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The NCAA's rise to absolute power and confronting its distortion of amateurism

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The NCAA's Rise to Absolute Power and Confronting its Distortion of Amateurism

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by Terek John Kirsch

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Preface

The creation of this thesis began with a conglomeration of swirling uncertainty as I struggled to pick a topic I felt would completely fulfil my aspirations. The history major is in essence so broad I could have written about a million different topics – I had so many options available to me that it made it impossible to pick just one. However, in the summer of 2021, a personal interest intertwined with a future goal when I overheard the news broadcasting a piece on *NCAA v. Alston*, a case that would soon challenge the compensation restrictions that the NCAA had put on collegiate athletes for the last century.

The personal interest for myself, as you may have guessed, was collegiate sports. I have loved college athletics for years now – there's something about the deep connection to a team that can drive one crazy yet keep them coming back for more. This semester, in the spring of 2022, I attended the James Madison University men's basketball game versus the University of Virginia. JMU, although a good program, had never beaten UVA in the seventy years of their program history. In a 52-49 win, in front of a sold-out crowd, James Madison sent the flagship state school packing. From my seat in the student section, I could feel the vibrant energy with every single shot, pass, and steal. At the end of the game, the students stormed the court, and the energy in the stadium was unlike anything I had felt before in my life. It is impossible to get that feeling anywhere else – American intercollegiate sports are a different breed of entertainment.

This capstone also directly services my desire for a legal education after graduation from JMU. I have spent a lot of time thinking about how I can pursue meaning in my life, and every path points to law school. It is my belief that the more responsibility one takes on, the more fulfilling and virtuous a life one will have. Pursuit of a law degree is one of the greatest

privileges, responsibilities, and honors possible. Two entire chapters of this work are dedicated specifically to my analysis of the released Supreme Court case, its progression through the levels of our judicial system, the decision, and my anticipated ramifications. Throughout this venture, I have cherished every opportunity to educate myself on antitrust law and specific intricacies like the rule of reason. It is my hope that dedicating the last year of my life to this work has exposed me to the type of learning I will be doing in law school, as well as provided a foot in the door towards a legal education.

When choosing this topic, I was absolutely set on making a meaningful impact in the historiography of whatever subject I picked. This topic could not have been timelier. As I was writing, news would come out about the NCAA losing its grip on college athletics, new multimillion dollar NIL deals were being signed, and the sheer transformation of the collegiate athletic scene was being heavily discussed in the media. All of this information happening in real time created a motivation and passion within that continually fueled my work on this project. The last few chapters quite literally wrote themselves. Instead of going out and researching, the research came to me straight off the daily news in such high quantity that figuring out what was important enough to include in my narrative was much more difficult than actually writing the paper. Because of the real-time aspect of this scholarly work, I can confidently say that my project is one of the first to explore this extremely interesting and grandiose piece of history unfolding in front of us. That is what I set out to do, and it is something I am extremely proud of.

Although the last two chapters are predominately based on primary sources, there are cornerstone scholars that paved the way for this research who I am indebted to for their tenacity and extensive research and writing. Firstly, to Jack Falla, whose book *NCAA: The Voice of College Sports* documents a comprehensive history of the NCAA from 1906 through 1981.

Arguing that the NCAA progressively dominated the collegiate athletic space the longer it was in power, Falla's work is a foundational piece for anyone researching the NCAA, and its specific detailing of the early days makes it indispensable to this topic. To Ronald Smith, who wrote both *Pay for Play: A History of Big-Time College Athletic Reform*, as well as *Play-By-Play: Radio, Television, and Big-Time College Sport*, I must pay great respect. In *Pay for Play*, Smith not only gives a history of athletic reform but also looks at a sociological perspective of athletes, coaches, boosters, and the legislature – arguing that they all had a distinctive roll to play in the growth of the landscape. In *Play-By-Play*, Smith looks at specifically how colleges and universities have harnessed the media for their own financial and aesthetical gain, giving a unique perspective as the radio is generally thought to be an NCAA issue. To John Watterson, whose extensive coverage of college football in *College Football: History, Spectacle, Controversy* shows how money turned the game from a playground sport to a billion-dollar enterprise, thank you for making such a complicated game seem so simple. Finally, to the team at *Harvard Law Review*, who helped a novice attempting to read a complicated Supreme Court case understand the implications and much of the complicated language within the case through "Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston," I thank you for your concise and clarifying work.

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Acknowledgements

First and foremost, I must thank my capstone project advisor Dr. Raymond Hyser. The first time I experienced an epiphany that history was the academic path that would best lead to self-actualizing my full potential was in my junior year of high school. The second time it happened, I was sitting in Dr. Hyser's seminar. The support he has shown me throughout this project has been absolutely transformative. I attribute much of my improved writing over my college experience to Dr. Hyser, but this capstone was a different beast. Every time I met with him, he could not have been more enthusiastic about my topic – he was kind, understanding, and full of new ideas. I count myself lucky to have had such a supportive figure throughout this process.

To my readers, Dr. Kevin Hardwick and Dr. Laura Henigman, thank you for your thorough analytical approach and encouragement. When Dr. Hardwick first read the entire work from start to finish, before he offered criticism, the first line in his email read "This is excellent work. Pause there to let that sink in – I don't want anything else I write to detract from what I see as a terrific achievement." Of course, he had improvements waiting below the subject line, but this is just one example of the powerful support and encouragement I received from this team. Likewise, I knew it would be important to bring someone outside of the history department in on this project, and Dr. Henigman was the perfect choice. Her expertise in American studies allowed me to approach my topic from a different lens, and who better to review syntax and grammar than my favorite English professor! I appreciate you both so much.

To the history department at JMU, including but not limited to Dr. Christian Davis, Dr. Yongguang Hu, Dr. Steve Guerrier, Dr. Owusu-Ansah, and professor Jeannie Harding, I have

only great things to say about every single one of you. Thank you for molding my education here at JMU, I believe the history faculty is one of the premier strengths of this institution.

When I came to college, I was astounded to learn that many of my peers at JMU felt as if their parents had pushed them towards a certain career path, or had designated certain majors as "off limits." It wasn't until then that I realized how lucky I was to have my parents, Mike and Merril Kirsch, who sent me off to school with full trust that I would pursue what I found to be the most fulfilling without any restraints. Mom, your unconditional love enables me to shoot for the stars. Dad, if I can grow up to be half of the person you are, I will be doing better than most. I hope I have made you both proud.

Abstract

This paper examines the progression of the intercollegiate athletic space, from a small regatta in 1852 to the massive athletic environment we know now in contemporary society. It finds the National Collegiate Athletic Association snared in a trap of circular logic that has been closing in on it since its conception, as it has defined collegiate athletes as amateurs and then proceeded to argue for amateur status for those athletes because of the definition that it wrote. This paper concludes in its final two chapters, after analyzing the recent Supreme Court case *NCAA v. Alston,* and the Name, Image, and Likeness legalization that followed, that the NCAA has recently taken a seismic blow to its authoritarian regime over collegiate athletics. It also fills an understudied yet extremely important gap in the historiography, due to its analysis of modern NIL deals and the transfer portal – two crucial pieces of contemporary collegiate athletics that have not yet come under academic study because they are so recent. This study finds that the intercollegiate athletic landscape is likely changed forever, and furthermore, that this change is for the better.

Introduction

Collegiate athletics have represented the pinnacle of American entertainment since their conception. Millions of people plan their livelihoods around flights, road trips, and home watch parties. It is safe to say that intercollegiate athletic events like March Madness and the NCAA football championship tournament have become indispensable to American culture.

As the space has become increasingly saturated because of the recognition of large amounts of money, donors, and brands flowing into collegiate athletics, regulations have been necessary to facilitate the growth and competitiveness of the sports. Those regulations have come in the form of the National Collegiate Athletic Association (NCAA). The NCAA started out in the early 20th century as a small committee with no real authority over its member institutions, and grew to a cartel with over 1,000 member institutions and just under half a million athletes in 2022. Although dealing with the fledgling problems at its inception, such as its lack of power, its lack of money, and its lack of widespread support, the NCAA knew from the very beginning what it wanted to be and the regulations it found most important. One of its most vigilant stances – defining its collegiate sports system on a concept of amateurism, which deprived student-athletes of the ability to be compensated for their labor, began in its infancy stage and continued for the next century.

As the 20th century introduced radio and huge structural stadiums that increased viewership around the field, the court, and from afar, the intercollegiate sports landscape exponentially scaled out of control. Meanwhile, the NCAA initiated its seizure of power over the athletic space. Until World War II, the NCAA had relatively little control over the teams it proposed to regulate. Beginning with the Sanity Code in 1946, the NCAA established ground

rules and a method to remove schools from their cartel if a majority of the schools chose to do so. It manipulated television blackouts in order to control which teams were allowed to go on television and when, and it crushed opponents from institutions like the University of Pennsylvania into submission. In doing so, it almost certainly violated the Sherman Antitrust Act, and it morphed its original definition of amateurism so that schools could offer athletes athletic scholarships.

The NCAA did not come to absolute power without any bruises or scratches. It faced court cases in the 1960's where the judicial system declared athletes employees of the colleges that they played for, but it quickly retooled and mutated its bylaws with the help of legal professionals to ensure that its concept of amateurism was undeniably separated from any employment contract. For a foundational principle, its concept of amateurism underwent much metamorphosis over the years. In the 1970's, the NCAA split its member institutions into three separate divisions, allowing Division I athletes to receive athletic scholarships, but restricting Division III athletes from having any – essentially conveying that some athletes were amateurs and others were not. Although DI athletes could receive scholarships, their ability to benefit monetarily was capped there. Dual athletes like Olympian Jeremy Bloom were forced to pick between playing collegiate sports, or making money off the field through branding and other sporting activities.

The 21st century, however, brought monumental change and opportunity to the athletic space by recognizing the unlimited power that the NCAA had crafted for itself with little to no ramifications. *NCAA v. Alston,* heard in the Supreme Court in the summer of 2021, declared the NCAA's restriction of education-related benefits unconstitutional. The Supreme Court justices essentially used the case as a way to ridicule the NCAA and elicit how powerful – and possibly

unconstitutional – it had become, declaring massive changes in education-related compensation regulation and foreshadowing non-education-related compensation that schools may soon be able to offer athletes. The progression of *NCAA v. Alston* forced the NCAA to adopt a new Name, Image, and Likeness policy that same summer. Now, for the first time ever, athletes could legally benefit from compensation related to branding themselves and their personal images. Over half-a-year into the post *NCAA v. Alston* world, America has already seen athletes make millions of dollars in such a short amount of time. If the tea leaves continue to spell out compensation for collegiate athletes, this space will only become brighter for them – and it seems to be getting dimmer for the NCAA.

Chapter 1: The NCAA

At precisely three pm on a gorgeous summer day in the northeast United States during the year 1852, a tremendously important event in the cultural, economic, and very foundation of the country was about to commence. A regatta between the two exemplary collegiate powers in the nation, Harvard and Yale, had drawn thousands of spectators to Lake Winnipesaukee in New Hampshire.[1] Up to this point, intracollegiate athletics had dominated the space, with most colleges competing within and against themselves for various prizes. The format would forever be changed, however, by a man named James Elkins – an aspirational businessman who happened to be the superintendent of the Boston, Concord, Montreal Railroad. Elkins had purchased land around the lake, and he wanted to turn it into a tourist hotspot. At one point, the savvy real estate executive was quoted saying to a colleague "If you will get up a regatta on the Lake between Yale and Harvard, I will pay all the bills." Elkins offered free excursions to both teams on his railroad line, and he made no secret of the event – advertising it widely and promoting his brand.[2]

The three boats from Yale – the S*hawmut*, the *Undine*, and the *Atlanta* – were matched up against Harvard's eight oared *Oneida.* When it was time for the rowers to perform, the Harvard men clearly outraced the three Yale vessels, beating the second closest finisher, the *Shawmut,* by at least four lengths. Historians who examined the student records at both Yale and Harvard in 1852 later determined that multiple members of each rowing team were not students at the schools, and were probably professional rowing mercenaries hired by the team in an effort to prevent their employer from being embarrassed by their fiercest rival. Historian Murray

[1] A regatta is an event made up of a series of boat races, in this sense rowing.
[2] James M. Whiton, "The First Harvard-Yale Regatta (1852)," *Outlook* 68, no. 5 (1901): 286.

Sperber, when commenting on the event, pointed out "thus, in the very first college sports contest in American history, even before the starting gun went off or an oar hit the water, two elements were at play: the event was totally commercial, and the participants were cheating."[3]

These two issues would be the first of many, as a fledgling intercollegiate athletic system began to propagate itself across the country. The first college football game played in 1869, a mere seventeen years after the first regatta, was contested between Rutgers and Princeton. This event was characterized by bizarre rules declaring that "goals must be eight paces," "no throwing or running with the ball," and "no holding the ball." The game finished in favor of Rutgers over Princeton with "The Scarlet Knights" winning 6-4. The poorly put together wooden fence surrounding the field did not last through the game, as two players fighting for the ball crashed into it with full force, taking surrounding fans to the ground with them. The captain of the Princeton team, William J. Leggett, went on to be a distinguished clergyman in the local church, and his counterpart from Rutgers William S. Gummere would go on to be the chief justice of the supreme court in New Jersey. The first college football game was astonishingly violent, and almost barbaric to an extent. The conditions were completely foreign to what we now know in the 21st century, and the players were athletes second and scholars first.[4]

These problems of barbarism would only continue to grow. The popularity of intercollegiate athletics was skyrocketing, and it ignited and compounded exponential commercialization and along with it cheating. By the end of the 19th century, the President of

[3] Shaun R. Harper, and Jamel K. Donnor, eds., *Scandals in College Sports* (New York: Routledge, 2017), 1-9; Murray Sperber, "How Big-Time Athletic Departments Run Interference for College inc," in Donald G. Stein, *Buying in or Selling Out? the Commercialization of the American Research University* (New Brunswick, NJ: Rutgers University Press, 2004), 17-18.

[4] "Football Back in 1869. Rutgers beat Princeton In First Intercollegiate Match," *New York Times*, 26 November 1916; "Rutgers Observes 60th Anniversary Today of First College Football Game Ever Played," *New York Times*, 6 November 1929; Neil Amdur, "Son of First Rutgers Captain Recalls Stories of 1869 Game with Princeton," *New York Times*, 27 September 1969.

