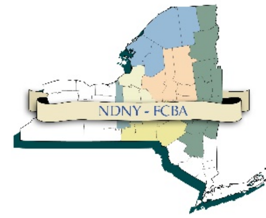
NDNY FEDERAL COURT BAR ASSOCIATION, INC.
www.ndnyfcba.org



NOTICE OF CLE PROGRAM

The NDNY-FCBA's CLE Committee

Presents

"The Supreme Court's decision in *Alston v. NCAA*, and its ramifications for college sports"

Thursday, December 9, 2021
1:30 p.m. – 2:45 p.m.
(Registration at 12:30 p.m.)
(R.S.V.P. by December 1, 2021)

Craftsman Inn
Syracuse, New York

This program will discuss the Supreme Court's reasoning and holding in *Alston v. NCAA*, wherein the Supreme Court unanimously held that the NCAA could not enforce certain rules limiting the education-related benefits that colleges offer their athletes. Under *Alston*, colleges can begin immediately offering incentives other than tuition to athletes, including computers, graduate scholarships, tutoring, and up to $5,900 in cash for academic awards.

Presenter:

John Wolohan, Esq.
Professor of Sports Law
David B. Falk College of Sport and Human Dynamics
Syracuse University

John Wolohan, Professor of Sports Law, Syracuse University, Syracuse, New York, USA
Attorney John Wolohan (jwolohan@syr.edu) is a professor of Sports Law in the Syracuse University Sport Management program and an Adjunct Professor in the Syracuse University College of Law. Professor Wolohan has been teaching and working in the fields of sports law, gaming law, and sports media for over 25 years.
Professor Wolohan, who is a member of the Massachusetts Bar Association, received his J.D. from Western New England University, School of Law. Wolohan also has a B.A. from the University of Massachusetts - Amherst and M.A. from Syracuse University
.

Agenda

1:30-1:45	Introduction and Welcome (Daniel Rubin, Esq.)
1:45-2:45	Presentation, Questions and Closing

The Northern District of New York Federal Court Bar Association
has been certified by the New York State Continuing Legal Education Board
as an Accredited Provider of continuing legal education in the State of New York.
"The Supreme Court's decision in *Alston v. NCAA*, and its ramifications for college sports"
has been approved in accordance with the requirements of
the New York State Continuing Legal Education Board for
1.5 credit towards the **Skills** requirement.*

This program is appropriate for newly admitted and experienced attorneys.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York
Federal Court Bar Association Members.

COLLEGE SPORTS AFTER NCAA V. ALSTON
OUTLINE

Event duration: 1:30 – 2:45
1 hour 15 minutes – (75 minutes)

I. WELCOME / INTRODUCTION

John Wolohan, Professor of Sports Law in the Syracuse University Sport Management program and an Adjunct Professor in the Syracuse University College of Law. Professor Wolohan has been teaching and working in the fields of sports law, gaming law, and sports media for over 25 years.
Professor Wolohan, who is a member of the Massachusetts Bar Association, received his J.D. from Western New England University, School of Law. Wolohan also has a B.A. from the University of Massachusetts - Amherst and M.A. from Syracuse University

II. INTRODUCTORY PRESENTATION / BACKGROUND (20 MINUTES)

A. Sports & The Law

1. Origins of Intercollegiate Sports

- The first intercollegiate sporting event in the United States occurred in 1852 when the rowing team from Yale University challenged the team from Harvard.
    - However, even in 1852, commercial sponsorship played a major role in U.S. college sports.
    - The Harvard / Yale race was sponsored by the manager of the Boston, Concord & Montreal Railroad to promote the train's services.

2. NCAA Background

- 1905: Birth of the NCAA
    - In 1905, after the deaths of 18 college football players, President Theodore Roosevelt summoned the Presidents of Harvard, Yale, Princeton and 10 other institutions to the White House to urge their leadership in cleaning up the game.
    - From its beginnings, the NCAA has failed to solve the conflict between those schools that emphasized big time athletics and those more concerned with academics.
- 1906-1952: Limited Power
    - From 1906 until 1952 the NCAA had no power to enforce the guidelines on member schools and lacked any real power to reform college sports and abuses.
- 1929: Carnegie Foundation Report
    - In 1929 the Carnegie Foundation published a report entitled "American College Athletics."
    - The report examined the impact college football had on American universities and how sports now overshadows the intellectual life for which the university exist.
- 1939-1945: Chicago & The Ivy Leagues Step Back
    - Due to the cost involved in competing at the highest level, both financially and academically, the President of the University of Chicago Robert Hutchins

announced in December 1939 that the university was leaving the Big 10 in football.
    - Chicago would abandon the Big 10 in all sports in 1946.
    - In 1945, the Ivy League schools agreed to observe common practices in academic standards and eligibility requirements.
- NCAA Structure
    - 1973: Creation of Three Divisions
        - In 1973, the NCAA underwent the first major organizational schisms when it split into three divisions to allow those schools that wanted to opt out of the college arms race to compete with other like-minded schools.
        - This divisional stratification increased the autonomy for the most competitive schools and by doing so further isolated less competitive schools, marginalizing their ability to contest unfavorable rules and slow the expansion of commercialism.
    - 2015: Conference Power on the Rise
        - In 2015 when the NCAA voted to approve legislation granting the Power Five conferences autonomy and flexibility to make decisions involving athletes, finances and the running of big-time college sports.
        - Since being granted autonomy, the Power-Five conferences have voted to grant athletes greater benefits and athletic departments seem to be growing unchecked.
- Student- Athlete Compensation
    - **1956:** NCAA permits payments for room and board, books, fees, and cash for incidentals (e.g., laundry)
    - **1974:** Permitted paid professional athletes from one sport to compete as amateur in another sport
    - **2014:** Increased permissible scholarships up to full cost of attendance.
    - Student Assistance Fund and Academic Enhancement Fund assist in meeting other student-athlete needs.
        - Examples of disbursements include postgraduate scholarships and school supplies
        - Also provides benefits not related to education such as travel expenses, clothing, magazine subscriptions, and loss-of-value premiums.

B. Pre-2015 NCAA Cases

- Most of the time the antitrust laws capture anticompetitive conduct that ultimately harms consumers. DOJ and the FTC enforce the Sherman Act of 1890 which covers anticompetitive collusion and conspiracies as well as monopolization.
    - Interestingly in terms of today's discussion, for many years, the Sherman Act was used to prevent employees from engaging in certain activities to get improved pay and better working conditions.[1]

- [1] Sherman Antitrust Act
    - Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.
    - Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several, or with foreign nations, shall be deemed guilty of a felony … .

- The Sherman Act has been interpreted to outlaw combinations that are unreasonable, not all combinations. Some agreements are believed to be so obviously pernicious that they are presumed unreasonable. Others require a more in-depth analysis into their reasonableness.
- One form of agreement between competitors is a Joint Venture. Here, competitors compete in some respects but cooperate in others.
- Sports is one common area where Joint Ventures often arise.
    - Teams in a league compete to win games, and over the years have increasingly competed for athletes.
    - Sports generally require rules – there is a long list of requirements imposed by Sports Governing Bodies, many of which have been challenged over the years.

- Television
    - *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).
        - Distinction in court treatment of NCAA as commercial entity versus NCAA as regulator of student athletes
        - The NCAA adopted a television plan for the 1982-1985 football seasons.
            - The plan stated that, during a two-year period, no member institution is eligible to appear on television more than a total of six times and more than four times nationally.
        - A group of schools challenged the plan.
        - The Rule of Reason test:
            - Plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market
            - If the plaintiff meets this burden, the defendant must show evidence of the restraint's pro-competitive effects.
            - The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.
        - Applying the first prong of the rule of reason test, the court found that the NCAA's television plan had significant anticompetitive effects.
            - Without the plan, the court found that "many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights."
        - As for the second prong of the rule of reason test, the Court found that the NCAA's television plan did not produce any procompetitive efficiencies which enhanced the competitiveness of college football television rights.
            - It concluded that NCAA football could be marketed just as effectively without the television plan and that the plan reduced the volume of television rights sold and increases the price.
        - "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."
        - In finding the rule illegal, the Supreme Court held that by curtailing output and blunting the ability of member institutions to respond to consumer

preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.

- Athlete Eligibility Rules
    - *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).
        - A group of football players from Southern Methodist University sued the NCAA after the organization suspended the SMU football program for the entire 1987 season and imposed restrictions on it for the 1988 season.
        - The athletes argued that the NCAA's restriction on compensation to football players constituted illegal price-fixing in violation of Section 1; and that the suspension of SMU constitutes a group boycott by other NCAA members in violation of Section 2.
        - In rejecting the players' claim, the court ruled that the Sherman Act does not forbid every combination or conspiracy in restraint of trade, only those that are unreasonable.
        - In ruling that the NCAA's rules were reasonable, the court held that under the rule of reason the challenged restraint enhances competition.
        - In the key rationale, which will resurface in *Alston*, the Court referenced the Supreme Court's decision in the 1984 NCAA decision:

            - The Supreme Court **indicated strongly** in *Board of Regents* that such was the case. In a paragraph **mentioning the eligibility rules expressly**, the majority stated:

                - It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among **amateur** athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.

            - The Court further explained:

                - (SC) [T]he **NCAA seeks to market a particular brand of football—college football**. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," **athletes must not be paid**, must be required to attend class, and the like.

