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HEY, COLLEGE SPORTS. COMPROMISE ON COMPENSATION AND YOU CAN HAVE A LEGAL MONOPOLY

TODD A. MCFALL*

OVERVIEW

The fate of the century-old National Collegiate Athletic Association (NCAA) has never been as tenuous as it is currently. Court disputes regarding the legality of the organization's long-standing scholarship-as-compensation model are in full bloom, and the decisions in these disputes, which range from suits like *O'Bannon v. NCAA*, a dispute that could have a somewhat large impact on NCAA policies,¹ to suits like *Jenkins v. NCAA*,² which asks the courts to overturn completely the compensation structure offered to scholarship athletes,³ could call for huge changes to the way college sports operate.⁴

If the courts side with any one of the plaintiffs in these suits, the NCAA and its members will face difficult questions about how to operate in a world with completely shifted legal constraints. However, were the courts to order the NCAA and its members to find a new compensation structure, it would represent a rather odd moment in the history of organized sport in the United States because the courts would recognize the need to provide legal coverage to

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1. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (explaining that in the appeals stage, the NCAA earned a partial victory in the September 2015 circuit court decision); *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NLRB (Aug. 17, 2015), <https://www.nlr.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case>.

2. Kurt Orzeck, *NCAA Scholarship Class Actions Merged in Calif. Court*, LAW360 (June 4, 2014), <http://www.law360.com/articles/544917/ncaa-scholarship-class-actions-merged-in-calif-court> (explaining that the other trajectory changing cases, including *Alston v. NCAA* and *Jenkins v. NCAA* were consolidated by the U.S. Judicial Panel of Multidistrict Litigation).

3. See generally *Jenkins v. NCAA*, 311 F.R.D. 532 (N.D. Cal. Dec. 4, 2015).

4. See Patrick Vint, *Ranking the NCAA's 5 Biggest Legal Battles, from Least to Most Threatening*, SBNATION (Mar. 20, 2014), <http://www.sbnation.com/college-football/2014/3/20/5528032/ncaa-law-suits-obannon-kessler-union> (providing a good summary of these disputes).

a non-unionized group of athletes.⁵ A ruling of this nature would have little precedent in sports law, as the important court victories earned by players over the last half century were won by players who were part of a players' union.⁶

While media attention has focused solely (and understandably so) on the legal entanglements in which the organization finds itself, the looming threat of a rival using the NCAA's stringent compensation limits against itself is not going away, no matter how many legal challenges it survives. Men's basketball and football earn incredible profits for the NCAA and some of its members, and if history is a trusted indicator, a rival, perhaps with the intention of making obsolete the edifice upon which college sports is built, will present itself to the organization, just as rivals have previously challenged the three biggest North American leagues, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Football League (NFL). At the turn of last century, the MLB's National League (NL) had to answer to the American League's (AL) challenge. The 1960s saw a battle between the NFL and the upstart American Football League ensue. And, of course, the NBA had to fend off a challenge from the American Basketball Association in the 1970s. The NCAA must understand that market forces—in addition to legal rulings—have sometimes provided for the implementation of constructive changes to the governance structures of these leagues.⁷

5. Of course, for several decades, courts were more than satisfied not to recognize a players' union's right to negotiate with owners.

6. *See, e.g.*, Prof'l Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101, 118 (1976) (Seitz, Arb.) (declaring MLB "had no right or power . . . to reserve [the players'] services for their exclusive use for any period beyond the 'renewal year' in the contracts") (A short list of league trajectory changing legal decisions should begin with Peter Seitz's decision to grant free agent rights to Major League Baseball players); *White v. NFL*, 836 F. Supp. 1458, 1487 (D. Minn. 1993) (depicting how in the NFL, the disputes granted an expanded set of free agency rights to NFL players); *McNeil v. NFL*, 790 F. Supp. 871, 893, 896 (D. Minn. 1992) (preventing the NFL "from relitigating the existence of their [sic] monopoly power in the relevant market of major league professional football in the United States"); *Robertson v. NBA*, 72 F.R.D. 64, 66–67, 71 (S.D.N.Y. 1976) (approving the settlement agreement between the players and the NBA).

7. The American League is the only successful rival to the incumbent National League. In the Nineteenth Century, the toughest competitor to the NL was the American Association. *See* LEONARD KOPPETT, *KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL* 61–66 (1998). Once the AL essentially merged with the NL in 1903, the player-owned Federal League was the impetus for the leagues to seek an antitrust exemption from the courts, which was granted by Chief Justice Oliver Wendell Holmes, who penned the infamous opinion in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*. *See* 259 U.S. 200, 208–09 (1922); J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 397 (1999). The NFL was founded in 1920 and met its first stout competition in 1946 from the upstart All-American Football Conference. DAVID S. NEFT ET AL., *THE FOOTBALL ENCYCLOPEDIA: THE COMPLETE HISTORY OF PROFESSIONAL FOOTBALL FROM 1892 TO THE PRESENT* 187 (Bob Carroll & John G. Hogrogian eds., 2d ed., 1994). Two teams from that league, the Cleveland Browns and the San Francisco 49ers, were welcomed into the NFL before the rest of the league disbanded. *Id.* In 1960, the American Football League (AFL) was founded and successfully merged with the NFL in 1967. *Id.* at 318–19. In the

Unlike MLB, which still possesses its antitrust exemption from Congress, the NCAA men's basketball and football leagues are not exempt from the possibility of a rival league challenging its monopoly status in the production of athletic events that feature college-age competitors. The potential for a rival to force (or even usurp) the NCAA's monopoly status in the production of these events might not be as imminent as the legal battles the organization is currently fighting, but elementary economic theory and history tell us the threat is clear and present due to the extraordinary rents the organization earns from the contests it produces.⁸