Harvard University, Charles William Eliot, was frightened about the direction things were going again – saying "lofty gate receipts from college athletics had turned amateur contests into major commercial spectacles." Similarly, the president of MIT looked upon the matter with satire – announcing that "if the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics." In terms of structure, small conferences were created among schools at both the faculty and the student levels to regulate the sports and collaborate with other schools for the creation of a schedule. Regardless, this process was extremely decentralized and unorganized. Under regulated and becoming feverishly popular, intercollegiate athletics seemed a recipe for disaster.[5]

Collegiate football, now the most popular sport in the space – even sometimes rivalling professional baseball – would be the catalyst for change in terms of regulating the college space. Football in the early 20th century, described by historian Christopher Klein as featuring twenty-two men on a field "locking arms in mass formations and using their helmetless heads as battering rams," was dangerous and sometimes fatal. Just in the year 1904, per *The Chicago Tribune,* eighteen young men perished, and horrific vertebrae injuries and broken ribs were all but uncommon. Little to no equipment or safety gear was used, and public health officials and much of the media called for an immediate end to the deadly sport. A year later in 1905, there were nineteen deaths, and the injuries tallied up to 137. Important players were being purposefully targeted and intentionally injured, and entire teams were fed up with their friends, family, and teammates being brutally harmed.[6]

[5] Christopher Klein, "How Teddy Roosevelt Saved Football," *History,* https://www.history.com/news/how-teddy-roosevelt-saved-football.
[6] Klein.

There was one man in the United States who had a vested interest in the collegiate football story. Finding himself in the most powerful position on the planet, President Theodore Roosevelt was in favor of the violent sport. In 1903, he said "I believe in rough games and in rough, manly sports. I do not feel any particular sympathy for the person who gets battered about a good deal so long as it is not fatal." Parallel with Leggett and Gummere, mentioned earlier, Roosevelt believed the raw passion behind a game of football was character building for a young man. It was not uncommon for the most prominent men in American society, including almost all of his fellow Rough Riders, to be former football stars. Before his presidency, while working in the New York City police force, Roosevelt helped resuscitate the annual football game between Harvard and Yale after a two-year hiatus due to an extremely violent game in 1894. Roosevelt himself, who struggled with vision problems for a great part of his life, did not make the Harvard varsity squad when he was in school. Regardless, he was originally a strong supporter of America's fastest up and coming game.[7]

While he continued to support the savage violence of the game, the deadliness of the sport was not something that he could take lightly. This was partially, and probably, due to the fact that Teddy had a son attending his freshman year at Harvard, and playing football. Once he had newfound paternal motivation, the playing ground changed. Following Stanford's lead, with other prominent universities such as California, Columbia, Northwestern, and Duke dropping their football programs – and Harvard threatening to do so – Roosevelt could not stand by and watch. When the Harvard freshmen played Yale, Teddy's son was brutally tackled and targeted by the other team's players. His nose was broken deliberately, according to some accounts of the

[7] Klein.

game. If his alma mater dropped football, it would be a kick in Roosevelt's face, and his son was receiving punishment for the lack of presidential action.[8]

Roosevelt decided to move. Calling for a White House conference, he invited many of the university presidents and rule makers from the major colleges to Washington with the goal of reforming the sport. This meeting, conducted around dinner at the White House, consisted of the head of the alumni committee and the head football coach from Harvard, Yale, and Princeton. Along with these six, Roosevelt invited his Secretary of State Elihu Root – who had also graduated from Yale – along as a personal companion to the meeting. Roosevelt cited unsportsmanlike conduct that had been reported from all three colleges – faking injuries, intentional injuries, cheating, and breaking of the rules. He requested the three executives from each school to write a pledge that they would carry out "in letter and spirit the rules of play." On their separate train rides home, they completed his request, and actually published their letter of intent to the world.[9]

Unfortunately, this initial conference did little to combat the rising death count. What it did accomplish, however, was establishing a working relationship between Roosevelt in the president's office and the major collegiate football powers. Today, the president of the United States would have little to do with intricate athletic matters such as this one. In the early 20th century, however, this space was a big deal and required executive attention. When Chancellor Henry MacCracken from New York University decided to take matters into his own hands and form a rules committee, Roosevelt sent White House representatives to meet with this formidable group that consisted of many of the major powers, to offer his support and cooperation. This

[8] Klein.
[9] John S. Watterson, *College Football: History, Spectacle, Controversy* (Baltimore: The Johns Hopkins University Press, 2000), 69-71.

concerted effort on behalf of both parties led to the formation of the Intercollegiate Athletic Association, consisting of sixty-two original members that would seek to regulate various intercollegiate sports to ensure the governance in the athletic space. A few years later, in 1910, this body of rule makers was renamed the National Collegiate Athletic Association (NCAA).[10]

After the new committee resuscitated collegiate football from near death, it began to lay the groundwork for its authority. In 1906 the greatest problem facing the NCAA was related to eligibility. At this point in its infancy stage, it seemed to know the kinds of regulations that should be put forward, but it was going to have a tough time actually enforcing them. The rule makers were concise in their constitution regarding intercollegiate athletic eligibility:

> No student shall represent a college or university in any intercollegiate game or contest who is not taking a full schedule of work . . . . who has at any time received, either directly or indirectly, money, or any other consideration . . . . who has competed for any prize against a professional . . . . who has participated in intercollegiate games or contests during four previous years.[11]

This set of rules was the first stab at the NCAA's concept of amateurism – a founding principle with the central idea that collegiate athletes should not profit from their labor because they are not professionals. Furthermore, each individual competitor at different schools was required to fill out an information card for their administration, answering extremely specific questions designed to elicit whether or not the athlete was taking money to play for the school. After signing and dating their card, it was used as a pledge by the athlete affirming that they would not break any of the NCAA regulations.[12]

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[10] Klein.
[11] NCAA Eligibility Rules Quoted in Jack Falla, *NCAA: The Voice of College Sports: A Diamond Anniversary History* (Mission, KS: National Collegiate Athletic Association, 1981), 25.
[12] Falla, 25.

In the early 1900's, college football was not the only sport troubling the NCAA. Baseball, enormously popular throughout the United States, had created and maintained a professional league that drew millions of spectators and offered salaries that no other sport in the country could touch due to the revenue it generated. Since baseball was a summer sport, it was desirable for young athletes who could complete their studies in the fall and spring and then compete for compensation on a professional team during the summer months. This proved to be very controversial and the first big test for the committee. Originally, the committee ruled that the amateurism it had intended to foster and the paying of summer baseball athletes were mutually exclusive. This became a problem, however, for schools in enormous baseball areas like New England, most of them saying that "they do not have rules prohibiting summer baseball and therefore do not feel that they would be welcome in the association."[13]

Many of the leaders of the NCAA were terrified that if they let these "professional" athletes compete in the collegiate season, they would be undermining the integrity of the sport, and the very foundations of their identity. They believed that if the two were allowed to co-exist, then many colleges would start accepting young men whose primary goal was to play baseball rather than pursue their education. In contrast, there were a number of leaders in opposition to any restriction on amateurism in summer league baseball. This side of the camp argued that if the athletes were receiving compensation in the summer to pay their tuition bills, then it was hypocritical of the NCAA to put a stop to their participation. Furthermore, they were worried that if the ability to make money was capped, the best athletes would not compete in college and the sport would become dry and unwatchable. This meant, for the foreseeable future, the NCAA

[13] Falla, 26-28.

would be deadlocked in this argument and inevitably left the summer baseball question up to the various schools and districts.[14]

Basketball, a relatively much newer sport to the time period, was also a problem for the NCAA – albeit a smaller one. The administration issues here proved difficult because the game did not have a central set of uniform rules that could be followed by every set of schools in the country. Although this was still a big issue for the NCAA to tackle, it was strictly a rules issue – there was no "summer league basketball" that divided the committee over amateurism rights. Originally designed by Dr. James Naismith because his students became frustrated with attempting to play soccer, lacrosse, and rugby indoors (leading to many broken buildings), basketball became the staple winter sport and it was quickly adopted by many schools. The NCAA moved quickly to establish several rules – with the primary one being that colleges would only be allowed to play basketball against other collegiate teams. It was popular in the time for a college team to play an independent club team, but often this exposed the college teams for their very small understanding of the rules. In order to further preserve the amateur status of their growing basketball league, the NCAA wanted to do whatever possible to keep the college games intercollegiate. Furthermore, the NCAA had to address the small problem of officiating. Even today, it is extremely difficult to officiate a game of basketball. After a century of playing the game, many calls are still controversial. In the early 20th century, the NCAA established a referee rating system that would be given to each player captain or coach after the games so that they could provide feedback on the officiating. The NCAA decided to add the position of umpire to watch the players without the ball and ensure that no "off-ball violence" was occurring, and it

[14] Scott A. McQuilkin, "Summer Baseball and the NCAA: The Second 'Vexation'," *Journal of Sport History* 25, no. 1 (1998): 18-42.

instituted a five foul limit before an offending player was disqualified for the remainder the game. Basketball, unlike its counterpart baseball, was proving to be an early success for the NCAA.[15]

By 1912, membership in the NCAA had increased to 97 colleges, with these schools representing a combined student body of over 120,000. Already, the NCAA was moving towards its goal of being truly national, monopolizing the athletic spirit and making it difficult to play college sports without joining the league. In 1913, LeBaron R. Briggs was elected as the new president of the NCAA. Although not a particularly important figure in his own right but as an academic dean at Harvard University nonetheless, his election was a huge success for the NCAA. Sitting in the audience at the commemoration was another dean at Princeton, and the leadership at Yale would be soon to follow in the coming years. Thus, the NCAA had gained support from three influential academic institutions in college sports, and it was ready to enter a decade of unprecedented growth. Between 1911 and 1918, the NCAA added committees on soccer, swimming, wrestling, and volleyball to their collection of football, basketball, baseball and track and field. It took time to publish the rule books under joint copyright of the NCAA and the American Sports Publishing Company, allowing them to be better updated and more widespread. American football rules were now completely under the jurisdiction of the NCAA, and it created a "code of ethics" that was by no means a rulebook, but a "plea for high standards of sportsmanship issued by men who love the game."[16]

Football in particular was becoming a unifying force not only for Americans, but Native American Indians as well. The Carlisle Indian Industrial School, formed by Richard Pratt, was founded as a boarding school for Native Americans to "Kill the Indian, save the man." Although

[15] Falla, 28-40.
[16] Falla, 41-55.

with deplorable cultural extermination and Americanization as its goal, the Carlisle school almost immediately became a powerful football force akin to the likes of Harvard and Yale. Pratt wanted to alter popular perception of Native Americans, and he thought playing football could be a path to doing so. As historian Sally Jenkins puts it, "The popular term for a good football player in the industrially obsessed 1890s was 'material.' The Carlisle players struck McCormick (their coach) as 'excellent material.'" At the beginning of the 20th century, the Carlisle Indians were the most creative, shiftiest team in the nation. They coached the first spiral throw, were the first to hide the football, and employed screen passes and creative schemes to confuse opposing teams. The fact that even marginalized groups were getting involved in intercollegiate sports illustrated they were a unifying force for almost every group of people on the continent, and that their outlandish popularity was not subsiding any time soon.[17]

When the United States declared war on Germany in April 1917, the intercollegiate world was shocked. Everywhere across the country, able bodied young men joined the military and were shipped off to Europe. Varsity squads were absolutely decimated with the biggest, strongest, and most athletic people putting down the ball or bat and picking up arms. From the time the war started until its completion in 1919, the intercollegiate athletics programs were essentially non-existent as the country dealt with the war. Coming out of the war, however, the space saw an athletic revival like no other. Athletes stormed back to campuses with military passion in their veins, looking to reignite the fire in their sports that had thrilled them for the longest time before the war. The NCAA, by this time, had become much more widely respected and included most of the biggest schools in the nation. It was, however, still very much all bark with no bite. In 1919, a spokesperson said the NCAA "does not attempt to govern, but

[17] Sally Jenkins, *The Real All Americans* (New York: Anchor, 2007), 206.

accomplishes its purposes by educational means, leaving to the affiliated local conferences the responsibilities and initiative in matters of direct control." It was evident its jurisdiction was growing, and by 1919 there were 170 universities who called themselves members in the NCAA – representing a student body population of about 400,000. However, regardless of the progress that had been made so far, its struggle with the two biggest problems that plagued it so far, amateurism and eligibility, was far from over.[18]

The 1920's American environment was unlike anything that had preceded it. Along with a cultural boom of jazz, automobiles, movies, prohibition, and a booming stock market, college sports – and football in particular – were taking off. Historian Frederick Allen wrote that "Teams which represented supposed institutions of learning went barnstorming for weeks at a time, imbibing what academic instruction they might on the sleeping car between the Yankee Stadium and Chicago or between Texas and the Tournament of Roses at Pasadena." It seems he was not particularly impressed. Others, however, were not intimidated by the growing importance in the roll of athletic departments. Many administration members were for the increased interest in sports because of their ability to bind a college community together and promote a sense of togetherness and patriotism for their respective schools. The very first NCAA championships were held in this decade, with track and field and swimming bringing the competitive spirit that finally allowed for an ultimate winner that could unquestionably take the bragging rights home with them.[19]

Additionally, two more important factors in the period facilitated unprecedented growth: the building of massive stadiums and the radio broadcasting of the games. This growth was

[18] Falla, 55-57.
[19] Joseph N. Crowley, David Pickle, and Rich Clarkson, *In the Arena: the NCAA's First Century* (Indianapolis, IN: National Collegiate Athletic Association, 2006), 64.

