1-1-1990

Intercollegiate Athletics and the Assignment of Legal Rights

Alfred Dennis Mathewson
University of New Mexico - School of Law

INTERCOLLEGIATE ATHLETICS AND THE ASSIGNMENT OF LEGAL RIGHTS

ALFRED DENNIS MATHEWSON*

I. INTRODUCTION

All is not right in the world of intercollegiate athletics. Thousands of young men and women, primarily between the ages of eighteen and twenty-four, participate in public exhibitions of athletic contests on behalf of the universities and colleges in which they matriculate. All revenues derived from the staging of these exhibitions, including gate receipts and proceeds from the sale of television rights, are retained by the universities and the associations formed by them to regulate such exhibitions. The students may participate only if they receive no share of these revenues or accept compensation, except for scholarships and other permissible but nominal amounts.[1] Furthermore, they may not accept compensation or pecuniary reward from any source for their athletic skill.[2]

The nomenclature for this system, in which all persons collaborating in the production, sale, and delivery of athletic contests to the public, except the athletes, share in the immediate commercial rewards generated, is "amateurism." Amateur intercollegiate athletics as such is mandated neither by natural law nor the legislative enactment of state legislatures or Congress. Rather, the prohibition against the sharing of the spoils with athletes, as well as other matters relating to player eligibility, for whom students may play and the consequences of violations, are established by agreements[3] among universities and col-

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* Professor of Law, University of New Mexico School of Law. The University of New Mexico Law Alumni Association funded the research for this article. I wish to express my appreciation to Burton Brody, Homer Clark, Linda Greene, and Fred Hart for their comments on drafts of this Article. I also would like to gratefully acknowledge Kelly Champagne, Christine Lale, Rose Little, Lorraine Montoya, and Donovan Roberts for their research assistance and Sabra Dreyer who waged a holy war against the university VAX system to complete this Article. Earlier versions of this Article were presented in faculty colloquia at the University of Colorado and the University of New Mexico.

1. NCAA CONST. art. 3-1(a).

2. *Id.*

3. Although the term "agreements" necessarily includes voluntary arrangements among parties reached through bargaining and commonly designated as contracts, I use the term broadly. Colleges and universities voluntarily associate with each other to organize and produce intercollegiate athletics. Because the number of colleges involved

leges. Through these agreements, which I call "first-tier" agreements, universities and colleges form associations to govern intercollegiate athletics and establish the terms and conditions by which the members will produce, sell, and deliver exhibitions to the public. The principal governing association in the United States and the subject of much discussion in this Article is the National Collegiate Athletic Association (NCAA).

Student athletes, the ultimate subjects of a vast number of the terms and conditions of first-tier agreements, are not members of these associations or otherwise parties to such agreements. Instead, student athletes enter into what I refer to as "second-tier" agreements directly with universities, which by their own terms are subject to first-tier agreements.[4] Saddled with terms and conditions of first-tier agreements that they believe are unfair, more and more student athletes are redressing adverse university or governing association actions in the courts. These forays into the judiciary have been largely unsuccessful.

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essentially precludes individual bargaining in many cases, the terms and conditions of their association together — or agreements — to accomplish this purpose must be established through other means. The law of nonprofit associations deems the relationship among all colleges and universities so associated as implicitly contractual, the terms and conditions of which are contained in the articles of association or constitution, bylaws, and resolutions, rules, and regulations approved in accordance with procedures provided in the governing instruments or state statutes. *See* California State Univ., Hayward v. NCAA, 121 Cal. Ct. Rptr. 85 (Cal. App. 1975). These terms are not generally bargained for. They may be accepted by a university upon becoming associated. The university may agree to be bound by such other terms as are approved through the normative associational democracy even though it opposes a particular term. To the extent that universities merely accept internal rules of governance without bargaining and are subject to and benefit from statutory and case law rules governing the relationship, the agreements among them would appear to encompass terms obtained through means beyond common notions of contract. Such rules, regardless of the source, not only serve as gap-filler provisions but also place constraints on the permissible terms upon which members may associate, thereby enhancing fairness in dealings among members and reducing the potential for oppression that might result due to differences in bargaining power and transaction costs. Thus, when I refer to the agreements among universities, I am including the acceptance of the application of legal rules provided under the law of voluntary associations.

There is currently some debate over the related question of whether the relationship among shareholders in a business corporation is entirely contractual. *See* Clark, *Agency Costs Versus Fiduciary Duties*, HARV. BUS. SCH. RES. COLLOQ. (1985); Easterbrook & Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986); Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

4. Second-tier agreements include the provision of national and conference letters of intent, scholarships, grants-in-aid instruments, and all other commitments made to a student athlete orally or in writing whether or not duly authorized by the university. *See* Begley v. Corporation of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973); Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. Ct. App. 1972).

Over the years, several commentators have railed against the treatment of student athletes in intercollegiate athletics and cried for more legal accountability on the part of the NCAA with respect to its regulation of student athletes.[5] Although the nature and scope of the advocated accountability remains unclear, implicit in their cries for accountability through the judicial system is the existence of enforceable private legal rights for student athletes.

This Article arose out of my curiosity about the precise assignment of legal rights[6] among colleges and students in the production, sale, and delivery of intercollegiate athletics. What rights might student athletes possess that give rise to legal accountability? Although a system that permits universities, coaches, concessionaires, television networks, and advertisers to reap the wealth sown by student athletes while precluding the latter from contemporaneous enjoyment of pecuniary profit seems patently unfair, my review of the cases uncovered a legal order that does not assign legal rights to student athletes consistent with my view.

I must confess that my curiosity about the assignment of legal rights arose after my research began. I originally contemplated writing an article that provided a blueprint for the liberation of student athletes from the exploitation of the NCAA and its member institutions. In many respects, I have succeeded with the latter objective, but the discoveries I made on my expedition through the cases have resulted in a far less cynical — indeed, a somewhat optimistic — view of the future of intercollegiate athletics in America.

To examine the assignment of legal rights between universities in intercollegiate athletics, I reviewed more than forty reported cases in which a student sued a university or governing association or a university sued a governing association in connection with its intercollegiate athletics program. Each case was examined for several factual variables: (1) university, (2) student, (3) governing association or university rule violated, (4) sport, (5) legal grounds on which the actions of a university or governing association were challenged, (6) legal relief or remedy sought, (7) disposition at trial level involving the procedural matter or determination of merits, (8) state or federal court, and (9) who won.

Studying the cases for these variables was very revealing. Perhaps

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5. *See* Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101 (1984); Note, *Compensation for Collegiate Athletes: A Run for More Than the Roses*, 22 SAN DIEGO L. REV. 701 (1985); Koch, *A Troubled Cartel: The NCAA*, 38 J. L. & CONTEMP. PROBS. 135 (1973); Weistart, *Legal Accountability and the NCAA*, 10 J. C. & U. L. 167 (1983); Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983-84).

6. *See* Part I of text, *infra*, for further discussion of the nature of legal rights.

the most startling observation was that students and universities rarely asked the courts to mandate systemic reform. Although the majority of cases concern the so-called revenue producing sports of football and basketball, other sports such as hockey, soccer, and tennis generated a significant number of cases. Regardless of the sport involved, the most frequently sought remedy was the right to participate as students or their university surrogates asked the court to enjoin the university or governing association from restricting their right to participate in intercollegiate competition. Several plaintiffs sought damages, but no case was found in which an athlete claiming that he or she was underpaid asked for quantum meruit damages for the fair market value of services rendered less the scholarship. The most common measure of damages identified in the cases was the speculative compensation lost at the professional level.

The cases confirmed my long held suspicion that there is not a unique body of sports law, and that the legal rules applicable to intercollegiate athletics, and sports in general, developed through the application of legal rules from established bodies of law. In each case the student athlete, or a university on his or her behalf, urged the court that the student possessed private legal rights under principles of an established body of law under which the NCAA or the university could be held accountable in a court of law. They argued that these principles applied to defined strings of events that occurred in the context of intercollegiate athletics. Thus, the plaintiffs advanced causes of action arising under the fourteenth amendment, federal or state antitrust laws, contract law, tort law, worker's compensation laws, federal statutes such as Title IX of the Educational Amendments of 1972,[7] and other similar laws.

A classic example is *Hawkins v. NCAA*.[8] In *Hawkins*, the NCAA imposed penalties on the Bradley University basketball program for infractions that occurred prior to the participation of the then current team members. The team members challenged the imposition of such penalties on the grounds that the penalties punished innocent parties in violation of their fourteenth amendment rights, violated antitrust law, and constituted tortious interference with their contractual rights.

The NCAA typically defends against these types of claims with arguments that its actions are shielded from judicial review under the law of voluntary associations, that the technical requirements of the cause of action have not been satisfied, or that a legal principle within the body of law upon which the athlete's claim is based exempts the NCAA from the claim. For example, the NCAA argued in *Hawkins* that it was not a state actor, that the student athletes were not deprived

7. Pub. L. No. 92-318, 86 Stat. 373 (codified at 45 U.S.C. § 1681(a) (1988)).
8. 652 F. Supp. 602 (C.D. Ill. 1987).

of a liberty or property interest, that due process was provided, that no suspect class was involved, that the appropriate standard of review was the "rational basis" standard, and similar defenses.[9]

My journey took a decided twist upon observing student athletes in case after case asking the courts to award participation rights[10] as a remedy to their grievances. Why did student athletes want to participate in a system that so obviously exploited them? While I pondered this mystery, I read Cheung, *The Contractual Nature of the Firm.*[11] Cheung reminded me of the fundamental economic proposition that people enter into an exchange because they perceive that they will gain from the transaction. Student athletes thus evaluate entry into the system of intercollegiate athletics relative to their other options. The contribution of Cheung's work to my analysis was not that it solved a mystery for me but that it inspired me to view the university and student as collaborators in the production, sale, and delivery of intercollegiate athletic competition to the public. This viewpoint led me to conclude that the principal legal rights assigned under current American law to collaborators in intercollegiate athletics relate to the right to associate.

In this Article, I detail student athletes' searches for legal rights to protect them in direct relationships with their universities and indirect relationships with the governing associations of which those universities are members. Part I of this Article identifies the assignment of legal rights among university and student collaborators involved in intercollegiate athletic competition under existing case law. I report that student athletes, universities, and governing associations are principally assigned the right to associate voluntarily, whatever rights that they mutually agree upon in binding contracts, and the right to refuse to associate. Part II discusses attempts of student athletes to find private legal rights under due process, equal protection, antitrust, and contract principles. I demonstrate that lawyers have argued that the strings of events resulting from the relationships among collaborators in the production, sale, and delivery of intercollegiate athletic competition are identical to the strings of events to which legal principles in those four legal regimes apply. Part III shows that transaction costs severely con-

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9. *Id.* at 605.

10. Typically, a student has been declared ineligible for membership on an athletic team and seeks to have his membership restored. *See, e.g.,* NCAA v. Gillard, 352 So. 2d 1072 (Miss. 1977). Sometimes only a part of his right to participate as a member of the team is affected. For example, in Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972), the players were suspended from playing in games but were permitted to continue to participate in practices for the remainder of the season. When the Big Ten Conference decided they were ineligible to participate in practices as well, the student athletes sued. Likewise, in *Hawkins v. NCAA,* the student athlete maintained that NCAA action denied him full participation, which included appearances on television and in post-season play.

11. 26 J. L. & ECON. 1 (1983).

strain bargaining among student athletes and universities at the point of formation of second-tier relationships and that such bargaining does not occur until the right to participate is jeopardized because of the inherent nature of its value and the differences in that value over time. I conclude this Part by demonstrating that the consequence of the combination of constrained bargaining and the allocation of legal rights, without regard to the constraints of transaction costs, is industry inefficiency that is reflected in the existence of two fundamental structural deficiencies in the governance of the collaborative arrangements among student athletes and universities. First, student athletes have no real opportunity to influence substantive first-tier terms. Second, and more important, student athletes are not able to obtain accountability on the part of universities through bargaining.

Part IV proposes to remedy structural deficiencies in the legal relationships among student athletes and university collaborators by developing common law rules governing their unique relationships or through the promulgation of an intercollegiate athletics code that would assign legal rights among the various collaborators in a fashion similar to general business corporation codes.

This article principally addresses issues in men's athletics because the vast majority of collegiate cases involve men's athletics. Nevertheless, the issues discussed are equally applicable to women's athletics. I have chosen to use the masculine pronoun as gender neutral. This Article does not address issues relating to equality between men's and women's athletic programs. Nor does this Article directly cover the legal relationships among member universities or between a university and its coaches.

II. THE ASSIGNMENT OF LEGAL RIGHTS TO ASSOCIATE AND NOT TO ASSOCIATE

The Coase Theorem, as commonly articulated, rests upon the premise that a legal order somehow assigns legal rights or entitlements to those persons who are subject to that legal order.[12] I have always found this fundamental premise as intriguing as the relationship of transaction costs and legal rights to economic efficiency. How are legal rights assigned? By whom and to whom are they assigned? And what are legal rights anyway? I suppose the latter is the most interesting of the three questions, for law students learn early in their study of the law that legal rules, whether rooted in common law or promulgated by legislatures, establish the benefits or burdens that society will confer, exact, or impose on people as they interact with one another. Thus, legal rights are assigned to persons through legal rules by legal rulemakers,

12. Coase actually wrote of the establishment of a delimitation of rights. Coase, *The Problem of Social Cost*, 3 J. L. ECON. 1, 8 (1960).

i.e., courts and legislatures. When a legal rule confers benefits and imposes burdens — and a legal rule necessarily accomplishes both — it may be said to effectuate an assignment of legal rights to those persons affected by it. However, Coase appears to have been concerned only with the right to control or influence the allocation of resources under certain circumstances in preference to others.[13] In this section, I shall discuss the specific delimitation of legal rights among universities, governing associations, and student athletes and how those rights establish the right to control or influence the allocation of resources in the industry of intercollegiate athletics.

The assignment of legal rights among collaborators involved in the production, sale, and delivery of intercollegiate athletic competition to the public flows from the confluence of three sets of similar legal rules, respectively applicable to three distinct factual contexts in which the courts have historically abstained from resolving disputes. These contexts are (a) sports,[14] (b) the relationship between students and the university[15] and (c) voluntary associations.[16] In cases involving each of these contexts separately, courts have articulated rules requiring judicial restraint except to the extent necessary to enforce legally binding agreements made by the parties, including, but not limited to, any implied contractual rights arising under the law of voluntary nonprofit associations.[17] When these contexts are combined in the intercollegiate athletics setting, the courts will honor rights obtained under the terms of legally binding agreements reached or accepted by the collaborators, but will not dictate terms upon colleges, universities, and students stag-

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13. Coase wrote, "But it has to be remembered that the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what." Coase, *supra* note 12, at 15 (emphasis in original).