The purpose of this Article is to analyze the viability of an outside threat from a rival league to the existing structure of the NCAA and to implore some part of the membership to adopt a more market-based approach to hiring athletes, a change that would offer such members the wonderful opportunity of strengthening its monopoly standing in the sports marketplace. The NCAA and its members might be taking on fire from many legal sides, and it is certainly possible that a court decision might force college sports to adopt different methods of production, but to think that the organization is exempt from competition from an upstart league is to ignore the history of professional athletics, a history that is rife with occasions in which an incumbent league lost its monopoly status after a rival league figured out ways to weaken the barriers to entry created by the incumbent. To avoid such a challenge, the NCAA should use to its advantage the intense attachment to member teams that its current consumers have. This unique relationship is very difficult to re-create by a newly hatched rival.⁹ However, the organization should be willing to trade the lasting benefits of fan devotion with a more flexible compensation approach that is based on market principles. Such a move would make poaching elite talent from the ranks of NCAA teams a much more expensive tactic for a rival to adopt. By reconciling the weakness of its current

mid-1980s, the United States Football League (USFL) was founded as a rival to the NFL. JIM BYRNE, *THE \$1 LEAGUE: THE RISE AND FALL OF THE USFL* 107–11 (1986). Despite poaching popular players like Steve Young, Doug Flutie, and Hershel Walker, the league folded in 1986. *See id.* at 107–11, 350. And of course, the NBA merger with the American Basketball Association, which took place in 1976, rounds out the major attempts to subvert league monopolies. *See* FRANK P. JOZSA JR., *NATIONAL BASKETBALL ASSOCIATION STRATEGIES: BUSINESS EXPANSIONS, RELOCATIONS, AND MERGERS* 23 (2015).

8. This view of the evolution of markets is economists' way of saying imitation is the finest form of flattery and undergirds the entire neoclassical view of industrial organization. Incumbent firms earn positive economic profits (called rents), which attract competitors that seek to compete away those rents. This theory works well when the product of the incumbent firm can be copied easily. Firms that produce products that are unique or under intellectual property protection do not face such competition.

9. *See The Largest, Most Attractive Fan Base in Sports*, IMG COLL., <http://www.imgcollege.com/why-college> (last visited June 9, 2016) (including an advertisement for IMG's services that touts the "off-the-charts loyalty" that fans of college sports teams have for their schools).

model, the NCAA could shield itself from a market attack that could water down the quality of its product while using to its advantage the strongest characteristic of its product, fans' rabid attachment to their favorite teams. The window is shutting, though, and when it does, the NCAA will not have the luxury of waving the white flag of merger with its rival—like the previously mentioned professional leagues did—for the NCAA will have lost to an entity that operates in an entirely different manner to it.

I. THE HISTORY OF ORGANIZED ATHLETICS SUGGESTS A RIVAL TO THE NCAA LURKS

Understandably, much of the attention being paid to the NCAA's and college sports' existential crisis is focused on the legal battles in which it finds itself. If the court sides with one of the plaintiffs in any of the aforementioned disputes, the case will join the pantheon of legal decisions that changed the trajectory of the rights athletes have in the marketplace. These decisions are well known, but bear repeating, as each was transformative to the league it impacted. MLB's existence was forever changed by the 1922 Supreme Court decision that granted it an antitrust exemption¹⁰ and by the *Seitz* arbitration decision that gave players free agency opportunities.¹¹ The NBA was forever changed by Oscar Robertson's victory over the NBA in *Robertson v. NBA*, which granted a suite of expanded labor rights to players.¹² Finally, NFL players earned expanded free agency rights in *McNeil v. NFL*.¹³

These legal disputes ossified or changed quickly the labor market landscape of professional sports, but the history of North American professional sports has been transformed just as much by market forces, which have provided financial incentives for upstarts to attempt to overturn the monopoly powers enjoyed by incumbent leagues. Like the National League in 1900, the NFL in 1960, or the NBA in 1968, the NCAA is earning supernormal profits from the production of men's basketball and football games while operating with a model that contains glaring flaws, which marks it as ripe for the picking by a rival that wants to compete for those cherished profits.¹⁴

What might such action look like from an upstart league? If history is a

10. *Fed. Baseball Club of Baltimore, Inc.*, 259 U.S. at 208–09.

11. *Prof'l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) 101, 118.

12. *See generally* *Robertson v. NBA*, 72 F.R.D. 64 (S.D.N.Y. 1976).

13. *See generally* 790 F. Supp. 871 (D. Minn. 1992).

14. This is a bit of a semantic point, but the NCAA actually is not earning profits from the national football tournament. Only the members of conferences from teams that earn a spot in the tournament enjoy such benefits. The NCAA, though, produces the men's Division I basketball tournament, which is the organization's flagship product. So, when the term "NCAA" is used here, I am actually discussing the sum of the teams that comprise the NCAA, as well as the NCAA.

guide, the rival will launch an attack on the main garrison of the NCAA's market power—its ability to control the prices paid for labor in its sporting contest productions. Were a rival to successfully start bidding away the top athletic talent that compete for NCAA members, its monopoly status as the preeminent producer of basketball and football games involving college-aged men would likely wobble severely, if not crumble immediately. Were this situation to occur, the NCAA membership would have few options with which to cope, and this point is a critical difference between the way professional leagues were able to operate in the face of a challenge and how the NCAA might be able to react. Given the organization's insistence that it use the amateur model, it would be incredibly awkward for many members to drop this pretense at the first volley from a rival league that is treating athletes as professional employees. At least the professional leagues were already operating with the same currency as the rival leagues.

To illustrate the need to pay attention to the organization's flaws in its compensation model, we turn to the first great challenge to an incumbent league, which occurred in 1901, when the National League's dominance in professional baseball was overturned by Ban Johnson's American League challenge. Johnson, a former Cincinnati baseball writer, created a successful minor league in the Midwest (what became the American League) before he tired of the National League poaching his players. After settling with the National League to enter into the Chicago market, Johnson went to war with the incumbent major league by moving franchises from Midwestern towns to the East Coast.¹⁵

It did not take but a winter of poaching players from the National League in the 1900–1901 offseason for the American League to gain favor with the media. As Koppett writes, the battle was easy to win because the “strict salary limits the monopoly had imposed made it a sitting duck to this [outbidding for players] approach.”¹⁶ For the 1901 season, 110 of the 180 players in the new American League “were former National Leaguers.”¹⁷ Johnson found deep pockets in the form of Midwestern and Eastern industrialists who saw an opportunity to beat up on an old, inflexible operation.¹⁸ Within three years, the American League bid away so much talent from the incumbent league that it became a de facto minor league, which was problematic for the league's bottom line.¹⁹

15. See KOPPETT, *supra* note 7, at 88–89.

16. *Id.* at 89.