        - Responding to arguments that NCAA already allows compensation in the form of scholarships and can be pro in one sport and amateur in another: That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.

C. **2015 – The Year of Change**

- Tons of money flowing into college sports from tv revenue; coaches getting rich

- Usually, changes in market structure spur antitrust cases; here, it was the change in income that caused people to look at the issues differently
- Economics result in schools and coaches having a lot more control over the unpaid student athletes
  - Athletes first and students second (changes began in the '90s)

- *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015)
  - Unable to distribute settlement proceeds to amateur student athletes
- *College Athletes Players Association (CAPA) v. Northwestern University*, Case No. 13-RC-121359
  - NLRB said the football players were employees given the level of control that the schools have over them
- NCAA granting additional benefits to student athletes in the wake of UConn National Championship (full cost of attendance)

Alston Overview (20 minutes)

- Background
  - Current and former Division I football and basketball players sued NCAA challenging the rules that limit student-athlete compensation.
  - Allegations based on Sherman Act Section 1
  - The relief sought was broadly no compensation limits, and more narrowly, loosen the limits on education-related benefits to athletes.
- District Court decision
  - NCAA did not contest evidence showing that:
    - It agreed to compensation limits on student-athletes
    - NCAA and its conferences enforce these limits by punishing violations
    - Limits effect interstate commerce
  - The court noted that price fixing, even for labor, would ordinarily be per se unlawful, but because "a certain degree of cooperation" is necessary to market athletics competition, the Court applies the Rule of Reason"
  - Applying the Rule of Reason, the district court found that the NCAA enjoys near complete dominance (and exercises monopsony power) in the market for athletic services in men's and women's Division I basketball and football.
    - No viable substitutes or restrain on power
  - Uses monopsony power to artificially cap compensation offered to recruits
    - The court found that students would receive higher compensation without these limits
  - At step 2 of the Rule of Reason analysis, the court found that NCAA's procompetitive justifications, including preservation of amateurism, could play some role in distinguishing college sports from professional sports and thus help sustain consumer demand for college athletics – called the product differentiation rationale.
    - Unpersuasive justifications included (1) increasing output in college sports, (2) maintaining a competitive balance, (3) preservation of amateurism
    - Failed to show that compensation rules had direct connection to consumer demand
  - Applying step 3, the court found that:

CTDOCS\78481.3

            - NCAA's rules limiting non-education related compensation and benefits were reasonable to prevent blurring the line between professional and amateur athletes
            - NCAA's rules limiting education-related compensation and benefits (e.g., scholarships for grad school, tutoring, paid post-eligibility internships) were too restrictive.
                - No one would confuse these benefits with professional salaries
    - District court enjoined the NCAA from limiting education-related compensation or benefits.
        - NCAA could continue to limit cash awards for academic achievement so long as they were no lower than the awards for athletic achievement – this was permitted to allow NCAA to distinguish college athletic events from professional events
        - Individual conferences were still allowed to impose tighter restrictions if they wanted to
- The Ninth Circuit Affirmed.
    - *"the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports."*
- **NCAA appealed the injunction to the Supreme Court**
    - The Student-Athletes did not renew their across-the-board challenge to all NCAA compensation restrictions.
- Many facts were uncontested. NCAA did not challenge certain facts/findings:
    - Scope of relevant market
    - NCAA enjoys monopsony power
    - Members schools compete fiercely for student-athletes
    - NCAA's restrictions in fact decrease compensation – both price and quantity
- In essence, NCAA wanted to challenge whether it was subject to the antitrust laws
- Rule of Reason analysis appropriate; NCAA is not entitled to abbreviated deferential review
    - SCOTUS did not decide whether or not NCAA is a joint venture, but even if it was, the Court found that given NCAA's market dominance, "it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions"

- *Board of Regents* decision did not approve limits on student-athlete compensation (and thus foreclose any challenges to such limits)
    - The NCAA argued that the language in *Board of Regents* suggesting that it "plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and "needs ample latitude to play that role" was evidence that the NCAA's actions to preserve amateurism are "entirely consistent" with the federal antitrust law.
    - Student-athlete compensation was not an issue in *Board of Regents*
    - Decision merely stated that courts should take care when assessing NCAA's restraints on student-athlete compensation and be sensitive to the procompetitive possibilities.
        - Market realities change over time – college athletics have continued to grow dramatically since 1984
    - Justice Gorsuch describes a history of compensation of student athletes that is inconsistent with the NCAA's vision of amateur student athletes

        - Change might explain why the Court distinguished "stray comments" in Board of Regents
    - *NCAA's arguments are the same arguments was made about free agency in baseball and professionals in the Olympics*
        - *Did not turn out to be true*

- If NCAA wants no scrutiny of its rules, it needs to go to Congress
- After reviewing the Rule of Reason analysis, SCOTUS affirmed the district court's decision
    - The district court did not require "least restrictive means" and was not micromanaging
    - District court's decision was narrow – only barred NCAA imposing restraints on benefits related to education.
        - District court issued narrow injunction after concluding that "relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand for college sports"
- Justice Kavanaugh's Concurrence
    - James Heckman, Nobel prize winning economist from the University of Chicago, expert for NCAA in O'Bannon and Alston, said the Kavanaugh opinion was insane:
    - "[I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes."
    - If athletes hadn't abandoned claim, they had Kavanaugh at least – but no one joined.

D. Forward Looking Questions

- What are the limits of the Supreme Court's holding? What is next?
- The NCAA oversees college sports at many different levels of competitiveness. How will this decision affect:
    - Major Division 1 sports (e.g., football, basketball)?
    - Other sports, including those that do not generate substantial revenue?
    - Top-tier D1 athletes?
    - Other athletes?
    - D1 competitiveness?

- Will Congress intervene to protect amateurism in college sports?

Past- Alston (2021) – The Year of Change II (20 minutes)

- NCAA's changes in the wake of Alston
    - Recent SEC decision to give schools discretion to determine appropriate educational expenses – the legal maximum amount per year is $5,980.

- State Pay-for-Play Legislation
    - In September 2019, California Governor Gavin Newsom signed Senate Bill 206 (SB 206), the Fair Pay to Play Act, into law.

    - The Act, which is not scheduled to become law until January 1, 2023, directly challenges the NCAA's model of amateurism, by allowing college athletes for the first time to financially benefit from their name image and likeness (NIL) without affecting the student's scholarship eligibility.
  - In June 2020 by Florida passed NIL legislation beginning July 2021.
  - At the time the *Alston* decision was issued, NCAA was trying to get federal action to override these policies.
  - After the Supreme Court's decision in *Alston* in June 2021, the NCAA told schools that they would need to develop their own policies on NIL.
    - Justice Kavanaugh's concurrence might have influenced their decision
  - Starting to see businesses paying athletes for name / image / likeness
    - Essentially allows deep-pocket boosters to incentivize athletes to choose their school

NY STATE also voted to allow high school students to also profit off their NIL rights.

- NLRB's General Counsel Memo
  - In a memo dated September 28, 2021, Jennifer A. Abruzzo, the National Labor Relations Board's general counsel, wrote that athletes at private universities should be considered employees under federal labor law.
  - The Memo also warned that universities "misclassifying such employees as mere 'student-athletes'" could be threatened with legal action for creating a "chilling effect" on athletes who wanted to organize.

In November, the College Basketball Players Association (CBPA) filed an unfair labor practice charge against the NCAA, claiming the NCAA violated the NLRA by classifying college athletes as student-athletes.

- NCAA announces that they are getting out of the regulation of sports
  - In Fall the NCAA announced that it was going to redo the organizations constitution and grant greater autonomy to the conferences and the schools to regulate college sports.
  - New constitution will be voted on in January 2022.

- $10 million a year Coaches
  - In November/December we saw 3 coaches sign $10 million contracts. Brian Kelly's at LSU is reported to be worth $150 million over 10 years if he meets all the incentives.

III. AUDIENCE QUESTIONS (15 MINUTES)

Will leave time for discussion of audience questions at the end of the presentation.