14. In National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922), the court stated:

> If a game of baseball, before a concourse of people who pay for the privilege of witnessing it, is trade or commerce, then the college teams, who play football where an admission fee is charged, engage in an act of trade or commerce. But the act is not trade or commerce; it is sport.

Id. at 685; *see* Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977); Nelson, *Introduction: Bringing Sports Under Legal Control*, 10 CONN. L. REV. 251 (1978); Zuckman, *Throw 'Em to the Lions (Or Bengals): The Decline and Fall of Sports Civilization As Seen Through the Eyes of a United States District Court*, 5 J. C. & U. L. 55 (1977).

15. Greene v. Howard University, 217 F. Supp. 609 (D.D.C. 1967), *cause remanded by* 412 F.2d 1128 (D.C. Cir. 1969); Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. C. & U. L. 141 (1981-82).

16. NCAA v. Tarkanian, 109 S. Ct. 454 (1988); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976); Note, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

17. *See supra* note 3.

ing sports contests.[18]

Whether the relationships among collaborators arise out of individual contracts or out of membership in voluntary unincorporated associations, legal rights are assigned based upon the association of collaborators with each other. The collaborators obtain the basic right to associate voluntarily with any other collaborators who are willing to associate with them, as well as other legal rights that might be obtained through the exercise of that right.[19] Implicit in the right to associate, and equally important, is the right to refuse to associate. The exercise of this right is the principal sanction used by governing associations in intercollegiate athletics.[20]

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18. NCAA v. Tarkanian, 109 S. Ct. 454 (1988); NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).

19. I frame the assignment in terms of the right to associate because more than freedom to contract is involved. "Contract" connotes a legally binding agreement and, as I wrote in note 3 and the text accompanying notes 15 and 16, those agreements include implied contracts and legal rules under voluntary associations law. Furthermore, I demonstrate in this Article, that many of the agreements reached between student athletes and the university are not legally binding. Contract is but one form of association. Although the student's associational relationship with his university may be contractual, his relationship with the NCAA, other universities, teammates, and players on other teams is not. In fact, viewing the relationship between a student athlete and his university may be misplaced. The fiction of the university as a body corporate is a modern convenience. A university is a setting in which students are provided an opportunity to obtain higher education. Although the various constituent participants at a university have sets of expectations that they hope to fulfill in the setting, none of those participants have the right to compel other individuals to deliver those specific expectations. Most of the cases involve attempts by a participant to remain in a setting rather than to compel the performance of an obligation or delivery of those expectations.

Thus, it is more appropriate to look at the association of student athletes and universities as collaborators. In at least one case the issue has been framed in terms of the student athlete's freedom to associate. In Karmanos v. Baker, 617 F. Supp. 809, 816 (E.D. Mich. 1985), *aff'd*, 816 F.2d 258 (6th Cir. 1987), the student athlete claimed that the NCAA punished him for associating with professional hockey players in Canada. The court rejected the claim, explaining that the NCAA had merely barred him playing intercollegiate ice hockey with an NCAA affiliated college or university, and had not barred him from otherwise associating with a member university or other participants. My point is that the NCAA, and the member university involved pursuant to its first-tier agreement, exercised their right to refuse to associate with him in the production, sale, and delivery of intercollegiate hockey to the public.

20. A university ordinarily has the right to refuse to admit a person as a student who does not meet its academic standards. It may terminate its relationship with students who fail to perform satisfactorily in their studies. Under the existing system of intercollegiate athletics, a university must refuse to permit a student to participate in intercollegiate athletics who does not meet certain academic standards or who accepts or has accepted compensation for his or her athletic skill. A university that does not approve of the rules of a governing association may withdraw from the association. Likewise, a student who believes the terms on which the university will permit him to

A. *The Sports Context*

Historically, the judiciary has not deemed disputes related to the staging or playing of sports contests worthy of judicial consideration. This attitude is exemplified in *Federal Baseball Club v. National League*.[21] The Federal Baseball Club of Baltimore sued the National and American Leagues after they permitted some teams from the Federal League to buy franchises but refused to permit the Federal Baseball Club of Baltimore to buy the Saint Louis Browns franchise.[22] The Federal Baseball Club asserted that the refusal violated federal antitrust laws. The applicability of the antitrust laws depended upon whether professional baseball exhibitions constituted interstate commerce.

The Federal Baseball Club argued that professional baseball teams did engage in commerce because they sold a product to the public who attended the games, traveled across state lines to play games, and purchased the services of players to produce the exhibitions.[23] Justice Holmes rejected the Club's contention because the playing of a baseball game before paying fans "although made for money would not be called trade or commerce in the commonly accepted use of those words."[24] He remained unpersuaded that baseball exhibitions were products. The distinguishing characteristic, according to Justice Holmes, that set professional baseball exhibitions apart from commerce was that it involved "personal effort not related to production."[25]

At the heart of this dispute over the characterization of professional baseball were the implications for associational rights. If professional baseball was merely sport, then the federal courts would not intervene and the Federal Baseball Club possessed only those rights obtained through its voluntary association with the National League. And it had no such agreement. Although the Federal Baseball Club might have been willing to associate with the National or American League, without judicial intervention the leagues were free to exercise

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participate in intercollegiate athletics are exploitative may refuse to participate. The exercise of the right to refuse to associate, unfettered by judicial intervention, is perhaps the most powerful legal right assigned to members of governing associations. It is the principal means through which governing associations enforce their rules.

21. 259 U.S. 200 (1922).

22. The Leagues were sued for violations of Sections 1 and 2 of the Sherman Act. According to Justice Holmes, the Leagues either bought out or induced all Federal League franchises to abandon the Federal League except the Federal Baseball Club of Baltimore. 259 U.S. at 207. For a detailed history of collective bargaining in organized clubs, see Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 686 (1981).

23. 259 U.S. at 202-03.

24. *Id.* at 209.

25. *Id.*

their right to refuse to associate.[26] Accordingly, what the Federal Baseball Club sought were legal restrictions on the right of the National and American Leagues to refuse to associate with it or at least restrictions on the right of those Leagues to require players to refuse to associate with it.[27] It offered the federal antitrust laws as a set of legal rules that placed restrictions on basic associational rights, including the right to refuse to associate, in commercial dealings.

In *Toolson v. New York Yankees, Inc.*,[28] the Supreme Court acknowledged that professional baseball was commerce, but declined to reverse *Federal Baseball Club* or reach a result inconsistent with it insofar as baseball was concerned. The Supreme Court has subsequently followed its reasoning in *Toolson* and has applied the federal antitrust laws to all other professional sports that have come before it.[29] In 1984, the Court followed the reasoning in *Toolson* when it ruled that federal antitrust laws applied to the regulation of broadcast rights in intercollegiate athletics.[30] Although these cases provide little consolation to the Federal Baseball Club, they show a retreat from Justice Holmes' approach and stand squarely for the proposition that associational rights among sports collaborators may be restricted under federal antitrust laws.

As implied by Justice Holmes' statements, a substantial justification for the hands-off approach is that people voluntarily associate in sports for fun. It is leisure activity, participated in as a player or a fan for its impact on the psyche and one's general well-being. This justification was also well articulated by the trial court in *Hackbart v. Cincinnati Bengals, Inc.*[31] In the absence of professional sports, such participation ordinarily would not result in any direct addition to or subtraction from one's tangible wealth.

Another justification was articulated by Justice White and joined by Justice Rehnquist in his dissent in the NCAA television case.[32] The participants must agree on some matters related to the playing of the

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26. *See supra* note 20.

27. The alleged antitrust violations included a challenge of the "reserve system" that bound a player to a team for his career. Arguably, a player so bound lacked the legal right to contract with a different team regardless of the league involved.

28. 346 U.S. 356 (1953).

29. Haywood v. National Basketball Ass'n., 401 U.S. 1204 (1971)(basketball); Radovich v. NFL, 352 U.S. 445 (1957)(football); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955)(boxing); *see also* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972)(hockey).

30. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

31. 435 F. Supp. 352 (D. Colo. 1977).

32. Board of Regents of Univ. of Okla., 468 U.S. at 121 (White, J., dissenting) (Justice White asserts that the NCAA establishes rules and regulations in order to enhance higher education and does not function primarily in the pursuit of profits).

games if they are to be played at all. The participants, among many others, must decide on the game's rules and on how and by whom the rules will be enforced. Certainly, the time and resources of the courts ought not be wasted reviewing the decisions of game officials[33] to merely redistribute psychic gains.

B. *The University and Student Context*

Legal rights in intercollegiate athletics are assigned not only on the basis of sports but also on the status of the university and student. The relationship between a university and its students is contractual in nature with terms evidenced by the application form, catalogue, student handbooks, and university regulations. The rights obtained by students are quite limited, as the courts historically have shown great deference to the decisions of educational institutions affecting their students.[34] The doctrine of academic abstention has been eroded somewhat in recent years,[35] but it still survives even though the related doctrine of *in loco parentis*, from which it derived, has become an anachronism. Under present law, the doctrine of academic abstention permits universities as bodies corporate, subject to express constitutional and statutory limits, to refuse to associate with students except on the terms and conditions agreed upon by the university.

C. *The Voluntary Associations Context*

Finally, one other factual variable in the intercollegiate athletic context results in a rule that primarily assigns each party the right to refuse to associate except on the terms it agrees upon, and concomitantly, affects the rights the party obtains through any such agreement. Universities necessarily must associate with other universities to produce exhibitions of intercollegiate competitions. The most common form this association takes is that of a legal entity known as a voluntary unincorporated association.[36] The members of a voluntary unincorporated association have rights provided by statute and case law, rights

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33. In Georgia High School Ass'n. v. Waddell, 285 S.E.2d 7, 9 (Ga. 1981), the parents of the players of a high school football team on the short end of the score challenged the erroneous decision of a referee in failing to award a first down on a "roughing the kicker" penalty late in the game. The Georgia Supreme Court went beyond the questions appealed and held that "courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies."

34. *See id.*

35. *See* Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J. C. & U. L. 269, 272-74 (1985); Greenleaf, *Academic Institutions in the Light and Shadow of the Law* 12 J. C. & U. L. 1 (1985); Nordin, *supra* note 15, at 145-49.

36. *See supra* note 3.

provided by the governing instruments accepted by a member upon joining, and rights provided by the resolutions and regulations adopted in accordance with the processes afforded by the governing instruments and applicable laws.[37] Under the noninterference doctrine, courts will not intervene in the internal affairs or operations of a voluntary association except to enforce rights so obtained.[38] Thus, the noninterference doctrine generally precludes a member of the association from successfully challenging an adverse determination on a student's eligibility in court.[39] A member university that does not like a determination or rule or bylaw provision has a remedy; it may refuse to associate with the governing association and its other members. The student athlete who is precluded from membership in the governing association is apparently relegated to that same remedy if he or she finds the rules of the governing association unacceptable.[40]

D. *The Intercollegiate Athletics Context*

Legal rights governing the second-tier relationship between the student athlete and the university are such that each has the right to associate or to refuse to associate prior to their association. They have whatever other rights they subsequently agree upon in legally binding agreements. The student athlete customarily agrees, as a part of those agreements, to associate or collaborate with other universities with whom the student's university has entered into first-tier relationships for the production, sale, and delivery of intercollegiate athletic competitions. As the student athlete further agrees to be bound by the first-tier agreements, the various governing associations also obtain legal rights.[41]

The operation of this assignment of legal rights may be demonstrated by examining four components of the second-tier relationship between a university and a student athlete: formation, nature and quality of the right to participate, the duration of the period of collaboration and its termination, and transfers of student athletes from one university to another.

Formation occurs upon the decision of a university and a student

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37. *Id.*

38. *See, e.g.*, California State Univ., Hayward v. NCAA, 121 Cal. Rptr. 85 (Cal. Ct. App. 1975); Note, *supra* note 16, at 1001-06, 1018-20.

39. *See, e.g.*, Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977).

40. Under the terms of the university's association with the governing association, all agreements it may make with student athletes are subject to the terms of the governing association.

41. The letter of intent between a student athlete and a university usually incorporates the rules and regulations of the applicable governing associations. *See, e.g., Begley*, 367 F. Supp. at 909.

athlete to associate together in the production of intercollegiate athletics. The agreement to associate is evidenced by a letter of intent, scholarship, or grant-in-aid, but these documents do not necessarily contain the entire agreement between the parties.[42] No university may compel the formation of this relationship with a student athlete if the student does not choose to do so. And in general, a student athlete may not compel a university to associate with him or her unless it so chooses. A university's ability to associate with a student athlete may be restricted, however, by virtue of its first-tier agreements — the most notable being requirements that athletes meet minimal academic entrance standards, become a student at the university, and qualify as an amateur. Thus, a university not only may, but must, refuse to associate with athletes lacking these characteristics.

The nature and quality of the student athlete's right to participate is fixed by the agreement of the parties. The student athlete ordinarily obtains the right to participate in practice sessions, conditioning programs, games with other universities, and post-season and television appearances when merited.[43] In most cases, the student athlete receives a scholarship in exchange for participation.[44] The ability of a university to deliver some or all of the participation agreed upon may be restricted by virtue of its first-tier agreements. For example, if the university violates its first-tier agreements it may be banned from television and post-season appearances even though it promised, perhaps only implicitly, such appearances to the student athlete.

The duration of the period of association will extend for as long as the parties agree. But again, the period of association to which the university may agree is restricted by first-tier agreements.[45] The university will associate for a maximum period of five years, but the student athlete may participate for no more than four of the five years.[46] Furthermore, the first-tier arrangements of the university preclude second-tier arrangements greater than one year at a time.[47] Thus, at the end of any academic year a university may refuse to associate further with a

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42. NCAA Bylaws art. 13.9, 15.

43. *See Hennessey*, 564 F.2d at 1150-51 (provision of coaching is recognized as a benefit to students); *Hawkins*, 652 F. Supp. at 609 (students seek to overturn ban on post-season and television appearances); *Behagen*, 346 F. Supp. at 606 (students seek to overturn suspension from participation in practice sessions and games).