something the NCAA embraced and accepted. As college sports became generally older, and as more fans flocked to see the games, the combination of current students, alumni, and fans made it logical for the construction of giant stadiums that could support that level of viewership. The Midwest and Western part of the country were thrilled to build new stadiums – naming them after sentimental World War I figures to gain public support and funding. Ohio State was the first to erect a 60,000-seat stadium, one that could even expand to 75,000 for when they played their closest rival Michigan. The Midwest rallied behind them, and soon Illinois, Minnesota, Chicago, Northwestern, Michigan, and Iowa built stadiums that were a similar size. California and Stanford led the West, with Stanford building their new stadium in less than five months. By the year 1930, there were seventy-four enormous stadiums across the United States, as college football continued to enthrall the nation. For the fans who were unable to physically attend the games, the radio and broadcasting industry brought the football game into the home. A statistic from the NCAA notes that "overall radio sales grew at a staggering rate during the decade, from $60 million in 1922 to more than $842.5 million in 1929, an increase of 1,300 percent." In October 1922, the very first college football game aired on radio, and the growth of broadcasts and listeners fed the captivating public events. Newspapers, too, began moving the stories of football games into a higher priority. The public sphere had gone all in on football.[20]

In 1926, as the world reacted to the insane growth of college athletics, the Carnegie Foundation for the Advancement of Teaching agreed to fund and conduct a study, visiting more than one hundred universities around the nation and conducting interviews with faculty, alumni, athletes, coaches, and others. This report, consisting of a thorough and quite encompassing 350 pages, blasted the colleges and the college presidents specifically for their hiring of professional

[20] Ronald A. Smith, *Pay For Play: A History of Big-Time College Athletic Reform* (Chicago: University of Illinois Press, 2010), 63-65; Crowley, 65-66.

and extremely competitive coaches, their "illegal" recruitment and coercive methods towards young athletes, and condemned the NCAA for letting amateurism get out of hand. The president of the Carnegie Foundation, Henry Pritchett, wrote:

> The paid coach, the gate receipts, the special training tables, the costly sweaters and extensive journeys in special pullman cars, the recruiting from the high school, the demoralizing publicity showered on the players, the devotion of an undue proportion of time to training, the devices for putting a desirable athlete, but a weak scholar, across the hurdles of the examinations – these ought to stop.[21]

The committee was upset with the NCAA because it neglected to control the lucrative contracts that came along with the commercialization. Coaches were now routinely making level with the highest professor salary at the college, evidenced by Stanford's coach Glenn "Pop" Warner making $7,500 (comparable with the top-ranking faculty), with an additional $2,500 incentive if his team made it to the Pasadena Rose Bowl – which would then very clearly make him the highest paid faculty member. Another to note – Knute Rockne – was so highly valued in the coaching world that he signed a ten-year, $100,000 contract at Notre Dame. Even after tying himself down, Iowa, USC, and Columbia pursued him to coach their football teams. While the investigators condemned the professional coaching contracts, they also could not wrap their heads around the concept of amateurism. With the exception of Virginia, which is up for debate by historians because of undisclosed information, every school in the report was subsidizing athletes in one way or another. In the eyes of the committee that wrote this report, the NCAA had failed to control the amateurism concept that it held in such high regard, often permitting

[21] Smith, 65-70.

individual schools to balance the value of their integrity and the value of winning intercollegiate competitions themselves.[22]

In 1935, the NCAA began to make foundational moves to finally take back some power in the intercollegiate space. The committee issued a survey to its members with a seven-part code of amateurism, to which more than half of the schools that were registered in the NCAA responded. While the majority of the schools replied with favorable reviews, and a large portion of that group agreeing to promote and enforce this code, there were many schools that pointed out they had a problem with at least one of the seven points that the committee had laid out. In most cases, the buck stopped with the collegiate president – as University of Pennsylvania President Thomas Gates said in 1931, "An institution has today the kind of athletic system … its president wants it to have or permits it to have. It is all very well to blame the abuses upon the public or the alumni or the emphasis given in the newspapers. But in the last analysis, the president is responsible."[23]

Most of the schools had a problem with the accountability of the various college presidents to enforce the amateurism rules. The collective sentiment addressed the almost impossible task to monitor the seduction of high school athletes to different collegiate schools – offering money, benefits, women, and other incentives. The NCAA still possessed no kind of "police power." College presidents were immune from accountability, and their value systems determined how much and how many scholarships would be offered to athletes. This corruption was prevalent, as writer Paul Gallico observed in 1937: "If we have any conception of the real meaning of the word 'amateur,' we never let it disturb us. We ask only one thing of an amateur and that is that he doesn't let us catch him taking the dough." The association sent out a letter to

[22] Smith, 60-70.
[23] Crowley, 68.

all of the college presidents in 1940 asking for adherence to the seven-point amateur code, and the response was overwhelmingly positive. A closer look, however, showed that little had changed. Executive members of the NCAA tried to rationalize the issue involved an interpretation of the amateur code, or that the conditions at each school were completely different, which meant it was hard to standardize expectations. In reality, the college presidents took advantage of the NCAA's lack of enforcement power. It was blatantly clear that until some sort of power was gained by the committee to actually punish and reprimand schools that failed to comply with its rules, a thirty-year history of being unheeded would continue.[24]

When the United States entered the Second World War in December 1941, the national attention switched from college athletics towards the enemies abroad. Amateurism was a miniscule issue in comparison to the threat of Nazi Germany and the Japanese. Much like the first World War, the military took all of the strongest, biggest, most capable young men from college campuses and sent them abroad. On a return from the war, however, the massive GI Bill funded thousands of veterans to attend college. Athletes were back, more people were attending college than ever, and more people were having their college paid for by the US government than ever before. These scholarships reminded the public of the lurking amateurism problem that had plagued the athletic scene since its conception, and the NCAA would soon make moves to finally gain some enforcement power over the colleges in its ranks.[25]

[24] Crawley, 69-70.
[25] Crawley, 71.

Chapter 2: The Sanity Code, Television, and Penn's Revolt

The decade following World War II was fundamental in the causal development of the NCAA's growth in power. Beginning with the introduction of a document called the Sanity Code, which was its first attempt to establish some sort of control over its member-institutions, and ending the decade with a complete and utter stare down and defeat of one of college football's primary big guns, Pennsylvania, this period can be viewed as the take-off point for the NCAA. With the environmental influences of an athletics craze after the war, as well as a newly developing television technology that was taking the country by storm, the NCAA finally harnessed the reigns and began to morph into a real powerhouse.

Calling a conference that met in Chicago in 1946, delegates flocked to the city in mid-July to begin writing a draft of what they called the "principles for the Conduct of Intercollegiate Athletics." This document would eventually become known as the "Sanity Code" – fittingly named in order to return sanity to the intercollegiate battlegrounds after it had quite apparently become its own, uncontrollable monster in the last fifty years. The principles in this document were not quite reformed and completed when they were released, with the conference delegates deciding that they would release their points as a "questionnaire" to each member of the NCAA to decipher what members viewed as acceptable conduct and regulation, and what they might oppose. As historian Jack Falla succinctly puts it: "the principles concern adherence to the definition of amateurism, the holding of student-athletes to the same 'sound academic standards' as those of the student body, and the awarding of financial aid 'on the basis of qualifications of which athletic ability is not one'." The Sanity Code also questioned how the representative

collegiate members felt about the soliciting of high school athletes with massive financial aid or other big competing incentives.[26]

This Sanity Code, however, was different from all of the tentative, weak, and incomplete NCAA legislation that had preceded it. When the responses from the NCAA members came back in a positive light, with very strong affirmation from most of the members, the committee almost immediately adopted it into the official constitution, editing and revising it with miniscule changes before adding it, and requiring its members to adhere to the finalized code. Just as important as the Sanity Code contents itself, the ideological cooperation from the collegiate members of the NCAA meant they were finally showing care for a collaborative effort. The NCAA had quadrupled its dues to $100 from each larger school, and also raised its prices for the smaller schools. Its influence and power seemed to be growing, as it accumulated more money and authority. For the first time, the various presidents, coaches, and administrators were willing to relinquish a small piece of autonomy to contribute to the collective good of the intercollegiate sports landscape.[27]

Despite its positives, the Sanity Code had embedded problems from the beginning. In a nearly unanimous vote by the members, the NCAA was finally able to enforce the points in the Sanity Code with a committee that could expel schools that violated any of the clauses, including the amateurism rights it held so dearly. However, it was unable to escape a hypocrisy that it had struggled with since its conception, because the new ruling allowed the compensation of athletes through tuition in scholarships. The athletes were paid to attend school. This fundamental disagreement with the genuine definition of amateurism meant the NCAA was voting to uphold the "principles of amateurism" in their constitution, yet directly violating its own code. Its

[26] Falla, 132.
[27] Crowley, 69.

concept of this rule had evolved and changed, and many of the big collegiate institutions voted yes to the code because they understood there were ways to circumvent the new rules for athletic scholarships, and even if they could not, these schools arrogantly believed the NCAA would not reprimand them. The Sanity Code was the first time that the NCAA admitted that it would allow subsidizing athletes, changing from their hard stance previously that no athlete should or could be compensated in any way shape or form.[28]

In order to enforce the points now in the constitution as a result of the code, the NCAA decided that it would expel any college from the organization if two-thirds of the member institutions voted to remove a fellow member. Unfortunately for the association, it did not have any sort of investigative team or objective detectives searching for violations. Therefore, it relied on tips from opponents or staff to gather proof that a team was guilty of infractions and indict them of anything. To do this, it sent out anonymous surveys to different teams, in hopes that they would get an admission of guilt. Unsurprisingly, this method simply did not work. Though the Sanity Code now had strict guidelines for each collegiate team to follow within their respective programs, violators would actually need to face consequences in order to show the entire community that the NCAA actually meant business. Furthermore, colleges were waiting to see the ramifications for schools that were kicked out of the NCAA – if they would be able to pull in the same revenues without the committee, what their schedule would look like, and other questions of the sort. In short, many member institutions and their athletic teams were in "wait and see" positions.[29]

Institutions in the South, namely the Southern, Southeastern, and Southwest conferences were not at all happy with the Sanity Code. The real limitations of this code came in the form of

[28] Smith, 96-97.
[29] Smith, 97.

money granted to students outside of tuition – living expenses, food expenses, books, laundry expenses, and more. Typically, collegiate programs offered all-inclusive full rides to student-athletes at this point, and the Sanity Code declared that illegal. In these southern states, mainly in poorer places like Alabama and Mississippi, the on-campus work or jobs close to campus for students were almost non-existent. These schools felt that the Sanity Code was prioritizing the programs in the East, Midwest, and the North, because they resided in much more urban places that could handle the influx of new collegiate workers when they came to town. Furthermore, as historian John Watterson points out, "the fact that the president of the NCAA and the permanent secretary-treasurer were both from the Big Ten and that the NCAA itself was based in Chicago further fueled (southern) authorities' resentment."[30]

In 1949, the members of these southern conferences met to discuss changes in the Sanity Code that they wanted the committee to embrace, the foremost of these to allow them to give athletes money in ways other than tuition. Ultimately, they decided if there was no movement on the NCAA's side and they were forced to comply with the Sanity Code, it was possible to secede from the NCAA entirely. There was a sentiment that the southern schools could form their own league, and do just fine separate from the majority of the collegiate programs. In July, the University of Virginia became the first school to publicly denounce the Sanity Code. The president of the school, Colgate Darden, when talking specifically about collegiate football said "there is no way whereby a student at Virginia can play football, earn enough by working and at the same time keep up his studies." They were vehemently stern that student-athletes would need more than just scholarship money. Six other schools followed UVA and publicly denounced the code, namely the University of Maryland, Virginia Polytechnic Institute, Virginia Military

[30] Watterson, 213.

Institute, the Citadel, Villanova, and Boston College. The NCAA dubbed these colleges "the sinful seven." VMI and the Citadel both had students doing military activities outside of their studies, limiting opportunities for jobs outside of classes. The rest of schools maintained they would leave the NCAA, rather than force their student athletes to give up study time in favor of an outside job in order to pay for their living expenses.[31]

Southern schools like Maryland and Virginia knew if they were expelled from the NCAA, that their recruiting classes would be smaller, it would affect the revenue that they generated from fans, and it could affect their overall reputation. In 1950, the NCAA gathered, and recommended the membership of the sinful seven schools be put to a vote, and if the sufficient votes were obtained, then the schools should be expelled indefinitely. On Saturday, January 12, the vote proceeded. In order for the schools to be expelled, a total of 136 votes were needed. When the individual ballots were tallied, the votes for expulsion tallied 111 delegates. President of the NCAA Karl Lieb originally began to assert the motion had passed and confirm the expulsion of the schools, but when the delegates began shouting that a two-thirds majority was needed, Lieb backtracked as if he had been unaware, and admitted that "the motion was not carried." It was with this vote, that the Sanity Code was struck down just as quickly as it had come to be. The NCAA's first attempt at enforcement powers had failed.[32]

Although the Sanity Code failed to get off the ground, a new technical innovation would soon allow the NCAA to continue their pursuit of power. Fresh off the disappointment, but with a taste of the possible power they could harness, it would not be long before the committee smelled blood again. In the late 1940's, television created an opportunity for fans around the country to watch their team rather than physically go to the stadiums – a luxury that radio had so

[31] Watterson, 212-215.
[32] Smith, 99; Watterson, 217.

far provided but simply lacked the optical aspect. As regional networks began popping up, a number of schools following the University of Pennsylvania – who was the leader in this space – invested in broadcasting their football games. Television, which had previously been a rich luxury, was exploding. The sales of television sets went from 7,000 in 1946, to 1 million in 1948, to 3 million in 1949. In a span of just three years, the number of sets sold in the United States had exponentially doubled nine times.[33]

Cafes in places like Pasadena were forcing customers who wanted to be seated near the television set to pay out $20 a piece, and people like the vice president of ABC, Robert Sandeck, were saying

> We'll have silent football . . . . It will be played indoors under perfect conditions. The weather will always be just right, the grass just the proper height, the ball will never be slippery. In this test-tube football, the players won't be bothered by the roar of the crowd, because the crowds will be watching at home, and they'll be comfortable. There'll be no one at the game except the sponsor – and he'll be behind a glass cage.[34]

This was not simply an individual sentiment. The technological advancements after World War II had led many to believe that television would completely change the atmosphere and dynamic behind collegiate athletics. A NCAA-conducted survey in 1948 in the northeast United States, asked the preferences of fans with regards to their football entertainment. A whopping 80 percent of fans declared that they preferred games on television rather than watching live.[35]

In 1950, college football received a shock when the gate receipts dropped for the first time since World War II. The year before had generated a record high, and the ticket purchases

[33] Jeffrey Montez de Oca, "A Cartel in the Public Interest: NCAA Broadcast Policy During the Early Cold War," *American Studies* 49, no. 3/4 (2008): 157–165.
[34] Robert Sandeck, "Air Waves of the Future," *Time,* 30 January 1950.
[35] De Oca, 161.

had been on a steady increase since the soldiers had come home. With a recognizable surge in television broadcasts, big schools in big markets that could effectively market their games like Pennsylvania, Notre Dame, and Michigan were increasingly set up to succeed. However, smaller schools and big schools in smaller markets (such as Oklahoma or other huge Midwest football powers) were undoubtedly disadvantaged, because they had no negotiating power with the big broadcasting networks. Many of these schools in conferences like the Big Ten scrambled to stop the loss of ticket sales due to the preferences of many viewers to sit on the couch. One method found schools blocking live broadcasts and showing them the next day. Others, like Illinois and Northwestern, would literally show a closed football game in movie theatres, charging admission like they would to the actual stadium. This experience, pimped out with cheerleaders and vendors, also came hand in hand with a separate movie and a show after the game was finished. The idea behind this phenomenon was to recreate the television experience to satisfy the viewer with that same technological craze, as the drop in ticket sales was undoubtedly due to the convenience of watching the game at home but also the scientific and technological spectacle that it represented. The age of television had well and truly begun, and it would forever change the collegiate athletic dynamics.[36]

Television affected different institutions in various ways. Schools like Notre Dame and Pennsylvania signed lucrative contracts with TV companies. Notre Dame received $160,000 in compensation from broadcasting their games on television, and Penn had dealt with ABC – giving them the rights to all of their home games for $100,000. Schools that built massive stadiums in the 1920's, and were losing fans to the couches because they could sit at home and watch the game for free, were in trouble. Most colleges only showed about five home games on

[36] De Oca, 162-163.

