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I. Introduction

Amateur athletics at the major college level is big business. It is marketed, packaged and sold the same way as many other commercial products. Last year's National Collegiate Athletic Association ("NCAA") basketball tournament generated over $70 million in gross receipts.[1] Final Four participants received direct payments of over $1.3 million.[2] Merely making the tournament earned invited schools almost $275,000.[3] Football revenues were similarly lucrative. During the 1988-89 season, bowl games generated $66 million, $53 million of which was distributed to participating schools.[4] The sale of television and radio rights to regular season games provided additional income to NCAA member schools. A successful college athletic program can also generate substantial indirect revenues. Schools can convert their athletic programs' prestige and notoriety into generous alumni donations and increased enrollment.[5]

Nevertheless, the NCAA prohibits payments, beyond educational scholarships and specified expenses, to the athletes who are responsible for producing those revenues.[6] NCAA rules also restrict the ability of college-athletes to earn outside income.[7] Thus, in a study sponsored by the NCAA, football and basketball players reported having less money available after expenses than nonathlete students.[8] Almost fifty-eight percent say the money they have is inadequate.[9] Many students are not even provided the education that is promised them.[10]

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1 *See* NCAA News, July 19, 1989, at 1, col. 4.

2 *Id.*

3 *Id.* These revenues may soar under the NCAA's new billion dollar contract with CBS Sports. *See* N.Y. Times, Nov. 22, 1989, at 1, col. 5.

4 *See* McManus, *Another Bowl for Miami?*, Sporting News, May 29, 1989, at 61.

5 *See* G. WONG, ESSENTIALS OF AMATEUR SPORTS LAW 22 (1988); Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 44 & n.39 (1987); N.Y. Times, Mar. 31, 1989, at 47, col. 1; N.Y. Times, Feb. 15, 1989, at 45, col. 1.

6 *See infra* notes 45-48 and accompanying text. The NCAA also limits the ability of students to receive government assistance to fund living expenses. *See infra* note 335.

7 *See* 1989-90 NCAA MANUAL 140 (1989).

8 *See* CENTER FOR THE STUDY OF ATHLETICS, REPORT NO. 1: SUMMARY RESULTS FROM THE 1987-88 NATIONAL STUDY OF INTERCOLLEGIATE ATHLETES 32-33 (Nov. 1988) [hereinafter REPORT NO. 1].

9 *Id.* Sixty-one percent of black and 40% of nonblack football and basketball players reported they had less than $25 per month for personal expenses. *See* CENTER FOR THE STUDY OF ATHLETICS, REPORT NO. 3: THE EXPERIENCES OF BLACK INTERCOLLEGIATE ATHLETES AT NCAA DIVISION I INSTITUTIONS 20-21 (Mar. 1989) [hereinafter REPORT NO. 3].

10 *See, e.g.*, Gup, *Foul!*, Time, Apr. 3, 1989, at 54-60; Norton, *No Time For Classes*, Calif. Law., July 1984, at 46 (a survey of professional football players indicated that two thirds had never received a college degree; similar results had previously been obtained for college basketball players). The recent Norby Walters trial revealed some of the academic abuses occurring on college campuses. *See,*

The NCAA's amateurism rules are ripe for review. It is inequitable that student-athletes, who generate millions of dollars for the university, must scrounge for basic expenses and struggle through their classes. It is hypocritical for the NCAA to restrict payments to student-athletes when its member universities continue to seek new ways of increasing revenues, often at the expense of educational interests.[11] The restrictions also are economically inefficient and result in resource misallocations.[12] Most serious, the technical and inflexible restrictions on amateurism have resulted in inevitable rules violations[13] which breed disrespect for educational institutions and damage societal values.

There can be no mistake—NCAA rules violations are rampant. Fifty-seven percent of the 106 NCAA division I-A football members were either censured, sanctioned or put on probation at least once during the last decade.[14] Many more schools are guilty of undetected violations. The infractions range from providing athletic shoes or game tickets that are sold for cash,[15] to the less subtle academic fraud or envelopes filled with money.[16]

Not only are universities' reputations sullied,[17] but the repeated violations create a climate of disrespect for rules generally. There has been an outbreak of reported criminal activity by student-athletes.[18] Whether this phenomenon represents an increase in crime or in its reporting, or evidences a correlation between flagrant rules violations and disregard for the law,[19] the fact remains that athletes are trained to view themselves

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e.g., *Notebook*, Sporting News, Apr. 3, 1989, at 42. For example, Paul Palmer was certified as academically eligible to play despite flunking remedial reading four times, completing no classes in his major, and taking courses such as bowling, racquetball, adjusting to a university, and recreation and leisure. *Id.* The problem is more than anecdotal. Over 40% of black football and basketball players at major Division I schools report having been on academic probation. REPORT No. 3, *supra* note 9, at 44. The average GPA is under 2.2 and over one-third have GPAs under 2.0. *Id.* at 43. Of course, athletes themselves share much of the blame for their academic difficulties.

11 *See* N.Y. Times, Oct. 4, 1989, at 44, col. 1 (A survey of college and university presidents and deans found that eighty-six percent of those polled believe that the financial rewards of intercollegiate atheletics are interfering with the educational mission of schools in the United States.); *see also infra* notes 98-102 and accompanying text.

12 *See infra* notes 50-51 and accompanying text.

13 *See infra* notes 52-54, 345 and accompanying text.

14 *See* NCAA News, Feb. 14, 1990, at 4, col. 1; *see also* Gup, *supra* note 10, at 56, 58, 59; J. TARKANIAN & T. PLUTO, TARKANIAN 361 (1988); J. ROONEY, JR., THE RECRUITING GAME 147 (1987); M. TROPE, NECESSARY ROUGHNESS 76-77 (1987).

15 *See, e.g.*, N.Y. Times, Nov. 17, 1989, at 25, col. 5; N.Y. Times, Feb. 22, 1981, at 2S, col. 1.

16 *See, e.g*, Kilpatrick, *Dodging a Bullet*, SPORTS ILLUSTRATED, May 29, 1989, at 24-34; Gup, *supra* note 10, at 56, 59; N.Y. Times, Feb. 26, 1989, at 27, col. 2.

17 *See, e.g.*, Gup, *supra* note 10, at 60; N.Y. Times, Feb. 26, 1989, at 27, col. 1. Even the Executive Director of the NCAA, Richard Schultz, has opined that the public's negative perception of college athletics mandates that the NCAA make "some drastic changes" in the way it functions. *See* NCAA News, Jan. 10, 1990, at 1, col. 1.

18 *See, e.g.*, Kirshenbaum, *An American Disgrace*, Sports Illustrated, Feb. 27, 1989, at 16-34; Eskenazi, *Campus Crimes: Athletes Make the Wrong Kind of Headlines*, N.Y. Times, Feb. 27, 1989, at 40, col. 1. For example, during a one-month period at the University of Oklahoma, three football players were charged with rape, another with selling cocaine and yet another with shooting his teammate. Detroit Free Press, Feb. 19, 1989, at 1E, col. 1. The University of Oklahoma has had the best on-field record over the last 15 years and has twice been sanctioned by the NCAA.

19 *See, e.g.*, Kirshenbaum, *supra* note 18, at 17 (following a 1986 survey of 350 colleges, the Philadelphia Daily News calculated that football and basketball players were 38% more likely to be implicated in sexual assaults than the average male college student).

as different and taught that rules and regulations are designed to be broken. A recent survey revealed that sixty percent of division I basketball players "had no moral problem with taking money under the table."[20] Is it any wonder that student-athletes similarly ignore societal rules? As Dr. James Wharton, Chancellor of Louisiana State University, opined:

> Virtually every student athlete who is recruited sees a series of negatives about each institution by the time the process is over. Things were done - a commitment was made for street money, an automobile was purchased or there was the assurance that, when they get to the university, a way will be found to keep them eligible and they need not worry about academics. Within the university, the fabric is stretched and stretched, until it basically tears. And if, in the recruiting process, the arrangements or agreements cause students to be cynical about the scholastic regulations - and everything else - then all things are acceptable.[21]

This Article argues that the NCAA operates as a classic cartel and its amateurism rules constitute antitrust violations. Athletes' compensation should be governed by the free market system. They should be paid according to their fair market value.[22] The elimination of the economically inefficient amateurism restraints, particularly if coupled with enhanced educational restrictions,[23] would lessen the inequity and hypocrisy that now exists in college athletics and thereby help restore societal values and respect for the rule of law.

The popular press has suggested that NCAA regulations may constitute an antitrust violation.[24] No thorough antitrust analysis has ever been provided to establish that fact.[25] This Article fills that void. Part II briefly describes the NCAA and its operation as a cartel. Part III provides a comprehensive antitrust analysis of the NCAA's amateurism restrictions.[26] It reviews and distinguishes the prior judicial decisions discussing the NCAA's restrictions on payments to college athletes, addresses several threshold issues about the applicability of the antitrust laws to the NCAA restraints, and thoroughly analyzes the reasonableness of those restraints. Part IV discusses several "nonlegal" objections to

20 *See* D. HOFFMAN & M. GREENBERG, SPORTSBIZ 103 (1989).

21 N.Y. Times, May 19, 1985, at D22, col. 1.

22 This Article does not suggest that all athletes should be paid. Many athletes, *e.g.*, cross country skiers or archers, do not produce revenue for their universities. Their fair market value would likely be less than the cost of a scholarship. The same might be true for marginal athletes in the revenue producing sports. Moreover, a university could always independently refuse to pay athletes if it believes such payments would be detrimental to the school's interests. It is the "agreement" among horizontal competitors (the NCAA's member schools), not the amount of compensation, that violates the antitrust laws.

23 NCAA educational restrictions, unlike the amateurism rules, do not violate the antitrust laws. *See infra* notes 321-23 and accompanying text.

24 *See, e.g.*, Becker, *College Athletes Should Get Paid What They're Worth*, BUS. WK., Sept. 30, 1985, at 18; *Pro and Con: Should College Athletes Be Paid Salaries?*, U.S. NEWS & WORLD REP., Dec. 23, 1985, at 56.

25 The most thorough antitrust analysis undertaken to date concludes that the NCAA restraints do not violate the antitrust laws. *See* McKenzie & Sullivan, *Does the NCAA Exploit College Athletes? An Economic and Legal Reinterpretation*, 1987 Antitrust Bull. 373 (1987), discussed *infra* at notes 59, 188-95 and accompanying text & 239.

26 This Article analyzes only federal antitrust law. State antitrust laws may be subject to differing interpretations. *See* California v. ARC Amer. Corp., 109 S. Ct. 1661 (1989).

the payment of college athletes. Some of these objections have merit and may require legislative action. They do not, however, provide the NCAA with a defense to an antitrust suit. Finally, Part V elaborates on the benefits that would result from a free market approach supplemented with enhanced educational restrictions.

II. The NCAA Cartel

The NCAA is a private, nonprofit association consisting of over 1000 members.[27] Membership is available to academically accredited colleges and universities located within the United States and its territories.[28] Regular members are classified into divisions to reflect differences in size and scope of athletic programs.[29]

The NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment by the members. The Constitution, Bylaws, Executive Regulations and Official Interpretations are published in a printed manual and distributed to all members.[30] Members are obligated to accept and observe the principles set forth in the manual.[31] A professional staff, located in Mission, Kansas and operating under the supervision of Executive Director Richard Schultz, executes and enforces NCAA policy.[32]

Organized in 1905, the NCAA's original purpose was to prevent the escalating violence in college football from destroying the sport.[33] Since that time, the NCAA has expanded its operations and goals. In addition to its supervisory functions, the NCAA conducts numerous championships, negotiates television rights,[34] and controls the marketing of its name and insignia. Budgeted revenues for fiscal year 1988-89 exceeded $82 million.[35] Despite its own growing commercialism, the basic, stated policy of the NCAA "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation

27 *See* NCAA News, Aug. 30, 1989, at 1, col. 1.

28 *See* 1989-90 NCAA MANUAL 8 (1989). Athletic conferences or associations and other groups that are related to intercollegiate athletics are eligible for allied or associate membership. *Id.*

29 *See* NCAA v. Board of Regents, 468 U.S. 85, 89 (1984). Division I includes between 200 and 300 schools with major athletic programs. Division II and III members have less extensive athletic programs. *Id.* Division I is further subdivided into division I-A and I-AA for football. Division I-A schools must meet designated attendance requirements and generally represent the more successfully competitive programs. *See* 1989-90 NCAA MANUAL 286 (1989).

30 *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

31 *See* 1989-90 NCAA MANUAL 8 (1989).

32 *See* NCAA News, May 24, 1989, at 3, col. 3.

33 *See* J. FALLA, NCAA: THE VOICE OF COLLEGE SPORTS 15 (1981).

34 The NCAA controls the television rights to its own annually sponsored championships. The NCAA's control over the lucrative television rights for intercollegiate football games was halted by the Supreme Court in NCAA v. Board of Regents, 468 U.S. 85 (1984).

35 *See* NCAA News, May 24, 1989, at 5, col. 3. NCAA television revenues alone exceeded $57 million in 1988 and will more than triple under the NCAA's new contract with CBS Sports. *See* Detroit Free Press, Mar. 31, 1989, at 46, col. 1; *see also supra* note 3. The NCAA also undertakes noncommercial activities such as providing drug education programs and post-graduate scholarships for student-athletes. *See* NCAA News, May 24, 1989, at 5, col. 2.

between intercollegiate athletics and professional sports."[36] To that end, it has enacted guidelines for recruiting students,[37] principles of amateurism,[38] limitations on financial aid,[39] academic and other eligibility rules,[40] and restrictions on playing and practice sessions.[41]

NCAA members, "employers" of student-athletes, compete with each other for the limited supply of talented labor inputs. The competition is often intense. Literally hundreds of schools court the top athletes.[42] Many people spend their money and time vying for the privilege of signing high school stars. Recruitment of student-athletes requires constant contact with the athletes and their high school coaches as well as carefully planned campus visits.[43] In addition, prize prospects often receive calls (and sometimes improper promises) from famous or wealthy alumni.[44]

The NCAA's amateurism rules seek to restrain this competition among its member institutions. In essence, the NCAA acts as a classic cartel, eliminating virtually all price competition among its members.[45] "Compensation" for student-athlete "employees" is set by agreement and is limited to tuition and fees, room and board, and required course-related books.[46] The NCAA also has an extensive set of rules to ensure that members do not increase athlete "compensation" indirectly through awards, benefits or covered expenses.[47] Like most effective cartels, the

36 *See* 1989-90 NCAA MANUAL 1 (1989).