44. Not all student athletes receive athletic scholarships. Some student athletes "walk-on" to the team, and although they are not recruited by the university for the athletic program, they make the team based upon a tryout.

45. NCAA Bylaws art. 14.2 limits a student athlete to four seasons of eligibility over five calendar years; *see also infra* note 47 and accompanying text.

46. NCAA Bylaws art. 14.2.

47. NCAA Bylaws art. 15.3.3; *see* Vannelli v. NCAA, No. C3-87-2039 (Minn. Ct. App. 1988), *cert. denied*, 109 S. Ct. 394 (1988) (court refused to find offer of four year scholarship because university lacked authority to do so under NCAA rules).

student athlete. Moreover, the university must terminate its association with the student athlete if the student commits a disqualifying act or fails to measure up to academic requirements.[48] Other member universities of the same governing association often agree to refuse to associate in intercollegiate athletics if a university does not terminate its association with a disqualified student athlete.

The student athlete is free at any time to partially or entirely cease his association with university intercollegiate athletics. The student athlete may choose to associate with another university after ceasing his association with one university, but such a decision is discouraged by the impact of first-tier agreements on available alternatives. First-tier arrangements permit but discourage a member university from associating with a student athlete who previously associated with another university. Such subsequent associations are discouraged by requiring the new university to withhold the transferred student athlete from full participation for a period of one academic year.[49] In addition, the new university may not provide the transfer student athlete with financial aid for a period of one academic year unless the original university consents.[50] A student athlete who wishes to transfer without suffering this transfer tax must engage in the costly process of seeking changes in the first-tier agreements or refuse to associate.

Under such a regime of associational rights, the persons or institutions with control or possession of resources will direct the use thereof unless they relinquish the right through contract. Many readers, no doubt, are familiar with the playground spectacle in which a lesser talented kid of means threatens to take his or her ball unless he or she can play in the game. In the intercollegiate athletics context, universities control the equivalent of the playground ball — resources. Not only are they able to withhold the ball unless they can play, they can insist on the right to select the other players in the game with the blessing of the law.

It is true that universities necessarily must relinquish some of the right to control resources through first- and second-tier agreements. As will be demonstrated herein, universities bind themselves in first-tier agreements in order to relinquish little control to student athletes in second-tier agreements. The allocation of the right to control essential resources to universities reflects the legal system's notion that universities will direct those resources into activities providing the greatest societal benefit.

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48. NCAA Bylaws art. 14.13.
49. NCAA Bylaws art. 14.6.
50. NCAA Bylaws art. 13.1.1.3; *cf.* NCAA Bylaws art. 14.6.5.1.1.

III. THE SEARCH FOR RESTRICTIONS ON THE RIGHTS TO ASSOCIATE AND NOT TO ASSOCIATE

No legal rule in Anglo-American jurisprudence, whether statutory or common law based, explicitly provides for an assignment of legal rights based upon the unique circumstances of intercollegiate athletics. The courts apply rules that identify specific factual variables that occur in the context of intercollegiate athletics, such as voluntary associations. The application of these rules has the effect of assigning participants only those rights that they have agreed upon in addition to the right to refuse to associate. Accordingly, aggrieved student athletes have been forced to search, like the Federal Baseball Club,[51] for other legal rules that identify any of the factual variables in the string of events occurring in the context of intercollegiate athletics: rules that place restrictions on the permissible terms and conditions on which the collaborators may associate or on the right to refuse to associate, rules that limit the right of universities to direct the use of resources contrary to the interests of student athletes.

The result has been claims that a student athlete was deprived of his right to participate in intercollegiate athletics without due process,[52] that eligibility rules were a denial of equal protection of the laws,[53] that the actions of a university constituted a breach of contract,[54] that imposition of penalties amounted to a tortious interference with contractual rights,[55] that the actions violated antitrust laws,[56] and that student athletes were entitled to compensation under workmen's compensation laws.[57] Other types of cases have been brought but they fall into isolated categories.[58] The cases generally fall into four classes corresponding to the four components of second-tier agreements described in the

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51. *See supra* notes 21-25 and accompanying text.

52. Regents of the Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); *Hawkins*, 652 F.2d at 609; Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983); NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977).

53. Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Bucton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973).

54. *See supra* note 4.

55. *Hawkins*, 652 F. Supp. at 602; Kupec v. Atlantic Coast Conf., 399 F. Supp. 1377 (M.D.N.C. 1975).

56. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Justice v. NCAA, 572 F. Supp. 356 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

57. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983), Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983).

58. *E.g.*, Butts v. NCAA, 751 F.2d 609 (3d Cir. 1984) (action for age discrimination); Rutledge v. Ariz. Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), *aff'd on reh'g*, 859 F.2d 732 (9th Cir. 1989) (action against coach for defamation and intentional infliction of emotional distress); Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972) (actions based on first amendment).

preceding section: Formation, Nature and Quality, Termination, and Transfer cases. In Formation cases, the university should not have formed or entered into a collaborative relationship with a student athlete. Typical Formation cases occur when a student does not meet academic entry standards or is no longer eligible because of participation in a foreign country.

Nature and Quality cases are those in which a university has been subjected to sanctions that infringe upon the nature and quality of the student athlete's right to participate in intercollegiate athletics, such as bans on television and post-season appearances.

In Termination cases, the university has terminated its relationship with a student athlete and refused to further associate in intercollegiate athletics with that student athlete. An example might be when a student has committed a disqualifying act and the NCAA or other governing association determined that the student athlete was permanently or temporarily ineligible for athletic participation. Frequently, cases involving the termination of a relationship for failure to satisfy academic entry standards arise only after a relationship has been formed, but for organizational purposes those cases are included with the Formation cases.

Transfer cases include those instances when a university has complied with first-tier restrictions on participation by a student athlete who has transferred from another university.

The classification of the cases as Formation, Nature and Quality, Termination, and Transfer is a necessary step in their analysis. Nonetheless, I have chosen to organize my discussion in terms of the usual causes of action used to challenge the action of the governing association or university rather than these four categories. I shall examine the use of due process, equal protection, antitrust, and contract-related rules by student athletes and universities on their behalf.

A. *Due Process Claims*

The fourteenth amendment makes no reference to intercollegiate athletics; nonetheless, student athletes and universities have repeatedly asked courts to grant remedies based upon its application to intercollegiate athletics in cases involving each of the four previously discussed classes of cases. The student athletes argue that the specific string of events in their cases constitute a deprivation of life, liberty, or property by a state without due process. They argue that the NCAA is a state actor, the student athlete's right to participate is property, and the NCAA's determination of ineligibility is a deprivation of that property and the process afforded to the student athlete falls short of due pro-

cess.[59] Variations of this analysis include claims that the property interest consists of contractual rights under a scholarship grant-in-aid agreement,[60] or intercollegiate athletics equate to education in such a way that the property interest is the right to an education.[61]

In many of the cases, the court finds the absence of state action but proceeds to analyze other elements of the claim. Challenges on procedural due process grounds in these cases are understandable since all four groups of cases involve decisions that must be rendered through some form of process. Theoretically, however, the NCAA or other governing association may cure due process failures by reconsidering the decision and using an appropriate process. If time and expense were not factors,[62] a court decision that due process requirements were not satisfied would provide a short-lived victory for the student athlete.

Analysis of specific due process claims reveal concerns regarding the application of at least one of four sets of substantive first-tier provisions to student athletes. The first set of challenged first-tier provisions is that governing the process afforded to student athletes in the enforcement stage. In *Gillard v. NCAA*,[63] a Termination case, a student athlete challenged his disqualification for a portion of the football season on the ground that existing NCAA rules technically granted a hearing only to the university.[64] He had participated in the hearing through his coach. The university, in the exercise of its rights, had also represented the student's interests in the hearing. He apparently argued at trial that the interests of the university were not aligned with his interests and the university had not adequately represented him in the hearings.

Similar arguments about the lack of process were advanced in *Hawkins v. NCAA*,[65] a Nature and Quality case, in which Bradley

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59. Most recent decisions, culminating in the Supreme Court's 5-4 decision in *Tarkanian*, have determined that the NCAA is not a state actor. Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982), is the only case of which I am aware that held the athlete possessed a property interest in his participation.

60. Spath v. NCAA, 728 F.2d 25, 29 (1st Cir. 1984); *Justice*, 577 F. Supp. at 356.

61. *See* Regents of the Univ. of Minn. v. NCAA, 422 F. Supp. 1158, 1162 (Minn. 1976), *rev'd*, 560 F.2d 352 (8th Cir. 1977).

62. In several cases, the student athlete won injunctive relief in the trial court. Although the injunction was subsequently overturned by an appellate court, such reversal did not occur until after the student's eligibility had expired in normal course. *See, e.g.*, NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977).

63. *Id.*

64. NCAA Bylaws art. 14.13.1 obligates a university to withhold a student athlete from all intercollegiate competition as soon as he becomes ineligible. A student athlete automatically becomes ineligible upon the occurrence of circumstances that render him ineligible. NCAA Bylaws art. 14.14.1 confers the right to appeal the loss of eligibility solely on the university.

65. 652 F. Supp. 602 (C.D. Ill. 1987).

University was penalized[66] for violations that had occurred in its basketball program before any of the suing team members had enrolled at Bradley. When Bradley University declined to appeal[67] the penalties, some team members filed suit. They claimed, among other things, that because they would suffer under the penalties they were entitled to a hearing that NCAA rules did not afford. Although the court determined that the due process claims failed because of a lack of state action, it nevertheless examined the alleged denial of due process.

Relying upon *Justice v. NCAA*,[68] a case with nearly identical facts, the *Hawkins* court concluded that only the university was entitled to notice and an opportunity for a hearing. The *Justice* court had concluded that the interests of the players were adequately represented by the University of Arizona and the only contribution the players could have added was additional requests for leniency.[69] In examining the adequacy of representation provided to the student athlete by Bradley University, the *Hawkins* court ignored Bradley's failure to appeal the penalties. The court stated that it was sympathetic to the plight of the student athletes but public policy favored first-tier agreements for the production of amateur intercollegiate athletics and second-tier agreements must necessarily be subject to them.[70]

Universities have expressed concern about their obligation to provide due process in the enforcement stage, notwithstanding first-tier provisions. State universities in particular have argued that their obligations under first-tier agreements are subject to their constitutional obligation to provide due process to student athletes.[71] In *Regents of the University of Minnesota v. NCAA*,[72] the university maintained that constitutional constraints mandated that it make a factual determination through student grievance procedures as to whether the student athletes accepted compensation in exchange for athletic skill in violation of NCAA rules.[73] The Eighth Circuit, like most appellate courts

66. The NCAA rendered a public reprimand, placed Bradley on two years probation, barred the men's basketball team from post-season competition during the 1986-87 academic year, and restricted off campus recruiting for one year. *Id.* at 605.

67. *Id.*

68. 577 F. Supp. 356 (D. Ariz. 1983).

69. *Id.* at 368-69.

70. *Hawkins*, 652 F. Supp. at 615.

71. *See, e.g.*, Cal. State Univ., Hayward v. NCAA, 121 Cal. Rptr. 85 (Cal. Ct. App. 1975).

72. 560 F.2d 352 (8th Cir. 1977).

73. *Id.* at 354. NCAA Bylaws treat the occurrence of ineligibility as an objective factual event requiring no official declaration. The rationale is essentially that a person is pregnant or not. Nevertheless, the university is required to withhold a student who is ineligible from participation. And a university cannot withhold a student from participation unless it is first determined that the student is ineligible. Ineligibility is not a condition like pregnancy that can be accurately determined through medical tests, especially when violations of amateurism are concerned. Verification is frequently inexact

that have considered this issue, recognized that upholding the position of the university would effectively render the NCAA incapable of enforcing its rules against state universities.[74] It accepted, without so holding, that the university was constitutionally required to provide due process, but held that its submission of the eligibility issue to its student grievance procedures satisfied constitutional requisites.[75] The court implied that the university grievance tribunal acted arbitrarily and capriciously in not finding violations since the record of proceedings contained clear violations.[76] In ruling on these issues, the court seemed more concerned about the preservation of amateur intercollegiate athletics than with the soundness of the proposition that constitutional restraints on governmental action must give way to the commands of first-tier agreements.

The second set of first-tier provisions are not directly challenged in due process cases, but appear at the core of disputes between student athletes and governing associations. These provisions, which establish the extraordinarily narrow scope of amateurism policies and the ultimate penalty of permanent ineligibility for their violation, were at the heart of *Regents of the University of Minnesota.*

The defense of the student athletes by the University of Minnesota was unquestionably motivated by concerns about the possibility of permanent ineligibility for the student athletes who were involved in relatively minor violations of substantive NCAA rules.[77] Under NCAA rules, a student athlete who violates the prohibition against receiving any compensation for performing is automatically ineligible to participate upon receipt of the compensation. The athlete's university may obtain a waiver of all or a portion of the penalty through an appeal to the NCAA for the restoration of eligibility.[78] Since NCAA rules do not contain standards for waiver, a decision to restore any portion of eligi-

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and based upon evidence that would be inadmissible in a court of law.

74. Specifically, NCAA Bylaws art. 14.14 authorizes an appeal to restore eligibility. Thus, no hearing or other process is afforded on the finding of ineligibility. Process is provided only after eligibility has been lost officially. The restoration of the eligibility process is really a means through which the NCAA determines if it will waive any portion the period of ineligibility prescribed under NCAA Bylaws. Technically, it is not a process for challenging a determination of ineligibility. Whether the Eighth Circuit understood this flaw is not clear. The court probably realized that the position of the University of Minnesota afforded a student athlete substantial process, and wary of the adverse impact on amateur intercollegiate athletics, was reluctant to hold that this much process was constitutionally required. First, the university must give the athlete a fact finding hearing on the issue of ineligibility. Then, he or she gets another crack if the university appeals for the restoration of eligibility.

75. *Regents of the Univ. of Minn.*, 560 F.2d at 367-68.

76. *Id.* at 368.

77. *Id.* at 359-60.