College and University Athletics

John Wolohan

I. Introduction

While this chapter is primarily concerned with the model used by colleges and universities in the United States to govern athletics, the concluding section will summarize the models used in several other countries for the purpose of comparison. Much like other colleges and universities around the world, college athletics in the United States started as unorganized recreational activities played between students during free time at school as means of relief from the academic rigors of college. For example, as far back as the early 1800s first and second year students at Harvard University competed in an annual game of "kick-ball."[1] Form these informal games, students began to organize more formal intramural clubs by the mid-1800s. As more college students developed intramural teams, it was only natural that students from one university would seek to compete and match skills against students from other universities. As a result, the first intercollegiate sporting event in the United States occurred in 1852 when the rowing team from Yale University challenged the team from Harvard to a contest to "test the superiority of the oarsmen of the two colleges" at Lake Winnipesaukee, New Hampshire.[2] Even in 1852, inspired by the University of Oxford and University of Cambridge boat race in England, , commercial sponsorship played a major role in U.S. college sports. To promote excursion trains from Boston and New York to the race and other services,

[1] Stephen H. Hardy & Jack W. Berryman, *A Historical View of the Governance Issue*, *in* THE GOVERNANCE OF INTERCOLLEGIATE ATHLETICS 15 – 27 (James Frey ed., 1982)
[2] George S. Mumford, *Rowing at Harvard, in* THE H BOOK OF HARVARD ATHLETICS (John A. Blanchard ed., 1923)

the manager of the Boston, Concord & Montreal Railroad sponsored the race and promised the rowers from both teams unlimited alcohol and lavish prizes as an enticement to compete.[3]

While an important development in college sports, the 1852 race is less important because of who won the race, Harvard, and more because of the impact it had on other colleges and universities. News of the race led to the formation of rowing teams at Brown University, the University of Pennsylvania, Trinity College and Dartmouth College.[4] The race also indirectly led to the first known college sports scandal when in 1855, Yale claimed that Harvard's coxswain was not even a student at the university.[5] The national and international prominence of college sports grew in 1869 when the Harvard rowing team traveled to London, England to take on the students from Oxford University. Due to all the national and international press coverage of the race, additional colleges and universities became interested in college sports. This led representatives from Harvard, Brown, Massachusetts Agricultural College (now University of Massachusetts Amherst) and Bowdoin College to form the Rowing Association of American Colleges for the purpose of staging an annual union regatta. [6]

With all press coverage the college rowing was receiving, it was natural that students were inspired to stage intercollegiate contests in other sports. For example, the first intercollegiate baseball game took place in 1859 between Amherst College and Williams College. By 1879, the popularity of the sport was such that an association to regulate it was deemed desirable, and representatives from Harvard, Brown, Amherst, Princeton, and

---

[3] Gerald Gurney, Donna A. Lopiano & Andrew Zimbalist, UNWINDING THE MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIT IT. 4, (2017).
[4] Guy M. Lewis, *The Beginning of Organized Collegiate Sport*, 22 AMERICAN QUARTERLY, 222 – 229 (1970).
[5] Gurney et al., *supra* note 3.
[6] Lewis, *supra* note 4.

Dartmouth founded an intercollegiate baseball league. [7] The first intercollegiate track and field competition was held at the same time and place as the 1873 regatta. It consisted of a single-event program in which athletes from Amherst College, Cornell University and McGill University of Montreal (Canada) ran a two-mile race. By 1875, several colleges and universities created the Intercollegiate Association of Amateur Athletes of America for the purpose of preparing competitors for intercollegiate meets. The new organization held its first championship meet in 1876. It was a ten-event program. [8]

Although rowing, track and baseball may have been some of the earlier sports, it was football that really caused college sports to take off. The first intercollegiate football game was played on November 6, 1869, between Rutgers College (now Rutgers University) and the College of New Jersey (now Princeton University). The game came about after a disputed baseball game between the two schools the previous spring prompted the challenge. [9] In 1876, at the invitation of Princeton, representatives of four football associations met for the purpose of forming an intercollegiate association to adopt a common set of playing rules. Of the schools represented, Harvard, Princeton and Columbia became charter members of the Intercollegiate Football Association. [10] College football became so popular that "by the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues."[11]

[7] *Id.*
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Andrew Zimbalist. UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS. 7 (1999).

Because of the growing popularity and the money involved in college football, colleges began to offer talented athletes all manner of compensation to come and play for their schools. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company.[12] In addition, since there was no academic residency requirements college football gave rise to "tramp athletes," athletes who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better."[13] One famous example was a law student at West Virginia University—Fielding H. Yost—who, in 1896, transferred to Lafayette as a freshman just to play a role in the school's victory against its arch-rival, Penn, but was still able to return to classes at West Virginia's law school the next week.[14]

BIRTH OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA)

Since all the various organizations established during the mid-1800s, and the competitions they staged, were student initiated and managed and as students constantly recycled in and out of college, the organizations were generally short lived.[15] In addition, they were all sport specific with no single umbrella organization overseeing all of college sports.

---

[12] *Id.*
[13] Francis X. Dealy. WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS, 71 (1990).
[14] *Id.*
[15] Stephen H. Hardy & Jack W. Berryman, *A Historical View of the Governance Issue*, *in* THE GOVERNANCE OF INTERCOLLEGIATE ATHLETICS 15 – 27 (James Frey ed., 1982)

College and university presidents, however, quickly saw the benefits big-time sports could bring to the schools, whether it was a matter of publicity or the desire of alumni to stay connected. As a result, college and university presidents slowly began to institutionalize the athletic programs into the universities by building ever bigger athletic stadiums at the expense of their educational mission, lavishing greater resources on coaches and allowed their coaches to run the athletic programs as they saw fit. However, with the job of balancing athletic excellence with academic excellence left to the coaches, whose only job was to win, this lack of institutional oversight eventually led "to more than 300 deaths by college football players between 1890 – 1905."[16] In 1905, after eighteen college athletes were killed and 149 others suffered serious injuries while playing football, Theodore Roosevelt, the President of the United States, summoned the Presidents of Harvard, Yale, Princeton and 10 other institutions to the White House to urge their leadership in cleaning up the game.[17] Spurred on by Roosevelt, who threatened to intervene if they failed to act, college and university presidents met again on December 28, 1905 to establish the Intercollegiate Athletic Association of the United States (IAAUS) with the goal of addressing football's rules, as well as the broader regulation of college sports. The IAAUS took its present name, the National Collegiate Athletic Association (NCAA), in 1910.[18]

From its beginnings, the NCAA has failed to solve the conflict between those schools that have emphasized big-time athletics and those with less such emphasis. For example, to

[16] Gurney et al., *supra* note 3, at 10.
[17] Walter Byers, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES. (1995).
[18] Gurney et al., *supra* note 3. While this chapter examines the NCAA, it must be noted that not every college in the United States is a member of the NCAA. There are other organizations colleges can join, including the: National Association of Intercollegiate Athletics (NAIA), and National Junior College Athletic Association (NJCAA).

get the more successful football schools to join, the NCAA gave each member the right to implement or ignore any rule that it wished. Therefore, from 1906 until 1952, the NCAA could only pass guidelines and had no power to enforce them.[19] As a result, the NCAA lacked any real power to reform college sports, and abuses continued.

As for the compensation of athletes, the NCAA expressed the view at its founding that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession."[20] Despite the NCAA opposition, however, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college."[21] These abuses were catalogued in 1929 when the Carnegie Foundation published a report entitled "American College Athletics." In tracing the transformation of college football from a game played by students into a professional enterprise, the report found that college football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable."[22] As for the impact the sport had on American universities and how it came to overshadow the intellectual life for which the university was assumed to exist. [23] The report found that schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000,

---

[19] Gurney et al., *supra* note 3.
[20] Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906); see also Proceedings of the Eleventh Annual Convention of the National Collegiate Athletic Association, Dec. 28, 1916, p. 34.
[21] The Carnegie Foundation for the Advancement of Teaching. BULLETIN NUMBER 23 AMERICAN COLLEGE ATHLETICS (Howard J. Savage, 1929).
[22] *Id.*
[23] *Id.*

while Harvard's football revenue alone came in at $429,000.[24] In conclusion, the Carnegie Foundation found that "commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youths."[25]

As a result of the financial and academic impact of competing at the highest level, the President of the University of Chicago, Robert Hutchins, announced in 1939 that the university was leaving the Big 10 in football. Chicago would abandon the Big 10 in all sports in 1946 because it claimed that it was "no longer capable of providing equal competition and must withdraw from the conference at the end of the academic year."[26] In 1945, the Ivy League schools reached the first "Ivy Group Agreement" whereby the schools agreed to observe common practices in academic standards and eligibility requirements and the administration of need-based financial aid, with no athletic scholarships in football. By signing the agreement eight schools (Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton, and Yale) effectively abandoned big-time sports to ensure academic integrity.

Given the abuses of college sports programs, including the outright paying of athletes to play for schools, the NCAA for the first time sought to regulate the relationship between athletes and schools. In 1948, the NCAA passed what has become known as the "Sanity Code." While the Sanity Code reiterated the NCAA's opposition to the direct compensation of athletes in any form, for the first time it allowed schools to award athletic scholarships to financially

---

[24] *Id.*, at 87.
[25] *Id.*
[26] *UC QUITS BIG 10! This article was originally published on March 8, 1946 and was re-printed on February 18, 2014 as part of the* Maroon's *historical issue.* https://www.chicagomaroon.com/2014/02/18/uc-quits-big-10/

needy students that could only cover the cost of tuition, and incidental expenses. Any payments exceeding these costs were prohibited. The Sanity Code therefore sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. Finally, the Sanity Code also created in the NCAA a new enforcement mechanism that would allow the organization to suspend or expel schools that violated the code. However, when NCAA member schools voted not to expel schools that violated the code, it was abandoned in 1950.[27]

After the failure of the Sanity Code, the NCAA faced another major crisis when a major gambling and match-fixing scandal involving college basketball teams came to light. Between 1947 and 1951, at least 35 college players from at least four schools in the New York City area and the University of Kentucky were paid by gamblers to fix at least 86 college basketball games.[28] Beside Kentucky, which won the 1951 NCAA Basketball Championship, the scandal also involved Manhattan College, Columbia University, Long Island University (LIU), and City College of New York (CCNY), which won both the NCAA and National Invitational Tournament (NIT) titles in 1950.[29] Of the 35 players involved in the match-fixing, 20 of them, along with 14 illegal bookmakers, would eventually serve time in prison.