TV, and their television audience could not compensate for the lack of spectators in the stands. This is most evident in areas like New England, which saw an abysmal 28 percent drop in attendance rates. For the National Collegiate Athletic Association, this new scientific development was an absolute disaster, and they could feel their control on the revenue streams becoming even harder to grasp.[37]

In 1951, the NCAA adamantly banned live telecasts of the collegiate games. In an almost unanimous decision, the committee set out to stop the new T.V. craze in its tracks. The only dissenting opinion came from Francis Murray, Pennsylvania's athletic director, who spoke for both Pennsylvania and Notre Dame – which had the two largest television contracts at the time – and said "If you don't keep abreast and go on when you have your foot in the door, you won't have a precedent to form an opinion." The reasons the decision was so one sided are understandable. The southern schools that had led the charge against the Sanity Code lived in poorer, more rural areas where television ownership was much lower, so they were not concerned about the live attendance. Smaller colleges were not excited about the power dynamic that would continue to develop if the games were put on television, as it would make them less relevant. Additionally, the report that showed the massive declines in gate attendance scared many of the institutions into submission.[38]

In order to understand how the NCAA was able to get away with this television ban, an examination of American society during this time is necessary. These were the early years of the Cold War, and paranoia and mistrust of things foreign to the people were prevalent. With the impending threat of a nuclear war on the horizon, historian Lynn Spiegel argues that "many people in the early 1950's experienced television as an alien force that transformed the social

[37] Watterson, 265.
[38] Watterson, 265-266.

space of their homes." Fear of vulnerability to the Soviets, of an invasion of privacy, or of a national assault was the first thing on many people's minds. The NCAA used this mistrust to its advantage. It took the nationalist stance, saying that small schools were essential to Americanism, and that broadcasts were hurting their autonomy. It argued if television stole football revenue, the training and physical fitness aspects of the sport would go down the drain – appealing to those who wanted to keep America's young men fit and strong in case the Soviets came knocking. The NCAA said that television would not only decrease football funding, but it was a threat to American nationalism and American security. By "undermining the masculinity of its youth," televising football games would cause America to lose the Cold War and would force it to look weak in the eyes of all of its international enemies and allies.[39]

The NCAA toyed with the implications of television blackouts. In its legislation, they did not conclusively shut down alternatives, such as pay-per-view and the movie theater viewings that had been attempted earlier. Scholar John Watterson noted, "Like cable TV in a later era, phonevision employed telephone lines; telemeter attached a coin deposit meter to the television to unscramble the picture; and Skiatron used plastic tickets to obtain the telecast." These options, if they had been developed more holistically and with better technology, could have challenged free TV in a commercial way. However, network television was simply on another level – and it was not even close. There was, however, a rising objection in the legal world to this all-encompassing blackout. Could the NCAA do this? Was it legal? Was it ethical? The challenge for the institution league was soon to come.[40]

The University of Pennsylvania was the matador for the dissenting opinion, although the group was pretty much limited to themselves and Notre Dame. While Notre Dame decided to lay

[39] De Oca, 165.
[40] Watterson, 266.

in waiting to see how the challenge to broadcasting would play out, Pennsylvania took action. Athletic director Francis Murray – a former Penn All American, NFL star, and media promoter in radio and television after his playing days – notified the NCAA that Pennsylvania would not comply with the NCAA's television monopoly but that it would instead broadcast its own home football games in 1951. Pennsylvania asserted that by monopolizing the broadcasting and challenging their right to lease their home games to ABC, the NCAA was violating the Sherman Antitrust Act. This act, dealing specifically with free trade, forbade cartels like the NCAA from restricting or restraining free capitalistic trade in the television market. Murray, and Penn President Harold Stassen, believed that the trust from their board of trustees would continue to keep their opposition viable in their fight against the member-institutions. Murray declared: "Our council also advises us that it would be a violation of the Sherman anti-trust act if we were to join in a nation-wide ban for control of television of college athletics."[41]

Unsurprisingly, the other Ivy League schools who could not obtain the lucrative television contracts like Penn had received were on the side of the NCAA. Ralph Furey, the athletic director of Columbia, issued a statement that his school had "notified Penn we would be unwilling to sign a contract to play Penn next fall unless Penn abided by the N.C.A.A." There seemed to be three possible courses of action. Either the NCAA would completely back down from its television monopoly and allow Pennsylvania to flat out break the rules, the opponents of Penn could simply continue to play them – turning a blind eye to the wishes of the NCAA and testing their backbone, or finally the opponents could just refuse to play Penn until they submitted. For the other Ivy's, it was the latter option that seemed to make the most sense. Although it could have been an enormous financial blunder due to Franklin Fields 73,000 seats

[41] Ronald A. Smith, *Play-By-Play: Radio, Television, and Big-Time College Sport* (Baltimore: Johns Hopkins University Press, 2001), 69-70.

and Penn's enormous stature, the opponents seemed firm in their opposition, backing the NCAA. Cornell, Columbia, Dartmouth, Princeton, and the University of California acted extremely quickly, ripping Pennsylvania out of their schedule.[42]

The NCAA labeled Pennsylvania "a member not in good standing," and affirmed that it would vote to expel them from the committee at its earliest convenience. Despite this group boycott almost certainly violating the Sherman Antitrust Act, the boycott members worried about television ruining college football. Due to pressure from alumni, fans, and many people affiliated with Penn that desperately wanted to see them play Ivy League games, President Stassen was forced to back down. One letter, from an Ivy colleague, said that he "offended the most intelligent section of public opinion [bringing] discredit to yourself. If you do not believe that the common good is more important than the private gain of any individual (or college), we had better give up the hope that you will ever hold high public office." Stassen and Murray inquired into the Department of Justice, and even presented an alternative to the NCAA – proposing that each individual institution could block broadcasting nationally on two separate Saturdays, leaving the rest of the games free to show. Thus, the NCAA could experiment with the blackout laws without completely ruining the TV deals financially. Not even Notre Dame supported Penn, and with the vast majority of member institutions siding with the NCAA, the Department of Justice inquiry did not even get off the ground.[43]

Surrounded on all sides, Pennsylvania refunded ABC for their $80,000 contract and backed down from the committee and all of the other colleges that had hounded its stance. Murray asserted that the NCAA was "making capital of the Hitler philosophy of the big lie,"

[42] "Penn Defies N.C.A.A. on TV Ban," *Chicago Daily Tribune*, 7 June 1951; "Princeton Joins 3 Other Ivy Elevens in Threat to Cancel Games with Penn," *New York Times*, 13 June 1951.
[43] Smith, *Play-by-Play*, 71-72.

comparing the broadcasting situation to the "stab in the back myth"[44] that turned many Germans against the Jewish population during the Holocaust. Murray's opposition did little to affect their collective stance, and the Eastern College Athletic Conference (containing all of the Ivy schools) voted unanimously to recommend that NCAA control broadcasting rights for the foreseeable future. This clear violation of the Sherman Act in 1950, while even being exposed by the University of Pennsylvania, would stand in place for another thirty years. The NCAA, for the moment, got away with this violation of the antitrust act through a calculated and purposeful strategy in which it controlled the narrative and used outside examples to support its cause. They posited that they were unquestionably defending smaller schools and institutions that could not obtain big television broadcast contracts, and as historian Jeffrey de Oca puts it: "The NCAA successfully framed uncontained broadcasting as a technological threat to the nation's human resources that would lead to greater centralization of wealth in large institutions. It also situated its regulations as a bulwark of defense against that attack."[45]

Enforcing the NCAA from a legal standpoint was their big brother, per se, the National Football League. Dealing with a similar issue, albeit less complicated due to a lesser number of teams, the NFL was concerned that allowing teams to individually sign television contracts would contribute to the same "rich get richer" and "poor get poorer" phenomenon that was happening in college football. While already declaring that the NFL draft would be structured so that the best players would be drafted to the worst teams in the interest of elevating them and ensuring a fun, competitive league – the NFL was concerned that the television aspect would fundamentally undermine their efforts. The NFL has always obsessed over this fairness aspect,

[44] The "stab in the back" myth was a sentiment in post-war Germany that the armies of the central powers had not lost World War I, but that Germany had been beaten because of internal forces who had purposely lost the war effort such as the German Jewish population.
[45] Smith, *Play-By-Play*, 72; De Oca, 172.

eventually leading to the salary cap (limiting the amount of money each team could spend on professional players) in 1990, but television as a challenge to their equity fixation in the 1950's was something they could not pass up and eventually it would be challenged in the legal world. In 1953, the *United States v National Football League* case heard in a district court in Pennsylvania affirmed and defended the NFL, upholding the right of that league to control the broadcasting requirements in an effort to protect teams that did not have a propensity for earning as much money.[46]

In his final decision, the judge wrote "The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the clubs, from protecting their home gate receipts from the disastrous financial effects of invading telecasts of outside games." Another decision by Congress, the Sports Broadcasting Act of 1961, officially gave the NFL a television monopoly but also blocked them from broadcasting Fridays and Saturdays. Signed by President John F. Kennedy, this act ensured that no matter what, the NFL could not infringe on the college football Saturdays and take viewership from them by scheduling their games on the same day. While it was absolutely asinine to think that the NCAA would be able to regulate when any of the other professional sports played, there was something regulatory about football and "the way that it had always been." High school football was played on Friday nights, college football on Saturdays, and the NFL on Sundays. The Sports Broadcasting Act of 1961 further gave college football and the NCAA validation that its stance against Pennsylvania had been correct as well as legal. The country had been fooled, and the NCAA got away with it.[47]

[46] De Oca, 172.
[47] Smith, *Play-by-Play*, 95-97; *United States Versus National Football League et al*, 116 F. Supp. 319 (1953).

Chapter 3: Van Horn, The Division Split, and Jeremy Bloom

Although the NCAA had gotten away with antitrust violations on television and pay-for-play up to this point, it still needed to further define who and what it considered an amateur so that it could hide its illegal activity behind the 'preserving amateurism' ruse. After receiving a small setback to its definition through a workers compensation case, the NCAA worked hard to establish laws that would facilitate a legal amateurism definition with loopholes that would make it work – truly differentiating between employees and athletes. It then exercised a division split in order to differentiate school sizes and monitor which schools would be able to offer scholarships. By the turn of the 21th century, the NCAA's grasp on collegiate athletics had reached an all-time high, and it was able to demand that athletes either play collegiate sports with no compensation outside of certain education related benefits, or quit.