78. NCAA Bylaws art. 14.14.

bility falls entirely within the discretion of the NCAA.[79] The University of Minnesota's internal disciplinary tribunal balked at the potential imposition of a penalty that on its face was disproportionate to the offenses committed.[80]

Disproportionality connotes an imbalanced scale with one weight heavier than the other. In these cases the student athletes might have argued that the permanent or lesser period of ineligibility outweighed the specific violations of amateurism. The student athlete in *NCAA v. Gillard* purchased a suit at a one-third discount not available to other students, whereas the student athletes in *Regents of the University of Minnesota* were accused of accepting $175 in exchange for complimentary tickets with a face value of $78 and receiving rides to and from a summer basketball camp. Query whether the student athletes in either of these cases should have been subjected to the loss of eligibility for those violations? The question is not whether permanent ineligibility or some lesser period of ineligibility is ever appropriate but whether it is appropriate in all cases involving violations of amateurism.

There have been direct challenges to the third set of first-tier provisions, which authorize the imposition of sanctions against a university in a manner so that the onus falls upon student athletes who did not take part in the violations. When the NCAA bans a university from television and post-season appearances in a particular sport, it effectively bans all student athletes who participate in that sport at that university regardless of their culpability. Student athletes have argued that such penalties, and the first-tier agreement provisions that prescribe their imposition, are impermissible because they violate the student athlete's fundamental right to be free from punishment absent personal guilt.[81] The student athletes based their arguments on substantive due process grounds in *Justice*[82] and on equal protection grounds in *Hawkins*.[83]

In both cases, the student athletes lost their arguments based upon technical analyses of their claims. The student athletes failed to show the existence of the fundamental property or liberty interests required under a substantive due process claim. The *Justice* court held that "the right to participate in post-season or televised college athletic competition" did not qualify as such an interest.[84] Moreover, the court declined

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79. *See supra* note 63.

80. *Regents of the Univ. of Minn.*, 560 F.2d at 359-60; *see also* NCAA v. Gillard, 352 So.2d 1072 (Miss. 1977) (student athlete was similarly motivated by a sense that a half-season of ineligibility was disproportionate to the seriousness of his violation).

81. *Hawkins*, 652 F. Supp. at 612; *Justice*, 577 F. Supp. at 369.

82. 577 F. Supp. at 369.

83. 652 F. Supp. at 612.

84. 577 F. Supp. at 370.

to equate NCAA enforcement actions with the type of punishment from which innocent persons are afforded substantive due process protection. *Hawkins* employed a similar analysis in rejecting the equal protection claim. The court stated that a classification will only be subjected to strict scrutiny when a suspect class is involved or where a fundamental property or liberty interest is infringed.[85]

The principal justification for such broad-brush, first-tier rules that seriously and adversely affect innocent student athletes lies in a deep-rooted but empirically unproven concern: universities fear that the governing associations can not enforce their rules efficaciously unless student athletes bear a significant portion of the costs of enforcement. This fear was openly expressed by the court in *Justice* in response to a suggestion that the NCAA levy fines on the universities as an alternative to television and post-season bans.[86] The court rejected this idea, stating that fines would have no deterrent effect on the university because it would pass along the fines to contributors, students, and taxpayers.[87] In other words, the universities would be worse off with fines as sanctions in that they would be unable to enforce the rules of the governing association even though student athletes would be better off. The court may not have realized the irony of its conclusion. It in effect suggested that the only way to deter misconduct by institutions of higher learning is to make the university less attractive to prospective student athletes by making innocent student athletes at the university suffer.

The *Justice* court advanced one other justification for its result. The very nature of playing sporting games requires that an entire team suffer for the misconduct of a single player during the course of a game.[88] When a football player jumps offside, the entire team is penalized rather than just the individual player. This reasoning exhibits the same flawed reasoning employed by Justice Holmes, namely that rules applicable to the playing of the game ought also apply to every aspect of the staging, production, sale, and delivery of the game to the public.

The final set of first-tier provisions involve restrictions on the right of student athletes to transfer to another university to participate in intercollegiate athletics. These restrictions are also overly inclusive.

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85. 652 F. Supp. at 613.

86. 577 F. Supp. at 372-73.

87. *Id.* at 373.

88. *Id.* at 371. The court quoted with approval Moreland v. Western Pa. Interscholastic Athletic League, 572 F.2d 121, 126 (3d Cir. 1978), as follows: "It is regrettable, however, that enforcement of the rule sanctioned upon schools for serious breaches of the rules visits tangible deleterious effects upon certain innocent players . . . . But the reality that the innocent do suffer because of the improper conduct of a guilty few is not an unusual occurrence in the sports world; it is an inherent risk in the rules of any game." *Id.*

Designed principally to prevent raiding and preserve amateurism,[89] they reach all transfers regardless of the underlying motive. For example, in *McHale v. Cornell University*,[90] a student athlete transferred from the University of Maryland to Cornell University for academic reasons. He discovered that NCAA bylaws precluded participation for an academic year regardless of the reason for the transfer.[91]

The student athlete in *McHale* resorted to procedural due process but it is not clear whether he attacked the process by which the rule was promulgated or the process by which the substantive rule was applied. If a student athlete in a Transfer case, or in any case involving a first-tier provision, brings an action on procedural due process grounds, the appropriate focus of the challenge should be on the exclusion of the student athlete from the process that generated the substantive provision as well as the process by which the rule was applied to him. The governing association could produce the identical rule but only after correcting the defective process by somehow including student athletes in the process through which the first-tier agreement was established.

These restrictions facilitate the governance of intercollegiate athletics by member institutions at the expense of the student athletes. The restrictions are overly broad because a rigid proscription is easier to enforce than one that provides for exceptions. If the rule contained exceptions, some mechanism to determine the existence of factual predicates for exemption would be necessary. Moreover, the exceptions eventually might subsume the general rule.

Thus, the goals of the governing association are obtained, but only by imposing a substantial, and perhaps disproportionate, share of the costs upon the student athlete. The student athlete in *McHale* did not argue that the NCAA could not place restrictions on transfers. Indeed, he seemed to acknowledge that a rule designed to prevent the raiding of student athletes was desirable. He objected, however, to an overinclusive rule that imposed costs on a student athlete when no raiding occurred.

B. *Equal Protection Claims*

Fourteenth amendment equal protection rules have been used by student athletes primarily in Formation cases involving first-tier provisions establishing eligibility standards. These types of provisions readily

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89. Presumably, universities with successful programs and the concomitant accoutrements would be able to lure student athletes with ease. A Notre Dame-like university need only announce that its team had openings and student athletes would beat a path to its door. Universities would be tempted to advertise their economic advantages.

90. 620 F. Supp. 67 (N.D.N.Y. 1985).

91. *Id.* at 68; NCAA Bylaws art. 14.6.

lend themselves to equal protection analysis because eligibility standards, by definition, must relate to personal characteristics such as whether, for example, the athlete is an amateur, whether he or she meets academic entry standards, or whether he or she is a student enrolled at the university.

Here student athletes used the same traditional legal analysis as used in the due process cases. They claimed that a state actor's refusal to permit a student athlete to participate in intercollegiate athletics on the basis of eligibility standards or other first-tier provisions that have a disproportionate adverse affect or facially discriminate against persons of a particular race, nationality, or other class protected as a suspect class is actionable under the Equal Protection Clause of the fourteenth amendment and civil rights statutes.[92]

First-tier provisions establishing uniform minimum academic standards have generated the most controversy even before the NCAA adopted Proposition 48.[93] *Parish v. NCAA*[94] is the leading case in which a student athlete challenged NCAA academic standards on equal protection grounds. Robert Parish, now of Boston Celtic fame, argued that the NCAA's exercise of the right to refuse to associate with him in intercollegiate athletics on the ground that he failed to meet minimum academic standards amounted to illegal discrimination. He apparently was unclear as to the precise nature of the discrimination, but the court ascertained allegations of racial discrimination as well as others.[95] Although the court agreed that a refusal to associate because of race would be illegal,[96] Parish was unable to prove discrimination and lost.[97]

A victory by Parish would not necessarily have meant the demise of academic eligibility standards, although the court almost certainly believed it would. The decision merely would have precluded the NCAA from establishing academic standards that it knew would exclude a discrete class of persons from participation in intercollegiate athletics who were otherwise eligible to participate in the university's academic program. The establishment of academic standards would have been decentralized and relegated to member universities in the

92. Whether the lawsuit is brought under the fourteenth amendment or 42 U.S.C. § 1983, the student athlete must show the presence of state action and racial discrimination that caused the harm.

93. Now codified at NCAA Bylaws art. 14.3 (setting minimum academic standards for admission and participation in intercollegiate athletics).

94. 506 F.2d 1028 (5th Cir. 1975).

95. *Id.* at 1033. The court found that the student athletes suggest at least seven suspect classes: blacks, cultural minorities, the educationally deprived, persons of less than average intelligence, late achieving students, student athletes, and impecunious student athletes.

96. *Id.* at 1033.

97. *Id.* at 1034.

same manner that such standards are established for all other students. Of course, proponents of uniform standards fear that standards set autonomously by member universities will mean the widespread use of professional athletes disguised as students, a state of affairs bearing a close resemblance to actual practice under the current standards determined through a centralized process.

Many equal protection challenges involve first-tier eligibility standards adversely impacting foreign student athletes. In *Howard University v. NCAA*,[98] a foreign student athlete was ineligible under then NCAA Bylaw 5-1(d)-(3).[99] Although Howard University lost the case on other grounds, the court struck down the bylaw because it discriminated solely on the basis of national origin.[100] The revised version[101] of the bylaw, which was made applicable to all student athletes, was unsuccessfully challenged in *Arlosoroff v. NCAA*[102] and *Spath v. NCAA*.[103] The student athletes in those cases claimed that the bylaw, although neutral on its face, was directed at foreign students.

Student athletes who previously played in the Canadian hockey system are a fertile source of equal protection challenges to first-tier amateur eligibility standards. In Canada, hockey at the scholastic level is operated by pure sports organizations independent of the school systems. These organizations routinely pay room, board, and incidental expenses to players who find it necessary to move to the urban areas where the teams are located. The receipt of such amounts constitutes compensation in exchange for athletic skill under NCAA rules and players who receive such "compensation" are deemed professionals and are ineligible for participation in NCAA governed sports. Canadians claim the amateur eligibility standards discriminate against them on the basis of national origin and wealth.[104] Americans who participate in Canadian hockey claim the standards discriminate on the basis of wealth.[105]

Regardless of the discrimination alleged, the broad outlines of the

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98. 510 F.2d 213 (D.C. Cir. 1975).

99. Under NCAA Bylaw 5-1-(d)(3), a foreign student lost one year of eligibility for each year of organized competition in the sport after his nineteenth birthday. The current version is codified at NCAA Bylaws art. 14.2.4.5. It does not, however, contain any reference to nationality. "Any participation as an individual or a team representative in organized sports competition by a student during each 12-month period after the student's 20th birthday and prior to initial full-time enrollment in a member institution shall count as one year of varsity competition in that sport." *Id.*

100. *Howard Univ.*, 510 F.2d at 222.

101. *See supra* note 98.

102. 746 F.2d 1019 (4th Cir. 1984).

103. 728 F.2d 25 (1st Cir. 1984).

104. Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973).

105. Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

challenges are similar. Student athletes object to the application of first-tier provisions that adversely affect some student athletes based upon how they played the cards life has dealt them. Young athletes who have spent their lives in substandard schools find that no college is willing to give them an opportunity to prove themselves except for their athletic skills. Poor Canadian athletes from rural communities find they have no alternative route to opportunity other than moving to urban areas to play hockey and accepting the payment of expenses. Other athletes find themselves in this same situation with the door to opportunity closed by first-tier provisions that forbid a member university to open it. Had they been lucky enough to be musicians, artists, or the children of politicians or wealthy alumni, no such first-tier provisions would close the door.

These student athletes resort to the equal protection doctrine because of its conceptual fit and because, when applicable, it restricts the right of universities to refuse to associate with them and others like them in intercollegiate athletics. Yet these challenges are usually unsuccessful. The courts have uniformly held that first-tier provisions establishing academic standards, limiting participation to amateurs, and setting limits on institutional financial aid are rationally related to legitimate objectives.[106] The most commonly discussed objectives relate to the educational mission of member universities and the promotion of amateurism.

C. *Antitrust Claims*

Student athletes have resorted to antitrust laws in a small number of reported cases, challenging first-tier provisions designed to establish or preserve amateurism. Amateurism is a vague concept and, as enforced by the NCAA, hardly resembles popular connotations. Contrary to conventional wisdom, it does not mean that student athletes may not receive compensation under NCAA rules.

The NCAA definition of amateurism presents a three-pronged concept. First, the NCAA fixes the amount of compensation a university may give to a student athlete in exchange for athletic services.[107] Member universities may not remunerate student athletes pecuniarily in excess of a scholarship and other authorized amounts in exchange for athletic services.[108] Any amounts paid by a university not author-

106. Parish v. NCAA, 506 F.2d 1028, 1034, (5th Cir. 1979); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976).

107. Under NCAA Bylaws art. 15.01.1, "[a] student athlete may receive scholarships or educational grants-in-aid adminstered by . . . an educational institution that do not conflict with the governing legislation of this Association." In general, permissible amounts of compensation are set forth in NCAA Bylaws art. 15.

108. NCAA Bylaws art. 15.1.

ized by NCAA rules will be deemed unauthorized compensation regardless of the purpose for which it is paid. The University cannot hire the student athlete as either a work study student or in some other capacity if the total amount of compensation exceeds authorized amounts.[109] Second, a university may not associate in intercollegiate athletics with a student athlete who has at any time accepted compensation for athletic skill from any source.[110] The NCAA deems many transactions to constitute the receipt of unauthorized compensation that the general public would not. Third, the NCAA restrains bidding for student athletes after they have associated with a university by imposing a direct cost on student athletes who transfer from one university to another.[111] Thus, the NCAA concept of amateurism is exceedingly broad.

With the exception of *McCormack v. NCAA*,[112] however, student athletes in reported cases have not directly objected to or advocated the outright abolition of amateurism. *McCormack* directly challenged only the first prong of the NCAA concept. The *Justice* court came close to challenging the first prong but the plaintiffs implicitly accepted the validity of the NCAA concept and objected only to the sanctions used to enforce the first prong.[113] The remaining few cases involve both the second and third prongs.

Whichever prong of the concept is in question, the requisite string of events under federal antitrust laws depends upon whether the action

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109. NCAA Bylaws art. 15.4.5.