Faced with the public outcry over the point-shaving scandal, the NCAA was forced to impose the "death penalty" on Kentucky, barring it from play for the 1952-53 season.[30] However, after the demise of the Sanity Code, there was some concern that the University of

---

[27] Gurney, et al., *supra* note 3.
[28] Dick Patrick, *Betting scandal not first in college sports*, USA Today, Dec. 20, 2002 at 3C.
[29] LIU would drop all athletic programs from 1951 to 1957, while CCNY's basketball team would drop from Division I, the big-time athletic programs, all the way down to Division III, the smallest programs.
[30] Byers, *supra* note 13.

Kentucky and other schools would just ignore the penalty and continue playing. Fortunately, Kentucky accepted the penalty and disbanded its basketball team for the 1952-53 season.[31]

The next major event in college sports was in 1956, when the NCAA voted to both approve the granting of athletic scholarships and the restructuring of the organization into two divisions. Despite the fundamental concept of an uncompensated student-athlete, the NCAA allowed schools to award four-year, non-need based athletic scholarships based on athletic ability alone. In addition, the expanded the scope of what the scholarship could include to: tuition, room and board, books, lab fees, and $15 a month for incidental expenses such as laundry.[32] The awarding of non-need scholarships for the first time, was an important benchmark in the NCAA's history by openly assisting in the recruitment of top high school athletes to play sports. To counter the argument that the athletes were being paid to play and were therefore no longer "amateur," the NCAA added rules that the scholarships could not be reduced or cancelled based on an athlete's on-field performance or decision not to participate. The NCAA also mandated the use of the term "student-athlete" when referring to scholarship athletes. In 1967, the NCAA allowed schools to void a scholarship if the recipient no longer participated in the requisite sports activity.[33]

In 1973, the NCAA underwent the first major organizational schisms when it split into three divisions to allow those schools that wanted to opt out of the college arms race to compete with other like-minded schools. It also broke again with the traditional "amateur" model by changing athletic scholarships from four-year non-voidable contracts to one-year

---

[31] *Id.*
[32] Gurney et al., *supra* note 3.
[33] *Id.*

renewable contracts, which could be cancelled by a coach for almost any reason.[34] "This divisional stratification increased the autonomy for the most competitive schools and by doing so further isolated less competitive schools, marginalizing their ability to contest unfavorable rules and slow the expansion of commercialism ... forcing schools to make commitment decisions that required far greater investments in athletics."[35]

In 1976, Division I was subdivided based on football sponsorship. The biggest of the football schools were split into Division IA. Those schools that wanted to offer football but offer fewer scholarships, were partitioned into Division IAA. Those schools that either did not field a football team or provide any athletic scholarships were partitioned into Division IAAA. In 2006, Division IA was reclassified as the Football Bowl Subdivision (FBS) and Division IAA was reclassified as the Football Championship Subdivision (FCS). The subdivisions apply only to football; all other sports the college and universities are simply designated as Division I sports.

Another major schism occurred in 1997, when the larger football and basketball schools threatened to leave the organization, the NCAA voted to give each of the three divisions more autonomy to govern themselves. While seemingly minor, this decision separates the Divisions for voting purposes and gave the big schools more power and control over legislation. Up until this time, the NCAA bylaws and policies had been determined through an annual legislative process in which each member school – regardless of Division – cast a single vote on a proposal.[36] Therefore, the vote of a small college in Division III had the same weight as the biggest Division I University. However, starting in 1997, each Division was granted the authority

---

[34] *Id.*
[35] *Id* at 14.
[36] *Id.*

to decide its own policy. Therefore, only Division I schools would vote on legislation impacting Division I schools. Divisions II and III retained the one-school/one-vote approach, while Division I adopted a representative system based on conferences that grants the larger Division I programs more voting authority than others.[37] In particular, the new structure gave the FBS schools 50 % of all voting positions on the NCAA Executive Committee and 61% control over the Division I Board of Directors. This gave the FBS schools control over the NCAA's governance structure and budget.[38]

Even under the new system, the big football schools in the five biggest and wealthiest conferences (the Power-Five) namely, the Atlantic Coast (ACC), Big Ten, Big 12, Pacific-12 (Pac 12), and Southeastern (SEC) conferences objected that the smaller Division I schools could still veto legislative changes. For example, when in 2011 the schools from the Power-Five conferences wanted to provide a $2,000 cost-of-attendance benefit to scholarship athletes, the other Division I members, who far outnumber the schools from the Power-Five conferences, did not believe that they could afford the extra benefit and voted down the proposal. As a result, the schools from the Power-Five conferences once again threatened to withdraw from the NCAA, and potentially take all the organization's television revenue with them, if they were not granted greater autonomy and flexibility to make decisions involving athletes, finances, and other aspects of managing big-time college sports. [39]

---

[37] https://www.ncaa.org/about/history-division-ii

[38] Gurney et al., *supra* note 3.

[39] For a more detailed discussion on the organization and structure of the NCAA, see: http://www.lawinsport.com/articles/item/will-restructuring-the-ncaa-change-the-balance-of-power

This led to the most recent schism. In January 2015, the NCAA members granted the Power-Five conferences greater autonomy and flexibility to make decisions involving athletes and finances. [40] The Power-Five conferences promptly voted to raise their scholarship limits up to the full cost of attendance, an amount that is generally several thousand dollars higher than previous limits. Every year since then, the Power-Five conferences have voted to grant athletes additional benefits, which has resulted in the athletic departments seemingly growing unchecked.

Today, the NCAA is probably facing some of its biggest challenges. In March 2020, the NCAA made the decision to cancel its' Division I Basketball Tournament due to the COVID-19 pandemic. This cost the NCAA and its member schools over $1 billion, forcing schools across the country to begin cutting sports teams. In the fall of 2020 with the pandemic still wreaking havoc on states, the NCAA which does not control college football like it does basketball, left the decision of whether to play football games up to the individual schools and conferences. This lack of unified leadership on the part of the NCAA as it relates to college football, the cash cow of college sports, made many people both inside, the athletes, coaches, and administrator, as well as those outside, the fans and politicians, to question the entire NCAA structure.

This lack of leadership from the NCAA was the main reason that in August 2021 three of the Power-Five conferences, the Atlantic Coast (ACC), Big Ten, and Pacific-12 (Pac 12), entered an alliance. The goal of the alliance is for the schools in the three conferences to provide some

[40] For a more in-depth overview of the conference, see: Brad Wolverton. NCAA's Top Conferences to Allow Additional Aid for Athletes. *The Chronicle of Higher Education,* (January 14, 2015). Retrieved from http://chronicle.com/article/NCAA-s-Top-Conferences-to/151299/
See also: Marc Tracy, (January 19, 2015). *In N.C.A.A.'s Varied Landscape, Some Open Floodgates While Others Fear Drought*. N.Y, Times, D7.

leadership in college sports by working together on athlete legislation, preventing a greater athletics arms race, developing uniform schedules, and protecting the collegiate sports model. In particular, the alliance believes that by banding together, they can slow down, if not stop, all the biggest football schools from breaking away from the NCAA and creating a semi-professional football conference associated with the colleges.

Meanwhile sports fans increasingly noticed the commercialization of big-time college sports. Net revenue totaled over $1 billion a year before the pandemic from its basketball tournament alone, and the Power-Five net revenue totaled hundreds of millions of dollars from television and other sources. Some schools made over $100 million, and at least 31 of the 65 coaches at Power-Five schools received a salary of over $4 million a year. Indeed, the average Power-Five football coach enjoyed an annual salary of about $3 million and some coaches made close to $10 million a year. It was no surprise that athletes and critics of the current "amateur model" were beginning to demand reform.[41]

While NCAA and school administrators mostly silenced these critics by providing players with cost of attendance money and other benefits, as more and more money flowed into college sports, politicians at both the federal and state levels began to respond against this current backdrop. As a result of all the political and legal pressure during the last decade, the NCAA Board of Governors in July 2021 announced plans to convene a special constitutional convention that is intended to reimagine college sports. The goal of the convention is to

---

[41] Charlotte Gibson, *Who's the Highest Paid in Your State?* ESPN.com (2019). http://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees (last visited August 10, 2020)

propose dramatic changes to the NCAA and college sports so that the NCAA can more effectively meet the needs of current and future college athletes and member schools.

The following section looks at the most important legal challenges the NCAA has faced over the last 50 years.

II. Legal Issues facing the NCAA

a. State Action

Today the NCAA is a privately funded, unincorporated association made up of 1,098 four-year colleges and universities. In addition, two other organizations that govern college athletics: the National Junior College Athletic Association (NJCAA), which is made up of junior and community colleges, and the National Association of Intercollegiate Athletics (NAIA), which is made up of schools that have chosen not to join the NCAA. All three of these associations are private organizations composed of both public and private schools, and membership is voluntary.

Even though they are private organizations, the question of whether they qualify as state actors for constitutional purposes is important. United States Constitutional protections apply only to the actions of governmental entities or state actors. Therefore, a threshold question in any case where a limit or interference with an individual's constitutionally protected rights is at issue is whether the controverted actions constitute state action. The United States Supreme Court has developed three basic tests to determine whether a private organization, like the NCAA, can qualify as a state actor.[42] The three tests are: 1) the public function test, in which the

[42] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

courts consider whether a private actor is performing functions that have been traditionally been reserved to government or that are governmental in nature; (2) the nexus or entanglement test, in which the court examines whether the state's involvement or relationship with the private actor is so entangled that it transforms the private conduct into state action; and 3) the state compulsion test, in which the Court examines whether the state significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that of the state.[43] Any of the tests may apply in a single case.