One of the primary cases that brought the issue of amateurism into the limelight was *Van Horn v. Industrial Accident Commission,* heard in the District Court of Appeals in California. The case, at its essence, was the review of an application for death benefits – filed by the spouse of deceased Edward Gary Van Horn – to the Industrial Accident Commission. Van Horn, a football player for the California State Polytechnic College, died in an airplane crash returning to California from an intercollegiate football game. The question revolved around whether or not Van Horn was an "employee of the college within the meaning of the Workmen's Compensation Act so as to render the state liable thereunder for death benefits to his dependents."[48]

The facts of the case, the court said, were objective. In September of 1956 Van Horn had been recruited out of high school, and was offered preference for an on-campus job – working in

[48] *Van Horn v. Industrial Accident Commission*, 219 Cal. 2d (1963).

the college cafeteria that funded his room and board. In 1957, he told the coaches and the school that he was "generally dissatisfied" with the program they built, and decided to not play football in order to work for his father in a flour mill where he earned $500 throughout the course of the season. In order to entice him to get back on the playing field, the school offered Van Horn "$50.00 at the beginning of each school quarter and $75.00 rent money during the football playing season." The funds given to Van Horn as an "athletic scholarship" came from a group of financial contributors called the "Mustang Booster Club."[49]

Under law, trustees could legally accept money from these donors to give to their athletes as long as it would "aid in carrying out the primary function of the colleges." This, combined with the fact that at California State Polytechnic College athletes were able to earn academic credit for playing on a sports team, meant that the teams could accept donations because it was indirectly aiding scholarly instruction. The Industrial Accident Commission, working with the university, asserted they had evidence Van Horn's scholarship had been something gifted to him – that he was not an employee of the university because the scholarship had been awarded for the full year and was not dependent upon whether or not he took any snaps in the football game.[50]

In their decision, the court ruled against the university and the Industrial Accident Commission. The court declared that since these athletic scholarships must be given to members of an athletic team, one's athletic skill and expertise must be a factor in choosing the recipient. With the notion that Van Horn's scholarship was entirely dependent on his role as a collegiate athlete, the court shot down all of the arguments of the university, and found that his scholarship was an employment arrangement, not a gift. With this ruling allocating Van Horn's role with the team under the Workmen's Compensation Act, his wife and children were compensated as if he

[49] *Van Horn v. Industrial Accident Commission.*
[50] *Van Horn v. Industrial Accident Commission.*

had been an employee of the university. This ruling was extremely significant. It represented a direct attack on the NCAA and its persistent stance that athletes were not employees and simply receiving gifts.[51]

This ruling put the NCAA on high alert. In December of 1964, an edited draft of an effective loophole brief focusing on the innerworkings of workers compensation with intercollegiate athletics – written by torts expert Marcus Plant at the University of Michigan Law School – was sent out to most of the institutions of the NCAA. This brief, focusing on the wording and intricacies of the different team's bylaws that would explicitly not suggest a worker/athlete relationship, was a defense mechanism for the NCAA against the legal minefield. With the brief, member-institutions were able to swiftly change their bylaws and constitutions, navigating any language or doubt on what the athletes relationships were with the schools, steering clear of anything that may signal employment.[52]

While it was fuddling with the intricacies of contracts and bylaws, the NCAA was also taking steps to make its scholarships more useful. As historian Allen Sack explained, "at the same time that NCAA officials were doing everything in their power to deny that scholarships constituted employment contracts, they were diligently seeking innovative ways to have nonproductive or noncooperative athletes fired." When facing the courts, the NCAA was fixated on the fact that scholarships were favorable gifts to athletes rather than employment contracts. When it was faced with athletes taking the "gifts" and then turning on their heels and deciding not to play, suddenly it became much less generous. Clyde B. Smith, the athletic director at Arizona State University, complained to the NCAA that "approximately 10 students who

[51] Allen L. Sack and Ellen J. Staurowsky, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth* (Westport, CT: Praeger, 1998), 80-82.
[52] Sack, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth,* 81.

accepted their scholarships to compete in our program . . . have decided not to participate. I think it is morally wrong. Regardless of what anyone says, this is a contract and it is a two-way street." Smith was not the only coach or athletic director expressing this sentiment. There were an increasing number of dissatisfied authorities.[53]

At the NCAA national convention in 1967, the NCAA voted by a margin of 214 to 13 to establish a bylaw that allowed schools to prosecute athletes who did not show up to practices or games. According to the legislation, if an athlete "fraudulently misrepresents any information on his application, letter of intent or tender, or . . . engages in serious misconduct warranting substantial disciplinary penalty" the school can take away a four-year scholarship that had been gifted to an athlete if they were not fulfilling the duties that the school thought they should be as a paid student-athlete.[54]

This ruling gave the collegiate administrations the power to determine if the athletes were earning their "gifts," and the NCAA had truly crafted a loophole for itself. In addition, it passed legislation in 1973 that limited schools to one-year grants. This made it possible for coaches to remove "recruiting mistakes" without the problem of a four-year grant that would have made the athlete almost impossible to move. Additionally, at this same meeting, legislation was proposed to the committee that would have ushered collegiate athletic scholarships in a "need-based" direction. If need-based scholarships had been awarded, it would have allowed many athletes to focus more on the academic aspects of their college career. However, this legislation fell short. With these decisions, the facade of the student athlete amateur policy that the NCAA upheld was becoming clearer and clearer. In effect, from its conception it had been slapping bandages on its

[53] Clyde B. Smith, letter to Walter Byers, 6 December 1966, Walter Byers Papers, Long Range Planning Folder, NCAA Headquarters, Overland Park, Kansas; Sack, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth,* 82-83.
[54] Sack, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth*, 83.

amateurism problem instead of fixing the root cause. At this point, the differences between professional athletes and college athletes were minimal.[55]

The next action taken by the NCAA in 1973 would forever change the separation between amateur and professional. The committee divided its member institutions into three divisions: Division I, Division II, and Division III. The split originally found about two-thirds of the colleges split between Division II and III – member institutions with "more modest goals and expectations," with the premier schools that sported big athletics programs grouped together into Division I. In 1973, historian James Koch outlined the reasons for this split, highlighting "profit maximization, cost minimization, or restrict of competition," before asserting that the NCAA's "success has been limited primarily by the heterogeneity of its membership." The primary reason for this split was to conserve the integrity of competition and keep butts in seats. The committee realized the biggest reason that fans came to sports games was to watch competitive league play with the belief that their team had a chance to win. The NCAA correctly identified the fact that a tier one athletic program would absolutely blow smaller schools out of the water. Restraining and restricting competition to schools with similar equality of opportunity meant that individual athletic programs would have a much better chance at an athletic championship.[56]

The three-division plan was ultimately approved for multiple reasons. Originally, the individual member institutions were allowed to pick and choose which division they wanted to participate in, except for the 126 "holed-in" Division I universities that were invited for their top tier football programs. Furthermore, if schools believed they were elite in another sport than football, they could join Division I in that unique sport. Each division, after the members were finalized, would be able to write and confirm their own rules. Limiting the interaction between

[55] Sack, *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth,* 84-85.
[56] James V. Koch, "A Troubled Cartel: The NCAA*," Law and Contemporary Problems* 38, no. 1 (1973): 135–138.

schools of different divisions was to the benefit of everyone. The University of Texas coach Darrell Royal, before the division split, was once quoted saying "Texas doesn't want Hofstra telling it what to do and vice-versa." The intent of Division I, as Koch further explains, would be to "consist of those university-firms that are truly operating big-time programs and which approach intercollegiate athletics in a semi-professional or outright professional fashion." This official division split saw the NCAA acknowledging that the amateurism principles it was founded on were outdated and needed to be reformed. This decision was in name, as well as in practice an official split between professional athletes (Division I) and amateurs (Division's II and III).[57]

While this relatively solved the problem of close competition, the elite tier one football programs had a further sizable issue, mainly with the enormous number of schools in Division I. Many of them proposed a 'super league' that would consist of the very top percentage of football programs, like the National Football League. This would allow them to hoard the television rights, and monopolize all or most of the best appreciated high school talent in the country. Five years later, in 1978, a proposal was put forth at the yearly conference to further divide Division I football programs into two groups – Division I-A and Division I-AA. When passed, the bigger schools hoped to relegate as many schools as possible into the second division, in order to maintain a football superiority at the top of the split. Although the legislation did pass, it only reduced the new number of schools in I-A to 137 – still a long way from satisfying their elitism.[58]

Division I institutions usually had the most money, the most attendance, and the biggest populations of students and faculty. This naturally meant these schools were able to give out the

[57] Koch, 145-147.
[58] Crowley, 88-89.

biggest athletic scholarships – in some cases covering all of tuition as well as room and board. Division II schools were still able to offer athletic scholarships, but they were much rarer and were usually combined with academic scholarships or no other money at all. These schools all had smaller athletic budgets and the national scale was surpassed by regional rivalries. Finally, Division III athletic programs constituted the most member-institutions out of all the divisions. Athletic scholarships were not allowed, true to the original amateur status propagated by the NCAA. This division had the lowest level of competition and outreach on a national scale, but many athletes preferred the smaller scale that allowed them to focus on their school work as well as their athletic prestige.

The turn of the twenty-first century saw the continuation and solidification of this division split. Scholars Douglas Toma and Michael E. Cross wrote about the grim landscape of the two diverging NCAA entities that were becoming worlds apart, saying it was "marked by two distinct features: The first is the essentially commercial enterprise associated with the two marquee sports (football and basketball) . . . at the roughly 100 largest institutions nationally . . . . The second feature . . . is everything else, including the other sports at these large universities." As evidenced, the NCAA was prioritizing the large sports at the large schools that would make them money and then lumping every other sport and school into the "other" category. With regards to the amateurism conundrum, it is football and basketball at these top marketable schools that raised the question: if these sports were generating hundreds of millions of dollars, shouldn't the athletes who were putting their bodies on the line for the entertainment of millions

of people be compensated past their athletic scholarships, as the schools were making this money off their livelihoods?[59]

To be clear, the issue now was not concerning if athletes should be able to be compensated for their commitment to the athletic programs at the schools, that debate the NCAA ceded long before when it began allowing athletic scholarships. In the twenty-first century, the question has been *how much* should they be compensated. In 2003, the president of the NCAA, Myles Brand, made his stance on the matter very clear in an NCAA news article:

> The NCAA historically has been against pay for play. I couldn't agree more with that position. If you start paying student-athletes (other than assisting them through financial aid), you essentially ruin the integrity of the college game. You take a first-rate set of college athletics programs and turn them into third-rate professional programs.

The committee maintained its warped definition of amateurism that anything outside of athletic scholarships should not go to the athletes.[60]

The validity of this claim is extremely subjective. It is estimated that if an athlete receives an all expenses included full ride from a public state school – whether they are coming from in that state or out of it – they will net around $50,000 to $75,000 in scholarships compared to those who are non-athletes paying sticker price. At a private school, the disparity becomes even larger – doubling to as much as $160,000 dollars in athletic aid that a non-athlete must pay out of pocket. Hundreds of thousands of dollars in full scholarships are waved in the faces of prospective high school students – someone sympathetic to the NCAA may see its point about the massive amounts of tuition, room, and board being funded and agree that their funding and

[59] J. Douglas Toma & Michael E. Cross, "Contesting Values in Higher Education: the Playing Field of Intercollegiate Athletics," in *Higher Education: Handbook Theory and Research 15* (Norwell, MA: Kluwer Academic Publishers), 2000.
[60] "Pay for Play Resurfaces, but NCAA Still Opposed," *NCAA News*, Mar. 17, 2003.

profitability should halt there. However, while the topic of whether or not these athletes should profit from more than just athletic scholarships is very subjective, the legality of the NCAA restricting them doing so is more black and white, and has recently trended towards a definitive conclusion.[61]

In 2002, an all-American kid named Jeremy Bloom challenged this very subject. A high GPA standout student in high school, member of the football team, and avid skier, Bloom seemed to have everything in life going for him. In the 2002 Olympic games, Bloom was called up to compete for team USA in mogul skiing. Additionally, his good looks and charming smile had netted him a big money contract with Tommy Hilfiger, a premier modeling brand. His talents did not stop there. Upon graduation from high school, Bloom was offered a scholarship to play collegiate football at the University of Colorado. The NCAA recognized that Bloom was making lucrative money outside of any football career, and told the university that he would not be able to represent their school in the upcoming season as long as he was making money outside of football. Even after declining his scholarship, the NCAA still would not budge. Feeling great injustice, with the help of his school, Bloom filed suit.[62]

At this point, the NCAA's definition of amateurism had morphed quite a sizable amount. Collegiate athletes were allowed to play professional sports, as long as they did not profit at all from their other ventures aside from their baseline salary from their professional team. This meant, for example, that collegiate baseball players could go play professional in the summer leagues and then return to their amateur collegiate sports teams when school started again.

[61] Stanton Wheeler, "Rethinking Amateurism and the NCAA," *Stanford Law & Policy Review* 15, no. 1 (2004): 213-235.
[62] Laura Freedman, "Pay or Play? The Jeremy bloom Decision and NCAA Amateurism Rules," *Fordham Intellectual Property, Media and Entertainment Law* 13, no.2 (2003), 674-680.

Branding themselves in any way, however, was prohibited. The NCAA bylaws at the time of the trial in 2004 stated:

> Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

As the NCAA saw it, Bloom's endorsement deal represented a breach of their bylaws. Because he was a nationally recognized athlete – a mogul skiing Olympic champion – they could not afford to let this one slip through the cracks on a national stage.[63]

Bloom was unfortunate. If his professional sport was more mainstream, he could have played for a team or club and made a salary with no issues. In this case, his problem, unfortunately, was that skiing is a luxury sport. The equipment, facilities, and training to ski professionally came at a great cost. Skiers do not make a salary, instead relying on sponsors and endorsements to generate funding, and Bloom had already negotiated deals with huge companies like Oakley sunglasses and Under Armour. Skiers, even the most talented professionals, also did not rake in high amounts of prize money. In 2002, Bloom attacked the NCAA multiple times in an interview with ESPN's Bruce Feldman. Calling the NCAA a dictatorship, Bloom said "Their rules are ancient and unconstitutional. They basically control the lives of 350,000 student-athletes. It's supposed to be a free country. But because of the NCAA, I feel like I'm literally fighting for my freedom." Bloom continued – bringing more and more allegations towards the

[63] *Bloom v. National Collegiate Athletic Association* 93 P. 3d 621 (2004); *National Collegiate Athletic Association,* Bylaw 12.5.2.1 in the *NCAA Division I Manual.*

NCAA. Looking forward to the next Olympics, he said "The bottom line is I just want to ski and have a shot at Italy in 2006 and play football. This is about me being able to pay for my (ski) season and I can't do that without my endorsements."[64]

According to the NCAA, not only was Bloom prohibited from making any money from his branding ventures, but he could not even do them for free. The NCAA bylaws firmly banned any name and likeness association at all. For example, in 1985 an Indiana University basketball guard was suspended from playing because a sorority at his school had included a photo of him in a calendar they had been selling to other students and families on campus in order to fundraise money. Another athlete, a football player from Northwestern University, was determined to be in violation of the bylaws because he had accepted an offer to perform in a supernatural movie thriller. As with many Olympic athletes, Bloom was in his prime. When he graduated college, he would likely not be able to ski professionally anymore, and the brand deals would likely choose someone younger and more popular to endorse their companies. Bloom figured that he was unfairly losing this prime time in his life to make money from his athletic ability and charming smile.[65]

Furthermore, Bloom was attempting to study communications while at the University of Colorado. The dean of the school thought this aspect might very well help his case. Stephen B. Jones, who was the Assistant Dean of the School of Journalism and Mass Communications, argued the university had an extremely competitive and difficult communications program. In order to gain entry to the program, students had to demonstrate proficiency and excellence in a number of different categories, including broadcasting. In order to gain this excellence, the

[64] Jeremy Bloom interview with Bruce Feldman, *ESPN The Magazine*, 2004.
[65] Paul C. Weiler and Gary R. Roberts, *Sports and the Law: Text, Cases, and Problems* (St. Paul, MN: West Academic Publishing, 2019), 734-735.

school advocated and encouraged its students to earn media experience. Bloom, at this point, had been offered multiple opportunities with Nickelodeon and MTV, and scholar Laura Freedman wrote that "While Bloom's athletic abilities (had) permitted him to fulfill his dream of playing collegiate football, the NCAA's restrictions are unfairly impairing his ability to make the most of his education and fulfill his ultimate career." The aforementioned Northwestern football player, who had attempted to play a part in a supernatural thriller, sued the NCAA in 1996 claiming that since he was a theatre major at university, the opportunity was academic and not related to football at all. In that case, the Illinois district court "granted a temporary restraining order against the NCAA" so that he could be in the film. Bloom believed a similar grant could be created in this scenario, due to his communications major goals.[66]

In the Boulder County District Court, Judge Daniel Hale ultimately confirmed the NCAA's authority on the matter, while chiding them for their inflexibility. After the decision, Judge Hale said:

> Here the NCAA had an opportunity to recognize and support a World Cup champion and an Olympic competitor by supporting his future success—by leaving doors open rather than closing them. . . . Mr. Bloom is truly an amateur athlete in football with only dreams of even receiving playing time . . . . [T]he NCAA is missing an opportunity to promote amateurism on the one hand, and the opportunity to support the personal and football [and] non-athletic growth of a student athlete on the other.
>
> Mr. Bloom is the epitome of an amateur who wishes to live out his dream of playing college football for [the University of Colorado] without abandoning the once-in-a lifetime future opportunities he has. I would like to [see him] live out those dreams. I

[66] Freedman, 681-683.

would like to be able to find a legal basis for me to be able to enjoin the NCAA. However, I cannot find a sound legal basis that would allow me to [do so].