110. Under NCAA Bylaws art. 14.01.2, a university may not permit a student athlete to participate in its intercollegiate athletics program unless he or she satisfies all eligibility criteria. Under NCAA Bylaws art. 12.1.1, a student athlete loses amateur status if the individual "uses his or her athletics skill (directly or indirectly) for pay in any form in that sport." This bylaw provision delineates other acts that do not actually constitute that receipt of payment but will still terminate the athlete's amateur status. These acts include, among others, accepting a promise of pay following the completion of intercollegiate athletics participation, signing a contract or commitment to play professionally (this restriction is limited to the specific sport because NCAA rules permit professional status in one sport while maintaining amateur status in another), and entering into a professional draft or an agreement with an agent to negotiate a professional contract. *Id.* NCAA Bylaws art. 12.1.1 is supplemented by NCAA Bylaws art. 12.1.2, which specifies several transactions that constitute the "receipt of 'pay.'"

111. NCAA Bylaws art. 14.6; *see supra* text accompanying notes 88-90.

112. 845 F.2d 1338 (5th Cir. 1988).

113. *Justice*, 577 F. Supp. at 362. Sanctions were imposed on the university because agents and employees of the university provided extra compensation to student athletes in violation of NCAA rules. The student athletes complained about the sanctions and not whether the penalized conduct should have resulted in sanctions. *Id.* In Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990), and Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990), students who had entered the National Football League draft or signed with an agent challenged a narrow set of second prong rules that had resulted in the students' loss of eligibility.

is brought under Section 1 or 2 of the Sherman Act.[114] If the action proceeds under Section 1, the student athlete must show an agreement or conspiracy to restrain commerce.[115] If under Section 2, the student athlete must show the existence of a monopoly or an attempt to monopolize.[116] The first-tier provisions that prescribe the three pronged amateurism policy of the NCAA are, on their face, vulnerable to antitrust attack. Arguably, the first prong constitutes price fixing[117] and the second and third prongs constitute a group boycott.[118] The NCAA frequently has been accused of being a monopolistic cartel under these theories.[119]

The difficulty for the student athlete under either section lies in the requirement that he show an injury from the antitrust violations. This injury cannot be just any type of injury; it must be an antitrust injury.[120] Somehow, an aggrieved student athlete must demonstrate, or at least argue, that the deprivation or infringement of participation in intercollegiate athletics is anticompetitive as that term is used under federal antitrust laws.[121] Technically, Section 4 of the Clayton Act requires an injury to "business or property" when damages are sought for antitrust violations.[122] Thus, the obstacle Section 4 places in the path of the student athlete is similar to that posed by the "property" element of the Due Process Clause of the fourteenth amendment. A similar result is obtained under Section 16 of the Clayton Act, which authorizes injunctive relief but only requires a showing of an injury cognizable in

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114. 15 U.S.C. §§ 1, 2 (1988).

115. 15 U.S.C. § 1 (1988).

116. 15 U.S.C. § 2 (1988). A significant difference between the two is that Section 1 requires an agreement between at least two parties while duality is not required under Section 2. In addition, the degree of restraint on commerce is higher in Section 2.

117. *See McCormack*, 845 F.2d at 1340, 1343-45.

118. *See Justice*, 577 F. Supp. at 375; Jones v. NCAA, 392 F. Supp. at 303; English v. NCAA, 439 So.2d 1218, 1223-24 (La. Ct. App. 1983).

119. *See* Board of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Jones v. NCAA, 392 F. Supp. at 303; Koch, *supra* note 5; *see also* Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984). *But cf.* McKenzie & Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 THE ANTITRUST BULL. 373 (Summer 1987) in which the authors argue that the NCAA is not a cartel and does not fix wages for student athletes. They contend that the market exists in which universities compete for the services of student athletes and the student athletes choose among them based on the expected value of their participation at each university.

120. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); *see also* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 373 (1985).

121. H. HOVENCAMP, *supra* note 120, at 374.

122. Clayton Act § 4, 15 U.S.C. § 15 (1988) (original version at ch. 323, § 4, 38 Stat. 731 (1914)).

equity.[123]

Student athletes nearly always claim, regardless of which case category is involved, that their potential earnings from a professional career have been diminished even though more than ninety-nine percent of all student athletes do not enter the professional ranks. This claim is premised on the axiom that any disruption in participation, training, career development, and exposure from television and post-season appearances necessarily results in the loss of enhancement to professional earnings. Given the minute statistical probability that a student athlete will realize any professional earnings, the courts have viewed the injury as being too speculative and any legal right as inchoate.[124] The student athlete's interest in the value of a professional career, as of the time of the dispute in question, has not sufficiently ripened into a business or property interest under the antitrust laws. The athlete has obtained nothing more than a mere expectancy interest.

The student athlete probably focuses on the expectancy interest because he is primarily interested in obtaining continued participation and not in the destruction of amateurism. *McCormack* is the only reported case in which the student athletes alleged that the injury to property was suppressed wages at the intercollegiate level, resulting from the absence of bidding by member universities. The focus on the first prong of the NCAA amateurism policy in *McCormack* probably occurred because the lawsuit was initiated by a disgruntled alumnus upset with the imposition of the "death penalty" on his alma mater, rather than by student athletes seeking participation.[125] The alumnus also argued that the imposition of the penalty constituted a group boycott,[126] a claim also made in *Justice.*

Ordinarily, price-fixing and group boycotts are deemed per se violations of the antitrust laws and the occurrence of an antitrust injury is presumed. In the case of institutional sanctions, however, the presumed injuries from the group boycott would be incurred by the university and not the student athlete.[127] The presumed injury resulting from price-

123. Clayton Act § 16, 15 U.S.C. § 26 (1988) (original version at ch. 323, § 16, 38 Stat. 737 1914)).

124. Hall v. University of Minn., 530 F. Supp. 104 (D. Minn. 1982), stands as an isolated exception. The student athlete sued the university for violation of his right to due process in rendering a decision not to continue him in its academic program. He established a property interest in professional earnings through the use of expert testimony. The experts testified that he would be drafted in an earlier round of the National Basketball Association draft and would receive a more lucrative contract if he participated in intercollegiate athletics for another year.

125. *McCormack,* 845 F.2d at 1340. The "death penalty" in intercollegiate athletics results in a complete ban on the university's participation in that sport for a specified period.

126. *Id.*

127. *See Justice,* 577 F. Supp. at 375 (student athletes complaining that ban on

fixing would be suffered by the student athlete, but courts have held that the occurrence of an antitrust injury will not be presumed in intercollegiate athletics.[128] Where intercollegiate athletics are concerned, the courts apply the rule of reason standard and engage in the factual inquiry into the reasonableness of the restraints on commerce.[129] Under the rule of reason standard, student athletes must show that the anticompetitive effects of the restraints outweigh the pro-competitive effects.

In *NCAA v. Board of Regents of the University of Oklahoma*,[130] the Supreme Court held that first-tier agreements governing intercollegiate athletics were not per se invalid under the antitrust laws because joint agreements are necessary if intercollegiate athletics are to be produced at all.[131] It examined first-tier television restraints and found dominating anticompetitive effects. In passing, however, the Court volunteered that first-tier provisions regulating and maintaining amateur athletics were pro-competitive.[132] Similarly, the *McCormack* court, relying upon *Board of Regents of the University of Oklahoma*, held that the NCAA rules establishing the first prong of the NCAA amateurism policy were pro-competitive because "they enhance public interest in intercollegiate athletics."[133]

The finding of a dominant pro-competitive effect is more intuitive than empirical, an exercise in the jurisprudence of the hypothetical status quo. The courts write as though the pristine state of intercollegiate athletics that they wish existed, in fact, does exist. They write blinded by the notion that rules designed to achieve a noble purpose do indeed achieve that purpose. To find that such first-tier provisions are pro-competitive, the courts must believe that no causal relationship exists between the first-tier regulations of amateurism and the domination of intercollegiate football and basketball on the playing field and in gate receipts and television revenues by a handful of universities over the last half century. Furthermore, the courts must believe that such first-tier provisions bear no causal relationship to the scandals that now rock intercollegiate athletics on a routine basis. Saying that first-tier provisions establishing amateurism are pro-competitive just does not make it so.

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television and post-season appearances constitute group boycott against the university by other universities).

128. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 100.

129. *Id.* at 103.

130. 468 U.S. 85 (1984).

131. *Id.* at 101.

132. *Id.* at 117.

133. *McCormack*, 845 F.2d at 1344 (citing *Board of Regents of the Univ. of Okla.*, 468 U.S. at 117); *see also* Gaines V. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Bank v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).

Even if the rules are anticompetitive, such first-tier provisions would not violate antitrust laws if the organization of intercollegiate athletics were exempt due to its nexus to the educational missions of collaborating universities. Both *Board of Regents of the University of Oklahoma* and *McCormack* refused to reach a decision on this argument by the NCAA and relied instead on the necessity of joint agreements.[134] Yet, the necessity of joint agreements to produce intercollegiate athletics and the concomitant analysis of anti- and pro-competitive effects simply do not explain why price-fixing is permissible under antitrust laws at the intercollegiate level but not at the professional level. First-tier agreements restricting bidding for athletes and fixing prices have been evaluated under the rule of reason standard at the professional level but have been determined to be anticompetitive despite the necessity of joint agreements.[135]

The Supreme Court acknowledged two factors in *Board of Regents of the University of Oklahoma* that differentiated college sports from professional sports: the athletes in college sports are not paid and they are college students. From an economic standpoint, it is not true that student athletes are not compensated for the rendering of athletic skills.[136] At a minimum, the scholarship constitutes compensation and thus, the lack of compensation cannot be a distinguishing factor. Accordingly, the educational nexus appears the most plausible justification for any immunity that intercollegiate athletics may have from antitrust laws. Even the NCAA Bylaws recognize the educational nexus as the principal distinguishing factor demarcating intercollegiate athletics from professional sports.[137] I do not suggest, however, that the educational nexus should warrant immunity from antitrust scrutiny.

Why student athletes have not brought more antitrust based challenges is open to conjecture but I propose three reasons. First, the student athlete may approve of amateurism if only in principle. He may not desire the dismantling of the system or mind if it generally remains intact.

Second, the immediate, paramount concern of the typical student athlete is his own participation. He is more concerned about how the specific substantive provisions of the first-tier agreements, their interpretation, and the actions by the governing association and the univer-

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134. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 101; *McCormack*, 845 F.2d at 1343-45.

135. Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

136. McKenzie & Sullivan, *supra* note 119, at 380-81.

137. NCAA Bylaws art. 12.01.2 states, "Member institutions' athletics programs are designed to be an integral part of the educational program and the student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports."

sity pursuant to those agreements will affect him personally. For example, the student athlete in *Jones v. NCAA* only challenged the policy of amateurism to the extent that he was deemed to be a professional by virtue of his participation in the Canadian system.[138] Similarly, in the *Justice* case, the student athletes challenged only the sanctions that directly affected them rather than policy. If the substantive provisions were modified as the student athletes desired in either of those cases, they could have continued to participate or the restrictions on participation would have been removed. However, a successful antitrust challenge would endanger the entire system of amateurism. No court would be unaware of this consequence. Student athletes may, therefore, be reluctant to use antitrust law because they do not need the entire loaf; they only need a slice.

Third, student athletes must overcome judicial reverence for amateurism and the proclivity of the courts to protect it from all perceived threats. Almost every court that has been moved to comment on amateurism, regardless of the legal issues, has stated unequivocally that it is a legitimate end.[139] Indeed, the court in *Hawkins* expressed its sympathy for the innocent student athletes but regretfully stated that the harm they suffered in no manner outweighed the value of amateur athletics.[140] One court refused to enforce a contract between a student athlete and a professional agent on the ground that the subject matter contravened public policy and was analogous to an illegal subject matter.[141] Since the courts have expressed this reverence in cases in which they thought a favorable ruling would threaten amateur intercollegiate athletics, student athletes and their lawyers must undoubtedly perceive a small probability of success for a direct assault.

D. *Contract and Tortious Interference Cases*

Several cases have contained claims based on contractual rights under second-tier agreements. Like the cases utilizing due process theories, these claims arise in all four categories of cases, but unlike the

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138. Jones v. NCAA, 392 F. Supp. at 303.

139. The Supreme Court, in *Board of Regents of the University of Oklahoma,* stated that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 117. The *Justice* court stated that "[t]he protection and fostering of amateurism in intercollegiate athletics is a legitimate objective of the NCAA." *Justice,* 577 F. Supp. at 371. The *Hawkins* court reached its conclusion on the legitimacy of amateur intercollegiate athletics on mere involvement of universities. "Based upon the sheer number of institutions which are active members of the NCAA, it is obvious that intercollegiate athletics is regarded as an important *adjunct* to the academic curriculum." *Hawkins,* 652 F. Supp. at 614-15 (emphasis in original).

140. *Id.* at 615.

141. Walters v. Fullwood, 675 F. Supp. 155, 161 (S.D.N.Y. 1987).

cases raising antitrust, due process or equal protection claims, these claims seek to protect the integrity of second-tier agreements. In the contract-based cases, the student athletes wanted the university, and in many cases, the governing association, to honor terms the student athletes believed the university had agreed to. These contract-based claims usually arose in actions for breach of contract and tortious interference with contractual rights. In the breach of contract cases, the student athletes asked the courts to enforce the terms of the second-tier agreement. In the tortious interference cases, the student athletes sought to prevent the implementation of first-tier agreement provisions when implementation would infringe upon their participatory rights under second-tier agreements. At the heart of these cases were the scope and character of the relationship among the student athlete, the university, and the governing association.

Those courts that have considered the matter have accepted the characterization of the second-tier relationship between the university and the student athlete as contractual.[142] Contract terms in those cases were ascertained pursuant to traditional contract law principles. In *Taylor v. Wake Forest University*,[143] a student athlete sought reimbursement for tuition and expenses after his scholarship was terminated. The court concluded without explanation that the scholarship or grant-in-aid was a contract, yet found in favor of the university based on its interpretation of the contract terms found in the written scholarship document.

Classification of the relationship between the student athlete and the university as contractual only begins to clarify matters, just as an individual's name only begins to reveal the person. Any number of issues remain, not the least of which is the role of the governing associations and first-tier agreements. The courts have tried to resolve these issues by ascertaining through traditional contract principles what the university and the student athlete mutually agreed that role would be. In *Begley v. Corporation of Mercer*,[144] a Formation case, the university refused to honor its scholarship award when it discovered that the student athlete was not eligible to participate in intercollegiate athletics under NCAA rules. The student athlete sued the university for breach of contract and sought recovery of the scholarship, but not participation.