Using these three tests variously, the courts up until the mid-1980 historically found that despite the NCAA's status as a private association, the NCAA's actions constituted state action and were subject to constitutional review. For example, in *Buckton v. NCAA* (1973), the court held that in supervising and policing most intercollegiate athletics nationally, the NCAA performed a public function, sovereign in nature, which subjected it to constitutional scrutiny.[44] In *Parish v. NCAA* (1973) basketball players sued the NCAA to prevent the organization from declaring them ineligible to compete at a private school, Centenary College.[45] The NCAA argued that the court had no jurisdiction under Section 1983 because there was no state action. In rejecting that argument, the court, citing the nexus / entwinement theory and held that the private character of a school is immaterial.[46] In *Howard University v. NCAA* (1975), the D.C. Circuit Court, in ruling that the NCAA's enforcement of its five-year competition rule constituted state action, found that the influence of state-supported universities in the NCAA required a

---

[43] John Wolohan, *State Action*, i*n* LAW FOR RECREATION AND SPORT MANAGERS (Doyice Cotten & John Wolohan 8TH ed., 2020).
[44] *Buckton v. NCAA*, 366 F.Supp. 1152 (D. Mass. 1973).
[45] *Parish v. NCAA*, 506 F.2d 1028 (5th Cir., 1975).
[46] *Id.*

finding of state action whenever NCAA actions are at issue.[47]

The courts began to move away from this position, however, in *Arlosoroff v. NCAA*, (1984). In *Arlosoroff v. NCAA,* the Fourth Circuit Court held that the NCAA's regulation of intercollegiate athletics was not a function traditionally reserved to the state. Mere indirect involvement of state government, the court held, could no longer convert private actions into state action.[48]

In 1988, the United States Supreme Court, in *NCAA v. Tarkanian* (1988), held that the University of Nevada las Vegas' (UNLV) decision to suspend its basketball coach Jerry Tarkanian, while in compliance with the NCAA rules and recommendations, did not turn the NCAA's conduct into state action under Nevada law and thereby engage constitutional analysis, since UNLV retained the power to withdraw from the NCAA and to establish its own standards.[49] Since the Supreme Court's decision in *Tarkanian* NCAA rules and activities have no longer been found to constitute state action. This point is illustrated in *Collier v. NCAA* (1992).[50] There a college wrestler sued the NCAA after the organization banned him from participating in intercollegiate meets for the 1991–92 academic year. In rejecting Collier's claim, the District Court held that since the NCAA is not a state actor, Collier's constitutional claim must fail.[51]

b. Title IX

---

[47] *Howard University v. NCAA*, 510 F.2d 21 (D.C. Cir. 1975). See also: *Associated Students, Inc. v. NCAA*, 493 F.2d 1251 (9th Cir., 1974); and Regents of University of Minnesota v. NCAA 560 F.2d 352 (8th Cir., 1977).
[48] *Arlosoroff v. NCAA*, 746 F.2d 1019 (4th Cir. 1984). See also: *Spath v. NCAA*, 728 F.2d 25 (1st Cir., 1984); *Graham v. NCAA,* 804 F.2d 953 (6th Cir., 1986); and *McCormack v. NCAA*, 845 F2d 1338 (5th Cir., 1988).
[49] *National Collegiate Athletic Association* v. *Tarkanian*, 488 U.S. 179, 181 (1988).
[50] Collier v. NCAA, 783 F.Supp 1576 (1992). See also: *Board of Trustees of Arkansas Tech University v. NCAA*, 2018 WL 2347062; Co*hane v. NCAA*, 215 Fed.Appx. 13 (2d Cir. 2007); *Salazar v. NCAA*, 35 Media L. Rep. 1563 (2007)
[51] Collier v. NCAA, 783 F.Supp 1576, 1578 (1992).

Title IX of the Education Amendments of 1972 is the landmark civil rights legislation that prohibits gender discrimination in the nation's education programs. Section 901(a) states:

> No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[52]

While Title IX was intended to increase the college and post-graduate educational opportunities of females, it has had a large impact on athletic opportunities for women. For example, while there were some college athletic opportunities for women prior to 1972, most colleges only offered women the opportunity to participate in intramural sports. In 1972, the year Title IX was enacted, there were fewer than 30,000 female collegiate athletes. In 2020, protected by Title IX, more than 216,000 women competed at NCAA affiliated institutions.[53]

While almost all colleges and universities in the United States receive some sort of federal funding, via research grants or student aid, sport organizations such as the NCAA do not. Therefore, since the NCAA is not a direct recipient of federal funds, the courts have held that it is not subject to the requirements of Title IX.[54] Colleges and universities, however, do need to comply with the law. In 1979, the U.S. Department of Education issued a Policy Interpretation specifically for intercollegiate athletics programs that introduced a three-part test to clarify the meaning of "equal opportunity"[55].

[52] Title IX: Education Amendments of 1972, §§ 901–909 as amended, 20 U.S.C.A. §§ 1681–1688.
[53] Barbara Osborne, *Title IX, in* LAW FOR RECREATION AND SPORT MANAGERS, *supra* note 35.
[54] *NCAA v. Smith*, 525 U.S. 459 (1999).
[55] U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972; A Policy

The three-part test provides institutions three possible ways to prove that they effectively accommodate the interests and abilities of their students. Compliance is satisfied if a school can prove any one of the following three benchmarks:

1. Substantially proportionate - Participation opportunities for male and female students are provided in numbers proportionate to their respective enrollments,
2. Continued practice of program expansion - The institution can show a history and continuing practice of program expansion to include women athletics, or
3. Interests and abilities - The institution can show that it is otherwise fully and effectively meeting the interests and abilities of the underrepresented sex.[56]

The leading case applying this three-part test is *Cohen v. Brown University* (1993).[57] In 1991, Brown University announced that it planned to cut four intercollegiate varsity athletic sports: women's volleyball and gymnastics, and men's golf and water polo. The members of women's gymnastics and volleyball teams sued the university to challenge their demotion from full varsity status to intercollegiate club status. The female athletes received a preliminary injunction reinstating the women's teams after the First Circuit Court, using the three-part test, found that while Brown could eliminate men's athletic programs to control costs, its attempt to eliminate two women's teams violated Title IX. In particular, the court found that Brown failed to meet any of the three alternative tests.[58]

Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71, 413, 71, 423 (1979).

[56] U.S. Department of Education Athletic Guidelines; Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71, 413, 71, 423 (1979).

[57] *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993).

[58] *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993).

An interesting aspect of Title IX is that it does not prohibit all discrimination based on sex. As the cost of college athletes has increased, some institutions have chosen to eliminate men's sports to come into compliance with Title IX. In response, male athletes have filed a series of Title IX lawsuits. However, every such claim of reverse discrimination has ultimately been unsuccessful. For example, in *Kelley v. Board of Trustees, Univ. of Illinois*, (1994) a group of male swimmers filed a lawsuit against the University of Illinois alleging that university violated Title IX when it terminated the men's team but retained the women's swimming team.[59] In recognizing that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics, the court found that Title IX allows a school to consider gender when determining which athletic programs to terminate. Since the remedial scheme at issue directly protected the interests of women, the disproportionately burdened gender, the court found that it passed constitutional muster. [60]

c. Drug Testing

In 1986, the NCAA enacted legislation implementing a uniform drug-testing program for all college athletes. It allows for year-round testing, as well as at championships and post-season bowl games. The program tests for anabolic agents, hormone and metabolic modulators, diuretics and masking agents, and peptide hormones, growth factors, and related substances and mimetics, during the year-round testing program. In championships and postseason bowl games, the NCAA includes testing for beta-2 agonists, beta blockers, stimulants, cannabinoids,

---

[59] *Kelley v. Board of Trustees, University of Illinois*, 35 F. 3d 265 (7th Cir. 1994).
[60] *Kelley v. Board of Trustees, University of Illinois*, 35 F. 3d 265 (7th Cir. 1994).

and narcotics. This list consists of substances generally purports to be performance-enhancing and/or potentially harmful to the health and safety of athletes. All NCAA member institutions are subject to NCAA drug testing.[61]

Since the NCAA is not a state actor, it is free to test athletes attending member institutions without fear of violating the constitutional protections provided under the Fourth Amendment prohibiting unwarranted searches and seizures such as those invading the privacy of individuals. For example, in *O'Halloran v. University of Washington* (1988) an athlete challenged the enforcement of the NCAA's drug-testing program. In upholding the NCAA's program, the District Court held that while the NCAA's urine testing program was a "search" for purposes of Fourth Amendment, O'Halloran failed to show that the conduct complained of, enforcement of the NCAA drug testing program, was state action. In support of this finding the court found that: (1) there was no showing that the State of Washington had exercised coercive power or provided significant encouragement, overtly or covertly, such that either the promulgation or enforcement of the drug-screening rule must be deemed to be state action; and (2) neither was there a showing that the regulation of intercollegiate athletics is a traditionally exclusive prerogative of the state.[62]

III. Antitrust Issues

In the United States, antitrust or anti-competition behavior is mainly regulated by the Sherman

---

[61] John Wolohan, *Drug Testing*, *in* LAW FOR RECREATION AND SPORT MANAGERS, *supra* note 35.
[62] *O'Halloran v. University of Washington*, 679 F.Supp 997, 1002 (1988).