17. *See id.*

18. *See id.* at 88–89. These industrialists were Charles Somers and John Kilfoyle of Cleveland and Ben Shibe, a name familiar to baseball fans, and Al Reach of Philadelphia. *Id.* at 89. John McGraw joined as a manager of the New York Giants after he was traded by his old Baltimore National League club to St. Louis. *See id.*

19. Several articles have discussed the need for competition or league organizers to sort through

Defeated by the aggressive upstart, the National League offered peace to the American League that included the possibility of a (sort of) merger between the two leagues. Of course, for the ownership class in both leagues, the key detail in the agreement was the reestablishment of the reserve system, which eliminated the need to bid on players, who were again tied to teams in perpetuity, with no chance of market activities revealing teams' willingness to pay for players' services.²⁰ By agreeing to reinstitute and honor the reserve system, the two leagues gained monopsony and monopoly power over the professional baseball market, with the former lasting until the 1975 *Seitz* decision, which granted free agent rights to Andy Messersmith and Mike McNally,²¹ and the latter lasting in perpetuity due to the incredible decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.²²

The same tactic was used in the early 1960s when the American Football League raided the incumbent NFL after it turned down offers from Bud Adams on the chance of expanding the size of the league. Shut out, the AFL slowly began poaching newly eligible college talent from the NFL by bidding up the salaries paid to players.

The most famous execution of this tactic was performed by the New York Jets. Owned by the media-savvy savant Sonny Werblin, the Jets signed University of Alabama quarterback Joe Namath to a record-sized contract after making him the team's first pick in the 1965 draft.²³ Faced with playing for less money for an established NFL franchise the St. Louis Cardinals, which acquired Namath in the NFL draft, or playing in New York for more money, Namath

entrants that might pose as top talent but in fact are not. Unmitigated, this problem can lead to adverse selection issues that can harm the reputation of the competition. For two excellent pieces on the need for contest organizers to hire appropriately talented competitors, see generally Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981) (outlining theoretically the problems associated with not investing in strategies to cope with adverse selection among contestant entrants); Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), <http://www.vanderbilt.edu/econ/faculty/Vrooman/rottenberg.pdf> (detailing the labor market for professional baseball players).

20. See KOPPETT, *supra* note 7, at 118–19. The Federal League attempted to compete with the incumbent leagues in the 1910s. *Id.* at 118. This league sued the NL and AL on antitrust grounds, eventually losing at the Supreme Court, a defeat which helped create baseball's amazing antitrust exemption. *Id.* at 118–19. “On May 22, 1922, the Supreme Court upheld the appellate decision in an opinion written by Oliver Wendell Holmes, an opinion considered by many . . . one of the most ludicrous decisions in the Courts [sic] history.” *Id.* at 119.

21. Prof'l Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101, 118.

22. 259 U.S. 200, 209 (1992); see also *Organized Professional Team Sports: Hearing on H.R. 10378 Before the S. Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 85th Cong. 5–6 (1958) (showing how Congress granted Major League Baseball an antitrust exemption in 1958, a golden goose that can be taken from MLB any time Congress sees fit).

23. MARK KRIEGEL, *NAMATH: A BIOGRAPHY* 131–32 (2005).

understandably chose the offer he could not refuse and played in the AFL under a contract that was worth more than twice the offer made by the NFL's Cardinals.²⁴ Suddenly, the professional football leagues were in a bidding war.²⁵

Like the two baseball leagues, the AFL and NFL merged in 1967 to avoid a costly bidding war between the two football leagues. Just as MLB did previously, the merged league acted as the monopolist and monopsonist of professional football until operational negligence opened the door to another rival, the United States Football League (USFL), which attempted to overthrow the NFL's monopoly in 1983.²⁶ The attempt did not go well—the USFL successfully sued the NFL for violating antitrust laws, but was famously only awarded \$1 in damages (the \$1 jury award was trebled).²⁷

Finally, the NBA faced a similar challenge to its monopoly and monopsony power over professional basketball when the American Basketball Association (ABA) started producing professional basketball games in 1967. Like the previous upstart leagues, the ABA saw the soft underbelly of the NBA as the

24. See *id.* at 130–42 (2004). Werblin secured an important television contract with NBC shortly before Namath's 1965 draft. *Id.* at 124–27. The effect of the contract was to place new investment cash into AFL teams' hands for poaching players from the NFL. See *id.* Namath famously asked the Cardinals for \$200,000 plus a Lincoln Continental. *Id.* at 131–32. Eventually, though, Werblin figured out that Namath was being courted by the Giants through the Cardinals, and Werblin, sensing another kill shot to his New York rival, tendered Namath a \$389,000 offer. *Id.* at 135. The Giants were not going to offer that much money to a rookie “with a history of a knee injury.” *Id.* at 136.

25. The Namath contract was actually the second poaching of NFL level talent performed by Werblin. See *id.* at 123. Werblin signed highly regarded running back Matt Snell out of Ohio State University in 1963, two years before signing Namath. *Id.* (“Sonny Werblin pulled up in front of the Ohio State athletic department in a chauffeured Cadillac limousine. Snell's first impression: tan, silver hair, glasses, looked you right in the eye, and that *suit*. Maybe it was the cut, maybe the fabric, or the shade of greenish gray. ‘You just knew,’ says Snell. ‘It was money.’”).

26. See BYRNE, *supra* note 7, at 32. The USFL benefited mightily from the NFL's negligent operations in 1982. *Id.* The owners and players could not agree to a collective bargaining agreement, so the players went on strike. *Id.* The last preseason game before the strike, played between the New York Giants and the Green Bay Packers, was delayed because of power outages at the stadium. *Id.* With incompetence all around the NFL, USFL executive Peter Hadhazy saw the opening that every rival league needs to bring down a monopolist. *Id.* To Hadhazy, the strike was terrible optics because “[s]everal hundred college football players who had the ability to make it in professional football were sitting out there watching the bizarre gyrations of the NFL's players and owners. As Hadhazy saw it, if they played their cards right, the USFL had a genuine opportunity to draft and sign some of the top-rated college players.” *Id.*