The court analyzed the issue in terms of whether the university had assumed the risk that the NCAA would refuse to associate with the student athlete. To find the answer to that question, the court examined the Student Aid contract where it found a provision under

142. *See supra* note 4.
143. 191 S.E.2d 379 (N.C. Ct. App. 1972).
144. 367 F. Supp. 908 (E.D. Tenn. 1973).

which the student athlete agreed to abide by all the rules and regulations of the NCAA.[145] It concluded that the university had not assumed the risk because the inclusion of that clause implied that both the student athlete and the university understood that he must meet NCAA academic standards.[146]

The true significance of *Begley* lies not in the allocation of risk analysis, but in what it tells us about the relationship between the student and the university and the relationship between the student and the governing association. First, evidence was adduced by the student athlete suggesting that the full understanding of the student and the university regarding their second-tier relationship was not contained in the Student Aid contract and that the parol portion of the agreement contravened the written portion on the allocation of risk issue.[147] This proposition is a familiar refrain in the tortious interference cases in which the student athlete maintains that the governing association has interfered with university promises to provide television exposure, appearances in post-season competition, and enhanced opportunities for professional earnings.

Second, the result indicates that when the written terms of the second-tier agreement incorporate the rules and regulations of a governing association — the normative case — any second-tier agreement provisions, whether in writing or otherwise, that contravene the first-tier terms are unenforceable. This outcome is supported with more authority in *Walters v. Fullwood*.[148] What is disturbing about this notion of the supremacy of first-tier provisions is that standard university recruiting practices typically involve numerous official and unofficial personal contacts between the student athlete and university representatives.[149] If the university can not be liable for breach of contract no matter what its representatives promise or imply, then accountability must fail since the university is thus free to make or exaggerate its position without obligation and has little incentive to supervise such representations.

Any legal doctrine that voids contracts or agreements contrary to first-tier agreements, however, necessarily fails to distinguish between the power to act and the legal right to act.[150] First-tier agreements may

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145. *Id.* at 909.
146. *Id.* at 910.
147. *Id.* at 909.
148. 675 F. Supp. 155 (S.D.N.Y. 1987).
149. That these contacts occur is acknowledged by the NCAA in that it devotes an entire article of its Bylaws to recruiting. NCAA Bylaws art. 13.
150. *See* Collins v. Lewis, 283 S.W.2d 258, 261 (Tex. Civ. App. 1955) (discussing the distinction between the legal right as opposed to the power to dissolve a partnership). A fair reading of *Walters v. Fullwood*, 675 F. Supp. at 160-61, indicates a judicial inclination to treat first-tier agreements as abrogating the capacity or power of universities to breach first-tier agreements.

negate the legal right of a university to reach contrary second-tier agreements but not its power to do so, or its liability to student athletes. In many instances, it is entirely possible to hold the university in breach of both sets of agreements. It is this distinction that the student athlete brings to bear in the tortious interference cases. For example, the student athletes in *Hawkins* argued that the imposition of sanctions by the NCAA, pursuant to first-tier agreements, constituted tortious interference with their second-tier agreements.[151] The claim is usually disposed of, as it was in *Hawkins*, without an in-depth discussion, probably because the inclusion of the incorporation clause in second-tier agreements precludes the NCAA or other governing association enforcement action from characterization as wrongful intervention in the legal sense.

A failure of accountability will occur whenever a university makes promises that are not enforceable for any reason. A key question then becomes, "Do universities make such promises?" The circumstances under which universities normally recruit student athletes alone are sufficient to create a reasonable inference that universities either make explicit promises or at least create implicit expectations not reduced to writing. A deeper inquiry into second-tier relationships reflects a significant class of unmemorialized promises that necessarily must be made to student athletes, most in accordance with first-tier agreements.

What are those promises? To answer this question, I consider a question raised earlier: Why do student athletes desire to participate in intercollegiate athletics when they are so obviously exploited? This, though, is not the appropriate question. The better question is, why do they choose to associate with one university rather than another? The answer is that the student athlete chooses University A over University B because he perceives that he will be better off at University A. How does the student reach that perception? He is recruited by each university for its athletic program. In the recruitment process, each university attempts to induce the student athlete by convincing him that the value of participation at its university will be greater than the value of participation at any other university.[152]

How can either university demonstrate this proposition if it is limited to offering a scholarship that is equivalent to that offered by any other university?[153] It makes promises and representations or otherwise

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151. *Hawkins*, 652 F. Supp. at 605. The *Hawkins* court declined to resolve the tortious interference issue.

152. This proposition flows from the economic maxims that people enter into voluntary exchanges because they expect to gain from the transaction, and that people seek to maximize their gains in exchanges.

153. The NCAA scholarship policy is properly characterized as a voucher system. The amount of aid that a university is limited to is based upon a formula prescribed in NCAA Bylaws. NCAA Bylaws art. 15.01.7 states:

creates expectations in the student athlete. These include, but are not limited to, the quality of its academic program, the quality of its athletic program, the prospect of television exposure and post-season competition, a higher probability of playing at the professional level, the amount of playing time, national publicity, the specific coaching staff, post-graduation employment, and last but not least, pecuniary remuneration.[154] With the possible exception of the quality of the academic and athletic programs typically described in the university catalogues or brochures, none of these items are usually included as terms in any of the written documents executed by or presented to the student athlete. When any of these promises are contained in writing, the language will probably reflect a general description of the program rather than an explicit promise to provide a program of that caliber to the student athlete or any other student.

Finally, even though monetary inducements violate NCAA rules, that does not mean they are not used.[155] Although student athletes will value items differently, it is undeniable that the university must create a set of expectations regarding that which the student athlete will receive from the university to distinguish it from all other universities competing for that student athlete.

IV. THE DEFECTS IN THE ASSIGNMENT OF LEGAL RIGHTS

The preceding section may be summarized as follows: Student athletes bring legal actions to challenge two principal defects in the relationships among student athletes, their universities, and governing associations resulting from the assignment of legal rights among them.

> An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution or that exceeds the limitations established by the membership division of the institution the student athlete attends, whichever is less. Any financial aid permitted by a division that would result in a student athlete's total financial aid exceeding the value of tuition and fees, room and board, and required course-related books shall be based upon the demonstrated financial need of the individual student-athlete.

The student athlete, in general, must use this financial aid to purchase the items specified above from the university at which he participates in intercollegiate athletics. He is not permitted to participate at one university and matriculate at another. Consequently, even though monetary amounts may vary, the award of financial aid is really a nontransferable voucher.

154. *See* McKenzie & Sullivan, *supra* note 119, at 380-81. The authors argue that scholarships do not constitute the totality of compensation received by the student athlete. Instead, they argue, the full value of the compensation received equals the expected value of the collaborative relationship to the student athlete, including enhancements to the probability of realizing professional earnings.

155. *1 in 3 Pro Football Players in Survey Took Payments While in College*, The Chronicle of Higher Education, Nov. 29, 1989, at A43, col. 2.

They use due process, equal protection, and antitrust laws to influence the substantive terms of first-tier provisions and they use contract-based actions to hold universities accountable for second-tier promises in spite of first-tier agreements. Professor Weistart refers to the lack of influence on substantive terms and lack of accountability for second-tier promises as "structural deficiencies."[156] It seems clear that the litigation by student athletes constitutes an effort to correct these structural deficiencies by bargaining over first-tier provisions and university accountability after the formation of second-tier agreements.

This section of the Article demonstrates that the optimum assignment of legal rights between student athletes and universities is not obtainable in intercollegiate athletics through bargaining because transaction costs preclude such bargaining in the formation stage of second-tier relationships. Instead, such bargaining does not occur until student athletes embark on a course of litigation when their eligibility or right to participate in intercollegiate athletics is in jeopardy. This section will attempt to explain how transaction costs constrain bargaining during formation but less so when eligibility is threatened. This section will conclude with an argument that the contemporary regulation of intercollegiate athletics is inefficient.

A. *Impact of Transaction Costs at Formation*

The courts, as exemplified by the Supreme Court in *NCAA v. Tarkanian*,[157] presuppose that individuals and universities who associate together to produce, sell and deliver intercollegiate athletics will promote and protect their best interests through bargaining for desired terms. If they are unable to obtain terms they want, they will protect themselves by refusing to contract. But the reality is the opposite of what the courts presuppose. The right to refuse to contract or associate is illusory in intercollegiate athletics insofar as the student athlete is concerned. Student athletes are frequently among a group that the law has historically maintained cannot protect themselves through voluntary contract.

Most student athletes begin their participation and make their agreements with the university when they are not more than eighteen years old, a time when the laws of most states consider them minors.[158] That parents or legal guardians are required to sign letters of intent

156. Weistart, *supra* note 5, at 169-71.

157. 109 S. Ct. 454 (1988).

158. At common law, the capacity of minors, that is persons under the age of 21, was questionable. Accordingly, contracts entered into by minors are generally voidable. J. AREEN, CASES AND MATERIALS ON FAMILY LAW, 1135-44 (2nd ed. 1985). The age of majority in many states is now 18 but this fact does not change the analysis. Student athletes are usually recruited and the second-tier relationship is entered into before they reach their eighteenth birthday.

and scholarship documents does not rectify the problem. Neither the student nor his parents are usually represented by an attorney to explain the nature, terms, and legal effects of these agreements. Furthermore, the introduction of attorneys at this stage increases transaction costs that the student athlete or his family may not be able to afford.[159] The legal regime governing the relationship between the student athlete and the university should recognize that the student athlete and those acting in his behalf may not do a good job of bargaining for his best interests.

From the university's perspective, the transaction costs of bargaining with each individual student over every term would render the production of intercollegiate athletic competitions impossible. For example, each student athlete may prefer a different coach, color uniform, practice times, competing teams, rules, and so forth. Some bargaining over second-tier agreement terms does occur, more so over the parol portions of the agreement, and only over terms that do not render production of the product unfeasible. In addition, the student athlete and the university do not bargain over the incorporation clause.

Transaction costs also motivate students not to exercise their right to refuse to associate if the university will not separately bargain over the incorporation clause. Students lack information about the future and have great difficulty evaluating the right to participate offered by the university. Moreover, no student has the leverage to force a university to negotiate individually. On the other hand, collective action would only add virtually prohibitive transaction costs for incoming freshmen. After all, how would one find out who all the other potential freshmen are and how much would it cost in time and money to communicate with them? Moreover, who would bear the initial outlays to organize such collective action?

B. *Impact of Transactions Costs When Eligibility is Threatened*

Transaction costs do not vanish when the eligibility of student athletes is threatened. Because of the nature of the exchange between student athletes and universities, if an "exchange" is an appropriate characterization, the perceived value of participation differs once a student athlete enters the system.[160] Student athletes, like all college students,

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159. Moreover, a student athlete runs the risk of violating NCAA rules if he does hire an attorney to represent him in bargaining with universities at this stage. NCAA Bylaws art. 12.3.3.

160. Perhaps, the relationship between a university and its student may be better characterized as purely "associational." In some sense, a university merely provides an environment in which a student may obtain an education. Just what the student receives is a function of what the student does and what is available in the environment. But the university guarantees nothing more than that the student may associate with others in that environment. It does not promise him that education received will have

are asked to choose a college based on intangible factors, but no university can guarantee as a practical matter that these factors will be greater than those offered by some other university. Some terms are open ended. The relative value of an intangible item may differ with each student and each factor is incapable of precise assessment at the time the student makes the choice.[161] Who knows whether Harvard really offers a better education than Yale?

Essentially, a student who is not an athlete comes to college to enhance his own knowledge. He may expect that his attendance at University A will place him in line to receive higher future earnings than he would receive at University B. However, those future earnings will not inure solely because he attended University A. The higher earnings would not materialize if he decided to do nothing after graduation. He must exert efforts in the future to produce wealth. He does, however, expect that his matriculation at a particular university will open the door to a career that will yield a higher level of income than he might otherwise have received.

These same concerns confront the student athlete when choosing a university. His ability to assess the amount of value offered to him may be no better than any other student, but whatever economic value he is to receive will come to him by virtue of his right to participate in intercollegiate athletics.[162]

The value of the right to participate does not remain constant over time. Such value increases due to the enhancement of the career income stream available to student athletes as a result of his athletic training and his education at the particular university. In almost every case, the student athlete complains only of the loss of the higher income level that he expected to derive from athletics. This limited complaint evidences the perceived value of the student athlete's participation in athletics relative to the value of the education received by the student athlete. Student athletes may perceive that enhanced career income levels attributable to education may not be available because of the type of education he is receiving at the particular university.[163] Or

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any particular value, although a student may desire to associate in a specific university environment because he anticipates that the education received will be valuable. The actual value of what the student receives, however, depends on what the student does.

161. Items such as the coaching staff and location do not fall into this category, even though keeping the promises of either might greatly inconvenience decisionmaking.

162. Even educational benefits are derived from the right to participate. The typical second-tier agreement conditions educational benefits on participation in intercollegiate athletics. *See Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972).

163. He may not be a good student, or academic support programs at the university may be inadequate. In any event, the student athlete may rightly perceive that he will not be able to cash in on his education after his eligibility expires or he graduates.

it may be that the career income level he expects to attain as a result of his education is simply not viewed as a function of his participation in intercollegiate athletics. Therefore, it comes as no surprise that, to the student athlete, the expectancy in professional earnings constitutes the principal component of the perceived value of the right to participate.[164]

The value of the second-tier relationship to the student athlete, when viewed in this light, begins to resemble that of the pension rights of an employee who will vest in a pension plan only after serving for a specified number of years. Prior to the passage of the vesting term, the employee has only an inchoate expectancy. From a technical standpoint, the value of the expectancy prior to the vesting of his legal right is zero. Upon vesting, however, the value dramatically and substantially increases. For the typical student athlete, who is not likely to have a professional career, the realization of the economic value occurs in a similar fashion. He virtually must participate in intercollegiate athletics for a lengthy period. His chances of a professional career are enhanced only after extended training and participation.

But for the rare student athlete who is likely to have a professional career, the economic value of his participation begins to increase substantially as soon as his skill has developed to the point at which he can be signed by a professional team if he desires. The economic value of his participation then continues to grow for the duration of his participation. In many instances, the economic value of his participation will exceed the economic value resulting from his college education due to anticipated professional earnings. Nevertheless, most of the cases appear to have been brought by the typical student athlete. Professional caliber student athletes probably do not litigate declarations of ineligibility as often because the different value curve allows them to realize an enhanced value by entering the professional ranks irrespective of team or individual sanctions.[165]

The irony in all this is that student athletes expect to receive value from the professional earnings component while universities expect them to receive value from the educational component. This irony is compounded by the fact that student athletes are often correct in as-

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164. *See* McKenzie & Sullivan, *supra* note 118, at 381. *But cf.* Banks v. NCAA, 746 F. Supp. at 859 in which the court refused to acknowledge the professional earnings expectancy as a component of value. However, the court may have done so because the student athlete concentrated on the value of the grant-in-aid rather than on the right to participate.