Antitrust Act.[63] Passed in 1890, the purpose of antitrust law is to promote competition among buyers and sellers of products within a relevant market. To this end, the Sherman Antitrust Act prohibits restraints of trade, monopolies and attempts to monopolize.

The relevant parts of the Sherman Act in terms of sports law are Section 1 and Section 2. Section 1 of the Sherman Act states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[64]

While Section 2 provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a felony … ."[65]

Unlike professional sports organizations, the courts have traditionally been reluctant to apply the Sherman Antitrust Act and other antitrust laws against the NCAA and its member schools. The historical rational behind this theory is that the NCAA, as the guardian of amateur sports in America, should be free to control eligibility requirements and other rules regulating the relationship between member schools. The reluctance of the courts to intervene into the workings of the NCAA under antitrust law, however, seems to be fading away.[66] Specifically, since the 2015 NCAA Convention, when the five biggest and wealthiest college-sports conferences (the

---

[63] The Sherman Antitrust Act of 1890, 15 U.S.C.A. § 1 *et seq.*
[64] The Sherman Antitrust Act of 1890, 15 U.S.C.A. § 1.
[65] The Sherman Antitrust Act of 1890, 15 U.S.C.A. § 2.
[66] John Wolohan, *Antitrust Law: Amateur Sports Application*, *in* LAW FOR RECREATION AND SPORT MANAGERS, *supra* note 35.

Power-Five) were granted autonomy to create new legislation granting athletes' additional financial benefits, the courts seem more willing to apply the antitrust law to the NCAA and other amateur athletic organizations.

a. NCAA v. Board of Regents

One of the leading cases involving the NCAA and antitrust law is *NCAA v. Board of Regents of the University of Oklahoma* (1984). The NCAA had developed a plan that was intended to reduce the adverse effects of live television upon football game attendance.[67] The plan contained "appearance requirements" and "appearance limitations" which limited the total amount of televised intercollegiate football coverage for any one team.[68] Unhappy with that rule, the big football schools sued the NCAA under the Sherman Antitrust Act. The United States Supreme Court held that the NCAA's television plan violated Section 1 of the Sherman Antitrust Act.[69] Using a rule-of-reason analysis, the court found that the NCAA television plan on its face constituted a restraint upon the operation of a free market and that the plan operated to raise price and reduce output, both of which are unresponsive to consumer preference.[70] The Supreme Court went on to find that, contrary to the NCAA's assertion, the television plan did not protect live attendance.[71] Finally, the Supreme Court noted that there was no evidence that the television plan produced any greater measure of equality throughout the NCAA than

---

[67] *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 92 (1984).
[68] *Id*, at 95.
[69] The Sherman Antitrust Act of 1890, 15 U.S.C.A. § 1.
[70] *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 86 (1984).
[71] *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 87 (1984).

would a restriction on alumni donations, tuition rates, or any other revenue-producing activities.[72]

This decision was a watershed development in college sports because it weakened the NCAA's control over member schools and allowed schools and conferences to enter into individual television agreements.[73] The decision also allowed the major football conferences to generate large sums of money without sharing it with the smaller NCAA schools. As such, it is viewed as the first step in the current Power-Five autonomous system.

b. Athlete Cases

In *Banks v. NCAA* (1992), Braxton Banks, while still a college football player, had entered his name into the NFL draft. When he was not drafted, Banks sued the NCAA seeking to have his final year of eligibility to play intercollegiate football restored.[74] Banks alleged that the NCAA rule revoking an athlete's eligibility once he or she chooses to enter a professional draft or engages an agent to help him secure a position with a professional team is an illegal restraint in violation of the Sherman Antitrust Act. In rejecting Banks' argument, the Seventh Circuit Court held that Banks failed to allege an anticompetitive effect on a relevant market; at best, the court held Banks had merely attempted to frame his complaint in antitrust language.[75]

In *Smith v. NCAA* (1998), Renee Smith sued the NCAA, alleging that the NCAA's

[72] *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 87 (1984).
[73] *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).
[74] *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).
[75] *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

enforcement of a bylaw prohibiting her from participating in athletics while enrolled in a graduate program at an institution other than her undergraduate institution, violated the Sherman Act. The Court of Appeals held that its restrant-of-trade provision did not apply to NCAA eligibility rules. Even if the Sherman Act were applicable, the court held that the challenged rule was not an unlawful restraint of trade.[76]

In *Agnew v. NCAA* (2012), two former NCAA Division I football players, who had suffered career-ending football injuries and lost their scholarships, sued the NCAA claiming that the NCAA's regulations on the number of scholarships given per team and the prohibition of multi-year scholarships prevented them from obtaining scholarships that covered the entire cost of their college education.[77] Although the Seventh Circuit Court disagreed with the district court that the former players could not have alleged a relevant cognizable market, the court ultimately concluded that the former players did not sufficiently identify a commercial market and therefore held that the district court's dismissal was justified.[78]

In *O'Bannon v. NCAA*, (2015), a group of former student-athletes who played Division I basketball and football filed an antitrust claim against the NCAA claiming that the NCAA conspired to restrain trade in violation of Section 1 by agreeing to fix at zero the amount of compensation the athletes were allowed to receive under NCAA rules for the use of their names, images, and likenesses.[79] In overturning the district court's decision, the Ninth Circuit Court held that the NCAA is not above the antitrust laws and courts cannot and must not shy away from

[76] *Smith v. NCAA*, 139 F.3d 180 (3rd Cir. 1998).
[77] *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).
[78] *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).
[79] *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

requiring the NCAA to play by the Sherman Act's rules. The court held that while the NCAA's rules are more restrictive than necessary to maintain its tradition of amateurism, the Rule of Reason does not require NCAA member schools to pay athletes for the use of their personality rights.[80]

The court expanded the *O'Bannon* ruling when a group of students challenged the NCAA rules that capped, to meet the total cost of attendance, grants-in-aid they may receive for their athletic services, and limited the additional compensation and benefits that have a monetary value above the cost of attendance. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation* (2019), the court held that conferences and member schools "have near complete dominance of, and exercise monopsony power in, the relevant market, and because it is undisputed that the challenged restraints suppress competition and fix the price of student-athletes' services, the Court has found that the anticompetitive effects of the challenged rules are severe."[81] Therefore, allowing each conference and its member schools to provide additional education-related benefits without NCAA caps and prohibitions, as well as academic awards, will help offset their anticompetitive effects and may provide some of the compensation student-athletes would have received absent the defendant's restraint of trade.[82] The District Court's decision was affirmed by the Ninth Circuit Court.[83] On appeal, the United States Supreme Court held that "colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on "amateur"

---

[80] *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).
[81] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058 (2019).
[82] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, 375 F. Supp. 3d 1058 (2019).
[83] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, 958 F. 3d 1239 (2020).

student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play."[84] While not reviewing all restraints on compensation to athletes, the Court held that any limits on the education-related benefits schools offer athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, or paid post eligibility internships was a violation of the Sherman Act.[85]

Although the case was limited, the concurring decision by Justice Kavanaugh opened the door for future challenges. In particular, Judge Kavanaugh held that the NCAA's compensation rules raise serious questions under the antitrust laws and that "the NCAA's business model would be flatly illegal in almost any other industry in America." [86] "Nowhere else in America, Judge Kavanaugh held could a business get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different." [87] The NCAA, Judge Kavanaugh noted, is not above the law.

IV. Labor

A growing area of conflict in college sports is between the athletes and their demand for greater collective-bargaining rights on the one side and their colleges and the NCAA wishing to keep the status quo. While there were attempts to unionize college athletes before the COVID-

[84] NCAA v. Alston, 2021 U.S. LEXIS 3123, __ S.Ct. __ (2021)
[85] NCAA v. Alston, 2021 U.S. LEXIS 3123, __ S.Ct. __ (2021)
[86] NCAA v. Alston, 2021 U.S. LEXIS 3123, __ S.Ct. __ (2021)
[87] NCAA v. Alston, 2021 U.S. LEXIS 3123, __ S.Ct. __ (2021)

19 pandemic, the push to get college athletes back on the field as quickly as possible has incentivized athletes to demand a voice on issues relating to their education, welfare and compensation. As addressed below, the #WeAreUnited movement had an immediate impact on college football with a threatened boycott by the athletes in the fall of 2020.

a. CAPA

In *College Athletes Players Association (CAPA) v. Northwestern University,* CAPA, a labor organization representing a group of Northwestern University scholarship football players claimed that those football players who receive grant-in-aid scholarships from Northwestern were "employees" under the National Labor Relations Act (the Act). Northwestern claimed that football players receiving scholarships are not employees under the Act and therefore had no right to be represented by a labor union.