37 For example, the NCAA strictly limits the permissible inducements that may be offered a recruit. *See* 1989-90 NCAA MANUAL 82-83 (1989). It also regulates the quantity of contacts a member may have with a recruit and the period in which the contacts can be made. *Id.* at 69-82.

38 *See id.* at 57-67. An amateur student-athlete is defined as "one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation." *Id.* at 57. The rules prohibit a student-athlete from receiving payments for his or her athletic ability (beyond permissible financial aid) and from making any commitment to participate in professional athletics unless the professional sport is different from the collegiate sport in which he or she competes. *Id.* at 58-66.

39 *See id.* at 133-68. *See also infra* notes 46-47 and accompanying text.

40 *See* 1989-90 NCAA MANUAL 101-32 (1989). A freshman student must meet designated minimum academic requirements to be eligible for participation in varsity athletics. *Id.* at 110-12. A student must at a minimum be enrolled in a full-time program of studies, be in good academic standing, maintain satisfactory progress toward a degree, and comply with all NCAA rules and regulations to retain eligibility. *Id.* at 101.

41 *See id.* at 169-256. The rules limit organized practice activities, the length of playing seasons, and the number of regular-season contests to minimize interference with the academic programs of student-athletes. *Id.* at 169.

42 *See* J. Rooney, Jr., *supra* note 14, at 9.

43 *See, e.g.*, *id.* at 37-72; 2 R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES xviii (1986).

44 *See, e.g.*, 2 R. BERRY & G. WONG, *supra* note 43, at 8.

45 The NCAA also attempts to eliminate some nonprice competition. Recruiting practices are extensively, if not altogether successfully, regulated. *See* 1989-90 NCAA MANUAL 69-99 (1989).

46 *See id.* at 136. Division III schools may also provide transportation and other expenses incidental to attendance, *id.*, but may provide no aid whatsoever except upon a showing of financial need. *Id.* at 144. The NCAA also limits any scholarship aid to entering freshmen who do not meet minimum academic requirements. *Id.* at 110-11.

47 *Id.* at 58-59, 62-63, 153-67. For example, there are limits on the number of complimentary tickets issued players, *id.* at 158-59, and the quality of housing and meals that can be provided to athletes. *Id.* at 161. Payments for summer jobs must be for work actually performed at a rate commensurate with the going rate in the locality for similar services. *Id.* at 62. A school may not provide transportation, *e.g.*, a ride home with a coach, to an athlete even if the athlete pays for the appropriate amount of gas expense. *Id.* at 164. The restrictions are seemingly endless. The NCAA also limits

NCAA maintains an elaborate enforcement mechanism to monitor and punish noncomplying members.[48]

The expected and actual market consequences of the NCAA's rules are a reduction in the wages of student-athletes, greater profits for colleges, a transfer of income from low-income athletes to higher income coaches, particularly talented recruiters,[49] inefficient forms of nonprice competition among member institutions,[50] and a misallocation of resources that harms consumer welfare.[51]

The NCAA "cartel" does not always operate smoothly. There is a strong incentive to "cheat" on NCAA rules. Athletes' "wages," particularly in division I men's basketball and I-A men's football programs, are often below their fair market value.[52] If an individual school pays more than the NCAA allows, it may attract better athletes, larger attendance, more lucrative television contracts, and greater national publicity.[53] Moreover, with in excess of 1000 members, and many "points of initiative,"[54] the school may justifiably believe that its cheating will go undetected. Consequently, cheating appears rampant.[55] Nevertheless, the rewards from cooperation are sufficiently great that NCAA members, rather than abandon the "cartel," have reacted by attempting to increase enforcement.[56]

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the number of student-athletes that can receive "compensation" in the form of financial aid. *Id.* at 146-52.

48 *See id.* at 355-67; NCAA News, May 24, 1989, at 7, col. 1.

49 Talented recruiters can increase university revenues by bringing to campus student-athletes whose value exceeds their cost. In effect, by eliminating wage competition for student-athletes, the schools created competition for head and assistant coaches. The NCAA also seeks to limit that competition by restricting the number of coaches that can be employed by Division I football and basketball programs. *See* 1989-90 NCAA MANUAL 51-57 (1989). Those restrictions were acknowledged to be "economy measures." *See* Hennessey v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977).

50 The immense recruiting costs and the extravagant expenditures for state-of-the-art training facilities and luxury stadiums are examples of inefficient nonprice competition for lucrative student-athlete contracts.

51 *See* McKenzie & Sullivan, *supra* note 25, at 378-79. Because NCAA restraints suppress the wages paid student-athletes, some athletes who would otherwise attend college will choose not to. Not only does this create a noneconomic loss for a society that values education, but it necessarily means that some athletes will employ their talents where they are less valuable than in college athletics. *Id.* at 379. The United State Justice Department also has recognized the wealth transfer and resource misallocation effects of buyer restraints. *See, Merger Guidelines Issued By Justice Department*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 1169, at S-1 (June 14, 1984); *see also* R. ECKERT & R. LEFTWICH, THE PRICE SYSTEM AND RESOURCE ALLOCATION 470-72 (10th ed. 1988).

52 *See infra* notes 57-59 and accompanying text. Division I basketball and I-A football are the primary revenue-producing sports.

53 *See* McKenzie & Sullivan, *supra* note 25, at 380.

54 A point of initiative is a place where one can buy, sell, exchange, or otherwise utilize the property rights to a resource. *See* Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 18 (1985). The greater the number of points of intiative, the more difficult it is to maintain a successful cartel. *Id.* The prevalence of alumni donors and other boosters increases the number of points of initiative in college athletics.

55 *See supra* notes 14-16. Not surprisingly, the greatest number of NCAA rules violations occur in the revenue producing sports - men's division I basketball and I-A football. *See, e.g.*, Kilpatrick, *supra* note 16, at 34.

56 The NCAA has greatly increased its enforcement staff during the last decade. *See* R. BERRY & G. WONG, *supra* note 43, at 67. It has also strengthened its enforcement and penalty procedures for member schools who violate NCAA regulations. *Id.* at 68; Kilpatrick, *supra* note 16, at 34; NCAA News, May 24, 1989, at 7, col. 1. Enforcement alone, however, cannot solve the problems in intercollegiate athletics. *See infra* note 345.

Despite the prevalence of NCAA rules violations, "cheating" has not dissipated all of the monopoly rents member institutions gain by restricting athletes' compensation. Numerous athletes are still paid below their fair market value. Many schools and student-athletes act scrupulously. Given the NCAA rules, they choose to follow them. Even those schools that act unscrupulously must pay athletes below market value to cover the risk that their violations will be detected and punished. For some athletes, their fair market value is so great that its payment could not possibly go undetected. For example, it is believed that a Patrick Ewing or Hershel Walker may increase direct revenues to the school by several million dollars.[57] The intense recruitment pressures that the majority of football and basketball players report experiencing[58] also suggests that many student-athletes increase revenues by more than their "compensation." Finally, if schools now paid student-athletes their fair market value, there would be no need for NCAA members to agree on financial aid limitations.[59]

Although there can be little doubt that NCAA rules restrain competition among member institutions, depress student-athlete compensation, and result in resource misallocation, it does not necessarily follow that the rules violate the antitrust laws. Not all restraints of trade are illegal.

III. Antitrust Analysis

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[60] Early on, it was recognized that the Act could not be construed literally, since every commercial agreement restrains trade in the sense that it binds the actions of the parties to it.[61] Thus, the Supreme

57 *See* Koch, *supra* note 54, at 24. Star athletes may also indirectly increase revenues by creating positive exposure for the school that increases applications for enrollment and alumni contributions. *See* D. Hoffman & M. Greenberg, *supra* note 20, at xiv (1989), Jensen, *supra* note 5, at 44 n.39; N.Y. Times, Feb. 15, 1989, at 45, col. 1.

58 *See* REPORT No. 1, *supra* note 8, at 17.

59 Professors McKenzie and Sullivan argue that the assumption that college athletes are underpaid mistakenly ignores that the expected pay of college athletes exceeds their actual pay by an amount equal to the present value of future income from professional employment. *See* McKenzie & Sullivan, *supra* note 25, at 380-81. They suggest that "[t]he fact that many athletes - including most of the better athletes - voluntarily use up their college eligibility before 'turning pro' suggests that their extra year or years spent in college sports provide valuable on-the-job training and media exposure . . . . [resulting in] an increase in their expected lifetime income that more than compensates for the loss of income during their college years." *Id.* at 381.

Even assuming that there were no restrictions on the ability of football players to enter the National Football League's draft and that all college athletes went on to play professional sports, Professors McKenzie and Sullivan's argument fails because it confuses athletes' subjective value with their fair market value. If oil companies fix the price of gas, the fact that some people choose to buy gasoline at the fixed price (i.e., have a subjective value for gas above the free market price) does not mean that there has not been a restraint of trade. Quite simply, all individuals have the right to expect prices set by the market, not by agreement, whether or not they are willing to accept the agreed upon price.

60 15 U.S.C. § 1 (1988).

61 *See, e.g.*, Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918); *see also* Board of Regents v. NCAA, 546 F. Supp. 1276, 1304 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

Court has ruled that the Sherman Act prohibits only those contracts or combinations that "unreasonably" restrain competition.[62] Several recent cases have addressed the reasonableness of the NCAA's restraints on payments to student-athletes.[63] None of those cases, however, presented a thorough antitrust analysis. Part A will discuss and distinguish those cases. Part B will address several threshold issues concerning the applicability of the Sherman Act to the NCAA's amateurism rules. Finally, Parts C and D will provide a comprehensive analysis of the reasonableness of the NCAA's restraints on payments to college athletes.

A. *Judicial Decisions*

The leading case addressing the NCAA's amateurism restrictions, *NCAA v. Board of Regents*,[64] did not involve a challenge to those rules at all. In *Board of Regents*, the Universities of Oklahoma and Georgia challenged the NCAA restraints on the televising of college football games. The NCAA negotiated television rights packages with the major networks and NCAA member schools were obligated to follow the provisions in those agreements. The package limited the number of television exposures any NCAA member school could have and effectively set prices for the types of games the networks chose to televise.[65] The Court affirmed the lower court decision finding the NCAA's restraints to be a violation of Section 1 of the Sherman Act. It reasoned that the NCAA agreement restricted output, affected price and could not be redeemed by any procompetitive purpose.[66] The Court compared the NCAA's amateurism restraints to the restrictions on television rights to illustrate what might constitute reasonable restraints. The former, the Court suggested, were necessary restraints that furthered the NCAA's essential purpose.[67] The parties, however, neither raised nor briefed the legality of the NCAA's restraints on payments to college athletes. The Court's discussion was *obiter dictum* and unsupported by any careful antitrust analysis.

Nevertheless, two subsequent cases relied on the Supreme Court's dictum to reject challenges to the NCAA's amateurism restraints.[68] Neither case employed independent reasoning. In both cases, the price fix challenge was not central to the case and was raised in a very unsympathetic context.

In *McCormack v. NCAA*, an SMU alumnus filed a *pro se* complaint against the NCAA challenging its suspension of SMU's football program for the entire 1987 season.[69] The NCAA imposed its sanction after it

62 *See* NCAA v. Board of Regents, 468 U.S. 85, 98 (1984); Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

63 *See* NCAA v. Board of Regents, 468 U.S. 85 (1984); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989).

64 468 U.S. 85 (1984).

65 *Id.* at 92-93.

66 *Id.* at 113-20.

67 *Id.* at 102, 117, 120.

68 *See* McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989).

69 845 F.2d at 1340.

found SMU had repeatedly transgressed restrictions on payments to college athletes.[70] The original complaint alleged that the NCAA suspension violated plaintiff's civil rights, the rights of SMU as well as those of other alumni and constituted a group boycott in violation of the antitrust laws.[71] Following a motion to dismiss for failure to state a claim, plaintiff filed an amended complaint. Plaintiff joined members of the SMU football team and cheerleading squad and, for the first time, alleged that the NCAA's amateurism rules constituted a price fixing violation.[72] The focus of the amended complaint, however, remained the boycott allegation. Plaintiffs wanted the court to enter an injunction that would enable SMU to continue operating its football program, despite the NCAA's finding of repeated rules violations.[73]

The Fifth Circuit affirmed the lower court's dismissal of plaintiff's amended complaint. The court found that the original plaintiff and the SMU cheerleaders lacked standing to pursue their claims, and questioned whether the football players were proper plaintiffs.[74] The court went on to hold that even if the players had standing, their substantive claims lacked merit. Citing extensively from the Supreme Court's *Board of Regents* opinion, the Fifth Circuit found the NCAA restraints reasonable.[75] Finding the NCAA eligibility rules lawful, the court concluded that enforcement of them through suspension or other restrictions could not constitute an illegal group boycott.[76]

United States v. Walters involved a criminal prosecution of two sports agents charged with several crimes, including racketeering, extortion, and mail and wire fraud.[77] The defendants were accused of secretly paying college athletes to sign representation contracts in violation of NCAA rules and using threats of force to prevent athletes from reneging on those contracts.[78] The defendants moved to dismiss the indictment on the ground that the NCAA's eligibility regulations violated the antitrust laws. The court rejected the defendants' claims, relying exclusively on the decision in *McCormack* and the dictum in *Board of Regents*.[79] A jury subsequently returned a verdict against the defendants.[80]

The context in which the parties challenged the NCAA's amateurism restrictions and the absence of reasoning in the courts' opinions make

70 *Id.*

71 *Id.*

72 *Id.*

73 Plaintiffs also sought damages for the alleged price fixing, group boycott and civil rights violations. *Id.* The largest award sought, a request for $150 million, was for the group boycott allegation. *Id.*

74 *Id.* at 1341-43. The court's doubt on the player-standing issue suggests that the court also viewed the complaint as primarily alleging an illegal group boycott. There is no question that players seeking damages for a price fix would have standing to challenge a direct restraint on their compensation.