165. Most professional sports leagues will accept student athletes before their eligibility expires. In fact, the refusal to accept a student athlete at such time has been held to violate federal antitrust laws. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Ca. 1971). However, some student athletes may erroneously view themselves as professional caliber athletes. *See* Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).

sessing the relative value of the two components to themselves. Considering that universities merely provide students with an opportunity for an education with the value of that opportunity dependent upon the capabilities and actions of the students themselves, a university that views itself as compensating a student athlete with the educational component is really only providing a form of lottery ticket to the student athlete. Unless a university does something more to make the receipt of an education a reality, whether the student athlete actually receives one becomes a quirk of fate.

The realization of value curves for colleges and universities are almost the exact opposite. Universities do not wait for student athletes to graduate to realize economic value. Universities receive pecuniary benefits contemporaneously with the participation of student athletes. The value the university receives after a student athlete graduates or forfeits his eligibility decreases almost immediately to zero. This consequence explains why universities are willing to litigate on behalf of student athletes who have been disqualified from athletic participation.

On the other hand, student athletes are willing to litigate when eligibility is threatened because all opportunity to realize the value that they expect to receive from the professional expectancy will be lost. It is no coincidence that most of the cases involve sports for which professional careers exist. Student athletes litigate when television and postseason appearances are banned because they perceive, with some justification, that the value of the professional expectancy is a function of those items. Is it not true that a star athlete at a prestigious university with a major athletic program has a better chance of winning the Heisman Trophy than a star athlete at a less prestigious university? In fact, a student athlete who has a choice between those schools may choose the more prestigious university because of that higher expected value. In any event, the student athletes who litigate must perceive that the value which will be lost is greater than the cost of proceeding with the litigation. Moreover, their loss will include their investment in that expectancy. It would not be reasonable to expect student athletes to simply treat the loss as another of life's experiences.

C. *The Resulting Inefficient Industry*

The occurrence of structural deficiencies should not surprise anyone because they result from a deliberate assignment of the right to control the allocation of essential resources to universities. The assignment of legal rights may be unfair to student athletes adversely affected by them and many have so argued. But perhaps the most severe defects lie in the removal of student athletes as a force capable of balancing the discretion of universities and compelling the universities to pay the full cost of the activity of intercollegiate athletics.

Courts have acknowledged that inefficiencies occur in amateur in-

tercollegiate athletics, but they are of the opinion that the benefits of amateurism to society clearly outweigh the inefficiencies.[166] As indicated elsewhere in this Article, the courts seem to take judicial notice of this proposition without requiring evidentiary proof.[167] Judicial attitudes thus not only reflect the notion that universities are better repositories of the control of resources in intercollegiate athletics, they also reflect a sense that student athletes generally are not suitable repositories. In acting on these attitudes, courts lose sight of the need for balance in the control of the allocation of resources. Without checks on those who have been assigned the right to control, activities will not necessarily bear the costs they engender[168] and resources will not be efficiently allocated. As shown in Part II, universities do not have a legal obligation to pay the costs of the compensation promised to student athletes and student athletes are unable to obtain accountability for such items through bargaining during the formation stage. Without a legal obligation to pay them, universities in many instances do not. Economic theory predicts that universities acting to further their self-interest will exploit this circumstance. Consequently, young people lured by the prospect of success in the industry of athletics choose to develop their athletic skills over their academic and job skills.

The logical end of a system that assigns the control of resources to universities and gives student athletes few enforceable legal rights is nothing short of scandalous. Illiterate student athletes graduating without a degree or an education and unprepared for life after sports greatly outnumber the rare professional athlete with a million dollar income. I do not mean to suggest that amateurism is inherently bad or that amateurism as conceived under the three pronged policy of the NCAA should never have been tried. But the system needs changes. The current form of intercollegiate athletics evolved from a system established by people motivated to help student athletes. Yet, the contemporary version would have evolved differently if universities and the courts had empowered the student athletes to assist in providing for their own protection.

V. THE SOLUTION: A COMMON LAW OR CODE OF INTERCOLLEGIATE ATHLETICS

In the preceding pages, I have argued that the system which produces, sells, and delivers intercollegiate athletics is inefficient. This inefficiency is due in large part to the assignment of legal rights among student athletes and universities. A logical path to improve efficiency is

166. *See supra* note 137.

167. *Id.*

168. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

clearly reassignment of these legal rights. Legal rights should be reassigned so that the intercollegiate athletics industry does not lose the counter-balance of self-interested student athletes. This new assignment of rights should be accomplished by restricting universities' right to refuse to associate and by limiting the range of permissible terms and conditions to which the parties may agree when they choose to associate, or which otherwise flow through associational law. In this section, I will suggest the substance of possible restrictions and the methods by which their imposition may be effected. An appropriate regime may be created through the promulgation of a uniform code of intercollegiate athletics enacted by Congress or state legislatures or through the development of common law rules recognizing the unique relationship among student athletes, universities, and governing associations.

A code of intercollegiate athletics would function as a device, similar to state corporation codes, capable of reducing the high transaction costs of bargaining among student athletes, universities, and governing associations.[169] Promulgation of a code offers several advantages, including a wider range of solutions, and the checks and balances of the political process. But the principal advantage is uniformity. The interstate nature of intercollegiate athletics and the need for uniformity suggest that congressional promulgation is preferable. However, uniformity could be obtained through a uniform code adopted by states in the manner of the Uniform Commercial Code and other uniform statutes.

Recognition of a common law relationship among the collaborators engaged in the production and delivery of intercollegiate athletics and a related set of rules to govern these relationships would also substitute for more costly and inefficient bargaining. Such an approach would be similar to the way fiduciary principles govern the relationship between fiduciaries and beneficiaries.[170] A common law approach requires continued litigation and its results may be less uniform than the statutory approach. The common law approach, however, does allow the rules to develop gradually whereas the statutory approach will require guessing.

A. *A Code of Intercollegiate Athletics*

Congress recently enacted the Student-Athlete's Right to Know Act,[171] which requires universities to disclose their graduation rates to prospective student athletes. Such laudable and welcome steps constitute only a beginning.

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169. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521 (1982).

170. Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738, 754 (1978).

171. Pub. L. No. 101-542, 104 Stat. 2381 (1990).

The purpose of the Act is to enhance the ability of student athletes to ascertain the value of the consideration offered by a university, based solely on the educational component, in exchange for his services. It does not address the valuation of prospective professional earnings, which is the primary attraction to many student athletes.[172] Consequently, the right to disclosure of graduation rates alone will not rectify structural deficiencies and industry inefficiency; other rights are needed. The right of universities to refuse to associate ought to be restricted by limiting the right of universities to define and enforce amateurism, and by conferring specific substantive rights on student athletes with respect to the educational obligations of universities.

1. Amateurism and Its Enforcement

Any meaningful code of intercollegiate athletics must address amateurism. Framers of a code must decide whether to prohibit amateurism through first-tier agreements or to simply regulate its imposition. Choosing the former would allow an individual university to restrict its association with student athletes by limiting compensation to specific items without regard to other universities' policies. More important, little more would be required in such a code as market discipline would remedy many of the problems described in this Article, including structural deficiencies. But I question whether universities and legislatures are ready to toss aside in one broad stroke the brand of amateur intercollegiate athletics so revered by the Supreme Court[173] and the rest of the judiciary.[174]

Accordingly, I suggest a code of intercollegiate athletics that accepts amateurism, but regulates it. I am mindful that altering the status quo will result in a different evolutionary pathway and may lead to the eventual extinction of amateur intercollegiate athletics, at least as it is now known.

A code of intercollegiate athletics that regulates amateurism could draw upon the many cases that touch and concern amateurism and the enforcement powers of governing associations. Student athletes have specifically sought the following through the courts: a broader definition of amateurism, abolition of the maximum penalty of permanent ineligibility for any violation of amateurism,[175] a greater role in eligibility hearings and in the imposition of institutional sanctions, the aboli-

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172. A recent study conducted by the NCAA showed that 44% of black football and basketball players expected to become professional athletes. *Many Black College Athletes Express Feelings of Isolation*, N.Y. Times, Apr. 6, 1989, at A1, col. 5.

173. *See, e.g., Tarkanian*, 109 S. Ct. at 454.

174. *See supra* note 137.

175. Violations of amateurism are not the only actions that may trigger loss of eligibility, nor is loss of eligibility permanent in all cases. *See* NCAA Bylaws art. 14.

tion of uniform minimum academic standards, and a less inclusive transfer rule. I will discuss each of these below.

a. *Definition of Amateurism*

The first two prongs of the NCAA's amateurism policy[176] constitute the core of the definition of amateurism at the collegiate level. Universities may not compensate student athletes for athletic skill except as permitted, and student athletes may not receive compensation for athletic skill from any source. Some of the litigation brought by student athletes, as well as some violations of NCAA rules by student athletes, is motivated by resentment against the fundamental concept in the first prong that focuses on the compensation received by the athletes but not on compensation of other collaborators. The dicta in judicial opinions expressing reverence for amateurism justifies this definition on the basis of the academic mission of the participating universities. However, this pristine view overlooks a fundamental distinction between intercollegiate athletics, at least where "revenue producing" sports are concerned, and the normal academic programs of universities. Universities ordinarily do not sell the academic product of its students. Amateurism exists at the collegiate level in large part because it is viewed as an academic program and students ordinarily are not awarded academic credit and pecuniary compensation for the same work. When a university does sell an academic product, such as the licensing of a patent, the students and professors involved normally share directly in the economic rewards. Amateurism is an aberration in this respect.

Although violations and litigation may be spurred by resentment, student athletes have not directly challenged this asymmetrical definition in the cases. Instead, they have sought to broaden the scope of the first and second prongs of the NCAA's concept of amateurism to include athletes who receive value under circumstances that the NCAA now construes as the impermissible receipt of compensation in exchange for athletic skill. This is a plausible interpretation of the stakes and motivations in *Gillard v. NCAA*[177] and *Regents of the University of Minnesota*.[178] In *Gillard*, a student athlete lost some eligibility because he purchased a suit of clothes at a discount, whereas in *Regents of the University of Minnesota* student athletes were deemed professionals because coaches furnished them transportation to and from a summer camp or because they sold complimentary tickets at a modest profit. Many provocative questions have not been litigated. For example, should a student athlete who has been randomly selected at a bas-

176. *See supra* text accompanying notes 106-18.
177. 352 So.2d 1072 (Miss. 1977).
178. 560 F.2d at 352.

ketball game be deemed a professional because he wins a prize for making a shot from halfcourt?

The NCAA definition of compensation in exchange for athletic skill narrows too greatly the characteristics of those whom it considers to be amateurs. Internal pressures within the NCAA have produced some changes over the years, such as the NCAA rule that an athlete can be a professional in one sport but an amateur in another.[179] Nevertheless, the rules remain cumbersome, inconsistent, and unnecessarily restrictive.

A code of intercollegiate athletics could address both the resentment and the underinclusiveness of the definition of amateurism. It need not abolish amateurism but it should disavow the broad brush approach of the NCAA and broaden the scope of the amateur characterization.

b. *Abolition of Automatic Permanent Ineligibility*

Closely related to concerns about the scope of amateurism are the penalties for its violations. A major concern of the university tribunal in *NCAA v. Regents of the University of Minnesota* was the mandatory penalty of permanent ineligibility for minor infractions of amateurism. The NCAA does not disagree that minor violations should not receive the ultimate penalty but uses an "*Alice in Wonderland*" approach; first it sentences, then it holds a hearing to determine if the sentence should be reduced. The purpose of this approach is to deter universities from willful violations. If a university must constantly fear the imposition of the maximum penalty, it reduces the temptation to cut corners. Yet this approach means that neither the university nor student athletes know what the real penalties will be for a violation and there is no guarantee that like offenses will receive like treatment.

A code of intercollegiate athletics should replace this system with one that reverses the present approach. It should establish a system in which offenses and penalties are established in advance rather than on an ad hoc basis[180] and penalties are proportionate to offenses.

c. *Greater Role in the Process*

As a general rule of law, only the members of governing associations are entitled to take part in the decisional processes of governing associations. In response to litigation over the exclusion of student athletes from the hearing process when eligibility is at stake, NCAA rules now permit student athletes to participate in the appeals process to restore eligibility.[181] Student athletes remain excluded from the process

179. NCAA Bylaws art. 12.
180. *See Regents of the Univ. of Minn.*, 560 F.2d at 369.
181. NCAA Bylaws art. 14.14.2. Of course, this participation can occur only if

when sanctions are imposed on a member university for violations. They have no right to receive notice of charges against a university or to appeal internally a decision to impose sanctions on a university even though they will bear a significant brunt of the sanctions. Although student athletes have not litigated the point, they also have no right to take part in the rule making process even when the proposed rule directly affects them as in Propositions 48[182] and 42.[183] Recently, however, the NCAA has established an advisory committee of student athletes to voice opinions on new rules.[184]

A code of intercollegiate athletics should require that student athletes have a greater role in the processes of governing associations when decisions will be made directly affecting student athletes. They should have a right, independent of the university, to appeal their loss of eligibility. Student athletes should be allowed to participate in hearings to appeal sanctions against their university even if it is only to plead for leniency.[185] Moreover, they should have the right to appeal sanctions if the university chooses not to do so. Such a right would be similar to a shareholder's right to bring derivative actions. Finally, student athletes ought to have a formal role in rulemaking decisions that affect student athletes. They should be permitted to present their positions on proposed rules prior to adoption.

d. *Uniform Minimum Academic Standards*

A student athlete has unfettered discretion in deciding whether to associate with a university. A university has broad discretion in deciding whether to associate with a student athlete. In general, student athletes should expect that a university may use that discretion to refuse to associate with student athletes based upon their prior academic and athletic performance. The choice of academic standards is usually a prerogative of the autonomy of a university. Thus, a student athlete may be acceptable to one university but not acceptable to another.