27. *U.S. Football League v. NFL*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). In what certainly cannot be purely a coincidence following the 1987 strike, the NFLPA won huge legal battles against the NFL owners in *White v. NFL* and *McNeil v. NFL*. See *White v. NFL*, 836 F. Supp. 1458, 1463, 1505 (D. Minn. 1993) (upholding the settlement agreement that modified the NFL's “college draft, the NFL Player Contract, and various other terms and conditions of NFL player employment,” which successfully “revised player mobility and employment rules . . . to eliminate Plan B”); *McNeil v. NFL*, 790 F. Supp. 871, 877 (D. Minn. 1992) (finding the NFL's Plan B wage scale violated players' rights to negotiate on an individual basis).

mistreatment of top talent²⁸ and made it a priority to bid away such players from the incumbent cartel. For almost a decade the ABA raided NBA rosters and outbid the incumbent league for legendary players before the leagues agreed to a mini-merger in 1976.²⁹ Before peace was established, though, the ABA hired legends like Julius Erving, George Gervin, Rick Barry, George McGinnis, and Moses Malone, who bravely entered the league immediately after high school graduation, the first players to do so in either the NBA or the ABA.³⁰

For a variety of reasons, the current monopoly position of the NCAA can be considered stronger than the incumbent professional leagues' positions at the time each faced a challenge. At this stage in its existence, college sports are much more engrained in the cultural psyche than were the three professional leagues when each was challenged. The revenue generated at the team, conference, and NCAA level from television deals not only adds heft to the league but also enhances its standing as the preeminent place for college-aged athletes to compete in basketball and football.

Of course, these large revenues also place a conspicuous bullseye on the NCAA and its members, as a group of investors certainly eyes the possibility of competing against the college sports leviathan as an opportunity to steal away some or all of the supernormal profits earned by the organization. To many economists, an upstart making such a challenge is inevitable. So why has such a challenge never materialized in any serious form?³¹

28. See Mike Bresnahan, *NBA All-Star Ultimatum Paid Off for Players*, L.A. TIMES (Feb. 16, 2011), <http://articles.latimes.com/2011/feb/16/sports/la-sp-all-star-strike-20110217>. The 1967–1968 season was only three seasons removed from the incredibly courageous collective decision of the players who competed in the 1964 All-Star game. Those players decided not to take the floor until perceived labor issues over pensions and working conditions were addressed. *Id.*

29. See Frank Deford, *One Last Hurrah in Hyannis*, SI VAULT (June 28, 1976), <http://www.si.com/vault/1976/06/28/618606/one-last-hurrah-in-hyannis>. Like the USFL, the ABA never really operated as well as it needed to operate to succeed. As Frank Deford, then of *Sports Illustrated*, wrote in his obituary of the league, “The seminal problem with the ABA was that it was created to merge instead of play. So, no matter how well it played, it wasn’t doing what it was supposed to do.” *Id.*

30. Pat Putnam wrote about Malone’s rookie campaign in a 1974 *Sports Illustrated* article. Pat Putnam, *Don’t Send My Boy to Harvard . . .*, SI VAULT (Nov. 4, 1974), <http://www.si.com/vault/1974/11/04/615822/dont-send-my-boy-to-harvard>. “‘He’s so quick it’s unbelievable,’ says Bucky Buckwalter, the Stars’ new coach and the man primarily responsible for luring Malone away from the University of Maryland last August. Bucky and a bundle of greenbacks, you understand.” *Id.*

31. It is an arguable point that NCAA basketball’s monopoly status was successfully challenged by the NBA, which, for some time, has employed the large majority of the very best college-aged players. Since Kevin Garnett entered the NBA in 1995, directly after graduating from high school, it has become unheard of for top-tier players to compete for an NCAA team for three or four seasons. The last player to choose to compete for an NCAA team for four seasons and forego an extremely high draft pick while doing so was Tim Duncan, who played for Wake Forest University from 1993 to 1997 and was the first player selected in the 1997 NBA draft. The Author writes that this surrendering of its top talent to the

A good answer might lie in an explanation provided by John Sutton regarding the role that advertising has in shaping firms' relative market shares within a given industry.³² In some markets, firms find it necessary to advertise to differentiate their products with rivals' products. These advertising costs are endogenous—and therefore sunk—to the firms in the market because the marginal cost of production is not affected by the level of firms' advertising decisions.³³ Simply, to compete in the major leagues in this industry, firms have to be willing to spend large amounts on advertising.

In some markets (college sports included), there are firms that enjoy tremendous benefits from being the well-known first-mover in the industry. These firms' might have tremendous brand-name awareness over lesser-known potential rivals, who would have to undertake the risky gambit of incurring huge advertising expenses to overtake the established brand. Without this willingness to risk capital investment to battle with the incumbent, potential upstarts either must be willing to exist on the fringe of the market or not at all.³⁴

Sutton's ideas about the difficulty of competing with established firms were used by Stefan Szymanski and Simon Kuper to explain the stubborn lack of turnover of the elite teams within the English Premier League.³⁵ In their view, the first-mover advantage is an enormous benefit for a team to enjoy.³⁶ To overcome this advantage, potential rival teams must make a risky investment in hiring talented players (instead of expensive advertising investments). Because players can incur injuries that limit their productivity, many team owners simply are not willing to bid the capital necessary to hire away star players from the upper-echelon teams.³⁷

It should be obvious why Sutton's first-mover story is a compelling view of the barrier to entry established by the NCAA and its members. There is a distinct

NBA should be viewed as a sign of incompetent management on the part of the NCAA and its members. See TODD A. MCFALL, *THE (PECULIAR) ECONOMICS OF NCAA BASKETBALL* 51 (2014).

32. See generally John Sutton, *Endogenous Sunk Costs and the Structure of Advertising Intensive Industries*, 33 *EUR. ECON. REV.* 335 (1989).

33. See generally *id.*

34. See *id.* at 338 (“As is intuitively clear, the viability of the fringe of non-advertisers (both in terms of their numbers, and their combined market share) will depend (positively) on the size of the population of ‘advertising insensitive’ consumers, and (negatively) on the size of the set-up cost e .”).