Northwestern is a member of the Big Ten Conference and thereby competes at the highest level in the NCAA Division I Football Bowl Subdivision (FBS) among around 130 schools (note that at the time of the original National Labor Relations Board (NLRB) hearing there were only 125 schools). Of the schools that compete at this highest level, only 18 other are private such as Northwestern. In the Big Ten Conference, Northwestern is the only private school of the 14 colleges or universities.[88]

In March 2014, the Regional Director for the NLRB in Chicago held that Northwestern University football players who received grant-in-aid scholarship were "employees" within the

[88] *Northwestern University v. College Athletes Players Association (CAPA),* Case 13–RC– 121359 (August 17, 2015).

meaning of Section 2(3) of the National Labor Relations Act. As a result, the players would be entitled to choose whether to be represented for the purposes of collective bargaining.[89]

Northwestern University appealed the decision to the full Board in Washington D.C. In 2015, the Board surprised a lot of people when it refused to answer the question of whether college athletes are, as such, employees. Instead, the Board passed the issue onto Congress by ruling that, after careful consideration, it had determined "that, even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction."[90] In other words, the Board refused to decide the case because it believed that it was an issue better left to Congress or college sport administrators, especially since Northwestern was the only private school in the Big Ten. All the other schools were public universities, and therefore not subject to the National Labor Relations Act, but are controlled by state law. In addition, as the Board noted, in the year and a half since the Northwestern players first sought to form a union, the NCAA had granted its five richest conferences substantial autonomy to pass rules that would allow them to give athletes more resources.

b. #WeAreUnited

In August 2020, athletes from the Pac-12 Conference, one of the Power-Five conferences issued a resolution voicing their concerns about health and safety related to the coronavirus

[89] John Wolohan, 'College Athletes Players Association vs. Northwestern university', LawInSport.com, 25 April 2014, last viewed 1 September 2020, http://www.lawinsport.com/articles/regulation-a-governance/item/college-athletes-players-association-v-northwestern-university
[90] *Northwestern University v. College Athletes Players Association (CAPA),* Case 13–RC– 121359 (August 17, 2015).

pandemic, social injustice, and the right to organize. In particular, the athletes stated that due to COVID-19 and other serious health and economic concerns, we will opt out of Pac-12 fall camp and game participation unless the colleges and universities in the Pac-12 act to protect college athletes physically, economically and academically, especially Black college athletes.[91] To address the economic exploitation and prevent the continued elimination of existing sports, the athletes argued for an end to the lavish salaries and performance bonuses paid to conference commissioners and coaches, as well as outlandish facility expenditures.[92] As for compensation, the athletes argued that they should have the freedom to secure agent representation, receive necessities from any third party, and earn money for use of their name, image, and likeness rights. Finally, the athletes stated that they "should be included in equitably sharing the revenue our talents generate" and receive 50% of each sport's total conference revenue, to be evenly divided among athletes in their respective sports.[93]

Two weeks after #WeAreUnited presented their demands to the Pac-12, the conference cancelled football and all other fall sports due to the COVID pandemic. When the season was restarted in November 2020, player support for #WeAreUnited seemed to have faded and no actions were taken by the players.

V. State Pay-for-Play Legislation

[91] "WeAreUnited." THE PLAYERS TRIBUNE. https://www.theplayerstribune.com/en-us/articles/pac-12-players-covid-19-statement-football-season (last visited August 11, 2020).
[92] *Id.*
[93] *Id.*

In September 2019, California Governor Gavin Newsom signed Senate Bill 206 (SB 206), the Fair Pay to Play Act, into law.[94] The Act, which directly challenged the NCAA's model of amateurism, was designed to allow college athletes for the first time to financially benefit from their name, image and likeness (NIL) by promoting products and companies without affecting the student's scholarship eligibility. While the NCAA, conference commissioners and college coaches voiced strong opposition to the Act,[95] California intentionally provided that the new law would not go into effect until January 1, 2023[96] in order that the NCAA might reexamine the issue. Within 10 months after California passed the Fair Pay to Play Act, however, similar legislation was introduced or considered in around 30 other states.[97] But unlike California, eleven states -- Alabama, Colorado, Florida, Georgia, Illinois, Kentucky, Mississippi, New Mexico, Ohio, Oregon, and Texas -- moved up the date to allow athletes to start accepting endorsement deals on 1 July 2021. In June 2021, the NCAA, fearing additional antitrust lawsuits if it passed new legislation related to NIL, announced that it would temporarily suspend amateurism rules related to athletes' name, image and likeness until the federal government passed uniform federal legislation. The NCAA recommended that each individual school develop and implement its own NIL policy for athletes based on state laws. As a result, beginning in July 2021, several college athletes were able to sign commercial deals valued at

[94] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206
[95] The NCAA's letter to the Governor of California can be found at: http://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206
[96] Sec. 2(h) https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206
[97] John Wolohan. "*Paving the way to Professionalism for College Athletes.*" LawinSports.com https://www.lawinsport.com/content/articles/item/paving-the-way-to-professionalism-for-college-athletes-a-review-california-s-fair-pay-for-play-act (Last viewed August 11, 2020).

over a million dollars. However, while some athletes have been able to cash in on their NIL, the market demand does not exist for most college athletes.

VI. College Sports Outside the United States

Unlike college athletics in the United States, college athletics elsewhere are largely organized on an intramural or student club basis, designed simply to offer students a recreational respite from the intellectual rigors of the classroom.

a. CANADA[98]

First, it should be noted that the NCAA, the largest organization regulating college athletics in the United States, also allows Canadian schools to apply for membership. While several schools have voiced interest in joining the NCAA, as of 2021, only one school, Simon Fraser University (SFU) in Burnaby, British Columbia, has actually joined the NCAA's Division II. Traditionally, post-secondary sport in Canada is organized in a very similar way to the United States, although it is usually not 'big business' as at the athletic Power-Five schools in the US. The typical structure is similar to NCAA Division II with a few Canadian schools (e.g., Laval, Western and Queen's) being comparable to NCAA Division I, with television contracts, ticket sales for football, hockey and basketball, and many students on scholarships.

There are two basic levels and two federations which manage post-secondary school sport in Canada, one for universities and one for colleges. The two key federations are U

[98] Special thank you to Norm O'Reilly, Director of International Institute for Sport Business & Leadership, Lang School of Business & Economics, University of Guelph for providing the above information on the Canadian college sports programs.

SPORTS (university level) and the Canadian Collegiate Athletic Association (CCAA) at the college level. Overall, university and college sports programs are both significant. Like the NCAA, they provide a feeder system for Olympic level and professional level sport. In most cases, the athletes compete at high level of performance, with professional coaches, professional support staff (sport medicine, sport technical, etc.), and scholarships. The athletes are students, who train at a high level, while at the same time balancing sport with their studies. For many universities and colleges in small Canadian towns and cities, the sport teams of those institutions are important elements of the local community and instill a sense of pride and identity.

U SPORTS is the governing body for university athletics in Canada. When it was founded as the Canadian Interuniversity Athletic Union (CIAU) in 1906, it represented only universities from the provinces of Ontario and Quebec. During the twentieth century, the organization grew considerably and became a national organization. In 2001, CIAU first rebranded itself as Canadian Interuniversity Sport (CIS) and, in 2016, as U SPORTS, resulting in a 'cooler', unified, and bilingual name. For the 2019-2020 academic year, U SPORTS offered programming to more than 10,000 student-athletes at 56 member institutions across the country in 11 sports, including swimming, wrestling, track and field, basketball, hockey, volleyball, curling, rugby, cross country, field hockey, and soccer. The champions from each region compete for annual U SPORTS national championships. The best known and largest of these are the Vanier Cup (national men's football final) and the University Cup (national men's and women's ice hockey final).

From a policy perspective, U SPORTS is very similar to the NCAA, with a focus on equity, ensuring student-athletes attain a high level of success both in academics and athletics, and recognizing student-athlete achievements (e.g., the All-Canadians Program). Scholarships are a more recent phenomenon in U SPORTS, but an area that has grown considerable with investment by both universities and donors, mostly in the high-profile sports. Notably, all U SPORTS members are public universities with (in most cases) tuitions lower than U.S. Schools. The schools are often smaller in size but still provide for a very attractive financial situation for many (and an increasing number of) student athletes. This has increased (i) the number of Canadian athletes who study at home, (ii) the number of American athletes who opt to come to Canada to compete and study, and (iii) the number of European student-athletes who come to Canada.

The **Canadian Collegiate Athletic Association** (CCAA) was founded in 1974, and the first national championship competitions were held for hockey and basketball in 1975. CCAA seeks to provide a framework within which interprovincial, national, and international college athletic competitions may be conducted, developed, and promoted. As of the 2019-2020 academic year, the CCAA represents 94 member institutions that provide services to 9,000 student-athletes, about 700 coaches, and over 150 sport administrators. CCAA has five regional conferences, and every year organizes national championship tournaments for golf, soccer, cross-country running, badminton, volleyball, basketball, and curling. CCAA also sponsors several academic- and athletic-based excellence awards.

b. United Kingdom / Europe[99]

While intramural college sports in England can be traced to 1815 when rowing clubs from two colleges at the University of Oxford, Brasenose College and Jesus College, held a boat race, intercollegiate sports is generally traced to 1829 when crew teams from the Universities of Oxford and Cambridge first raced against each other. However, while older than in the U.S., college sport in Europe in general, and the U.K. in particular, developed under a different model and occupy a very different role in the sporting ecosystem. Whereas the U.S. inter-collegiate sports system operate as the primary feeder competitions for the main elite and professional sports disciplines, that function is undertaken in Europe by the junior, youth, and academy teams of private, sports clubs including elite professional ones. Thus, recruitment to a professional team in Europe is not because of a draft system drawing primarily on college-age students, but instead occurs throughout an athlete's childhood years.