Although displeased, the court found that the NCAA was not overexercising its reign of power, or using its bylaws in a way that was "unfair, arbitrary or (in a) capricious manner. [67]

The appellate court affirmed Judge Hale's decision. As with the trial court, they were worried that allowing Bloom to ski and receive endorsement income would set an extremely dangerous precedent. The court observed:

> In an honest world where there is no attempt to avoid an ideal, there wouldn't be an impact on amateurism if Mr. Bloom was allowed to be compensated as is customary for professional skiers; however, it's naive to think that we live in such a world. There are those who would be less than honest and seek profit for profit's sake.

By this, the court was expressing their apprehension towards other sports – ones that have more money in them than skiing – that would possibly begin to brand their athletes and allow them to get endorsements. This type of thing becoming a regularity was something that the NCAA believed it could not afford, and the court upheld that sentiment.[68]

The Jeremy Bloom case resulted in a monumental decision at the turn of the twenty-first century that reaffirmed the NCAA's authority over its member-institutions and athletes. Bloom was forced to choose between skiing with thousands of dollars in endorsement deals, and his passion – college football. The hypocrisy, as Bloom so charismatically pointed out in his interview with Bruce Feldman, was that "the ironic thing is the reason why the NCAA has all this money is from all the athletes like me." Athletes around the country were making schools and the NCAA millions of dollars a year from their branding and likeness. If they tried to make

[67] *Bloom v. National Collegiate Athletic Association*.
[68] *Bloom v. National Collegiate Athletic Association.*

even a percentage of that money back outside of scholarships, however, the NCAA bylaws shut them down. In terms of justice, Bloom competed in the 2006 Olympic games and was barred from his last two years of collegiate athletic activity. Later that year, Bloom got the last laugh when the Philadelphia Eagles selected him in the fifth round of the NFL draft. However, Bloom could never get those two years of college football back. A decade and a half later, a monumental Supreme Court decision would set into motion a seismic change in the relationship between athletes like Bloom, and the NCAA forever.

Chapter 4: NCAA v. Alston

In 2014 and 2015, several Division I athletes decided it was finally time for the NCAA to own up to their hypocritical amateurism policies. They believed the NCAA was unquestionably in violation of the century-old Sherman Antitrust Act, which very clearly states that every "contract, combination, or conspiracy in restraint of trade" is prohibited. While the Sherman Act itself is blatantly and purposefully ambiguous because a contract is inherently restraining in its very nature, these athletes believed the court would look favorably upon the student athletes – as District Court Judge Daniel Hale did in the Jeremy Bloom case (even though ruling against Bloom). These athletes brought suit to the NCAA, challenging limits on money that athletes were allowed to receive. A case that was first heard in a small District Court in California, *NCAA v. Alston*, and would eventually make its way to the highest judiciary in the country, the Supreme Court of the United States.[69]

The case began in the United States District Court for the Northern District of California, where the court was tasked with deciphering whether or not the NCAA could legally exercise financial restrictions on athletes with respect to the Sherman Antitrust Act. In order to assess this, the court applied what is called the "rule of reason" test, a fairly standard practice when interpreting the Sherman Act and analyzing antitrust claims. It "requires the judge and jury to analyze the nature of the restraint, the market structure of the industry in question, and other economic factors in determining whether the combination violates the Sherman act." In particular, there are three parts to this test. First, the plaintiff, or the person bringing the suit, is charged with proving that the law or laws they are questioning substantially hinder competition

[69] "Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston," *Harvard Law Review* 135, no. 1 (November 2021): 471-480.

in their field. Second, the defendant must prove that their restraints improve competition in said field. Third, if both parties succeed, then the plaintiff is tasked with showing the court that the improvements the laws make with regards to improving competition could be accomplished without restriction or with less restriction. Usually, a disproportionate amount of rule of reason tests end during the first step, when the plaintiff fails their initial proof.[70]

In the district court, the rule of reason passed all three tests. Both parties succeeded in showing there were aspects of the NCAA restrictions that both helped and hindered competition. The basis of the NCAA's case hinged on the very same one it had been using for decades – that restricting compensation distinguished collegiate athletics from professional competition. In the end the court sided with the athletes, claiming they had put forth evidence the NCAA could still accomplish this amateur distinction with less restrictive means. It is important to note, however, the court's decision did not address limitations on non-educational benefits. The crux of their decision focused on education-related benefits. These benefits – like scholarships for graduate school, academic tutoring salaries and paid internships – were previously banned by NCAA rules. However, by invoking the rule of reason, the court declared this was absolutely a violation of the Sherman Act.[71]

The district court found that if NCAA restrictions were reduced or abolished, "Competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result . . . . Student-athletes would receive offers that would more closely match the value of their athletic services." The

[70] Jarod Spencer Gonzalez, "Antitrust Law: a Long Time Coming; United States Supreme Court Adopts the 'Rule of Reason' Test for Vertical Maximum Price Fixing Cases," *Oklahoma Law Review* 52, no. 4 (1999): 645–664; "Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston," *Harvard Law Review* 135, no. 1 (November 2021): 472-473.
[71] "Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston," *Harvard Law Review* 135, no. 1 (November 2021): 473.

district court also blatantly called the NCAA out on the fickle definition of amateurism that had persisted since its inception. The court declared the NCAA "nowhere defines the nature of amateurism they claim consumers insist upon." The plaintiff student athletes were allowed to present evidence and statistics in the court that increasing compensation availability to student athletes would "not negatively affect consumer demand," another main assertion in the NCAA's case. Both parties ended up appealing the decision. The NCAA was unhappy with the ground the district court took from it. The athletes, on the other hand, wanted the court to go further in its investigation of non-educational benefits so that they could put a stop to the monopoly once and for all.[72]

The United States Court of Appeals for the Ninth Circuit affirmed. In their official summary of the case, the court staff wrote:

> The panel held that the district court's injunction was not impermissibly vague and did not usurp the NCAA's role as the superintendent of college sports. The panel also declined to broaden the injunction to include all NCAA compensation limits, including those on payments untethered to education. The panel concluded that the district court struck the right balance in crafting a remedy that both prevented anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.[73]

Concurring Judge Milan D. Smith, Jr. joined the panel in their affirmation, but additionally wrote "to express concern that the current state of antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprived the student-athletes of the fundamental protections

[72] "Sherman Act – Antitrust Law – College Athletics – NCAA v. Alston," *Harvard Law Review* 135, no. 1 (November 2021): 473.
[73] *National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F. 3d 1239, 1263 (9th Cir. 2020).

that the antitrust laws were meant to provide them." Smith, Jr. believed the rule of reason test was applied correctly, but that the court did not go far enough to combat the NCAA's artificial suppression of competition through limiting compensation. The NCAA appealed once again.[74]

When the case reached the Supreme Court, the justices described *NCAA v. Alson* as noticeably different than many other examples of antitrust litigation because in rare fashion many of the typical issues in this case were agreed upon by all. No one disagreed with the fact that the NCAA had a monopoly on the collegiate athletic market. No one disagreed with the fact that these restrictions decrease Division I athletes' compensation that they would earn at a fair competitive market price. Everyone agreed "the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market." Instead, the NCAA objection lay in the decision of the original district court case to enact the rule of reason: the NCAA claimed that the courts should have given the original district case an "abbreviated deferential review." In layman's terms, the NCAA was pleading for a "quick look" review rather than a deep dive into full rule of reason analysis.[75]

The Supreme Court rejected this notion, saying that in cases where circumstances clearly restrict competition, as well as in cases where competition is clearly not restricted at all, a quick look is sufficient. In the *NCAA v. Alston* case, however, the NCAA freely admits that its monopolistic restrictions can and do harm competitive pay. The justices go on to say that just because "*some* restraints are necessary to create or maintain a league sport does not mean *all* aspects of elaborate interleague cooperation are." The court argued the present case presents and maintains complicated intricacies – those that require "more than a blink to answer."[76]

[74] *National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*
[75] *NCAA v. Alston*, 141 S. Ct. 2141 (2021).
[76] *NCAA v. Alston.*

The court then revisited *Board of Regents*, a 1984 Supreme Court case that declared the NCAA in violation of antitrust laws with regards to television rights. *Board of Regents* was the first time the NCAA was challenged on its television monopoly since Penn's revolt, and it lost quite convincingly. However, the NCAA claimed as part of its stance in *Alston* that although the supreme court held that their television plan was a violation of the Sherman Act in 1984, the decision inadvertently "expressly approved its limits on student-athlete compensation." The basis for this claim, was a section of the court's decision in *Regents,* where the Justices wrote:

> 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.[77]

The contemporary Supreme Court disagreed with the NCAA's stance again. In the opinion of the court, Justice Neil Gorsuch wrote "While *Board of Regents* did not condemn the NCAA's broadcasting restraints as per se unlawful, it invoked abbreviated anti-trust review as a path to condemnation, not salvation." In other words, a quick look "abbreviated deferential review" methodology the NCAA had suggested be utilized in *Alston* would default towards condemning the NCAA rather than affirming their monopoly. Furthermore, the 2021 Supreme Court explicitly stated that *Board of Regents,* while it did note that the goals of the NCAA were consistent with the Sherman Act, did not "suggest that the courts must reflexively reject *all* challenges to the NCAA's compensation restrictions." Finally, the court explained that even if

[77] *NCAA v. Alston.*

the Board of Regents *did* have precedential merit in this analysis, the market had morphed so much in forty years that the impact of a half-a-century old case would be negligible.

The court continued debunking the NCAA's attack on the legitimacy of the rule of reason by saying that the NCAA expects "that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money." The court called on two prior examples to make its point. First, *National Soc. Of Professional Engineers v. United States*, in which a trade association attempted to restrain and artificially moderate price competition between engineers for building projects in order to "ensure quality work and protect public safety." Second, in *FTC v. Superior Court Trial Lawyers Assn.,* a group of defense attorneys collaborated together and boycotted court appointments until their employer (the government) would pay them more. In both cases, the 2021 court argued, the prior Supreme Courts had tossed out a social justification very similar to the one the NCAA was making in their appeal to preserving their ever so flaky concept of amateurism. "The social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful."[78]

After striking down the objection to the rule of reason being used by the judicial system in the first place, the court then shifted its attention to the NCAA's claim the actual application of the rule of reason had been faulty. The Supreme Court clarified that the rule of reason was not end-all-be-all; rather, it was "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful." In fascinating fashion, the court points out the first step of the rule of reason – the burden of the plaintiff to prove anticompetitive effects in the market – had failed in almost every

[78] *NCAA v. Alston; National Soc. of Professional Engineers v. United States,* 435 U.S. 679 (1978*); FTC v. Superior Court Trial Lawyers Assn.,* 493 U.S. 411 (1990).

instance the rule of reason was used in the last 45 years. The court cited statistics: "Since 1977, courts decided 90% (809 of 897) on this ground." In *NCAA v. Alston,* the plaintiff passed the first step with flying colors. "Perhaps even more notably" the court observed, "The NCAA did not meaningfully dispute this conclusion."[79]

When proceeding to the second step, the NCAA again took issue with the intricacies of the rule of reason. The NCAA said that although the court initially generally inquired about the rules as a *collective* set, in its second step it broke each rule down to its individual sense and required the NCAA to show that every rule individually had procompetitive merit. The NCAA's legal representatives deemed this to be overly demanding and putting it at a disadvantage in the rule of reason process. The court again retaliated. Gorsuch wrote, "While we agree with the NCAA's legal premise, we cannot say the same for its factual one." The court disagreed that distilling the rules to their individuality was the problem. Instead, the evidence the NCAA offered in its procompetitive defense was uninspiring. Furthermore, it was the third step in the rule of reason – the plaintiff's burden to show that the rules could be less restricting – that put the nail in the coffin. The justices declared:

> Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the least restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "'patently and inexplicably stricter than is necessary'" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act.[80]

The NCAA also alleged that the district court originally misrepresented and "impermissibly redefined" it concept of amateurism. It took until the year 2021, but the deceptive and ever-

[79] *NCAA v. Alston.*
[80] *NCAA v. Alston.*

morphing concept of amateurism that had been changing since the conception of the NCAA finally exposed their inconsistency. The district court "found that the NCAA had not adopted any consistent definition . . . . Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time."[81]

Lastly, the NCAA disagreed with the district courts' decision that procompetitive rules put forward by the plaintiff were less restrictive, and step three of the rule of reason had any substance. The Supreme Court again disagreed. With respect to the education related benefits – those being the ones questioned in this case – the court said determined:

> The (district) court did so (ruled in favor of the plaintiff), moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules.[82]