75 *Id.* at 1343-45.

76 *Id.* at 1345. The court also rejected the plaintiffs' civil rights claims, finding the NCAA was not a "state actor" within the meaning of section 1983. *Id.* at 1346.

77 United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989).

78 *See* N.Y. Times, Feb. 26, 1989, at 27, col. 1.

79 Walters, 711 F. Supp. at 1442.

80 *See* N.Y. Times, Apr. 15, 1989, at 30, col. 1.

McCormack and *Walters* less than compelling precedent. The language in *Board of Regents* itself was unreasoned *obiter dictum*. Thus, future courts should be free to apply their own thorough antitrust analysis in a case directly challenging the NCAA's restraints on payments to college athletes. This Article provides such an analysis below.

B. *Applicability of the Sherman Act*

The basic requirement for application of the Sherman Act is that the activity in question involve or affect interstate commerce.[81] There is some dispute among lower courts about whether a plaintiff must establish a nexus between the challenged restraint and interstate commerce, or simply an effect on commerce resulting from the defendant's business activities in general.[82] It is not necessary to resolve that dispute. The NCAA restraints on competition for student-athletes satisfy both tests. Athletes are recruited on a nationwide basis. The schools for which they play compete nationally. Games are often telecast nationally. Tickets to national championships are sold throughout the country. Thus, courts addressing the issue have routinely found NCAA restraints to involve or affect interstate commerce.[83]

An issue that has received more attention and been more vigorously argued by the NCAA is whether the NCAA is involved in "commerce" at all. The NCAA has maintained that the Sherman Act has been traditionally applied only to commercial enterprises, not nonprofit organizations pursuing noncommercial objectives.[84] The leading case for complete exemption of educational institutions from the Sherman Act is *Marjorie Webster College v. Middle States Association*.[85] In that case, a college sought to enjoin enforcement of a rule denying accreditation to any but nonprofit organizations. Despite the serious impact of the defendant's rule on proprietary schools, the court denied the plaintiff relief. It held that "the proscriptions of the Sherman Act were 'tailored * * * for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions."[86] Later cases have specifically cited *Marjorie Webster College* to exempt the NCAA from the Sherman Act.[87]

A blanket exemption for the NCAA must be rejected. The court in *Marjorie Webster College* limited its decision to restraints with incidental ef-

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81 *See* McLain v. Real Estate Bd., 444 U.S. 232, 242 (1980); Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976).

82 *Compare* Western Waste Serv. Sys. v. Universal Waste Control, 616 F.2d 1094, 1096-97 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980), *with* Furlong v. Long Island College Hosp., 710 F.2d 922, 925-26 (2d Cir. 1983).

83 *See, e.g.*, Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983).

84 *See* Brief for Appellee at 19-21, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (No. 87-2802); Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984); Hennessey v. NCAA, 564 F.2d 1136, 1148-49 (5th Cir. 1977).

85 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

86 *Id.* at 654 (footnotes omitted).

87 *See* Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975); College Athletic Placement Serv., Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117 at 65,267 (D. N.J.), *aff'd without opinion*, 506 F.2d 1050 (3d Cir. 1974).

fects on competition that did not have an intent or purpose to affect the commercial aspects of the profession.[88] The NCAA's amateurism restrictions cannot meet that standard.[89] More fundamentally, *Marjorie Webster College*, *Jones*, and *College Athletic Placement Service, Inc.* all preceded the Supreme Court's decision in *Goldfarb* v. *Virginia State Bar*.[90] *Goldfarb* involved an attack upon a bar association's minimum fee schedule. The Court rejected the defendant's argument that the learned professions did not involve trade or commerce. In sweeping language, the Court concluded that there was no implied exemption for nonprofit organizations, stating "Congress intended to strike as broadly as it could in Section 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose."[91] Following *Goldfarb*, courts repeatedly have applied the Sherman Act to restraints imposed by nonprofit regulatory groups in general,[92] and the NCAA in particular.[93]

Nevertheless, the NCAA might argue that a narrow exemption for nonprofit organizations pursuing noncommercial purposes survives *Goldfarb*. Support for this position might be found in *Missouri v. National Organization for Women, Inc. (NOW)*[94] and *Henry v. First National Bank*.[95] In *NOW*, the Eighth Circuit held defendant's campaign for a convention boycott of states that had not ratified the Equal Rights Amendment beyond the purview of the Sherman Act. In *Henry*, the Fifth Circuit suggested that the Act might not apply to a civil rights group's boycott of white businesses to protest racial discrimination by merchants and local public officials. The NCAA could seek to distinguish *Board of Regents* by arguing that the restraint at issue primarily implicated commercial activity, the regulation of lucrative television contracts.[96] By contrast, the NCAA would say, amateurism rules further strictly educational and social goals, much like the restraints in *Marjorie Webster College*, *NOW* and *Henry*. The Supreme Court's ready acceptance of the NCAA's amateurism rules, albeit in dictum, might support this position.[97]

The NCAA's argument should fail for both legal and factual reasons. The cases following *Goldfarb* that recognized an exemption for noncommercial boycotts involved noncommercial entities pursuing first amendment rights. The NCAA may be a nonprofit organization, but it is not a noncommercial entity. The NCAA and its member institutions, when presenting amateur athletics to a ticket-paying, television-buying public,

88 432 F.2d at 654.

89 *See infra* notes 104-06, 167-70 and accompanying text.

90 421 U.S. 773 (1975).

91 *Id.* at 786-87.

92 *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679 (1978).

93 *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).

94 620 F.2d 1301, 1312 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980).

95 595 F.2d 291, 304 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

96 *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988).

97 *See* NCAA v. Board of Regents, 468 U.S. 85, 102, 117, 122-23 (1984); *see also* Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) ("[I]t is clear that the NCAA is now engaged in two distinct kinds of rule making activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose.").

are engaged in a commercial venture of far greater magnitude than the vast majority of "profit-making" enterprises.[98] The NCAA has a multi-million dollar annual budget, negotiates television rights to events it produces, and actively markets its product. Its member institutions appear to constantly seek new ways of increasing revenues.[99] The Supreme Court has recognized that the NCAA and its member institutions are organized to maximize revenues,[100] and the Division I Philosophy Statement itself acknowledges that each member school "[s]trives to finance its athletic program insofar as possible from revenues generated by the program itself."[101] "[I]t is cavil to suggest that college football, or indeed higher education itself, is not a business."[102] There is also no first amendment interest proximately affected by the NCAA restraints.[103] An injunction barring agreement on the amount of compensation college athletes can receive would not conflict with any protected speech (though some wags might suggest that it would interfere with a religion).

Factually, one doubts that the NCAA restraints are solely motivated by educational and social goals. Despite much support for stipends beyond scholarship aid for college athletes, the NCAA refuses to permit such compensation.[104] Richard Schultz, the Executive Director of the NCAA, has conceded that financial concerns are the primary reason for rejecting proposals to pay college-athletes a stipend.[105] College sports is big business and the recruitment and hiring of college athletes is an integral part of that business. It stretches credulity to suggest that NCAA members are unaware of, or are uninterested in, the substantial cost sav-

98 *See* Hennessey v. NCAA, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977).

99 For example, Division I-A football schools have begun plans for a national playoff. *See* N.Y. Times, Apr. 26, 1989, at 45, col. 3. The playoff proposal is not motivated by a desire to determine the number one school, much less to enhance education or preserve amateurism, but to increase revenues. *See* NCAA News, May 17, 1989, at 4, col. 2. Money has motivated twenty-three division I-A schools to form a consortium to link collegiate sport with corporate sponsorship. *See* NCAA News, Sept. 11, 1989, at 5, col. 1. Even the U.S. Military and Naval Academies have yielded to that temptation. *See* Dunnavant, *Army-Navy Game Seeking Corporate Touch*, Sporting News, June 12, 1989, at 56. Bowl games, of course, already have corporate sponsorship. *See* Dunnavent, *Sponsors Use Clout With Bowls*, Sporting News, July 3, 1989, at 52.

100 NCAA v. Board of Regents, 468 U.S. 85, 100, 101 & n.22 (1984).

101 1989-90 NCAA MANUAL 282 (1989).

102 Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984); *accord* NCAA News, June 14, 1989, at 4, col. 1. The Justice Department does not believe educational institutions are immune from Sherman Act review. The Department has recently investigated whether elite colleges and universities have restrained trade by setting similar levels of tution and financial aid. *See* N.Y. Times, Aug. 10, 1989, at 1, col. 2.

103 *But see* Gulland, Byrne & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, 52 FORDHAM L. REV. 717, 724 (1984) (suggesting that educational values protected by the first amendment are implicated by NCAA rules, although conceding that they are not so directly raised by television rules that the antitrust laws cannot apply).

104 The NCAA has even eliminated the nominal $15 "laundry" stipend that historically had been provided student-athletes. *See* D. EITZEN & G. SAGE, SOCIOLOGY OF AMERICAN SPORT 230 (2d ed. 1982).

105 *See* Sunday Lincoln Journal Star, March 27, 1988, at 1D, 4D; Sunday Omaha World-Herald, Apr. 3, 1988, at 1C, 4C. The NCAA has most recently appointed a Special Committee on Cost Reduction to explore the merits of further restricting athletic scholarships to basic educational expenses, augmented only upon a showing of need. *See* NCAA News, June 7, 1989, at 1, col. 1.

ings the NCAA rules provide.[106] The Supreme Court's summary approval of the NCAA's amateurism rules[107] is not to the contrary. Not only were the Sherman Act implications of those rules not raised or briefed in *Board of Regents*, but also the Court's terse discussion merely suggested that the rules were reasonable, not that they were immune from Sherman Act review.[108] The nature and purpose of the activities and rules of the NCAA are relevant to a determination of their legitimacy under traditional antitrust analysis; they do not, however, support an exemption from antitrust review.[109]

The NCAA might argue that even if it is engaged in commerce, its amateurism restrictions do not restrain commerce. Several commentators have opined that restraints on the labor market were not intended to be covered by section 1 of the Sherman Act or are protected by the labor exemption contained in section 6 of the Clayton Act.[110] A prior Article has fully developed and criticized these arguments.[111] Despite superficial support, legislative history, policy and judicial precedent all argue against adoption of these commentators' position.[112] Workers (in this case, student-athletes), like consumers, are entitled to the protections of the Sherman Act.[113]

In earlier litigation, the NCAA also argued that its rules and regulations were immune under the state action doctrine.[114] The state action

106 *See supra* note 105 and accompanying text; *see also* NCAA News, June 14, 1989, at 2, col. 3 (Frank Broyles, athletic director at the University of Arkansas and outgoing chair of the Division I-A Athletic Directors Association, stated "the number one issue for I-A directors is cost containment.").

This Article does not suggest that the sole motivation of the NCAA is economic. The NCAA engages in numerous worthwhile activities and enforces many laudable rules. Rather, this Article only maintains that the NCAA amateurism rules are not solely motivated by social or educational concerns. When a party is "at least partially motivated by the desire to lessen competition," no exemption applies. F.T.C. v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 777 & n.10 (1990) (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 468 U.S. 492, 508, 108 S. Ct. 1931, 1941 (1988)).

107 *See supra* note 67 and accompanying text.

108 *Id.*; *see also* 468 U.S. 85, 133 (1984) (White, J., dissenting).

109 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975); Hennessey v. NCAA, 564 F.2d 1136, 1149 n.15 (5th Cir. 1977).

110 *See* Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986); Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 PITT. L. REV. 337 (1986); Jerry & Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984); E. MILLER, ANTITRUST LAWS AND EMPLOYEE RELATIONS 94-112 (1984); Hoffmann, *Labor and Antitrust Policy: Drawing a Line of Demarcation*, 50 BROOKLYN L. REV. 1 (1983); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

Section 6 of the Clayton Act provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1988).

111 *See* Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employer Labor Market Restraints in Sports and Non-Sports Markets*, 1989 Utah L. Rev. 617 (1989).

112 *Id.*

113 *Id.*

114 *See* Hennessey v. NCAA, 546 F.2d 1136, 1149 (5th Cir. 1977).

doctrine immunizes conduct of private actors taken pursuant to state law. The dual requirements for its application are 1) the private party must act pursuant to a clearly articulated and affirmatively expressed state policy and 2) the state policy must be actively supervised by the state.[115] The NCAA's rules and regulations satisfy neither prong. The Court in *Hennessey* summarily rejected the NCAA's claim of exemption and the NCAA has not raised the argument since.[116]

In sum, the NCAA's amateurism regulations satisfy the prerequisites for application of the Sherman Act. The restraints are in, and affect, interstate commerce, and there is no applicable exemption preventing Sherman Act review. It is therefore necessary to determine the legality of the NCAA's restraints under traditional section 1 doctrine.

C. *Rule of Reason v. Per Se Rule*

While the Sherman Act forbids only "unreasonable" restraints of trade, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . ."[117] These types of arrangements have been determined to be unreasonable *per se* and are illegal without elaborate inquiry into the precise harms they cause or the reasons for their adoption.[118] By contrast, traditional "Rule of Reason" analysis requires a consideration of the nature, purpose, and competitive effect of any challenged agreement before a decision is made about its legality.[119]

Antitrust plaintiffs have argued that the NCAA's restrictions on payments to student-athletes fall within the *per se* rule.[120] The NCAA is an association of schools that compete against each other to attract student-athletes to their campuses. By agreement, they have eliminated all forms of price competition among themselves. One purpose of the restraint appears to have been and the actual effect has been to lower the "price" paid student-athletes.[121] This is a horizontal agreement restraining price, the paradigm of an unreasonable restraint of trade subject to *per se* condemnation.[122]

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115 *See* Patrick v. Burget, 486 U.S. 94, 100 (1988); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

116 Recently, the state of Texas enacted legislation making it a crime to recruit student-athletes with money or gifts. *See Notebook*, Sporting News, May 29, 1989, at 42. This legislation may serve to immunize Texas schools from prosecution under the Sherman Act. It should not protect the NCAA, other than, perhaps, to prevent students in Texas from having standing to sue the NCAA for future violations.