Uniform minimum academic standards infringe upon this autonomy. There is only one plausible justification for an infringement on the academic autonomy of universities when intercollegiate athletics are concerned but not in other academic programs: that is the elimination of competitive advantages on the playing field for universities willing to admit gifted student athletes who have dubious academic potential under uniform criteria relative to universities that will not.

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the university decides to appeal.

182. Now codified at NCAA Bylaws art. 14.3.

183. Codified at NCAA Bylaws art. 14.3.2, repealed and replaced effective Aug. 1, 1990, by Proposition 26 codified at NCAA Bylaws arts. 14.3.2.1 through 14.3.2.2.

184. NCAA Bylaws art. 21.3.23.

185. Such a provision would overrule the holdings in *Hawkins*, 652 F. Supp. at 602 and *Justice*, 577 F. Supp. at 356.

Proponents of uniform standards argue that such standards are necessary to prevent the exploitation of minority student athletes, thereby acknowledging that the issue of uniformity has principal meaning only to minority student athletes. They overlook the significance of university autonomy in fulfilling the aspirations of minority students to obtain a college education. It is noteworthy that the principal culprit in *Parish v. NCAA* was the governing association and its uniform standard rather than the university. University autonomy is not only desirable in the area of minority access to higher education, it is essential. Given the differences in performance under most standardized criteria along racial lines, universities necessarily must take a closer look at minority applicants, and this can not be done under rigid adherence to uniform standards. A university must have a free hand in setting the range of credentials acceptable to it if it is to provide access for larger numbers of minority applicants, including student athletes.

No university can determine at the outset which of these students with credentials that deviate from the norm will succeed; it can only know that some of them will. The question ought not to be whether universities can admit such students. If a university wants to devote resources and bear the costs of saving a handful, why prevent it from doing so? Rather than subject universities to a uniform academic standard, a code of intercollegiate athletics should focus on the programs available to a student athlete once he matriculates, not on the admissions process.

e. *Less Inclusive Transfer Rule*

The articulated purpose for rules discouraging transfers between universities is to prevent raiding by competing universities. The fear is that unrestrained transfers could transform intercollegiate athletics into professional sports through continuous bidding for the services of student athletes after they enter the system.

Cases upholding transfer restrictions and other rules at the collegiate level often rely on precedents from high school cases.[186] Reliance on high school cases fails to consider the role of choice at the collegiate level. Student athletes choose to attend specific colleges and participate in their athletic programs. In making this choice, they are forced to place a value on what they stand to gain from each university. The nature and timing of this valuation process is such that any particular value will frequently be speculative. Student athletes, just like any other students, may choose to transfer when they realize that they made an error in valuation, and that the university is not living up to expectations.

A blanket transfer rule imposes additional costs on a student ath-

186. *See Parish*, 506 F.2d at 1034; *Gillard*, 352 So.2d at 1081.

lete for making an error in his original valuation. He may desire to transfer because of personality clashes with a coach or teammates, homesickness, dissatisfaction with the academic program, or disappointment in playing time. Not every student athlete desires to transfer because of improper inducements. In fact, the reported cases involve transfers for other reasons.

A code of intercollegiate athletics should seek to balance the concerns relating to the disruption of the athletic programs of universities with legitimate attempts on the part of student athletes to correct erroneous valuation decisions. Student athletes who desire to transfer for reasons other than improper inducements ought to be able to transfer without additional costs. Perhaps every student athlete should be entitled to transfer at least once without penalty. Or perhaps governing associations should establish an arbitrational system pursuant to which a student athlete could petition a tribunal who would determine if it is a legitimate transfer request. If so, the student athlete could transfer without penalty.

2. Substantive Right to an Education

Student athletes should pursue the obligation of universities to provide an education. A student author once proposed a contractual obligation on the part of universities to educate their students.[187] The difficulty of imposing specific substantive obligations lies in the elusive nature of education. Its value depends on many factors, including the academic preparation and motivation of individual student. Difficulty in attaining academic success should not be confused with impossibility, however.

As matters now stand, the university is obligated only to provide an opportunity to receive an education. As I have suggested elsewhere in this Article, the promise to provide this opportunity resembles a lottery ticket. The opportunity would have more substance if the university were required to do more than merely let student athletes enroll and take courses.

A code of intercollegiate athletics could add substance by requiring the university to make a four year commitment to the student on the education side. Under current NCAA rules, a university may offer an athletic scholarship for a maximum period of one year at a time,[188] but the opportunity for an education bestowed upon a student athlete in one year has relatively little value. If a university chooses not to renew a scholarship for a student athlete, it has compensated him with

187. Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96 (1985); *see also* Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990).

188. NCAA Bylaws art. 15.3.3.

a losing lottery ticket. In order for the opportunity to receive an education to have meaning, the normal obligation of a university ought to extend for at least as long as it normally takes a student athlete to obtain his degree.

A code of intercollegiate athletics should extend the obligation of universities, and in addition to lengthening the period of commitment, it should require minimum levels of support programs. It is unrealistic to expect that student athletes can take full advantage of the opportunity to obtain an education without assistance. The necessity for academic support increases as a university admits student athletes with academic credentials substantially deviating from those of its typical students. Imposing a more substantive obligation to provide an education does not mean that universities should guarantee a degree. It simply means that the university will be required to take specific measures to enhance the likelihood that a student athlete receives one. Such results would also be relevant in evaluating academic enhancement programs used by universities.

B. *A Common Law of Intercollegiate Athletics*

Realistically, promulgation of a code may take several years. Seeking relief through the common law provides an alternative evolutionary pathway that the framers of a code could build upon. The development of a common law of intercollegiate athletics, although accomplishable, faces several obstacles. Courts must be asked to cast aside their reverence for intercollegiate amateurism. Uniformity among jurisdictions is not guaranteed. Solutions crafted through legislative compromise are not available because of considerations of judicial restraint. A proponent of common law rules must be willing to bear the costs of advocating advances in the law. Finally, its development will depend upon the serendipitous occasions of actual disputes.

A common law of intercollegiate athletics will have to address two basic issues. It must define the relationships that are covered and determine the substantive rights based upon those relationships in specific circumstances. The first issue poses little difficulty. I have devoted substantial space in this Article to the first- and second-tier relationships among student athletes, universities, and governing associations in connection with the production, sale, and delivery of intercollegiate athletics. Most courts and commentators deem the second-tier relationship between a student athlete and his university as contractual, but conspicuously have not determined the class of contract. The first-tier relationships creating governing associations are deemed to be matters of voluntary associations law. Although some light has been shed on first- and second-tier relationships, the relationship between student athletes and governing associations remains obscured. A common law of intercollegiate athletics must recognize the existence of this relationship and

allocate rights directly between student athletes and governing associations.

The second issue is more problematic. The nature of common law development requires actual cases with concrete circumstances. Some of the cases and circumstances discussed previously lend themselves to common law development more so than others. The types of cases best suited for this approach are perhaps cases involving contract-based issues, Termination cases involving due process issues, cases in any category in which a court may be asked to narrow the scope of amateurism or provide standards for setting penalties, and Transfer cases in which the court may be asked to narrow the scope of the blanket rule covering all transfers.

Contract-based cases offer the opportunity to craft the fundamental relationship among student athletes, universities, and governing associations. Student athletes must ask the courts to recognize that the nature of this tripartite relationship includes formal and informal agreements, and that universities enter into second-tier relationships with promises that affect the relationship between student athletes and governing associations, often in contravention of first-tier agreement terms. Moreover, student athletes must ask the courts to examine and give life to the reasonable expectations of the student athlete created by his university. Recognition of the formal written second-tier agreement while ignoring the extra-writing informal agreements facilitates frustrating reasonable expectations. It is this familiar contractual concept of reasonable expectations that makes contract-based cases suitable for common law development.

Recognition of informal, extra-writing agreements means enforcing agreements for payments that violate NCAA rules. Such enforcement merely accepts that the university and the student athlete retain the capacity or power to breach their contractual arrangements with each other and the governing associations. Accepting the notion of contract breach is far more appropriate than branding the student athlete as a criminal while viewing universities as innocent victims.[189]

The contract-based cases also offer the opportunity to transform

189. Federal prosecutors have begun to use the Racketeering, Influence and Criminal Organization Act, 18 U.S.C. §§ 1961-1968 (1988) to reach agents who sign student athletes before their eligibility has expired and the student athletes who sign with them. The theory is that the agents and the student athletes defrauded the university when the student athlete continued to participate for the university, knowing that signing terminated his eligibility under NCAA rules. NCAA Bylaws art. 12.1.1(c). In the Norby Walters case, the most notorious one to date, the federal prosecutor obtained a conviction for the agent and plea bargains from over 40 of the student athletes who signed with him. They agreed under the terms of the plea bargain to testify, serve 250 hours of community service, and reimburse their universities for their scholarships. L.A. Times, Mar. 7, 1989, at 3, col. 1. The convictions of Norby Walters and Lloyd Bloom were reversed and a new trial ordered because of errors at trial.

the promise of an opportunity for an education from a lottery ticket into a realistic probability of receiving an education. Student athletes will have to focus on the enhancement of future earnings due to the educational component of their realization of value curves instead of, or in addition to, the professional earnings component. Courts may be receptive to a claim grounded on a university's structuring the curriculum of a student athlete with a view toward the maintenance of eligibility rather than meaningful progress toward a degree. Claims based on the failure to provide tutors or adequate studying time ought to receive a similar judicial reception. The NCAA requirement that the student athlete make satisfactory progress toward a degree[190] should be interpreted as giving the student athlete a substantive right to an environment and program that facilitates his reasonable progress.

One advantage of allocating greater rights to student athletes with respect to educational promises is that it obviates the need for uniform minimum academic standards. If a university admits student athletes whose academic records do not measure up to Proposition 48 standards, it should have an obligation to provide that student academic support and monitoring that will help assure his academic progress. If the obligation were made a legally enforceable one, a university would have to evaluate acceptance of a student athlete against the ability of the university to fulfill its obligation to educate the student athlete.

Termination cases involving due process issues are ripe for a common law approach because the existing cases provide precedential value. Most courts that have considered due process questions have upheld the procedures in question even when they have determined that the NCAA is not a state actor. The mere fact that the courts subjected the procedures to review could form the foundation of a common law requirement that governing associations and universities must afford student athletes, who are not members of the governing association or parties to the first-tier agreements, due process both in termination of eligibility proceedings and in enforcement proceedings against a university that may result in sanctions adversely affecting student athletes. The adoption of common law due process requirements, in essence, would restrict the right of a governing association and its members to refuse to associate with a student athlete in intercollegiate athletics unless they provide due process to the affected student athlete.

Threats to amateurism have arisen in all four categories of cases.

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190. NCAA Bylaws art. 14.01.1 requires that a student athlete enroll on full-time basis and "maintain satisfactory progress toward a . . . degree." As is typical of many NCAA bylaws, the actual language of the bylaw imposes the obligation to make satisfactory progress on the student athlete rather than the university. However, the Principle of Student-Athlete Welfare set forth in NCAA CONST. art. 2.2 states, "Intercollegiate athletic programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student athletes."

A common law of intercollegiate athletics would broaden the scope of amateurism on a gradual case-by-case basis to include athletes whose activities would technically qualify them as professionals under NCAA rules. The ideal cases will be those that carefully frame the issues on a specific limit of amateurism. The student athlete must utilize a slice of the loaf approach that apprises the court of the limited focus of the challenge and convinces the court that the effect of a favorable ruling for the student athlete will be gradual change rather than sudden revolution. In fact, in many instances a student athlete may be able to demonstrate his request only by asking the court to validate the status quo, notwithstanding NCAA rules to the contrary.[191]

Termination cases, perhaps, offer the best opportunity for developing common law restrictions on amateurism as these cases seek the thinnest slice; the student athlete need only ask for a restriction of the right of the university and the governing association to refuse to associate with him. A court need only hold that the purchase of clothing at a discount, the giving of rides, the occasional lending of a car by a coach or other person, or some similar violation of NCAA rules does not constitute compensation in exchange for athletic skill. Such holdings would restrict the NCAA from construing all transactions as involving tainted compensation merely because it is difficult to discern a tainted from an untainted transaction.

One other advantage is offered by the Termination cases. A student athlete need not ask the court to render a decision touching amateurism at all. He could ask the court to restrict the permissible range of penalties or at least require the establishment of a system of penalties such that student athletes will have prior notice of the likely penalty for a given violation. Moreover, a student athlete could petition the court to assure that he will receive a penalty consistent with the penalty meted out to others who committed the same violation. A court could, consistent with current NCAA practices, rule that some permanent ineligibility is not a suitable penalty for some classes of violations.

The same logic would apply in the Transfer cases. Cases involving a student athlete who has transferred because of academic reasons are the most appealing. Here a court could simply restrict a governing association from penalizing a student who sought to maximize his academic potential. More troublesome are those potentially archetypical raiding cases in which a student athlete seeks to transfer because of personal conflicts with the coaching staff or lack of playing time. Nevertheless, a student athlete who is able to demonstrate that his lack of playing time or a bona fide conflict rises to a level at which the univer-

191. For example, if payments to student athletes in excess of NCAA limits are the rule rather than the exception, then the student athlete has an argument based on industry custom. The rule is out of step rather than the payments. *See supra* note 153.

sity is no longer meeting his reasonable expectations based on prior university promises may be successful.

Formation and Nature and Quality cases appear to offer unfavorable milieus for challenging the parameters of amateurism under a slice of the loaf approach. Universities possess substantial discretion in determining whom they will admit as a student. A successful challenge to first-tier eligibility rules by a student athlete would not necessarily preclude a university from deciding independently of first-tier obligations to deny admission. Many Nature and Quality cases would have a major impact on the functioning of governing associations. A suit that successfully challenges the range of sanctions that may be imposed on a university constitutes a rather large slice of the loaf.

VI. CONCLUSION

This Article presents a starting point for the debate over the future of intercollegiate athletics. It does not call for the end of amateurism, only the end of its enshrinement by law. We must determine if amateurism can exist without express legal protection or we may discover that we have a system that is a dinosaur that refused to evolve. I suspect that until the aggrieved student athlete has power in the system of checks and balances in the industry of intercollegiate athletics, the industry will continue to evolve inefficiently, capable of survival only through legal subsidization. I propose to save this system with an idea as old as the law itself; I ask that we provide legal rights to student athletes, sufficient to enable them to receive adequate consideration for their efforts, or at least, what they have been promised.