Those for college football and basketball teams come from the 2015 *NCAA Revenues and Expenses* bi-annual report.
17. College coaches have protested that college football teams cannot be properly compared to professional teams. The latter, they say, can always call up reserves when players get injured, but college teams must have players on their rosters to replace the injured. First, NFL teams have a maximum of sixteen players on reserve and practice squads to complement their forty-five-men active rosters. Second, the NCAA Injury Surveillance System Summary reports that for the 2000–2001 season, the serious-injury rate during games in football was 14.1 per 1,000 exposures, while the rate in football practices was 1.6 per 1,000. If we assume that sixty players enter a game and the team plays thirteen games during the year (that is, including a postseason game), then the average total number of serious injuries (where a player is out seven or more days) from games is eleven per year. If on average each such player misses two games, then the average number of game-injured players is 1.69 per game. Performing a similar calculation for practice-injured players yields 1.48 per game for a combined average of 3.17 injured players per game. This hardly constitutes a justification for carrying 85 scholarship and 117 total players on an FBS team.
18. Teams are also allowed to carry up to eight additional players on their practice squads.
19. NCAA, *Gender Equity Report, 2005–06*, October 2008, p. 27.
20. This number is based on twenty-five men's scholarships at $40,000 each, plus the possibility of savings on women's scholarships and the probable reduction in athletic support staff and equipment.
21. NCAA, *NCAA Revenues and Expenses: Division I Intercollegiate Athletics Programs Report, 2004–08*, October 2009, p. 37.
22. While this sliding scale eligibility was introduced after a two-decade struggle with the Black Coaches Association that claimed a hard cutoff on standardized tests was arbitrary and discriminatory toward minority athletes. It is interesting to note the growth in the participation of African-American athletes in college sports actually was more rapid prior to 2003 than it was after.

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