Public universities that are members of the NCAA may be immune from suit in federal court as state agencies. *See infra* note 300. This too does not protect the NCAA. The NCAA is not a state actor. *Cf.* NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (due process challenge).

117 Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

118 *Id.*

119 Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

120 *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989).

121 *See supra* notes 45-59 and accompanying text.

122 *See, e.g.*, F.T.C. v. Superior Court Trial Lawyers Ass'n, 58 U.S.L.W. 4145, 4148, 4151-52 (1990) (agreement among attorneys to cease representing indigent criminal defendants until the District of Columbia government increased the attorneys' compensation held a "naked restraint"

Despite its superficial appeal, the argument for *per se* treatment of the NCAA's amateurism rules is inconsistent with modern antitrust jurisprudence. Numerous Supreme Court decisions evidence a preference for an efficiency-oriented Rule of Reason analysis.[123] The Court has been concerned that *per se* analysis may create overdeterrence that stifles effective competition.[124] The concern is especially strong where the defendants lack market power.[125] Thus, even if parties have "literally" fixed the price of goods, courts require further factual inquiry to decide if the challenged restraint should be characterized or classified as *per se* illegal price fixing.[126] If the defendants can proffer any plausible justification for their agreement that is not tantamount to arguing that the Sherman Act should not apply to them, the court will reject *per se* analysis.[127] It may be that on further examination the proffered justification

violating the antitrust laws); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 346-47 (1982) (maximum fee schedule agreed upon by doctors for reimbursement for health services provided to policyholders or certain insurance plans held *per se* illegal); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (agreement among beer wholesalers to eliminate short term credit to retailers held *per se* illegal). The "rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct." F.T.C. v. Superior Court Trial Lawyers Ass'n, 58 U.S.L.W. at 4151 n.15, *quoting* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16, n.25 (1982); *accord*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. at 344 n.14. The *per se* rule also serves to clearly demarcate certain types of prohibited conduct and thus affords business guidelines for structuring their affairs. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part I*, 74 YALE L.J. 775, 832, 840-41 (1965).

123 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

124 *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 16-25 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-59 (1977).

125 If the defendants lack market power, a price agreement cannot affect the market. If the price set is too high, consumers simply will buy elsewhere. The defendants eventually will be forced to lower their prices. *See* E. SULLIVAN & J. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 86 (1988). Accordingly, if rational defendants lack market power, it might be presumed that their agreement must not be designed to tamper with market forces, but to somehow enhance their own efficiency and improve competition.

126 *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 9 (1979); Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988); P. AREEDA, VII ANTITRUST LAW 423-25 (1986).

127 *See supra* note 123.

In Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), the Court, in a 4-3 decision, labeled the agreement among defendant doctors as illegal *per se*. That label was misleading, however, because the Court ultimately examined the defendants' justifications for their restraint and found them wanting. *Id.* at 351-54. The Court also intimated that if the defendants had been pursuing some ethical norm, formal adoption of the Rule of Reason would be justified. *Id.* at 349. The Court's analysis was fully consistent with the "quick look" analysis followed in F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) and NCAA v. Board of Regents, 468 U.S. 85 (1984). *See infra* notes 160-61 and accompanying text.

In Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980), the Supreme Court held that an agreement among beer wholesalers to eliminate short term credit to beer retailers was *per se* unlawful price fixing. The defendants attempted to justify their agreement as procompetitive by claiming that it lowered barriers to entry and increased price visibility. The Court summarily dismissed these justifications because such defenses would insulate even the most anticompetitive agreements from antitrust attack. *Id.* at 649-50. Without any cognizable justification, the defendants' restraint was properly viewed as a naked price-affecting scheme subject to *per se* treatment.

The *per se* rule was applied most recently in F.T.C. v. Superior Court Trial Lawyers Ass'n, 58 U.S.L.W. 4145 (1990). In *Trial Lawyers*, the Court considered, but rejected, the defendants' first amendment justifications for their refusal to represent indigent criminal defendants until govern-

will be found illegitimate or achievable by less restrictive alternatives. In that event, the challenged conduct can be condemned as unreasonable under the Rule of Reason.[128] Analysis under the Rule of Reason, however, creates the flexibility that ensures that actual market harm exists before a court undertakes a rigorous second-guessing of the defendants' actions.[129]

The NCAA may present two broad justifications for its restrictions on payments to student-athletes. It can argue that 1) noncommercial, public interest reasons support its regulations and 2) its regulations are procompetitive either because they are part of a productive joint venture or because they enhance the image of the NCAA and improve the ability of the NCAA to compete in the marketplace. Although this Article, after close examination, rejects these justifications under the Rule of Reason,[130] they are both sufficient to avoid application of the *per se* rule.

1. Public Interest Justifications Supporting a Rule of Reason Analysis

An initial inquiry is whether the Sherman Act recognizes noneconomic interests. The Supreme Court recently has emphasized that the goals of antitrust are economic efficiency and competitive markets.[131] Noneconomic values are dismissed as beyond the ability of the courts to balance. The Court has reasoned that the consideration of noneconomic values requires "some ultimate reckoning of social and economic debits" that is best left to Congress.[132]

Absent actual anticompetitive effects, however, consideration of public interest or other values neither requires the nebulous balance the Court fears nor usurps Congressional power. Thus, the better view permits noneconomic values to justify a Rule of Reason analysis, even if they are not allowed to offset actual anticompetitive effects or serve as an overall defense to liability. In this way, the *per se* rule can be avoided where defendants further public interests without jeopardizing a competitive marketplace.[133] The case law is compatible with this position. The cases rejecting noneconomic interests generally involved a finding of

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ment-paid compensation was increased. *Id.* at 4149-52. Absent any first amendment protection, the Court understandably viewed the explicit horizontal agreement, that affected price and was not part of any productive joint venture, as a "naked restraint" subject to *per se* condemnation.

128 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents, 468 U.S. 85 (1984); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

129 The Court does not necessarily require a full Rule of Reason analysis to determine that actual harm exists. *See infra* notes 160-61, 166 and accompanying text. Thus, the policy basis's for the *per se* rule, *see supra* note 122, are not sacrificed.

130 *See infra* notes 154-280 and accompanying text.

131 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Board of Regents, 468 U.S. 85, 104 (1984); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978); *see also* McKenzie & Sullivan, *supra*, note 25, at 391 n.44.

132 United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963); *accord* Ford Motor Co. v. United States, 405 U.S. 562, 569-70 (1972); *see also* Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 668 (1978).

133 If defendants lack market power, any agreement pursuing social goals should be legal. The social goal prevents application of the *per se* rule and the absence of market power prevents a finding of illegality under the Rule of Reason. For example, if a small athletic conference adopted any of the NCAA's rules independently, the conference likely would not face Sherman Act liability.

substantial harm under the Rule of Reason.[134] Moreover, the contrary view would be inconsistent with the Court's admonition that it is "unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas,"[135] and would place all regulatory associations in antitrust jeopardy.[136] Although "good motives will not validate an otherwise anticompetitive practice,"[137] they should justify actions that do not present an anticompetitive threat.

The NCAA regulations limiting payments to athletes can be justified as promoting amateurism and education.[138] As stated by Justice White, NCAA regulations "represent[ ] a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.' "[139] The NCAA's regulations may not be necessary or reasonably tailored to accomplish this goal.[140] That issue, however, is appropriately considered when evaluating the NCAA restraints under the Rule of Reason. The pursuit of educational objectives constitutes at least a facially sufficient noneconomic justification demanding rejection of the *per se* rule.[141]

134 In *Indiana Federation of Dentists*, the Court said, "[a]bsent some countervailing procompetitive virtue . . . such an agreement limiting consumer choice . . . cannot be sustained under *the Rule of Reason*." 476 U.S. at 459 (emphasis added). In *Professional Engineers*, the Court rejected the defendant's public interest justification for its ban on competitive bidding stating, "the inquiry mandated by *the Rule of Reason* is whether the challenged agreement is one that promotes competition or one that suppresses competition." 435 U.S. at 691 (emphasis added). Similarly, in *Board of Regents*, the Court found the essential inquiry to be whether the challenged restraint enhances competition under the Rule of Reason. 468 U.S. at 103-04.

In F.T.C. v. Superior Court Trial Lawyers Ass'n, 58 U.S.L.W. 4145 (1990) the Court dismissed the defendants' social justifications and applied a *per se* rule. In *Trial Lawyers*, however, the restraint undeniably affected price and was not part of any productive joint venture. Indeed, the social justification offered, that higher fees would result in better legal services for the indigent, necessarily required an effect on price. Thus, the real issue was whether the Sherman Act should apply to the defendants' conduct, not whether Rule of Reason analysis was justified. *Id.* at 4149-52. If the Sherman Act was applicable, the defendants' agreement was unquestionably illegal under any mode of analysis.

135 Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975); *see also* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

136 Ultimately, whether noneconomic values are recognized may be just an academic question. A court wishing to consider noneconomic values can reformulate the justification as a procompetitive one. For example, if the NCAA justifies its amateurism restrictions as pursuing the noneconomic Olympic ideal, a court can consider this procompetitive justification by observing that the NCAA's image and marketability may be enhanced by pursuit of that ideal. There is evidence that courts already play this game. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978)("Ethical norms may serve to regulate and promote . . . competition . . . .").

137 NCAA v. Board of Regents, 468 U.S. 85, 101 n.23 (1984).

138 *See* NCAA v. Board of Regents, 468 U.S. 85, 122 (1984)(White, J., dissenting); McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); J. WEISTART & C. LOWELL, THE LAW OF SPORTS 768, 770 (1979).

139 NCAA v. Board of Regents, 468 U.S. 85, 123 (1984) (White, J., dissenting), *quoting*, Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377, 1380 (M.D. N.C. 1975); *accord*, McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); J. WEISTART & C. LOWELL, *supra* note 138, at 770.

140 *See infra* notes 256-80 and accompanying text.

141 Promotion of educational values also furthers economic interests of the NCAA member schools and therefore can be considered procompetitive. *See infra* notes 259-60 and accompanying text.

2. Procompetitive Justifications Supporting a Rule of Reason Analysis

Procompetitive (economic) justifications also can support Rule of Reason treatment of the NCAA's restrictions on payments to college athletes. In particular, the NCAA can argue that the restraints are part of a productive joint venture and are ancillary to the NCAA's legitimate purpose of promoting college athletics.

Antitrust law is designed to ensure an appropriate blend of competition and cooperation, not to require all economic actors to compete absolutely at all times. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm.[142] Thus, courts have been especially solicitous of productive joint ventures[143] in general and sports leagues and associations in particular.[144] They have reasoned that in sporting enterprises, rules are essential if the enterprise is to exist and compete in the marketplace and have therefore held the *per se* rule inapplicable to all league and association regulations. The Supreme Court specifically applied this body of law to the NCAA in *NCAA v. Board of Regents*. The Court found the NCAA, through rules that protect "the character and quality" of college football, "enables a product to be marketed which might otherwise be unavailable. In performing [that] role, its actions widen consumer choice - not only the choices available to sports fans but also those available to athletes - and hence can be viewed as procompetitive."[145]

The assumption that the NCAA or its restrictions on payments to athletes are necessary for the production of college athletics may be challenged.[146] Nevertheless, the NCAA "joint venture" does result in the creation of some new products. The NCAA sponsors seventy-seven national championship competitions, forty-one in men's sports, thirty-four for women, and two for mixed teams.[147] The popularity of its men's basketball playoffs alone attests to the productivity of the joint enterprise. Although the NCAA's restrictions on payments to athletes may not be

142 *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 16 (1979); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985).

143 The commercial law joint venture has been traditionally defined as "a sort of 'temporary partnership' - dissolved upon the completion" of a particular business undertaking. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 49, at 105-06 (3d ed. 1983). In antitrust law, however, it is not a term of art, *see* M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, CASES AND MATERIAL ON TRADE REGULATION 496 (1983); P. AREEDA, *supra* note 126, at 348, and has generally been applied to any research, production or marketing enterprise that maintains an identity separate from that of its parents. *See* Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1525 (1982); P. AREEDA, *supra* note 126, at 348-49; Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 U.C.L.A. L. REV. 219, 247 (1984).

144 *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); Los Angeles Mem. Coliseum Comm'n v. NFL, 726 F.2d 1381, 1390-98 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); NASL v. NFL, 670 F.2d 1249, 1258-59 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 787-90 (7th Cir. 1981); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179-82 (D.C. Cir. 1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-54 (5th Cir. 1977); Mackey v. NFL, 543 F.2d 606, 618-21 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

145 468 U.S. at 102.

146 *See infra* notes 224-33 and accompanying text.

147 *See* NCAA News, May 24, 1989, at 3, col. 1.

"essential" to this productivity, the Supreme Court did not require such a showing to justify Rule of Reason treatment in *Board of Regents*.[148] It was enough that some restraints, not the particular restraint challenged, were essential if the product was to be produced at all.[149] The NCAA easily meets that test.

The NCAA also serves a useful marketing function, much like a trade association. It seeks to improve the image and enhance the consumer appeal of college sports. The restrictions on payments to college athletes may be justified as ancillary to this legitimate purpose.[150] NCAA rules are said to promote competitive balance and thereby further the public's interest in existing contests.[151] Without these restrictions, it is predicted that one or a few teams will purchase all the star players and dominate on-field competition. The quality of athletic competition and hence fan appeal would suffer. Although the assumptions made about the stabilizing effects of restraints on payments to college athletes are subject to challenge,[152] the Supreme Court's ready acceptance of the competitive balance argument[153] suggests that it is at least a plausible justification for Rule of Reason treatment.

In sum, NCAA restraints plausibly further valued noneconomic interests, are part of a productive joint venture and are arguably reasonable ancillary restraints. This justifies application of the Rule of Reason, rather than the *per se* rule.

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148 Restraints on the marketing of television rights surely are not essential to the production of college sports, yet the Court found the Rule of Reason applicable.