35. See STEFAN SZYMANSKI & SIMON KUPER, *MONEY AND SOCCER: A SOCCERONOMICS GUIDE* 1–28 (2015).

36. In English football, these first-movers were teams like Manchester United and Arsenal.

37. SZYMANSKI & KUPER, *supra* note 35, at 22 (“Applying Sutton’s model to the world of professional club soccer, one should focus on player investment instead of [advertising]. The big clubs are the ones that spend heavily on players and achieve a potentially global following—there are only a small number of these large, dominant teams. These clubs were able to develop this image because they were first movers, because of their location, because of a specific event in their history, or because of their association with particular individuals or [movements].”).

lack of outside competition to the NCAA's monopoly in basketball and football because college sports were there first and have been so successful, collectively speaking. College sports producers not only have rapidly expanding budgets on which to invest in marketing their events, but the producers have the built-in advantage of having fans who, for one of many reasons, identify intensely with the institutions that produce the sporting events under the NCAA's banner.

By Sutton's reckoning, any potential rival to the NCAA would have to overcome not only the NCAA's inherent historical advantage for producing athletic productions but also the emotional ties fans have to the way these sports are packaged and sold.³⁸ If history is an accurate guide, the former characteristic is something with which a rival can cope, because a rival can simply bid away good players from the NCAA teams; however, the latter characteristic is very difficult—if not nearly impossible—for a rival to replicate.³⁹ For a challenger to succeed against the NCAA, there would have to be a large enough market of sports fans who are more interested in watching top-level talent compete in sports productions than in watching second-level talent compete for the institutions with which fans are emotionally affiliated. That is a proposition that, at best, can be described as uncertain. And all it takes is a little uncertainty to keep the NCAA's rivals at bay.

The continued support from fans of the NCAA's flagship product, the men's Division I basketball championship, illustrates well the rigidity of college fans' devotion to their favorite teams. Since 1995, when Kevin Garnett entered the NBA draft directly from high school, the number of elite-level players competing for a Division I team has fallen drastically.⁴⁰ Yet, despite concerns regarding the quality of play degrading, the value of the tournament has done nothing but increase. Since 1991, the NCAA has twice renewed its contract with CBS to televise the men's Division I tournament.⁴¹ In 1999, the value of the contract increased, in nominal terms, 300% annually to \$6 billion for eleven years. The value of the 2010 contract came to about \$750 million per year,

38. Of course, this views the NCAA and its members as one firm, an idea well-established in legal and economic literature. Interestingly, the intra-NCAA differences between members like the University of Alabama and the University of Alabama-Birmingham, are explained well by Sutton's view of establishing market power through advertising.

39. International Marketing Group, a leader in marketing around college athletics, touts the benefits of relationships with athletic departments. See *The Largest, Most Attractive Fan Base in Sports*, *supra* note 9 (depicting its marketing pitch to prospective clients). Its brochure states "[e]xamined in every key metric, college sports are more popular than ever." *Id.*

40. See MCFALL, *supra* note 31, at 112–13. The first-round of the 1992 NBA draft featured exclusively players who competed for a Division I team for at least three years. *Id.* at 113. By 2001, only eleven of the twenty-nine players chosen played for a college for three years. *Id.*

41. *Id.* at 31.

another 35% nominal annual increase from the previous contract.⁴² Thus, in an era in which the NCAA essentially gave up on having Hall of Fame level talent play in its most valuable competition, the value of Division I basketball has been increasing rapidly.⁴³ And any rival wishing to compete away some of that television contract will have to contend with a fan base devoted not only to watching high quality athletic contests but also to participating in the ritual of said contests involving their favorite teams.

This example, though, falls short in describing how decimating a successful poaching of talent would be to NCAA teams. A rival league would not just scrape the cream of the crop from Division I teams. A rival league would bid away nearly all the best prospects from college football and basketball teams, just as the American League nearly did to the National League over a century ago. Could the two revenue producing college sports survive such an onslaught? Walter Neale, in his classic piece, *The Peculiar Economics of Professional Sports*, wrote “[i]n brief, a firm is better off the smaller or less important the competition, and it will try to attain a situation in which it is the sole supplier.”⁴⁴ In a world with a rival that successfully poaches NCAA members’ best players, college teams will not meet any part of Neale’s timeless observation about the way monopoly sports leagues must operate.

Common sense should inform us that fans will not support major college sports with the same fervor if the players they watch are of uniform lesser quality. In the end, the quality of a monopoly product matters, and when the best players are plying their trade in another league, it is hard to take as seriously the merit of a contest that involves lower quality competitors, no matter who is playing. Simply, the potential destruction to the quality of its product should worry every employee within collegiate sports. Luckily, the NCAA (or at least some of its members) has a great opportunity available to it because it can leverage its intense fan loyalty in exchange for adopting compensation models that are more market-based compared to the scholarship model that has been the norm in college athletics for almost seventy years. Time is of the essence, for this window of opportunity will not last forever, as discussed in the next section.

42. *Id.* For a discussion on the growth of television revenue, see *id.* at 31–32.

43. See Marc Tracy, *College Basketball Is an Attraction. Is It Pretty? Well . . .*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/19/sports/ncaabasketball/beauty-of-ncaa-tournament-may-not-hide-games-warts.html?_r=1. That is not to say the enjoyment fans have received from the product has increased, as this article discusses “[w]hen the balance between offense and defense gets out of whack and the defense has more of an advantage than the offense, then I think the game’s not in the right place,” said Dan Gavitt, the N.C.A.A.’s vice president for men’s basketball championships.” *Id.*

44. Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1, 1 (1964).

II. A PROACTIVE NCAA CAN AVOID A RIVAL'S THREAT

If history has any predictive power regarding the NCAA's desire to fend off potential rivals from competing with members' football and basketball products, we can assume safely two things. First, unless the courts force it to take action, the NCAA will do nothing until a rival threatens its monopoly and monopsony status. Second, with near certainty, it can be assumed that a rival league will attempt to shake the NCAA's monopoly power. Remember, before they waged war on the entrenched leagues of the day, Ban Johnson and Lamar Hunt approached the incumbent cartel about joining! But both incumbent leagues were so cossetted in their power that they turned away interested parties, an attitude that describes perfectly the NCAA's current state-of-mind.⁴⁵

Clearly, history tells us that not taking proactive measures to fend off potential outside threats can be incredibly costly and lead to an existential crisis for the incumbent league. With history and some knowledge of what makes a monopoly sports league in mind, what steps could the NCAA—or at least a more flexible segment of its membership—do to signal to potential rivals that an attempt to bring down the NCAA monopoly would be futile?