Many European professional clubs operate an academy system, within which youth talent is nurtured and developed. For example, professional soccer and basketball clubs run their own talent identification and recruitment programs that can draw not only from their immediate location, but from a worldwide network of scouts and, in cases like Manchester City Football Club, groups of clubs that are part of the same global corporation. Elite athletes in Europe, especially those playing team sports, would expect to be full-time professionals by age 18, when U.S. student-athletes would be hoping to enroll at university. Those athletes who do maintain their studies are usually either limited in the number of times they can represent their

[99] Special thank you to Mark James from Manchester Metropolitan University for providing the above information on the United Kingdom and European college sports programs.

university or are completely prohibited from engaging in university competitions. Other sports, such as rugby union, operate in a similar way, or have links with specific universities, where their athletes can play as a means of developing their skills outside of the professional environment. Thus, the norm is for private sports clubs to develop talent pathways for elite and professional sports, for both school and university-age athletes.

In recent years, an increasing number of U.K. universities have begun to offer student-athlete scholarships, ranging in value from £1,000 to £15,000 per year (U.K. tuition fees are currently capped by the government at a maximum of £9,250 per year). These scholarships are to enable students with the potential to compete in elite and/or international competitions, to train, play and study at the same time. Unlike U.S. scholarships, however, they are not an integral part of the university sporting landscape. Their much lower value, and availability demonstrates that U.K. university sport is not a revenue stream for institutions. In general, only a handful of non-paying friends and family watch university sport. Besides the institution-specific scholarships, the Talented Athlete Scholarship Scheme (TASS) is a government-backed partnership among Sport England, a quasi-non-governmental organization with a sports development remit, talented young athletes, educational institutions and 30 national governing bodies of sport. The aim of TASS is to enable young athletes with the potential to achieve elite status to follow a dual-career training program at the start of their careers, receiving both an academic and a sporting education.

With the emphasis on talent identification and development dominated by private sports clubs, the role of the universities is to provide a competitive environment in which athletes can flourish, but not as the main source of future elite athletes. Although some will be

spotted and recruited while playing university sport, the potential of many elite athletes will have been identified at a much younger age.

c. South Africa[100]

As the political negotiations to end Apartheid and introduce constitutional democracy in South Africa gained momentum, it became apparent that sports federations had to prepare for more normalized sports in a post-Apartheid environment. As far as student sport is concerned, the South African Student Sports Union (SASSU) was established in 1992 with a view to provide for a unified student sports regime in a post-Apartheid South Africa. Prior to 1992, there were six different bodies that governed student sport in South Africa. Some of these bodies were the result of racial segregation under Apartheid, while others were reflective of the tertiary education environment that consisted of universities, technicons (polytechs focused on vocational training), teachers' colleges and community colleges.

In 1993, SASSU was accepted as a member of the International University Sports Federation (FISU) and in 1996, of the Africa Zone VI Confederation of University and College Sports Associations (CUCSA). In 2001, SASSU also became a member of the Africa University Sports Federation (FASU).

In the early 2000s, there was a wholesale reorganization of sports in South Africa insofar as the National Olympic Committee and most national federations had been based on

[100] Special thank you to Steve Cornelius from University of Pretoria for providing the above information on the South African college sports programs.

transitional structures established at the time of political transition to democracy. In 2008, SASSU followed this trend. It was registered as a non-profit company and changed its name to University Sport South Africa (USSA). USSA was then recognized by the South African Sports Confederation and Olympic Committee as the official national coordinating umbrella sports structure for the regulation and organization of all university sports activities in South Africa.

Membership of USSA is open to any public or private institution of higher education that offers academic qualifications at or above level 5 of the National Qualification Framework. This effectively includes all post-high school programs, ranging from certificate courses to diploma programs, degree programs and postgraduate programs up to doctoral qualifications. Each member is entitled to two seats on the Council. One delegate must be a sports administrator or official of the member concerned and one delegate must be a bona fide student registered for an academic program at the member concerned. For each sport recognized by USSA, a subcommittee, known as a National University Sports Organization (NUSA), is established. Each NUSA is responsible for the administration of student participation and competitions in the sport concerned. Each NUSA is also affiliated with the appropriate national federation for the sport concerned.

In some sports, such as track and field athletics, swimming, gymnastics and cycling, the relevant NUSA organizes an annual national student championship. In other sports, such as tennis, badminton, soccer, rugby, softball and field hockey, the NUSA concerned organizes an annual national student tournament. In 2009 USSA contracted a service provider, known as ASEM Varsity Sports, to operate several competitive student leagues for various sports in consultation with the relevant NUSA. ASEM Varsity Sport had introduced a national university rugby

tournament the previous year and by 2019, Varsity Cup competitions were held in rugby, under 20 rugby, men's and women's 7s rugby, track and field, field hockey (alternating men's and women's competitions from one year to the other), men's and women's soccer, men's and women's basketball, netball, cricket, beach volleyball and mountain biking. The organizers of these Varsity Cup competitions secured broadcasting deals and commercial sponsorships, with the result that these competitions soon became the source of bragging rights for the leading South African universities.

d. Australia/ New Zealand[101]

Inter-varsity sport in Australia traces its history to 1870 with competitions in rowing and cricket between the University of Sydney and the University of Melbourne (both established in 1853). The rugby union club founded at the University of Sydney (in 1863) and the Australian rules club at the University of Melbourne (1859) are among the first established clubs in each of their cities. On formation, University sport in Australia was very much reflective of the British tradition, valuing an amateur ethos and the awarding of "Blues" for inter-varsity participation. A blue is an award, first started at Oxford and Cambridge Universities, and is given to athletes who compete at the highest level.

As more universities became established in Australia, intervarsity sport began to develop across several disciplines (male and female) notably track and field, tennis, and hockey. In 1919, the first national governing body for university sport in Australia was established – the Australian

[101] Special thank you to Jack Anderson from University of Melbourne for providing the above information on the Australian college sports programs.

University Sports Association. The amateur nature of intervarsity sport sat relatively comfortably within the wider Australian ecosystems. which largely remained amateur until well into the 1980s. The exceptions were Australian Rules Football, rugby league and cricket. Athletes in Australia predominately enter professional sport directly from secondary school either through elite club academies or, in the case of the AFL, through a draft system.

The peak body for university sport in Australia is now known as UniSport Australia, which seeks to promote sport as an integral part of university life at 43 member universities, collectively representing more than one million students nationwide. Unisport Australia facilitates opportunities for competitive participation in sport for students at regional, national, and international levels. More than 40 of the sports have national championships. Universities in Australia do supply some modest funding and benefits to elite athletes. For example, the University of Melbourne's elite athlete program supplies athletes with benefits such as: up to $4,000 to assist with competition and travel costs, professional strength and conditioning coaching and programming, and subsidies for inter-varsity representative sporting events.

e. Mexico

College sport in Mexico, as in Europe, does not have an association regulating it throughout the country and is organized more for the students' recreation and less as a feeder system to the professional leagues. There are, however, two particularly interested aspects about college athletics in Mexico. First, like Canadian schools, in 2018 the NCAA voted to allow Mexico schools to apply for membership to the NCAA's Division II. As of 2020, no Mexican schools have

applied to join. Although Cetys University in Baja, Mexico has expressed interest in joining the NCAA, as of 2021 no Mexican schools have applied for membership.

Second, college athletics in Mexico have long been affiliated with professional clubs. For example, Club Universidad Nacional, A.C., was originally an amateur club of college students from the National Autonomous University of Mexico (U.N.A.M.) before it started competing in the professional Mexican league. Insofar as the club is no longer made up of college athletes, U.N.A.M. ‘s university designation seem to be purely informal. The only real relationship between the club and the university involves the club’s rental of a university-owned stadium.

VII. Conclusion

Organized college sports in the United States stared out as in other countries simply as an intramural opportunity for students to take a break from their studies and compete against other students. Today, college students in the U.S. still overwhelmingly play club or intramural sports - over 11 million in 2020.[102] In addition the vast majority of the 460,000 students who play on college teams that compete for NCAA championships do so in the lower Divisions (II and III) of the NCAA.

However, teams in what is now termed the Power-Five Conferences at the elite levels of college sports, assumed much greater significance in universities and colleges. As crowds of fans, money, and media attention began to grow around big-time college football and

[102] Tom Farrey, *How Loss of Varsity Teams Can Become a Win*, N.Y. TIMES, October 14, 2020, Sec. B. at 8.

basketball, college presidents embraced a more professionalized model of college sports by building bigger and more lavash stadiums and facilities and sought out large donations and professional quality coaches. Today, college sports at the Power-Five universities in the United States resemble professional sports by contrast to the recreational sports played by colleges elsewhere. College football and basketball generate billions of dollars a year, are broadcast over their own television networks. The four team “College Football Playoff National Championship” games in football and “March Madness” championship in basketball are the largest sports tournaments in the country. While college sports is big business in the United States, the athletes are still to be considered amateurs. However, as we have seen over the last 10 years, colleges athletes are now beginning to fight for a bigger piece of the revenue being generated by college sports. What college sports will look like in the next 20 years is currently being negotiated and adjudicated.