149 468 U.S. at 101. Earlier joint venture cases could be construed to require a showing that the challenged restraint is essential or necessary to market the joint product. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23 (1979); Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 356 (1982). Those cases, however, are more appropriately interpreted as holding that such a showing justifies legality, not merely analysis, under the Rule of Reason. If a restraint is truly necessary for a productive joint venture, the restraint must have net procompetitive effects.

More troubling was the Supreme Court's failure to require some nexus between the challenged restraint and the joint enterprise's productive activities. For example, if a trade association adopted an explicit price fix, the Court's opinion seemingly would allow the association to avoid a *per se* rule merely by proffering the procompetitive functions the trade association performs. Perhaps the Court assumes that such problems easily can be handled by its "quick look" Rule of Reason analysis. *See infra* notes 160-61 and accompanying text.

150 An ancillary restraint is a collateral part of a larger procompetitive endeavor whose efficiency it enhances. *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985); Los Angeles Mem. Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). Also, ancillary restraints cause otherwise *per se* unlawful conduct to be tested under the Rule of Reason. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); National Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592, 599-604 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185, 189 (7th Cir. 1985); Los Angeles Mem. Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). For a discussion of the history and development of the ancillary restraints doctrine, see Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 992-1015 (1988).

151 *See, e.g.*, Brief of Appellee at 23, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (No. 87-2802); J. WEISTART & C. LOWELL, *supra* note 138, at 770.

152 *See infra* notes 246-55 and accompanying text.

153 NCAA v. Board of Regents, 468 U.S. 85 at 117, 119 (1984).

D. *Rule of Reason Analysis*

The broad contours of a Rule of Reason analysis were first articulated in 1918 in *Chicago Board of Trade v. United States*:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[154]

This has remained the general statement of the Rule of Reason standard, although recently the Supreme Court has sharpened the required focus. In *National Society of Professional Engineers v. United States*, the Court indicated that contrary to its name, the Rule of Reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[155] Rather, the focus must be on the "market impact" of the challenged restraint.[156] This has typically required a two-fold inquiry.[157] First, the restraint's effect in a relevant market must be identified. Often, but not always, this will require determination of a relevant product and geographic market.[158] Second, the procompetitive justifications for the challenged practice must be analyzed. An apparently anticompetitive restraint can be redeemed only if it is the least restrictive alternative, or at least reasonably necessary, to further a legitimate purpose.[159]

A court's ultimate conclusion about a restraint's competitive impact may involve some balancing of the practice's anticompetitive and procompetitive effects. Frequently, however, the reasonableness equation does not require extensive analysis. Where the harm resulting from a restraint is clear, and the benefits dubious or minor, it may be condemned without establishing market power or making detailed findings.[160] This so-called "quick look" or "truncated Rule of Reason" analysis provides flexibility to consider the defendant's proffered justifications without necessarily sacrificing the litigation cost savings and business predictability that a *per se* rule provides.[161]

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154 246 U.S. 231, 238 (1918).

155 435 U.S. 679, 688 (1978).

156 *Id.* at 690, 692.

157 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979).

158 *See infra* notes 165-66 and accompanying text.

159 *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1979); *see also* P. AREEDA, *supra* note 126, at 403-04.

160 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Board of Regents, 468 U.S. 85, 109 & n.39 (1984); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); *see also* P. AREEDA, *supra* note 126, at 398, 403.

161 The Supreme Court has acknowledged that "there is often no bright line separating *per se* from Rule of Reason analysis." NCAA v. Board of Regents, 468 U.S. 85, 104 n.26 (1984). "[W]hether the ultimate finding is the product of presumption or actual market analysis, the essential inquiry remains the same - whether or not the challenged restraint enhances competition." *Id.* at

This Article views the NCAA's restraints on payments to college athletes as susceptible to this form of truncated analysis. The restraint on competition is clear and the restraints do not or are not necessary to further a procompetitive purpose. The bases for these conclusions are detailed below.

1. Market Effect of the Challenged Restraints

The character of the market(s) in which the parties operate, the parties' market shares, and the behavior and shares of their competitors usually determine whether a threat to competition has or will come to pass and whether such impact is likely to be significant.[162] Cooperative production cannot threaten competition or consumer welfare unless those who participate possess market power - that is "the power to control prices or exclude competition."[163] Without market power, the parties' agreement will face the discipline of the marketplace.[164] Because it is often difficult to measure market power directly, it is generally necessary to define a market and to determine the parties' share in that market. A substantial share is the basis for inferring market power.

Nevertheless, the ultimate inquiry under either the Rule of Reason or the *per se* rule remains whether competition has been or could be affected.[165] If prices have been raised above the competitive level, there is no reason to inquire whether proxies for effects on competition have been established. Thus, the Supreme Court has held that it is not necessary to define a market or establish market power if actual effects on competition are proved.[166] "Quick look" analysis is sufficient to condemn the challenged restraint.

The NCAA's restrictions on college athletes appear to be an agreement for which "no elaborate study of the industry is" required.[167] One can take judicial notice of the collective power of NCAA member institutions over current and prospective student-athletes. The NCAA rules college sports. NCAA regulations directly restrain price competition and

104. The "quick look" or "truncated Rule of Reason" review merely constitutes the middle ground in the continuum of antitrust analysis.

162 *See* P. AREEDA, *supra* note 126, at 376.

163 United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

164 *See supra* note 133.

165 *See* NCAA v. Board of Regents, 468 U.S. at 104.

166 *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986); NCAA v. Board of Regents, 468 U.S. 85, 109 (1984). Taken literally, the Court's statement is problematic. It is impossible to show an effect on competition unless the "competition" has been defined. For example, if three sellers establish a joint advertising program, prices in their advertisements may stabilize prices among the three of them. But, unless they are a well-defined market, there may not be an effect on competition. More generally, any agreement restricts the freedom of those agreeing. That is only a concern if they constitute a significant part of a relevant market. The proper interpretation of the Court's statement therefore must be that *precise* definition of a relevant market is not necessary. Courts may interpret the record in light of common knowledge or assumptions about the economy generally and the defendant's market in particular. *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. at 459; NCAA v. Board of Regents, 468 U.S. at 109 n.39; *see also* P. AREEDA, *supra* note 126, at 403. Those assumptions can be particularly broad when no procompetitive justification is evident. *See* NCAA v. Board of Regents, 468 U.S. at 110 n.42.

167 National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); NCAA v. Board of Regents, 468 U.S. 85, 109 (1984).

result in compensation below fair market levels.[168] The NCAA also limits the number of students that can be given financial aid.[169] Actual effects on the competition for student-athletes' services are apparent and there is evidence that such effects were intended.[170]

A more precise market definition only substantiates the NCAA's market power. Formal definition of the NCAA's market share requires definition of a relevant product and geographic market. The focus of both inquiries is upon the ability of consumers and suppliers to substitute other goods or services for the product the NCAA members offer or purchase.[171]

The NCAA has almost complete monopsony power over the student-athlete labor market for men's division I basketball and division I-A football. The student-athlete generally has no adequate substitute for participation in either sport.

The NCAA might argue that men's division I basketball and division I-A football or "big-time" college sports are not well-defined products because the market definition excludes the broad entertainment industry, professional sports, minor NCAA divisions and other athletic associations,[172] as well as other NCAA sports. Each of these, the NCAA could argue, offers alternatives to participation in big-time college athletics to student-athletes. These arguments do not undermine a finding of market power.

There can be some dispute concerning whether the NCAA competes in a general entertainment market for fan or television revenues.[173] There cannot be a broad entertainment market, however, for restraints on the student-athlete labor market. Neither prospective student-athletes nor colleges perceive acting or other types of entertainment careers as substitutable for participation in college athletics; different skills must be developed for each endeavor; Hollywood studios simply do not recruit star high school athletes as colleges do; and the salaries in the broad entertainment industry and college athletics are very different.

A market including professional sports is slightly more persuasive. At some level, college athletics can already be considered professional.[174] Nevertheless, for most student-athletes, professional sports are not an adequate substitute for college athletics, at least for the revenue producing team sports of basketball and football. First, for the many athletes who want the combination of sports and an education, professional sports is not an adequate substitute for college athletics.[175] Sec-

168 *See supra* notes 45-59 and accompanying text.

169 *See* 1989-90 NCAA MANUAL 137-42 (1989).

170 *See supra* notes 105-06 and accompanying text.

171 For a detailed discussion of factors relevant to market definition, see The Department of Justice Merger Guidelines, 49 Fed. Reg. 26,823 (1984); P. AREEDA & H. HOVENKAMP, ANTITRUST LAW 392-465 (SUPP. 1988).

172 The National Association of Intercollegiate Athletics (NAIA) and the National Little College Athletic Association (NLCAA) regulate college athletics among many smaller colleges.

173 *See, e.g.*, NCAA v. Board of Regents, 468 U.S. at 132 (White, J., dissenting).

174 *See infra* notes 260-71 and accompanying text.

175 Student-athletes engaging in individual sports such as tennis might be able to create their own professional athletics schedule while enrolled in college. For them, professional sports might be an

ond, the professional leagues, particularly the National Football League, have rules restricting the recruitment of athletes before their college eligibility expires.[176] For those sports, the professional leagues are not a ready alternative to college athletics. Third, the vast majority of recruits do not have the talent to succeed in the professional leagues at the time they enter college. Professional sports is not a realistic alternative for them. The present *de minimis* number of high school athletes directly embarking upon professional basketball or football careers attests to the nonsubstitutability of those college and professional sports.[177] Moreover, even if professional athletes were included in the market, the small number of professionals relative to college athletes still would leave the NCAA with substantial market power.[178]

The exclusion of less competitive NCAA divisions and other athletic associations is easily justified. Those divisions do not maintain the budgets or provide the exposure necessary to compete with the major college teams for recruitment of star athletes.[179] Neither students, nor broadcasters nor the public view those schools as competitive with major division I schools. The district court in *Board of Regents* implicitly found that such schools could not compete with division I universities.[180] In any event, many members of the smaller athletic associations are also members of the NCAA. Those schools, as well as all schools in NCAA division II and division III, are subject to NCAA regulations and control. They cannot offset NCAA power.[181]

Defining separate markets for each sport is also justified. Although some athletes are gifted in more than one sport, the vast majority special-

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adequate substitute for college athletics. This alternative is not feasible for football or basketball players. They would not be able to calendar their own events and the professional team schedule would unduly conflict with their classes.

176 Professional baseball commonly drafts high school players. A men's baseball market therefore might more reasonably include professional sports. Professional leagues also offer some competition for upperclassmen in both of these revenue producing sports.

177 A few basketball players have entered the NBA directly from high school. Nevertheless, the number is so small as to be statistically insignificant. *See* Weistart, *Legal Accountability and the NCAA*, 10 J.C.U.L. 167, 174 (1983-84). No high school football player has directly entered the National Football League in modern times.

178 This would not be true, however, if all levels of professional athletes were included. For example, although the National Basketball League has only 324 (12 x 27) players, addition of the players in the Continental Basketball League and European Leagues increases that number substantially. Those leagues, however, might be excluded because they do not offer the same exposure or money as the National Basketball Association and "big-time" NCAA competition. *Cf.* International Boxing Club v. United States, 358 U.S. 242 (1959)(champion boxing events constitute a market separate from that for nonchampionship events). Foreign leagues also limit the number of American players permitted on each team's roster. *See* Detroit Free Press, Aug. 11, 1989, at 2F, col. 1.

179 *Cf.* International Boxing Club v. United States, 358 U.S. 242 (1959); *see also* NCAA v. Board of Regents, 468 U.S. at 111-12. Of course, some star athletes attend minor division schools. The vast majority, however, do not. Substitution at the margins does not justify inclusion in the market.

180 The district court found that the NCAA's restrictions on the sale of television rights reduced output even though division II and III schools were not subject to those restrictions. Board of Regents v. NCAA, 546 F. Supp. 1276, 1290 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). If all divisions were in the same market, an increase in output by schools in the unrestricted divisions would have offset any reduction of output by division I universities.

181 The argument that minor associations may begin to compete by paying athletes is addressed *infra* notes 186-95 and accompanying text.

ize.[182] The Bo Jacksons of the world, who can play professional football as a "hobby," are rare. Not only are the skills required for each sport different, but the participants' and spectators' perceptions of them are different. Thus, both supply-side and demand-side considerations militate against inclusion of other sports in the market. Cases challenging restraints on athletes and teams in professional sports have implicitly recognized each sport as a separate market.[183] Moreover, the issue just may be academic because the NCAA governs all college sports.[184]

Geographic market definition presents no real issues. Schools recruit nationally and student-athletes attend universities throughout the country.[185] A national market seems appropriate. A narrower market definition, however, would not undermine the finding that the NCAA possesses market power. The NCAA is the dominant force in college athletics in every region and locality in the country. A broader international market, on the other hand, is not proper. Few athletes attend universities outside the United States.

Despite the apparent effects on competition and the NCAA's virtual monopsony over the labor market for men's division I basketball and division I-A football, Professors McKenzie and Sullivan, in their thought-provoking article, question whether the NCAA really has market power. They argue that it is not feasible for the over 800 NCAA members to maintain agreement and that even if they could, the absence of barriers to entry prevent the member institutions from effectively exercising market power.[186] They suggest that "if the NCAA seriously depressed athletes' wages, the temptation of member colleges to drop their membership and form another association that permitted competitive wage payments would be overwhelming."[187]

There is no question that the sheer number of NCAA members makes the NCAA cartel operate imperfectly.[188] Numbers alone, however, do not prevent an effect on competition. An elaborate enforcement mechanism, costly penalties and the benefits of NCAA membership prevent complete departure from the NCAA agreement. Professors McKenzie and Sullivan are correct that maintaining an effective cartel among 850 members in other industries would be difficult or impossible.[189] Other industries, however, have difficulty policing and enforcing their agreements because they must keep their conspiracy secret. When se-

182 To the extent athletes have the skills to excel in multiple sports, the greater potential professional earnings of basketball and football already channel those athletes to division I basketball and division I-A football. Therefore, payments to college basketball and football players would not cause significant changes in the supply of multi-skilled student-athletes to those sports.