A good plan would accomplish two tasks. First, it would capitalize on the NCAA's strength—the intense brand loyalty felt by fans. According to Sutton's theory of endogenous costs, any rival would need to spend an inordinate amount of capital to compete with the existing monopoly, and given the uncertainty to the return of such a decision, rivals could not be blamed for never taking up the fight in the first place. Second, the NCAA membership needs to learn from past leagues' mistakes and shield its Achilles heel, which is the wage ceiling paid to athletes that it currently mandates among its membership. If this flank is not protected, the NCAA can win legal challenges to its model from now until time stands still, but the NCAA will always be open to raids from rival leagues that want to drain it of talent.

To utilize fully its brand name comparative advantage while shielding its current biggest weakness, the NCAA cannot adopt half-measure changes to its business model, like it has recently done by adding cost of attendance adjustments for athletes in revenue sports.⁴⁶ Some members need to be willing

45. MLB and the NCAA's explanations for the existence of player wage controls are startlingly similar in that both revolve around the need to protect competitive interests of the games being affected by the controls. For a discussion of the NCAA's argument defending its policies in *O'Bannon*, see Jon Solomon, *O'Bannon Judge Rules NCAA Violates Antitrust Law*, CBS SPORTS (Aug. 8, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24653743/obannon-judge-rules-ncaa-violates-antitrust-law>. For a discussion of MLB's argument for the need to retain its reserve clause, a main issue argued in *Flood*, see Hylton, *supra* note 7, at 398–99.

46. In 2015, the NCAA allowed for its most powerful members, the so-called autonomous schools, to pay cost-of-attendance stipends to football and basketball players. For the NCAA's announcement

to admit that operations based more closely to free market principles might be the best way to remain in control of monopoly power, even if it means leaving behind the NCAA's traditional governance system and some of the teams' traditional opponents. Simply, teams interested in exercising fully their unique position in the sports marketplace should take the drastic step of paying athletes based on market conditions while also becoming an entity attached only to the university by name, thereby ending the practice of asking students to juggle the increasingly impossible demands of competing in high-level athletics competitions while also attending college.⁴⁷ Instead, players will be compensated directly (in cash) for their efforts, and the university will own the team as a profit-maximizing entity that can, if run successfully, add to the endowment of the university.⁴⁸

There is no need to say such a plan would be a radical departure from the current model that has come to regulate college sports. But adopting such changes would allow for fans of these universities to attend the contests—and all the rituals and splendor that accompany the productions—to which they have grown accustomed. For many teams that take this route, conference affiliations and rivalries will look very similar to the current affiliations and rivalries that dominate fans' calendars. The only difference is that the players will be employees of the entity that operates the team, not so-called student-athletes.

The benefits of such a plan are many. Institutions will strengthen in perpetuity the monopoly status the NCAA has created by continuing to utilize the NCAA's comparative advantage in brand loyalty while simultaneously shoring up possible weak points that a rival could exploit. A successful execution of this strategy would bring a rarity to the marketplace for sports—an honest-to-goodness monopoly, which is as rare and valuable as Aesop's fabled golden goose. Additionally, a well-governed league will not have to worry about defending itself against allegations of violating the Thirteenth and Fourteenth

on the stipend policy, see Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA.ORG (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships>. For criticism of the stipends, see Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER ED (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

47. Consider playing football or basketball for West Virginia University in 2015. The teams, which are part of the Big 12 Conference, played multiple games in, of all places, Texas. See WVUSPORTS, <http://www.wvusports.com/> (last visited June 9, 2016).

48. By no means is this the only way in which teams can operate. The heart of the matter for this hypothetical league is the intellectual property that surrounds the production of the games. If a private entity wanted to purchase the rights to produce games in the likeness of a particular team, then a contract could be created that spells out the conditions for such a transaction. But simply moving part of the athletic department off of campus to manage a privately held basketball or football team is maybe the simplest way for this transaction to occur.

Amendments while producing athletic contests.⁴⁹

But what about the costs? Not addressing some of the many voices of dissent would be a cowardly way to end the Article; so anticipating questions from skeptical parties is a necessary step in showing the plausibility of this plan. In the end, it should be clear to many universities sponsoring teams that compete under the NCAA's organizational umbrella that continuing to be a part of a successful monopoly should outweigh many economic and psychic costs of adopting such a radically different business model.

An understandable primary concern of many collegiate teams is the extent to which the explicit costs of operations will change after a system of direct payments to athletes is implemented. Further, important questions about the nature of the compensation system within the cartel must be asked too. Will there be open bidding on players or will players be drafted into the league, which could limit compensation to players? There is no single answer to these questions, and the answers might make it imprudent for some institutions to compete in a market-based league, but those who raise the specter of not being able to afford paying players directly should not be taken seriously for a long list of reasons.

First, for such a league to exist, it must be said that a consortium of teams that are interested in joining this league must be created. For this to occur, rules governing teams' actions, both on-field and off-field, will need to be ratified, and a subset of those rules will determine how players join the league. As with any other professional sports league, a players' union will likely be recognized, so there will need to be cooperation between the consortium of teams and the players employed by consortium members regarding their entry into the league and the level compensation offered to players.⁵⁰

Economic theory suggests that the level of compensation paid to players will be based on their perceived marginal revenue product.⁵¹ The most important idea to understand (and easiest to misconstrue) regarding the move to a more market-based system is that only a select few players will be paid an

49. This is the issue at the heart of *Jenkins v. NCAA*. See generally *Jenkins v. NCAA*, 311 F.R.D. 532 (N.D. Cal. 2015). It should be embarrassing for American universities to have to defend their methods against such allegations—yet, the beat goes on.

50. See MCFALL, *supra* note 31, at 1–25.

51. Marginal revenue product is a measure of the value of skills one possesses. Workers in certain professions can be elite amongst their peers, but if society does not place a high value on the skills they possess, their marginal revenue product will be relatively small, so relative skill level is not the only contributing factor to a worker's earnings. High earners must also possess skills that are valued at high amounts by society. To consider the earnings of the world's best horseshoe thrower, which are dwarfed by the best competitors in more popular sports, see *2015 World Tournament Prize List*, NAT'L HORSESHOE PITCHERS ASS'N, <http://www.horseshoepitching.com/topeka/2015%20prize%20fund.htm> (last visited June 9, 2016).

amount that is exorbitant compared to the cost of the currently used scholarship. To illustrate this likelihood, consider the market for minor league baseball players, where elite prospects are paid quite handsomely while much of the rank-and-file earn subsistence level wages.⁵² There is no reason to expect the compensation structure for players competing in a market-based college league to be any different than minor league baseball. Highly sought players, no matter how they enter such a league, would be given large bonuses and probably a hefty salary from their employer. The superstars' rank-and-file brethren, who would be needed for practice squads and to round out depth charts, would be playing for a chance to prove themselves to the NFL or the NBA and to take advantage of their rapidly dwindling youth, which is the only time of their lives in which they can play a game as a vocation.