The court even left open leeway for the NCAA to discuss with its members and set boundaries on how schools were able to offer these newly available education-related benefits – it just was not allowed to restrict them any longer.[83]

The court further specified that on an intricate level, the NCAA had three main objections in its appeal. Firstly, the district court had approved "paid post eligibility internships" that were grouped in with the education-related things that schools could now offer. The NCAA feared schools and boosters would use this as a work-around in order to pay players massive money;

[81] *NCAA v. Alston.*
[82] *NCAA v. Alston.*
[83] *NCAA v. Alston.*

allowing them to complete their eligibility and then giving them a paid internship with a much higher salary than anyone but the top 1 percent of collegiate graduates would normally receive. However, the Supreme Court believed the NCAA was reading the decision too broadly. The district court ruled that education-related finances would be allowed, but only those that were "made available *from conferences or schools*." Therefore, the NCAA would still be able to limit any fishy internships from the local car dealership or shoe factory.[84]

Secondly, the NCAA believed the ruling of the district court "would allow a school to pay players thousands of dollars each year for a minimal achievement like maintaining a passing GPA." The NCAA asserted that currently, the athletic awards that it gave out were reserved "for genuine individual or team achievement (and are) received by only a few student-athletes each year." Essentially, the NCAA thought that schools could now give spontaneous academic achievement awards that fit whatever current need they had. However, the Supreme Court rebuttal again asserted, the NCAA was able to reduce and control its athletic awards. If the NCAA wanted to establish more control to make sure that its awards were clearly reserved for special standout educational performances, the district court did not stop that.[85]

Third, and finally, the NCAA figured schools might again look for a loophole and attempt to give student athletes extravagant educational benefits like "fancy computers," or even do something sinister like give them "luxury cars . . . . to get to class." Again, the Supreme Court rejected this by arguing the "NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a 'no Lamborghini' rule." At the end of the court's opinion, just before the affirmation, Justice Gorsuch wrote a very important

[84] *NCAA v. Alston.*
[85] *NCAA v. Alston.*

statement: “The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.” Some neutrals will believe the district court, and therefore the Supreme Court, did not go far enough in compensating the athletes for the copious amounts of finances they provide their institutions. *NCAA v. Alston* was not concerned with this matter. Regardless, it would come to be addressed very soon.[86]

Justice Brett Kavanaugh, in his concurring opinion, took care to travel outside the narrow scope of the actual decision and question the antitrust problems with the NCAA’s *non-education* related benefits. Beginning his opinion, Justice Kavanaugh wrote:

> The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court’s decision marks an important and overdue course correction, and I join the Court’s excellent opinion in full.[87]

After the introduction, however, Kavanaugh pointed out that although this case strictly and in isolated fashion addressed educational related benefits, non-educational benefits also “raise serious questions under the antitrust laws.”[88]

The reason for these questions lies in the precedent that *NCAA v. Alston* set. Kavanaugh clarified that the ruling in this court case meant any analysis or ruling on the non-educational

[86] *NCAA v. Alston.*
[87] *NCAA v. Alston.*
[88] *NCAA v. Alston.*

rules should be subject to the same "rule of reason" test. The ambiguous definition of amateurism and the previous cases such as *Board of Regents* that seemed to give the NCAA some leeway were now under serious scrutiny. Kavanaugh himself, it seems, was very skeptical of the remaining compensation rules, declaring: "Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification." Kavanaugh goes on to criticize the NCAA's apparently circular argument: "Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid." Defining college sports by amateurism, and then making policy to not pay athletes based on that fickle definition was not going to work anymore.[89]

This, according to the skeptical Kavanaugh, would be akin to every restaurant in a certain state universally cutting cook's wages because they believed that customers would prefer to dine at establishments that did not pay cooks well. Or in more formal words, "Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product." Colleges making millions of dollars in income every year from student athlete performances, and then spending the money on everything else – from salaries to new architecture on campus – was fundamentally depriving student athletes of their own labor in a way that is not legal anywhere else in America. Kavanaugh ended his concurring opinion by succinctly summing up his take on the matter:

> Traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else

[89] *NCAA v. Alston.*

> in America can businesses 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. The NCAA is not above the law.[90]

Concluding with a devastating condemnation from Kavanaugh, *NCAA v. Alston* had gone very wrong for the NCAA, and had quickly spiraled out of its control.[91]

In the months following the *Alston* decision, the landscape of collegiate athletics experienced monumental change. However, the Supreme Court case was not the only catalyst. Possibly sparked by its fear of Kavanaugh's predictions, the NCAA, of its own accord, removed its NIL (Name, Image, and Likeness) restriction policy for its athletes. Finally, the student-athletes that had brought these schools billions of dollars for decades would see a percentage of the grand profits. Now, it was up to the student-athletes, the university athletic departments, and the NCAA to navigate the new landscape that had been flipped upside down in front of their very eyes.

[90] *NCAA v. Alston.*
[91] *NCAA v. Alston.*

Chapter 5: The Transformation of Collegiate Athletics

On February 1, 2022, rising college football quarterback star Caleb Williams announced he would transfer from the University of Oklahoma to the University of Southern California (USC). USC, a sleeping giant in college football that has not won a college football championship since 2004, seems to be a perfect fit for the true sophomore. His previous coach Lincoln Riley moved to coach Southern California in the same year, and Riley has previously sent several quarterbacks to play in the NFL at an impressive success rate – including two number one draft picks: Baker Mayfield and Kyler Murray. Williams, who cares greatly about his success in his professional career in the National Football League, told *Sports Illustrated* that he has "dreams and aspirations of getting to the NFL, being great there and beating all of Tom Brady's Super Bowls and passing records." USC was the logical choice for the young superstar, who presumably needs Lincoln Riley to continue molding his game. After all, striving to compete with the records of a seven-time Super Bowl champion that has been excellent in the NFL for over twenty years seems a lofty goal.[92]

It would be foolish to conclude Williams left the University of Oklahoma strictly for football reasons. Their program is on the rise and they will be transitioning into what is largely considered the best conference in college football, the Southeastern Conference, in the near future. The Oklahoma program claims seven national championships, and at one point won more consecutive games than any college football team. One could argue that at the conclusion of the 2021-2022 college football season, before Riley left to USC, that Oklahoma was in a more promising position going forward than the Southern California Trojans. However, the aesthetics

[92] Ross Dellenger, "Caleb Williams Lands With New Team, but His Larger Goal Remains the Same," *Sports Illustrated* Feb 17, 2022, https://www.si.com/college/2022/02/17/caleb-williams-usc-new-team-nfl-draft.

of the two programs are worlds apart. The population of the entire state of Oklahoma is estimated by the United States Census to be just under four million people, with the city of Norman (where the university resides) claiming 123,000 people. The Greater Los Angeles Area has 18.7 million people, and represents the second most populous metropolitan area in the United States behind New York. Furthermore, USC's proximity to Hollywood and access to countless businesses, make its location attractive.[93]

USC has a rich program history and a huge brand. They possess eleven college football national championships, and have had six players win the Heisman trophy (representing the best player in college football) – but seven if you count Reggie Bush's Heisman award that was taken from him in 2010. Awarding them seven would tie them with Oklahoma, Ohio State, and Notre Dame for the most Heisman's awarded to a player from a certain school in college football history. Bush is the only player to win a Heisman in the last eighty-six years to have it stripped from him. Ironically enough, he "gave the award up in 2010 amid an investigation into around $300,000 he received in cash and gifts during his collegiate playing days," according to *Forbes*. The NCAA hammered Bush and USC for what it called a "pay for play" agreement, forcing the program to give up every single game that it won over the course of the 2005 season, and Bush to forfeit all of his stats. In a shocking display, the NCAA ordered Bush and USC to "disassociate from themselves for 10 years – meaning Bush could not attend games and USC could not use Bush for marketing purposes."[94]

In the present day, Caleb Williams will not face the same monetary problems as Reggie Bush did just over a decade ago. On June 30, 2021, less than ten days after the conclusion of

[93] *U.S. Census Bureau* as of July 1, 2021.
[94] Nicholas Reimann, "Reggie Bush Won't Get Heisman Back After NCAA Ruling," *Forbes* Jul 28, 2021, https://www.forbes.com/sites/nicholasreimann/2021/07/28/reggie-bush-wont-get-heisman-back-after-ncaa-ruling/?sh=366a42abcbb5.

NCAA v. Alston, the NCAA released a statement on their website titled "NCAA adopts interim name, image and likeness policy." This statement represents the first time the NCAA has ever given up this amount of leverage in terms of the ability of its athletes to generate compensation. In a statement, President Mark Emmert said:

> This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities. With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment — both legal and legislative — prevents us from providing a more permanent solution and the level of detail student-athletes deserve.[95]

This "interim" policy seems to be the NCAA's skittish way of "preserving amateurism and avoiding pay-for-play," while seemingly leaving the door open for different states to regulate how the NIL policies will be monitored. It should be noted, however, any state that wants its football and basketball programs to be even remotely good would not even think about regulating the NIL policies. The NCAA statement concluded by stating "The temporary policy will remain in place until federal legislation or new NCAA rules are adopted. With the NIL interim policy, schools and conferences may choose to adopt their own additional policies." Leaving the door open to more legislative policy in the future is a smart choice. As for today, the collegiate athletic scene has become a free-for-all.[96]

While Reggie Bush will likely not be able to get his Heisman reinstated, Caleb Williams very well may win one – and get paid for playing. Monetary gains will not plague his shot.

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[95] Michelle Brutlag Hostic, "NCAA adopts interim name, image and likeness policy" *NCAA* June 30, 2021, https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.
[96] Michelle Brutlag Hostic, "NCAA adopts interim name, image and likeness policy" *NCAA* June 30, 2021, https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

Shortly after joining the University of Southern California and becoming one of the most popular collegiate American football players in recent times, Williams appeared on *Good Morning America*. Although Williams stated on GMA that NIL legalization by the NCAA was not a huge factor in his decision to transfer, he mentioned it was something to think about and then very subtly plugged his new AC+ION Water partnership, a startup company which he has a share of equity. To an analytic listener, it would seem as if NIL may have been a larger factor in the decision to transfer than he was letting on in his interview. Fox Sports analyst Colin Cowherd pointed out the stark difference between OU and USC, cryptically tweeting after the GMA appearance: "At Oklahoma, he appeared on the local AM radio show 'Party Marty and firecracker eatin' Frank' in the morning."[97]

The same week Williams transferred to USC, he announced his first NIL deal. Signed with major company Beats by Dre, Williams declared the partnership through Twitter with a flashy picture of himself sporting a new pair of headphones. While the sponsorship money from Beats has not been officially released, Cowherd – a plugged-in journalist with reputable sources – reported on his podcast the NIL deal was in excess of $2.5 million per season. This deal, although possible at Oklahoma, was facilitated and thrust ahead by his move to the City of Angels. Along with his partnership deal with Beats and AC+ION water, Williams joined Fanatics Authentic, a large company that sells autographed and authentic sports memorabilia. He also inked a deal with Faculty, a men's grooming company, acquiring part ownership in the deal. Most recently, on February 17, 2022, *247sports* reported that Williams struck a deal with a private equity real estate fund in Beverly Hills. The fund collectively manages around two billion

[97] Caleb Williams, "College football quarterback Caleb Williams talks about his future in football," interview by *Good Morning America* Feb 9, 2022, https://www.goodmorningamerica.com/culture/video/college-football-quarterback-caleb-williams-talks-future-football-82767318; Colin Cowherd, Twitter Post, Feb 9, 2022, 11:37 AM, https://twitter.com/ColinCowherd/status/1491451251015700483.

dollars' worth of real estate. Williams was quoted regarding the real estate opportunity saying "I'm excited about the opportunity to get some experiential learning in a valuable component of business." It is not difficult to see why he is so excited.[98]

Williams cultivated all of these partnerships within his first month of arriving in Los Angeles. When asked if there would be more deals, he stated: "I still have two years left in college. Don't really have exact dates for certain things or what's next yet. Just got to school and got to actually be around my guys and go to school and focus on football and get ready for the season. There will be more." Seemingly acknowledging the pristine opportunity he has before him, Williams has the potential to make tens of millions of dollars before he even takes a snap in the NFL. While he is one of the first athletes to greatly benefit from the transfer portal and the newly minted NIL policy, he will almost certainly not be the last.[99]

In August 2021, a month after the NCAA legalized NIL deals, the average Division I athlete made about $471 per NIL deal. However, the median earning was $35. In December, the average profit per athlete had more than doubled to $1,036. The distinction between the mean and the median is presumably caused by a number of athletes being "worth" much more to brands and promotional companies than the median, like Caleb Williams. Promotional company *Opendorse*, which has dedicated itself to helping collegiate athletes build and monetize their images, ranked football as the top collegiate sport for NIL compensation. Coming in at a close second and third were women's and men's basketball, respectively. Regardless of which sport

[98] Dean Straka, "USC Trojans QB Caleb Williams lands NIL deal with Beverly Hills-based real estate private equity fund," *247sports* Feb 17, 2022, https://247sports.com/Article/USC-Trojans-QB-Caleb-Williams-lands-NIL-deal-with-Beverly-Hills-based-real-estate-private-equity-fund-183024589/.
[99] Claudette Montana Pattison, "Caleb Williams Lands Third Massive NIL Deal," *Sports Illustrated* Feb 11, 2022, https://www.si.com/college/usc/football/caleb-williams-third-nil-deal.

one plays, the school that one attends will almost certainly play an enormous role in how they are able to market themselves and the amount of deals they will get.[100]

> On January 24, 2022, Ohio State University released this statement:
>
> A total of 220 student-athletes have engaged in 608 reported NIL activities with a total compensation value of $2.98 million. All three figures rank No. 1 nationally, according to Opendorse, the cutting-edge services company hired by Ohio State to help its student-athletes with education and resource opportunities to maximize their NIL earning potential.[101]

Leading the article with the headline "Virtually all of Ohio State's varsity sports will have designated staff to work with NIL requests," Ohio State announced they were creating a new "NIL Edge Team" within the athletic department. This team's primary purpose is to contact brands and "educate donors" who are concerned with legal ramifications. Every division I varsity sport at Ohio State will get an "operations director" whose primary job is to connect athletes with brands and sponsorships in order to get them paid.[102]