183 *See, e.g.*, USFL v. NFL, 842 F.2d 1335 (2d Cir. 1988); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867 (S.D. N.Y. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

184 *But see supra* notes 175-76.

185 *See* J. ROONEY, JR., *supra* note 14, at 97-117.

186 McKenzie & Sullivan, *supra* note 25, at 384-87.

187 *Id.* at 386.

188 *See supra* notes 52-56 and accompanying text.

189 McKenzie & Sullivan, *supra* note 25, at 385 n.19.

crecy is not required, courts have often found successful conspiracies among large numbers of defendants.[190]

Professors McKenzie and Sullivan are also correct that absent barriers to entry by competing associations, the NCAA would not have effective market power. Their assumption that no barriers to entry exist, however, depends upon too static an approach to market analysis. Secession by an individual member/university, of course, would be ineffective. A successful secession movement would require a large number of schools to leave the NCAA simultaneously - a number the district court in *Board of Regents* found "prohibitively high."[191] The schools must agree on a variety of rules, not just on payments to athletes. Until agreement could be reached, they would risk suffering the wrath of the NCAA. The withdrawing (or expelled) members would likely find it impossible to sponsor a well-rounded sports program. For example, if members of the College Football Association (CFA)[192] attempted to form their own paying football conference, they would have to forfeit the right to participate in all other NCAA sports. In particular, they would lose the right to take part in, and share the revenues from, the lucrative NCAA basketball championship. The seceding members would also lose the many noncommercial benefits offered by the NCAA. The experience with the CFA's television contract is illustrative. When the CFA signed a contract with NBC, the NCAA announced that it would take disciplinary action against any team that complied with the CFA-NBC contract. The NCAA "made it clear that sanctions would not be limited to the football programs of the CFA members, but would apply to other sports as well."[193] As a result, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC and the agreement was not consummated.[194] Furthermore, the long-range financial projections of the prospective competing association do not seem as rosy as Professors McKenzie and Sullivan suggest. There is currently an entrenched preference for NCAA sports. The competing association would have to pay student-athletes more than the NCAA pays to overcome that preference. It is difficult to imagine that all star athletes would select a NAIA team over a Notre Dame overnight. If the competing association began to constitute a threat to the NCAA's popularity and superiority, NCAA members could vote to begin making competing payments. The smaller associations would remain competitively inferior, but would incur significantly greater costs than they now incur. Schools or existing associa-

190 *See, e.g.*, F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); In the Matter of American Medical Ass'n, 94 F.T.C. 701 (1979), *aff'd sub nom.* AMA v. FTC, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

191 Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984); *see also* Koch, *supra* note 54, at 23.

192 The CFA is an association of five leading conferences and major football-playing independent institutions organized to promote the interests of "big-time" football-playing schools within the NCAA structure. *See* Board of Regents v. NCAA, 468 U.S. 85, 89.

193 *Id.* at 95.

194 *Id.* Of course, after the Supreme Court held the NCAA's television plan violated the Sherman Act, the CFA members no longer had to fear NCAA discipline if they signed their own television contract.

tions, aware of this dynamic, would be reluctant to incur short term costs for what would appear to be uncertain, if not doubtful, long run gain. Thus, as the district court in *Board of Regents* concluded, "formation of a rival organization is neither practical, feasible nor desirable."[195]

In 1982, the district court in *Board of Regents* referred to the NCAA as a monopolist of college athletics.[196] Nothing has changed since that time. The NCAA amateurism rules directly regulate price competition and both a "quick look" and detailed market analysis demonstrate that the NCAA has the power to affect competition. Absent some convincing procompetitive justification, the NCAA restrictions on payments to college athletes should be found illegal under the Rule of Reason.

2. Justifications for the Challenged Restraints

The NCAA's historic role in preserving collegiate athletics justifies a presumption of validity for its motives.[197] Good motives alone, however, cannot justify an otherwise anticompetitive practice.[198] Where actual effects on competition have been demonstrated, every defendant, including the NCAA, has "a heavy burden" of establishing a procompetitive justification for the deviation from the operations of a free market.[199] No longer is it sufficient to proffer a mere "plausible" procompetitive purpose.[200] The defendant must persuade the court that the challenged restraint furthers a legitimate goal, and that less restrictive means are not available to accomplish the same purpose.[201] The rigor with which the defendant's asserted justifications are analyzed and questioned increases with the seriousness of the anticompetitive harm.[202] When, as with the NCAA's restrictions on payments to college athletes, a direct restraint on price appears evident, only the most convincing showing of necessity

195 Board of Regents v. NCAA, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

196 *Id.*; *see also* Weistart, *supra* note 177, at 171-74 (describing the NCAA as a "monolithic" entity that controls major collegiate sports).

197 *See* NCAA v. Board of Regents, 468 U.S. at 101 n.23; *but see, infra* note 203 and accompanying text.

198 468 U.S. at 101 n.23.

199 *Id.* at 113.

200 *See supra* note 127 and accompanying text.

201 *See, e.g.*, NCAA v. Board of Regents, 468 U.S. at 115 n.56, 116, 119; Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 352-53, 356-57 (1982); *see also* P. AREEDA, *supra* note 126, at 383-84. Less restrictive alternative analysis is a matter of degree. As Professor Areeda suggests, if an industry with 20 members undertakes four research joint ventures with five firms in each venture, its procompetitive justification will not be dismissed merely because five ventures with four firms each could have achieved the same results. P. AREEDA, *supra* note 126, at 388. A different conclusion might be reached, however, if all 20 firms formed the joint venture. In short, less restrictive alternative analysis requires discriminating judgment about the magnitude of harm caused by the challenged restraint, the degree by which an alternative could have lessened that harm, the extent to which adoption of the alternative would have sacrificed procompetitive efficiencies, and the ease with which the alternative could have been employed.

202 *See, e.g.*, In the Matter of American Medical Ass'n, 94 F.T.C. 701, 1004 (1979); *aff'd*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *see also* P. AREEDA, *supra* note 126, at 402; J. Weistart & C. Lowell, *supra* note 138, at 770. This "sliding scale" approach reflects the balancing process that is central to the Rule of Reason.

should justify the otherwise unreasonable restraint.[203] The NCAA's amateurism rules cannot satisfy that heavy burden.

The NCAA and commentators have argued for, and courts have cited, five basic justifications to support the reasonableness of the NCAA's restrictions on payments to college athletes. The restrictions are said to 1) preserve the "revered tradition" of amateurism in college sports,[204] 2) permit the marketing of a "new product" that might not otherwise be available, by maintaining the character and quality of college sports as distinct from professional sports,[205] 3) increase demand for the college product by enhancing the image of collegiate sports,[206] 4) foster the competitive balance deemed necessary to sustain public interest in college athletics[207] and 5) to prevent the commercialization of college sports at the expense of educational values.[208] None of these justifications can withstand scrutiny, especially given the heavy burden of proof that must be imposed on the NCAA.[209]

a. *Amateurism For Its Own Sake - The Olympic Ideal*

Amateurism does appear to be a "revered tradition." The reaction of students and colleagues to this Article's suggestion that college athletes should be free to receive compensation confirms as much. The public, with "stubborn innocence," adheres to the Olympic ideal of competition for its own sake.[210] Nevertheless, amateurism for its own sake is not a legitimate goal under the Sherman Act. Noneconomic values may justify Rule of Reason analysis, but they cannot offset actual anticompeti-

203 Judicial scrutiny of the NCAA's regulations should also be at a heightened level because they affect "student-athletes who neither participate directly in the group's rule-making nor have an opportunity to select representatives to act on their behalf." Weistart, *supra* note 177, at 169. Faculty or administration representation is inadequate because the institutions' financial interests often conflict with student needs.

In January 1989, the NCAA, for the first time, created a student advisory committee. *See* 1989-90 NCAA MANUAL 306 (1989). The student committee, however, does not have voting rights, and, of course, was formed subsequent to adoption of the NCAA's amateurism restrictions.

204 NCAA v. Board of Regents, 468 U.S. at 120.

205 *See id.* at 101-02; McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989).

206 *See* McKenzie & Sullivan, *supra* note 25, at 382-84.

207 *See* NCAA v. Board of Regents, 468 U.S. at 117; McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989); Justice v. NCAA, 577 F. Supp. 356, 382 (D. Ariz. 1983).

208 *See* NCAA v. Board of Regents, 468 U.S. at 123, 133 (White, J., dissenting); McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989); Weistart, *supra* note 177, at 175; Gulland, Byrne & Steinbach, *supra* note 103, at 722; Note, *supra* note 132, at 676 n.106.

209 *See supra* notes 202-03 and accompanying text.

210 *See* Walters v. Fullwood, 675 F. Supp. 155, 163 (S.D.N.Y. 1987). The depth of the public's commitment to the Olympic ideal, however, may be questioned. Despite superiority in Olympic basketball, after the only noncontroverted defeat of a United States team, much of the public demanded participation by professionals to ensure invincibility. Winning took priority over amateurism. *See also infra* notes 236-39 and accompanying text.

tive effects.[211] Consideration of such values requires "some ultimate reckoning of social and economic debits" that is best left to Congress.[212]

Amateurism for its own sake is a noneconomic value that is particularly unworthy of consideration under the Rule of Reason. Two belief systems seem to underlie the pursuit of the Olympic ideal: 1) the college game should be played for the fun of it, and 2) professional athletes are already ridiculously overpaid - such absurdity should not be extended to the college level.[213] The Sherman Act, however, was not designed to legislate motives or make judgments about the reasonableness of prices or wages.

We do enjoy the exuberance of youth playing sports for the fun of the game. Nevertheless, our economic system has always assumed that if an individual provides a lawful service people value, there is nothing immoral about being paid for it. Our system does not attempt to legislate motive. We prefer to view doctors as motivated by a desire to help people, not by monetary interests. Yet, the Sherman Act would not permit an agreement among hospitals to restrict the wages of staff physicians. In short, the belief that college sports should be played merely for the fun of it is inconsistent with our capitalist system. Furthermore, there would be few limits to the breadth of such a justification. It could support restrictions not only on athletes, but on coaches, teachers and a variety of other service workers or products.[214] It cannot be a legitimate justification under the Rule of Reason.

This Article is sympathetic to the position that professional athletes are vastly overpaid and the concern that such nonsense would be extended to college sports. But that too is a danger inherent in our capitalist system. We, as a society, are afraid of our own priorities — we seem to value sports too greatly. The Sherman Act, however, was not designed to prioritize values beyond efficiency, and it certainly was not intended to make judgments about the reasonableness of individuals' wages.[215] Why should athletes be treated differently than child stars, news anchors, or even owners of sports franchises? In all of these cases

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211 *See supra* notes 131-37 and accompanying text. Amateurism for its own sake may be redefined to encompass efficiency values, *e.g.*, amateurism to further educational goals or preserve public interest and increase demand. These justifications are discussed *infra* at notes 234-45, 256-80 and accompanying text.

212 United States v. Philadelphia Nat'l Bank 374 U.S. 321, 371 (1963). This is especially true when, as with the NCAA's restrictions on payments to college athletes, the defendants have a financial interest that is furthered by the asserted noneconomic value. Such defendants cannot unbiasedly or objectively weigh competing values or protect the public's interest. *See supra* note 132.

213 The belief that compensation would interfere with educational values is treated as an independent argument below. *See infra* notes 256-80 and accompanying text.

214 For example, an agreement among networks and affiliates to limit payments for television rights to college games might also be justified as preserving amateurism. A restriction on similar payments to television series or movie producers might be justified by the analogous interest in preserving artistic amateurism, that is, art for art's sake.

215 Even the labor laws do not make judgments about the reasonableness of wage offers. Rather, the National Labor Relations Act seeks to promote collective bargaining in an atmosphere where free market forces control the salary determination. *See* S. REP. No. 573, 74th Cong., 1st Sess. 2 (1935) ("Disputes about wages, hours of work, and other working conditions should be continued to be resolved by the play of competitive forces . . . . This bill in no respect regulates or even provides for [government] supervision of wages . . . ."); *see also* Roberts, *supra* note 110, at 81-86.

the free market is allowed to set the appropriate compensation for the individual's services. Concern that college athletes' wages cannot be controlled, although understandable, is not a legitimate consideration under the Sherman Act. In any event, it is ludicrous to have the schools, which stand to gain by their salary limitations, make such judgments.

Even if the pursuit of amateurism were a recognized goal under the Sherman Act, the NCAA's rules do not effectively further that goal. The true amateur "tradition" has long been dead in major college sports. Athletes are often motivated by a desire to reap the rewards of a professional career.[216] They view college as a showcase for professional scouts, not as an opportunity to play for the fun of the game.[217] Athletes receive scholarships and other special treatment based on their athletic prowess, not need. Although student-athletes may not receive their fair market value, they nevertheless are paid. There are also frequent illegal payments by recruiters, coaches, alumni and agents.[218] In effect, the NCAA defines an amateur as someone who does not receive more than the NCAA members agree to pay them and argues that if student-athletes are paid more, they are no longer amateur. This is tautological nonsense. The "amateurism" regulations cannot be considered necessary to preserve true amateurism. They are only essential to define and enforce the NCAA's agreement.

It might be argued that some element of amateurism is better than none. Bill Russell, the legendary Boston Celtic center, provides the appropriate response:

> The hypocrisy of amateur sports is offensive to anybody who cares. To me, being an amateur is like being a virgin. It is an old idea that has some innocence and charm, celebrated mostly by people to whom it does not apply . . . . It is impossible to keep partially, though many try to do so. It is associated with pretense and deception.[219]

Moreover, considering the direct and substantial effects on competition,[220] incremental benefits are not sufficient to justify the challenged restraints.

Finally, it is disingenuous for the NCAA to rely on the Olympic ideal to justify restrictions on payments to athletes. The NCAA and its member institutions are largely responsible for the commercialization of sports. They have long attempted to maximize television revenues, sought sponsors for bowl games, and engaged in an elaborate marketing operation.[221] These efforts belie a claim that the Olympic ideal is paramount. Rather, evidence suggests that the NCAA currently maintains re-

216 Despite the small number of college players who actually progress to professional careers, a substantial number of student-athletes expect to become professional athletes. *See* REPORT NO. 1, *supra* note 8, at 14; REPORT NO. 3, *supra* note 9, at 49-50.