Of course, players in this league will no longer be viewed as engaging in an activity, which is the argument used to defeat Alvis Waldrep's claim to worker's compensation following Waldrep being paralyzed in a 1974 football game involving his Texas Christian University team and the University of Alabama.⁵³ These athletes will be employees, and likely will have union representation, so they will have the opportunity to collect compensation when a serious injury occurs.

With regard to football, this detail is critically important when it comes to understanding cost differences that might exist between the scholarship and market-based league structures. There is no doubt football has experienced an inflection point regarding the role the game plays in brain injuries, which means there is no doubt teams that might want to join a market-based consortium will worry mightily over the level of compensation a player might earn for injuries. For many institutions, the uncertainty regarding the level of direct costs that teams must sustain for insuring players might keep them from being willing or able to join a league with market-based compensation policies.⁵⁴

The final issue regarding costs is that many academic institutions and their fans might resist joining this revamped league on moral grounds because the

52. See Chris Cwik, *Court Dismisses Lawsuit That Would Raise Wages in the Minor Leagues*, YAHOO SPORTS (Sept. 15, 2015), <http://sports.yahoo.com/blogs/mlb-big-league-stew/court-dismisses-lawsuit-that-would-raise-wages-in-the-minor-leagues-000220168.html>; Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, MOTHER JONES (July/Aug. 2014), <http://www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income>.

53. See *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692, 696, 702 (Tex. App. 2000).

54. In fact, these insurance costs could be a line in the sand that prevents a market-based football rival from ever even being formed, for it might be the number of teams with the resources to insure employees might be too small to warrant forming a league. Currently, teams that participate in NCAA sponsored contests are protected from the threat of paying out massive damages to injured players because of the ruling against Waldrep. A rival league that pays its players likely will not be afforded such protections.

ties between the institution and the players will be different from the current amateur model. This resistance is understandable. The opportunity to attend a four-year institution in exchange for playing football or basketball is valuable, and many institutions and their fans care deeply about the players who grace their campuses. To alleviate this concern, it needs to be pointed out that perhaps part of the compensation offered to players could include the opportunity to attend school once their playing days have ended. This opportunity need not be offered to all players, nor will all players necessarily be interested in such an offer. But for many, the chance to attend a four-year institution at a discount once their playing days are over is a valuable chip that could be used more constructively later in life, when they are not being forced to navigate the difficult waters of preparing full time for athletic competitions while also being a full-time student.

Additionally, a system devoid of the current type of student-athlete would have wonderful downstream benefits for academic institutions, many of which succumbed to the temptation of creating calmer waters for players to navigate while competing in basketball or football.⁵⁵ Schools that are part of a more market-based consortium no longer would have to invest huge sums of money on monitoring the academic progress of football and basketball players, many of whom are sadly not prepared to perform at a satisfactory level in a postsecondary classroom and are simply taken advantage of while enrolled in the school for which they compete.⁵⁶ Additionally, the temptation to create fake classes or lean on professors who might be sympathetic to the cause of the athletic department will vanish, so the cost savings to institutions could be realized in a variety of directions.

As for the players, not only would they earn direct compensation for their efforts, but they would also gain the chance to constitute a union, which would mean gaining leverage over coaching staffs and institutions that are currently using the system to overwork athletes. A common practice of coaching staffs that do not want to run aground of NCAA regulations regarding ceilings on the amount of time that can be devoted to practice is to label certain training tasks as either mandatory or voluntary while not treating differently either type of

55. The perfect example of such behavior can be found at the University of North Carolina-Chapel Hill, which, for two decades, enrolled students who competed for a variety of teams into classes that did not physically meet or did not have work requirements for earning credit. See Dan Kane, *UNC Dismisses Two More Employees in Academic-Athletic Scandal*, NEWS & OBSERVER (Nov. 12, 2015), <http://www.newsobserver.com/news/local/education/unc-scandal/article44538867.html>. Sadly, this example is one of many that are too numerous to list in this Article.

56. See generally, e.g., Class Action Complaint, *McCants v. NCAA*, No. 15 CVS 1782, 2015 WL 366150 (N.C. Super. Jan. 22, 2015). The plaintiffs are suing on the grounds that they were not provided access to a quality education while playing for the University of North Carolina-Chapel Hill. *Id.* ¶¶ 250–52.

task. Thus, athletes are forced to attend so-called voluntary meetings or workouts, which do not count against mandatory practice limits. This obnoxious abuse of power is an unintended (but likely foreseen) consequence of rules put forth by the NCAA that were designed to diminish the acute trade-off between school work and training.⁵⁷ Since the adoption of practice time ceilings, the rewards for coaches skyrocketed, thus, from a management perspective, making it more imperative for athletes to be prepared for games, which has translated to more abuse of the voluntary practice label.⁵⁸ Union bargaining between players and institutions will likely spell out the nature of what constitutes a mutually beneficial working relationship between players and their employers that can be monitored by multiple interested parties.

Of course, there will be institutions, even amongst the most powerful conferences, that will not stomach the move to a market-based model. Understandably, these institutions might wish to continue to compensate players indirectly to retain the vestiges of the current model. For many, this option will no doubt be more palatable compared to the market-based model, but the likely cost they will endure is not having the best players compete in the competitions they sponsor. The talent drain will likely reduce the value of the contests institutions currently produce, but this decrease might lead to exactly what those institutions want- a quainter role for athletics on campus.