The NIL legalization is undoubtedly a new weapon for schools to attract high school and transfer college athletes. The latter is also a newer development in the collegiate athletic scene. On April 15, 2021 (before the NIL legalization), the NCAA Division I Council adopted a one-time "transfer and compete immediately" policy. This meant that athletes could experience a coaching change, find themselves out of favor or out of form in the lineup, or simply want to

[100] "NIL Industry Insights: through December 31, 2021. Compensation and activity trends through six months of name, image and likeness monetization in college sports," *Opendorse*, https://opendorse.com/nil-insights.
[101] "Dept. of Athletics Creates NIL Edge Team, Updates Guidelines," *Ohio State University*, January 24, 2022, https://ohiostatebuckeyes.com/ohio-state-creates-nil-edge-team-updates-guidelines/.
[102] "Dept. of Athletics Creates NIL Edge Team, Updates Guidelines," *Ohio State University*, January 24, 2022, https://ohiostatebuckeyes.com/ohio-state-creates-nil-edge-team-updates-guidelines/.

search for greener pastures and they could now enter the transfer portal and compete immediately if they wished. The NCAA stated:

> The Council expanded the one-time transfer exception to all sports, which means student-athletes who play baseball, football, men's and women's basketball, and men's ice hockey have the same chance as all other student-athletes to transfer and play right away. If ratified by the board, the change is effective for student-athletes who have not transferred before and want to compete at a new school as early as this fall.[103]

For high schoolers and athletes who enter the transfer portal, schools that are offering this help with navigating the new "wild west" NIL landscape are extremely appealing. For one of these athletes in limbo, with no idea where they will be living in the short term, having the comforting pitch of a professional whose only job is to work as a liaison between the athlete and brands in order to make everyone money can be a determining factor. For schools like Ohio State, who are able to quantify and use their NIL numbers as a pitch to prospective players, having hard concrete data will play to their advantage. If schools are able to offer a "floor" amount of NIL deals with a life changing amount of money, with the Ohio State announcement equating to about $13,500 per athlete, it will attract the top prospects.[104]

Other programs will need to step up their game in order to compete with Ohio State. Texas Longhorn fans, alumni, donors, and business leaders recently created the "Clark Field Collective." Initially started with 10 million dollars to be dispersed through the Texas athletics program, alumni and retired NFL player Kenny Vaccaro stated it was time for the student

[103] Michelle Brutlag Hostic, "DI Council adopts new transfer legislation," *NCAA* April 15, 2021, https://www.ncaa.org/news/2021/4/15/di-council-adopts-new-transfer-legislation.aspx.
[104] Michelle Brutlag Hostic, "DI Council adopts new transfer legislation," *NCAA* April 15, 2021, https://www.ncaa.org/news/2021/4/15/di-council-adopts-new-transfer-legislation.aspx.

athletes to reap the benefits of "one of the highest grossing athletic programs in the NCAA." Nick Shuley, the CEO of the Clark Field Collective, talked about the athletic fund:

> Our goal is to create something that becomes both the gold standard in the field, and a one stop fund to be disseminated amongst all sports for NIL activities activated through: endorsements, autographs, appearances, and more. This plan will help ensure that all sports will have focused boards, leaders, and representatives to ensure their individual success in the NIL space. Businesses, donors, and fans can work with their sport/athlete of choice by executing proper legal NIL contracts. This setup will ensure access to participation for all who are interested in this important opportunity. The generosity and savviness of our donors has allowed us to launch with real financial backing. Through a multi-tiered approach beginning with the donors, followed by major brand participation and ultimately brand building, we will create something that allows for stability, sustainability and growth over the years at Texas.[105]

Similarly, a Miami hurricanes booster is offering $6,000 to every player who signs with the program. This represents a nice floor for athletes who are looking to get a sort of "signing boost" before they even attempt more NIL deals once they are actually on campus in South Beach.[106]

The NIL benefits are not only changing the collegiate athletics landscape, but the high school one as well. According to *The Signal*, "The number one high school prospect in the 2022 class, QB Quinn Ewers, skipped his senior year of high school to cash in on NIL deals. His largest being a whopping $1.4 million over three years to provide autographs for GT Sports Marketing." He accomplished the early graduation by taking summer classes after his junior

[105] "News," *Clark Field Collective*, https://clarkfieldcollective.com/news.
[106] Zach Barnett, "Ohio State claims No. 1 ranking in NIL earnings," *Footballscoop* Jan 24, 2022, https://footballscoop.com/news/ohio-state-nil-earnings.

year. Ewers originally committed to Texas, but after realizing that the Texas University Interscholastic League (UIL) would prohibit him from cashing in on NIL benefits, he decommitted and committed to – unsurprisingly – Ohio State. After Texas outlawed the UIL restrictions, after taking just two snaps with Ohio State, Ewers announced that he would be transferring back to Texas. Ewers made over a million dollars in high school, followed the money to Ohio State, and then transferred to his preferred destination with no penalty all in under two years. The now freshman quarterback is another perfect example of the unhinged nature of NCAA athletics, and the power that superstar athletes now hold.[107]

The rapid and infectious spread of NIL deals to high school does not stop with Ewers. *On3,* a college sports database, ranked the top 100 most marketable athletes in the collegiate and high school space. At the top of both categories, with double the number of social media followers as the name in second place, sits King James. Not Lebron, however, but his son Bronny. As junior in high school, Bronny currently boasts 6.2 million Instagram followers and 5.4 million followers on Tiktok, totaling to 11.6 million. *On3* projects that Bronny's NIL Valuation is 5.1 million dollars. On February 24, 2022, Bronny signed his first reported NIL deal with *PSD underwear*. The brand announced the partnership on their Instagram under a photograph of Bronny sporting a huge smile and holding up a pair of underwear, captioned, "Who's ready for Bronny's collection? Welcome to the fam." Bronny also reportedly "filed three trademarks with suggested use for video games, clothes, and NFTs." It is hard to imagine the

[107] Tom VanHaaren, "QB Quinn Ewers, No. 2 prospect in 2022, skipping senior season to join Ohio State," *ESPN* Aug 2, 2021, https://www.espn.com/college-football/story/_/id/31942467/source-qb-quinn-ewers-no-2-prospect-2022-skipping-senior-season-join-ohio-state.

NIL landscape would not play a major role in where Bronny ultimately decides to go to college, and he will probably make millions of dollars before he even gets there.[108]

Another famous name, the nephew of Peyton and Eli Manning, and grandson of Archie Manning, has surname-royalty NIL potential. *On3* creates its NIL valuation for a player, and defines it as being "comprised of a number of dynamic data points that focus on two primary factors – an athlete's social media presence and their level of athletic performance." Other things taken into account are the engagement on posts and stories, the prestige of the college one commits to, their recruiting ranking, their position, their performance/achievements, and their name legacy. Arch, who is athlete number five on *On3's* athlete valuation, has quite possibly the highest name legacy on the planet behind Bronny. Although his NIL valuation is at 1.6 million dollars, the six-foot-four quarterback possesses only 5.6 thousand total followers on Instagram and Tiktok. Out of the top 100 players on the valuation list, Manning has the least number of followers by a long-shot. Sports writer Darren Rovell says that refraining from collecting the enormous social media numbers will not stop him. "Arch Manning, I could see making $10 Million as a freshman in college." Number one overall National Football League pick Joe Burrow is slated to make around $9 million dollars per year on his rookie deal. If Rovell is correct, Manning will out-earn every quarterback still on a rookie deal, including Lamar Jackson, Justin Herbert, and Burrow – who just took his team to the Super Bowl.[109]

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[108] "NIL 100," *On3*, https://www.on3.com/nil/rankings/player/nil-100/; Krysten Peek, "Bronny James signs NIL deal with PSD underwear," *Yahoo Sports* Feb 24, 2022, https://sports.yahoo.com/bronny-james-signs-first-nil-deal-with-psd-underwear-204320645.html?fr=sycsrp_catchall.

[109] Jeff Nowak, "Arch Manning's NIL prospects? He could make '$10M as a freshman,' one analyst says," *Audacy* July 2, 2021, https://www.audacy.com/wwl/local-sports/prep-football/arch-mannings-nil-prospects-could-make-usd10m-as-freshman.

The NIL legalization will also have a large impact on Division II and Division III collegiate athletics as well. On the NCAA website, it characterizes Division III as not monetarily focused:

> The opportunity to play sports in college is a privilege, but we often forget taking part in collegiate athletics is also a choice. When high school seniors decide to be Division III student athletes, their choice illustrates their passion for the sport and pursuit of an education. Division III student-athletes compete not for financial reward, but quite simply, for the love of the game. Division III student-athletes are fueled by passion. They strive to do their best on the field and in the classroom because they realize the value in athletics lies beyond a scoreboard.[110]

It is important to remember the NIL legalization is not directly related to athletics. Name, Image, and Likeness utilization does not inherently mean that the only way money will become available is due to one's athletic prowess. In short, as *Opendorse* puts it "monetizing NIL is not a new concept – it is only new to collegiate athletics." Division II and Division III athletes choose to play a sport in college for their love of the game. But in this day and age, where one can become a Tiktok, Youtube, or Instagram influencer literally overnight, the NIL regulations have previously limited their ability to monetize that platform. As Braly Keller at *Opendorse* observed: "What this means is student-athletes can reference their athletic involvement when promoting camps or clinics, cash in on their social media platforms with content related to their athletic experience, market their business ideas related to their sport and much more." [111]

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[110] Sue Henderson, "Welcome Letter from Sue Henderson," *NCAA*, https://www.ncaa.org/sports/2013/12/28/welcome-letter-from-sue-henderson.aspx.
[111] Braly Keller, "NIL for Division II and Division III Institutions," *Opendorse* Aug 18, 2021, https://opendorse.com/blog/nil-for-division-ii-and-division-iii-institutions-2/.

It would, however, be foolish to insinuate that Division II and Division III athletes will benefit from the NIL legalization anywhere in the same stratosphere as Division I athletes. It will require greater levels of creativity for them to monetize their NIL, and they will not have the resources that bigger schools with dedicated NIL representatives and boosters have. It is not impossible though. Caleb Eagans, who plays for East Texas Baptist University in Division III, has a deal with Dairy Queen, and with the company Elite Athletic Gear. He also told *Front Office Sports* that he chooses a brand if it "represents me and who I am as a person." It does not sound like he is dealing with slim pickings. Less known Division I programs will also benefit from the NIL deals. Eastern Michigan University (EMU), even though it is a Division I school, does not get recognized with the top football programs like Ohio State, Alabama, or USC. However, one notable alumni, Charlie Batch – a former Pittsburgh Steeler fifteen-year NFL veteran and graduate of EMU – attempted to sway Caleb Williams when he was hanging in limbo in the transfer portal. Batch tweeted: "Hey @CALEBcsw, have you considered Eastern Michigan, @EMUFB? If not, you SHOULD. GameAbove Capital is prepared to pay you ONE MILLION DOLLARS for one year! Are you ready be an EAGLE?" Although they ultimately lost out on Williams because of the allure of Los Angeles, throwing that kind of money around is sure to attract better players than before NIL legalization.[112]

At this moment, the collegiate athletics scene is shrouded with uncertainty. If legislation regarding the NCAA's power to enforce its non-education related benefit restrictions is brought to the Supreme Court, Justice Brett Kavanaugh made it clear there would be intense scrutiny due to the precedent that *NCAA v. Alston* set. In his concurring opinion, Kavanaugh wrote "Under the

[112]Charlie Batch, Twitter Post, Jan 5, 2022, 5:46 PM, https://twitter.com/CharlieBatch16/status/1478860539606573060; Amanda Christovich, "The NIL Marketability of DII and DIII Athletes," *Front Office Sports* September 27, 2021, frontofficesports.com/nil-marketability-dii-diii-athletes/.

rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification." This, combined with the NIL legalization, would mean schools would be able to compensate athletes themselves, as well as help them sign NIL deals from notable boosters. This is certainly a slippery slope. If large names are able to receive both, it is feasible that players will be making more in one year in college than on their rookie deal in the NFL or NBA.[113]

The collegiate athletic space is spiraling out of control into chaos. However, chaos is not necessarily a negative thing. The transfer portal and NIL deals mean players have more freedom and control over their futures than ever. The money can be life changing. Whereas before there was some sort of structure, it is now a free-for-all. Although these two seem to be polar opposites, there seems possible parity between pre-*NCAA v. Alston* and NIL legalization athletics, and post-*NCAA v. Alston* and NIL legalization athletics. The bigger schools that have the most money, the best coaches, and the highest profile boosters will continue to attract the best recruits and create the best programs. Before, it was because that program would give them the best chance at playing in professional leagues. Today, it is because the program gives them the two-pronged opportunity of a cash-grab before ever entering the professionals, and offers to develop their game to make sure that their career continues at the next level. There are only so many roster spots on collegiate teams. So, while more transferring between schools will take place, the monetization aspect will not do much to shake up the level of talent between, say, a power 5 Division I team and a small Division III school.

It is possible that NCAA or congressional legislation will attempt to restrict the wild west landscape of the current athletic system. However, at the time of writing, this seems very

[113] *NCAA v. Alston.*

unlikely. It seems much more feasible that non-education related compensation will eventually become legal. The transfer portal and NIL are good for the schools, more exciting for the fans, and empower the players to make life changing decisions they have not been able to make for a century. If non-education related compensation is eventually allowed, then it is very possible and even probable that restriction would come in the form of a salary cap, just like in the NFL and NBA, to ensure financial fair play. This salary cap would probably vary within the different conferences, due to the funding available to different schools. Regardless, it is fair to say more change is probably coming, and that it will not be detrimental to the interests of the athletes.

The NCAA, which started out with little to no power and a sheepish goal to preserve a shaky concept of amateurism that was of its own creation, grew to be an authoritarian cartel that was desperate to hold on to that creation. In 2021, the United States judicial system analyzed their hypocrisy and began the process of dismantling their monopoly legislation. It remains to be seen how far they will go. Intercollegiate athletics, which began on that glorious summer day in 1852, remain largely commercial and economically driven 170 years later. But the athletes, who this entire process is dependent on and ultimately subservient to, finally have a medium of reaping the benefits of the billions of dollars that they have created in college athletics. To say that it was a long time coming is an understatement.

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