217 Notre Dame, to enhance its athletes' professional value, has introduced classes on how to handle the media. *See* NCAA News, May 31, 1989, at 23, col. 1.

218 *See, e.g.*, D. EITZEN & G. SAGE, *supra* note 104, at 229; J. ROONEY, JR., *supra* note 14, at 147-62; J. TARKANIAN & T. PLUTO, *supra* note 14, at 210; M. TROPE, *supra* note 14, at 69-70, 76-77, 121-26; N.Y. Times, Feb. 26, 1989, at 27, col. 1.

219 *Quoted in* D. EITZEN & G. SAGE, *supra* note 104, at 229.

220 *See supra* notes 49-59, 167-71 and accompanying text.

221 *See, e.g.*, N.Y. Times, June 19, 1989, at 1; *see also infra* note 262.

straints on payments to college athletes as cost cutting devices.[222] This inherent conflict of interest, particularly considering the absence of student input,[223] is yet another reason why Congress should be the body to pursue amateurism for its own sake if society truly values that interest.

In sum, the Olympic ideal cannot justify the NCAA's amateurism rules. Amateurism for its own sake is not a recognized goal under the antitrust laws and, in any event, the restrictions on payments to college athletes cannot be considered necessary to, and do not effectively further, that goal.

b. *The New Product Justification*

The NCAA has argued, and the Supreme Court has accepted in dicta, that the NCAA's restrictions on payments to college athletes are necessary to produce a new product and are therefore procompetitive.[224] The "new product" justification originated in the Supreme Court's *Broadcast Music, Inc. v. Columbia Broadcasting System* opinion.[225] In *Broadcast Music*, the Court confronted a challenge to a blanket license for copyrighted music, issued by an organization of composers and publishing houses. The Court noted that the blanket license involved a joint setting of price by competing composers, but concluded that the license could not be equated with a simple horizontal arrangement among competitors.[226] The Court reasoned that the blanket license was "quite different from anything any individual owner could issue," and an agreement on price was "necessary to market the product at all."[227] The NCAA amateurism rules satisfy neither condition of the *Broadcast Music* "new product" justification.

Contrary to the Supreme Court's unchallenged assumption, the NCAA does not market a new product, i.e., college, as distinguished from professional, athletics.[228] Collegiate sport existed before the NCAA was formed and operated for many years without any central enforcement body.[229] Member institutions independently produce college athletics and could continue to do so if the NCAA were disbanded. In effect, the NCAA operates as a classic trade association.[230] It facilitates the independent business interests of its members. It does not produce the new product attributed to it by the Supreme Court.

222 *See supra* notes 105-06 and accompanying text.

223 *See supra* note 203.

224 *See* NCAA v. Board of Regents, 468 U.S. 85, 101-02 (1984); Brief for Appellee at 23, McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (No. 87-2802).

225 441 U.S. 1 (1979).

226 *Id.* at 23.

227 *Id.*; *see also* NCAA v. Board of Regents, 468 U.S. at 114. The Court, in *Broadcast Music*, also found the continuing availability of individual licenses significant. 441 U.S. at 24. The opportunity to individually negotiate license fees limited the market effect of the blanket license and provided some objective indicia that the license resulted in net efficiencies.

228 *See* NCAA v. Board of Regents, 468 U.S. at 101-02.

229 Even after the NCAA was created, individual conferences operated under differing regulations. *See* J. FALLA, *supra* note 33, at 21-22, 126, 130. It was not until at least 1948 that the NCAA attempted to enforce a uniform body of rules. *Id.* at 21-22, 126, 133.

230 *See* Roberts, *supra* note 143, at 240-46.

Moreover, the restrictions on payments to college athletes are not necessary to produce college sports. University sponsored athletics would no less be "college sports" if players were paid. It is the association with an educational institution, not the wages of the players, that defines the product. Schoolyard games, although purely amateur, are not "college sports." Schools that compensate athletes with financial aid, on the other hand, are still considered to be producers of the college product, even though the players no longer maintain purely amateur status.[231]

Perhaps most fundamental, permitting amateurism restrictions to define a "new product," distinct from the professional product, makes a mockery of the antitrust laws. Too many price fixes could be justified on that basis. For example, if all the comedy club owners in a geographic area agreed not to pay standup comics, their agreement could be justified as necessary to produce amateur comedy or "amateur night" entertainment. Similarly, a group of furriers may justify a high price fix as necessary to produce a new product defined as "luxury" furs. Such results are untenable.

Although the NCAA does not produce a new product defined as college athletics, it might be argued that it produces a new product defined as national championship events. Nevertheless, the NCAA's restrictions on payments to men's division I basketball and I-A football players are not necessary to produce that product. Restrictions on payments to football players are not even arguably necessary because the NCAA does not at present sponsor any national championships for division I-A member schools. For basketball, it might be suggested that the amateurism restrictions are necessary to produce a national championship because they ensure fair competition. This, however, is just the competitive balance argument that this Article analyzes and rejects below.[232] Moreover, the tournament selection process guarantees some semblance of competitive balance. The NCAA invites only conference champions and other teams thought to be highly competitive. If necessary, the NCAA could further refine its selection process. In any event, differences in quality between the top and last selections now exist and probably add to the excitement of the tournament.[233]

Thus, the NCAA's amateurism restrictions are not necessary to produce a product that would otherwise be unavailable to consumers and therefore the restrictions on payments to college athletes are not procompetitive under the *Broadcast Music* rationale.

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231 The NCAA might protest that financial aid should not be deemed to remove amateur status. In that case, however, restrictions on payments to college athletes may actually limit, rather than expand, consumer choice. If payments were permitted, not all schools would choose to bid for college athletes. Consequently, some conferences could offer purely amateur contests while others offered semi-professional competition. Two alternatives to the professional game, rather than one, would be available.

232 *See infra* notes 246-55 and accompanying text.

233 *See, e.g.*, Wolff, *Great Escape*, SPORTS ILLUSTRATED, Mar. 27, 1989, at 24-25 (describing Princeton's one point loss to Georgetown).

c. *Amateurism to Enhance Image and Increase Demand*

Rather than define its interest as the pursuit of the Olympic ideal, the NCAA may reformulate its justification as seeking to preserve amateurism to increase consumer demand. Enhancing public interest in college athletics can be viewed as procompetitive.[234] By stimulating industry demand, the NCAA increases interbrand competition.[235] Nevertheless, this justification fails for both factual and legal reasons.

There is a major empirical question whether preservation of amateurism increases consumer demand. Much evidence is to the contrary. The public voices its approval of competition for its own sake as an abstract proposition, but it does not seem to express this preference with its dollars or viewership. U.C.L.A.-U.S.C. or Nebraska-Oklahoma games attract far greater attendance and television ratings than Ivy league or division III pairings. Following NCAA sanctions, the Universities of Oklahoma and Florida, rather than encountering a reduction in demand, experienced a "fund raising and recruiting bonanza."[236] The vehement reaction of University of Kentucky basketball fans to publication by the local paper of recruiting violations[237] similarly suggests that fan support is not greatly influenced by a preference for amateurism. Quite the contrary, fund raising increased nearly three-fold during the NCAA's investigation of Kentucky's athletic program.[238] An individual's association with a school, either because it is a local school or the individual's alma mater, and the quality of the competition, not the degree of amateurism, appear to be the primary determinants of demand. If the public truly prefers purely amateur athletics, there might not be a need for an agreement to restrict payments to college athletes. Each team's individual self-interest would militate against payments to players.[239] Finally, pay-

234 *See* NCAA v. Board of Regents, 468 U.S. at 117.

235 In *Board of Regents*, the Supreme Court suggested that the unavailability of substitutes for the purpose of market definition foreclosed the possibility of interbrand competition and therefore made collective action by the NCAA inappropriate. *See* NCAA v. Board of Regents, 468 U.S. at 115 & n.55. That analysis, however, mistakenly assumes that market definition is an absolute, rather than an effort to draw lines along a continuum. Merely because products are excluded from a market does not mean they offer no competition at the margins. Cross-industry competition is one reason trade associations are formed and are generally considered lawful under the antitrust laws. Thus, collective action, even if industry members control 100% of a well-defined market, may still be procompetitive.

236 J. ROONEY, JR., *supra* note 14, at 158.

237 *See* N.Y. Times, Apr. 27, 1988, at D25, col. 1.

238 *See* NCAA News, June 14, 1989, at 4, col. 1.

239 It may be that the public prefers amateur to professional college athletics as long as the quality of competition remains constant. In that case, Professors McKenzie and Sullivan suggest that agreement may be necessary to prevent a "free rider" problem. *See* McKenzie & Sullivan, *supra* note 25, at 382-83. Each individual school has an incentive to bid on athletes to improve its quality and competitiveness. Yet, if each school acted on this motivation, quality would not noticeably improve, but amateur status would be lost. Professors McKenzie and Sullivan conclude that this free rider problem is analagous to the problems faced by sellers of brand names and franchises, such as McDonalds, and therefore justifies the NCAA's rules and regulations restricting payments to college athletes.

The free rider analogy provides an unsatisfactory basis for justifying the NCAA's restraints. Franchisors such as McDonalds, or manufacturers, impose vertical restrictions. In that case, the franchisor's or manufacturer's self-interest coincides with that of consumers. *See* Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d 358, 368-70 (7th Cir. 1987); *see also* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 249 (1985). The same protection does not

ments may actually improve the image of college athletics and enhance demand by reducing the hypocrisy that now stains its reputation.[240] Payments to players are not immoral *per se*. The capitalist system supports such payments. Rather, moral turpitude exists when rules previously agreed to, have been violated. The formal acknowledgement of the right to participate in a free market, where compensation is not banned, ought to stem the tide of flagrant rules violations that newspapers are only too pleased to report. The NCAA's image and the respect for its member institutions may be restored.

The fundamental problem with the "enhancing public image and demand" argument is that it is not a legitimate justification when a direct restraint on competition is imposed. The Supreme Court has recognized that benefits in one market may not offset harm in another.[241] The Sherman Act was designed to protect all sectors of the economy.[242] The NCAA's restrictions on payments to college athletes are not mere regulatory rules with incidental effects,[243] but are direct restraints that cause substantial anticompetitive effects in the market for college players.[244] Speculative increases in demand for the college product cannot justify that harm. Moreover, the public image justification, as a reformulation of the "amateurism for its own sake" argument, shares one of the same infirmities. The justification offers no boundaries. Consumers prefer supermarkets with low beef prices, yet a price fix among supermarkets on the price paid to cattle ranchers for beef should not be legal; the image of schools is enhanced if teachers work for the love of teaching, yet agreements limiting their salaries cannot be acceptable; high associate salaries and, consequently, high legal fees have sullied the reputation of large law firms,[245] but that does not justify inter-firm agreements restricting associate compensation. The justification that amateurism enhances the

exist when horizontal competitors agree on terms, Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, 814 F.2d at 369-70. In particular, the NCAA does not analogously protect the interests of college athletes in maximizing their compensation. Moreover, even in the vertical context, agreements fixing price are *per se* illegal. *See* Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). The "free rider" argument in the horizontal context appears remarkably close to the "ruinous competition" justification that has repeatedly been rejected by the Supreme Court. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90 (1978); NCAA v. Board of Regents, 468 U.S. 85, 117 (1984).

240 *See, e.g.*, Kirshenbaum, *supra* note 18, at 16; N.Y. Times, Apr. 27, 1988, at D25; D. EITZEN & G. SAGE, *supra* note 104, at 229.

241 *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 609-11 (1972); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).

242 *Topco Assocs.*, 405 U.S. at 609-11. The Court has acknowledged its "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector . . . ." *Id.* at 609-10. The NCAA might argue that the restraints' net effect is procompetitive because, by ensuring more viable schools, it increases output and hence demand for players' services. Increased demand, however, is immaterial if free market forces are restrained so that prices cannot respond to the increase in demand. Moreover, the identical argument could be made by every defendant in buyer price fixing cases. There is no question that buyer price fixing is illegal under the Sherman Act. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); United States v. Pook, No. 87-274 (E.D. Pa. Apr. 18, 1988) (LEXIS, Genfed library, Dist file).

243 *Cf.* Justice v. NCAA, 577 F. Supp. 356, 382 n.17 (D. Ariz. 1983).

244 *See supra* notes 49-59, 167-71 and accompanying text.

245 *See* Anderson, *Wage Spiral*, A.B.A. J., June 1989, at 26.

NCAA's public image, like the Olympic ideal argument from which it derives, is inconsistent with our capitalist system and thus cannot be cognizable under the Sherman Act, even if its dubious factual premise were accepted.

d. *Competitive Balance*

The NCAA has supported many of its regulations as necessary to preserve competitive balance among amateur athletic teams.[246] The Supreme Court has found this interest legitimate.[247] It has reasoned that fostering competition among NCAA members is procompetitive because it enhances the public's interest in intercollegiate athletics.[248]

There is empirical evidence to support the view that consumer appeal is enhanced by the unpredictability of outcome among opposing teams. Well balanced competition, particularly among better teams, attracts larger audiences.[249] Nevertheless, this fact cannot justify the NCAA's restraints on payments to college athletes.

Although interest may be enhanced by maintaining competitive contests, or competitive leagues, there is no basis for imposing national restrictions, particularly in division I-A football. Most schools do not play each other, and in football, where there is no national championship among division I-A teams, it is likely most schools never will play each other. At best, there needs to be competitive balance within conferences.

In any event, "only by the most fanciful characterization" do the NCAA regulations promote balanced competition.[250] Member institutions' budgets vary widely.[251] Schools engage in extensive nonprice competition. As a result, there is a well-recognized existing "power elite."[252] Restrictions on payments to athletes cannot be justified as supporting an interest that does not now exist.[253] The restrictions, to a large extent, merely channel funds from students to coaches, stadium contractors and weight room equipment companies. They do not provide competitive balance.