A schism forming between NCAA members over the direction of college sports would not be unprecedented. In 1978, NCAA members chose to join either Division I-A or Division I-AA, depending upon the amount of spending a school was willing to incur on football.⁵⁹ At the time of the schism, it might not have been clear to all parties that a mammoth gulf would develop between the earning potential of the types of teams, as Division I-A members were privy

57. For the NCAA's presentation on what constitutes practice time, *see generally* NCAA, COUNTABLE ATHLETICALLY RELATED ACTIVITIES, <http://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf> (last visited June 9, 2016). For the Notre Dame University Athletic Department's explanation of practice time, *see Countable Hours*, ATHLETIC COMPLIANCE—U. NOTRE DAME, http://www3.nd.edu/~ncaacomp/countable_hours.shtml (last visited June 9, 2016). For a story on the University of Michigan football team's snubbing of these rules, *see NCAA Finds Michigan Not in Compliance*, ESPN (Feb. 24, 2010), <http://sports.espn.go.com/nca/news/story?id=4938956>.

58. Practice time rule abuses have not just occurred in football and men's basketball. *See* Mick McCabe & Mark Snyder, *Player's Shocking Allegations Against Former NCAA Women's Basketball Coach*, USA TODAY (July 21, 2013), <http://www.usatoday.com/story/sports/ncaaw/2013/07/21/oakland-university-fired-coach-beckie-francis-special-report/2573613/> (detailing practice time abuse in women's basketball at Oakland University).

59. For a historical discussion of the decision to split college football, *see Small Colleges*, SI VAULT (Sept. 11, 1978), <http://www.si.com/vault/1978/09/11/822949/small-colleges> ("But now the NCAA seems determined to blur the delineation between big time and small time in college football by creating yet another division. This new group, titled Division I-AA, has been slipped in between the old superpower elite level of Division I (now I-A) and the relatively low-key schools in Divisions II and III.").

to the incredible revenue growth of college football. Those schools now compete in what is known as the Football Bowl Subdivision. Despite this gulf, there is a thriving, quaint market that enhances university life at schools that field teams in what has become known as the Football Championship Subdivision (FCS). The past schism is valuable to consider, though, because revenue differences between a market-based league and a league with teams using the status quo scholarship model likely would grow in the same fashion.

Which leads to the last voice of concern regarding a more for-profit model—the NCAA. The organization has been, more or less, the lead governor of college sports over the past century. But its role has been diminished by court decisions like *NCAA v. Board of Regents*⁶⁰ and the subsequent maneuverings that made conference affiliation more important to teams than the cover of the NCAA's umbrella.⁶¹ Perhaps if a few schools broke away from the NCAA and started a consortium that played under market-based rules, the old organization might consider itself to be in a better place compared to the way it has been forced to operate in the recent past because it would not have to concern itself with the power struggles that have characterized its relationship for some forty years. The behavior of NCAA President Mark Emmert suggests as much, as he has grown comfortable with the notion of the NCAA as the marketer of college sports. His attitude belies a man who understands very well the new limits of his organization's power.⁶²

Of course, in a world with a consortium of teams that cast aside the NCAA's leadership for another governance structure, the NCAA's most lucrative event, its Division I men's basketball tournament, will become a less valuable asset because the best college-aged players will no longer be competing in the tournament. Unless the NCAA and a market-based consortium find a way to coexist, which is a very real possibility, the NCAA will be forced to exist on less because the revenue it will collect from selling the broadcasting rights to its events will fall.⁶³

60. 468 U.S. 85, 120 (1984). The decision favored the University of Oklahoma and destroyed the NCAA's monopoly hold on negotiating televised football contracts, which also was the beginning of the end of the organization's stranglehold over its members. *See id.*

61. For a summary of conference realignment as of 2014, *see* Pete Volk, *Conference Realignment Cheat Sheet 2014: Where College Football Teams Are Now*, SBNATION (Feb. 13, 2014), <http://www.sbnation.com/college-football/2014/2/13/5404930/college-football-realignment-2014-conference-moves>.

62. To read about how resigned Emmert was to the biggest schools adopting new rules in a January 2014 conference, *see* Greg Johnson, *Emmert, NCAA Leaders Discuss Issues Facing Association*, NCAA.ORG (Jan. 17, 2014), <http://www.ncaa.org/about/resources/media-center/news/emmert-ncaa-leaders-discuss-issues-facing-association>. For a perspective on Emmert's ineptitude, *see* Pete Thamel, *The NCAA's Real Problem? Lack of Leadership, Starting with Mark Emmert*, SI, <http://www.si.com/college-basketball/2014/04/07/ncaa-mark-emmert> (last updated June 23, 2014).

63. For a discussion on the importance of basketball tournament revenues to the entirety of the

For the many schools that do not join a market-based consortium, the institutions' teams will still be able to practice the classic scholarship-based compensation model of college sports but probably at a highly discounted rate. Without the best players (or the chance to compete against teams that employ the best players), the value of these events, no matter what governing body oversees the events, will fall precipitously. The domino effect will likely force these teams to scale back all athletic endeavors or to discover entirely new ways of funding athletics teams.⁶⁴ It is safe to say many universities' leaders would rest easier than they do currently, seeing that they will have to expend less energy worrying about perpetrators of academic scandals or rule violations who stain the reputation of the university.

In closing, this Article hopes to make clear that some NCAA members face a glorious opportunity to shed a tired system of governing college athletics and erect a system against which upstart leagues will find it very hard to compete. The NCAA can fend off legal challenges from generations' worth of athletes, but when an upstart finds it worth the risk to compete with NCAA teams for top-flight basketball or football talent, the league will have a difficult time answering the upstart's challenge. By relinquishing control of its traditional compensation structure and substituting it for more market-based labor policies, some NCAA members can shore up the weak flank in their operations while leveraging their wonderful advantage—the indelible team spirit that is virtually impossible for a rival league to recreate. Suddenly, a consortium consisting of these types of teams will not only produce games that have the look and feel of the games to which the American sporting public has grown accustomed, but it will also have a greater opportunity to employ the best college-aged athletes, a necessary requirement for a league that wants to earn the major league profits from the games it produces.

NCAA, *see* MCFALL, *supra* note 31, at 31–32. A back-of-the-envelope calculation conservatively estimates that 90% of the organization's revenues come from the television rights to the tournament. *Id.* at 32. Any slip in the value of the tournament would have profound implications regarding college sports that exist outside of the most lucrative conferences.

64. *See, e.g.,* Karen Crouse, *Cal Men's Golf Team Plays and Pays Own Way to Top*, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/06/sports/golf/cal-mens-golf-team-plays-and-pays-own-way-to-top.html?_r=0.