Most fundamentally, the competitive balance argument poses a direct challenge to the basic policy of the Sherman Act. In essence, the

246 *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 117 (1984).

247 *Id.*

248 *Id.*; *accord* McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989).

249 *See*, H. DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 11 (1973); J. Weistart & C. Lowell, *supra* note 138, at 595.

250 *See* J. Weistart, *supra* note 177, at 179.

251 For example, in 1985, the athletic budgets within division I ranged from $528,000 to $15,403,000. *See* NCAA News, May 24, 1989, at 3, col. 2. The differences between divisions were equally pronounced. *Id.*

252 *See, e.g.*, Board of Regents v. NCAA, 546 F. Supp. 1276, 1310 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984); J. ROONEY, JR., *supra* note 14, at 74-80.

253 The NCAA might argue that the restrictions provide relative balance. That is, without the restrictions, competition would be even more one-sided. This argument must be rejected. There is no evidence to support this assertion and no "neutral standard" by which to measure the success of the NCAA restrictions. *See* NCAA v. Board of Regents, 468 U.S. at 118. "Reasonable first step" arguments may be sufficient to justify incidental effects, but not direct and substantial restraints on competition.

NCAA argues that if member institutions are allowed to compete for college athletes, the same teams will attract all the top athletes, rout the opposition, alienate viewers and, as a result, destroy the market. This "age-old cry" of ruinous competition has consistently been rejected by the Supreme Court.[254] Payments to athletes are the free market mechanism by which schools can compete for athletes. Permitting such payments will reduce the relative advantage enjoyed by unscrupulous schools that currently bid for athletes' services in violation of NCAA rules. Moreover, if the NCAA is correct that one-sided games reduce consumer interest, the free market should resolve any problem that develops without NCAA restrictions. Attendance and viewership of "overly powerful" teams will fall and their self-interest will motivate them to limit their dominance.[255] Alternatively, other schools will eliminate such teams from their schedule and form their own competitive league. The result would be several leagues or conferences with varying levels of competition. Consumer and student choice would be enhanced.

e. *Educational Values*

Several courts have said NCAA regulations "represent[ ] a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives. . .' "[256] Mounting commercial pressures create a "win at all costs" attitude that threatens schools' educational standards and practices. These pressures may affect a school's admission policies, distribution of financial aid and scholarships among students, standards for promotion and athletic eligibility and allocation of resources among educational and extra-curricular programs.[257] The prohibition on payments to athletes arguably is designed to further educational values by reducing those pressures. Limits on compensation are also said to encourage student-athletes to choose their college, at least in part, based on educational quality, not economic reward.[258]

Educational values are an important interest that should be recognized under the Sherman Act. Although noneconomic interests generally have limited status under the Rule of Reason,[259] the furtherance of educational values by the NCAA transcends the noneconomic interests. The NCAA member schools' primary function is education. Regulations furthering that goal therefore may be viewed as product improving or enterprise enhancing, and hence procompetitive. Nevertheless, the ama-

254 *See supra* note 239; *see also* Board of Regents v. NCAA, 546 F. Supp. 1276, 1310 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

255 *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1310-11 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

256 NCAA v. Board of Regents, 468 U.S. at 123 (White, J., dissenting) (quoting Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377, 1380 (M.D. N.C. 1975)); *accord* McCormack v. NCAA, 845 F.2d 1338, 1344-45 (5th Cir. 1988); United States v. Walters, 711 F. Supp. 1435, 1442 (N.D. Ill. 1989). *See also* Note, *supra* note 132, at 676 & n.106.

257 *See* Gulland, Byrne & Steinbach, *supra* note 103, at 722.

258 *See* NCAA v. Board of Regents, 468 U.S. at 133 (White, J., dissenting); Note, *supra* note 132, at 676 n.106.

259 *See supra* notes 131-37 and accompanying text.

teurism rules are neither necessary nor narrowly tailored to further the NCAA's asserted goal.

NCAA member schools have already commercialized college athletics[260] and created a "win at all costs" mentality that threatens educational standards.[261] Sports is big business and division I members are willing participants.[262] With millions of dollars in tournament or bowl revenues and alumni contributions at stake, schools often place intense pressure on coaches to succeed. Job retention and salary bonuses are increasingly tied to winning, not graduation rates.[263] As a result, coaches may recruit athletes ill-equipped for college, demand extended practice hours that compromise study time, retain academically troubled students or even overlook, if not encourage, academic fraud.[264] The rejection of regulations prohibiting freshmen eligibility, lengthy basketball and football seasons, exhorbitant salaries of coaches relative to professors, retention of winning coaches regardless of their athletes' academic performance, and late night starts to increase television exposure all represent commercial concerns prevailing over educational interests.[265] The very fact that the NCAA believes agreement on athlete compensation is necessary to preserve educational values reveals the relative priorities of its member institutions. If member schools value academics over athletics and believe payments to athletes undermine educational values, schools could independently choose to reject such payments.[266]

The commercialization of sport and its concommitant emphasis on winning has unquestionably denigrated the educational component of

260 *See supra* notes 98-102 and accompanying text.

261 *See, e.g.*, Spander, *Sports Pages Read Too Much Like a Police Blotter*, Sporting News, Feb. 27, 1989, at 7; N.Y. Times, June 22, 1989, at 43, col. 1; Kirshenbaum, *supra* note 18, at 16; Gup, *supra* note 10, at 54-55; N.Y. Times, June 8, 1986, § 5, at 1, col. 1; *see also supra* note 11.

262 *See supra* notes 1-5, 98-102 and accompanying text. Professors Eitzen and Sage categorize big-time college athletics as "corporate sport." That is, "sport as spectacle; sport as big business; sport as an extension of power politics." D. EITZEN & G. SAGE, *supra* note 104, at 19. The governing body in "corporate sports" (the NCAA) devotes less energy to satisfying the needs for which they were created and becomes more interested in perpetuating the organization through public relations and making profits. *Id.*

263 *See* J. ROONEY, JR., *supra* note 14, at 161; *Notebook*, Sporting News, May 22, 1989, at 42; *New Meaning For March Madness*, Sporting News, Apr. 10, 1989, at 20; USA Today, Mar. 19, 1989, at 3C, col. 1.

264 *See* J. ROONEY, JR., *supra* note 14, at 160-62; G. WONG, *supra* note 5, at 13-24; NCAA News, Nov. 20, 1989, at 5, col. 3; N.Y. Times, Aug. 21, 1989, at 32, col. 1; USA Today, Mar. 19, 1989, at 3C, col. 1; Kirshenbaum, *supra* note 18, at 17-18. This is not to suggest that all coaches are uninterested in student-athletes' academic performance. Many responsible coaches view education as the primary function of the university and are very supportive of student academics. *See* REPORT No. 3, *supra* note 9, at 29.

265 *See, e.g.* N.Y. Times, Apr. 19, 1989, at 44, col. 1; Craig, *Do Networks Really Dictate Starting Times?*, Sporting News, Feb. 13, 1989, at 6; Nightingale, *Controversial Late Knight With Hoosiers*, Sporting News, Feb. 13, 1989, at 11. Another of the more noxious examples of the commercialization of college athletics is the operation of big-time college basketball shoe contracts. Shoe companies pay head coaches thousands of dollars to require student-athletes to wear the manufacturer's product. *See* Brown, *Rubber Sole: Should College Basketball Coaches Accept Sneaker Money?* 7 ENT. & SPORTS LAW 3 (Winter 1989). The athlete does not get to choose the brand that is most comfortable or effective to play in, and of course, does not receive any cash payment himself. *Id.* The university happily acquiesces in their coach's deal because the lucrative perquisite means the school can offer a lower base salary and still maintain a competitive compensation package.

266 The NCAA must fear that schools would not choose to prohibit payments if the pursuit of educational values meant sacrificing revenues to schools who chose to pay athletes.

student-athletes' college experience. Athletes feel the pressure to perform to please, or at least satisfy their coaches, and to impress professional scouts.[267] Successful performance can mean millions of dollars for themselves and their universities. As a result, they spend more hours at their sport during the athletic season than studying and attending classes.[268] Their attendance and classroom performance suffer.[269] As the late Bear Bryant said:

> I used to go along with the idea that football players on scholarship were 'student-athletes,' which is what the NCAA calls them. Meaning a student first and an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.[270]

Thus, it is disingenuous to suggest that restraints on student-athletes are necessary to prevent commercializing sports at the expense of educational values.[271] Member schools have already sacrificed educational values to commercial interests and student-athletes largely have adopted these priorities. There is no reason to believe that payments to student-athletes will result in a significantly greater focus on their on-field performance than exists today.

The elimination of the NCAA's amateurism rules and the acceptance of payments to athletes may actually further educational objectives. For example, given salaries for participating in sports, students would have less incentive to terminate their education and seek "hardship" status for the professional draft. High school students would have an increased incentive to finish high school and maintain grade eligibility. College students would similarly be encouraged to preserve their academic eligibility. Payments could be used to fund schooling after expiration of the four years of athletic eligibilty permitted by the NCAA.[272] Salaries could be creatively structured to encourage academics. Contracts could contain penalty clauses for noncompliance with educational requirements[273] or bonus clauses rewarding exceptional academic performance. Perhaps the contract could withhold partial payment until the college athlete

267 Many student-athletes view college athletics as their showcase for a professional career. *See supra* note 216.

268 *See* REPORT No. 1, *supra* note 8, at 26. Many athletes also are channeled into less academically demanding courses. *See* N.Y. Times, Oct. 4, 1989, at 44, col. 1.

269 *See id.* REPORT No. 1, *supra* note 8, at 8E; REPORT No. 3, *supra* note 9, at 5E-6E.

270 *Quoted in* J. MICHENER, SPORTS IN AMERICA 254 (1976); *accord* D. EITZEN & G. SAGE, *supra* note 104, at 128.

271 *See also* J. WEISTART, THE LAW OF SPORTS 183 (Supp. 1985) ("the credibility of a purported objective is substantially affected by the consistency with which it is pursued . . . some proferred educational defenses will similarly wilt in the face of close scrutiny of the extent to which they embue the total regulatory scheme").

272 The average college student requires 5.5 years to graduate. *See* J. TARKANIAN & T. PLUTO, *supra* note 14, at 338.

273 *Cf. Switzer Says He's Ripe for NFL Job*, Sporting News, May 29, 1989, at 42 (former Coach Barry Switzer suggests that salary penalties are an effective means of discipline that is currently unavailable in college sports).

graduates.[274] Alternatively, to the extent permitting payments to college athletes reduces profits, some schools may cut back on or restructure their athletic program, foregoing the revenues and commercialism that are a bane to educational goals.[275]

The primary objection to the "educational values" justification is not that the restrictions on payments to athletes do not further that interest, but that there are less restrictive means to accomplish the NCAA's goal. Again, a national agreement to restrain payments is unnecessary. At a minimum, individual conferences should be permitted to make their own rules concerning payments to athletes. More fundamentally, there are many direct methods of regulating academic goals and performance that would more effectively serve educational values without directly restraining price competition.[276]

The fear that students would make unwise choices when selecting a college also cannot justify the NCAA's restrictions on payments to athletes. It is presumptuous and excessively paternalistic to assume students, and their parents or other advisors, are incapable of determining the mix of athletics and academics that best suits their needs. In any event, students are currently forced to make identical choices. Nonprice athletic concerns compete with academic interests. The "power elite" offer better professional exposure, more renowned coaches, and more extensive training facilities. Payments to athletes would not greatly change the required choice. Indeed, to the extent competitive bidding occurred, there would be little price difference among interested schools.[277] If anything, permitting payments might have the beneficial effect of reducing the incentive to attend the unscrupulous schools that now offer illegal payments.

Finally, it may be argued that payments to athletes would undermine their academic environment by isolating them from the "normal" college student. Again, the commercialization of collegiate sports and emphasis on winning has already had that effect. Many schools have special athlete dorms and cafeterias, as well as special classes and tutorial programs to facilitate the scheduling of games and practice sessions. Athletes are culturally and physically distinct.[278] The many hours of practice and weight room work furthers the feelings of isolation. More than sixty-two percent of students at competitively superior schools already say it is harder or much harder as a college athlete to be regarded as a serious stu-

274 Currently, many college athletes leave school after their college athletic elegibility expires and before they get their degree. *See, e.g.*, J. TARKANIAN & T. PLUTO, *supra* note 14, at 323; SPORTS ILLUSTRATED, Feb. 19, 1989, at 19.

275 Similarly, by reducing the marginal value of players, i.e., the difference between the cost of, and benefits provided by the player to the university, a free market system reduces the incentive to engage in academic fraud to maintain player eligibility.

276 *See infra* notes 352-58 and accompanying text.

277 Although not all schools may bid for a student-athlete's services, there should be a sufficiently broad range of interested schools to satisfy most students' educational needs. The current "power elite" contains many exceptionally fine educational institutions such as the University of Michigan, the University of Notre Dame, Duke University, and the University of Virginia.

278 *See* Kirshenbaum, *supra* note 18, at 34.

dent,[279] and over seventy-three percent report that they frequently feel different from other students.[280] Thus, although athletes' academic environment may be a valid interest, payments to athletes would at most have a *de minimis* effect on their sense of isolation. Regulations aimed at eliminating athlete dorms and training tables, limiting practice hours, and limiting the length of seasons would more directly further the asserted interest without imposing direct restraints on price competition.

In sum, educational concerns strike at the heart of NCAA members' basic function and are a cognizable justification under the Sherman Act. Nevertheless, upon close examination, restrictions on payments to students, at most, are only marginally effective in furthering educational interests. It is the "win at all costs" attitude created by member schools and the prospect of a professional career that undermine educational values. More important, there are many less restrictive alternatives that do a better job of furthering educational interests without directly restraining trade. Those alternatives may mean sacrificing member schools' own revenues, rather than those of their students. Such cost savings, however, cannot validate buyer restraints any more than enhanced revenues can justify seller price fixes.

At first blush, the NCAA's amateurism restrictions appear reasonable. At one time they may have been motivated by altruistic concerns. The restraints, however, cannot now survive antitrust scrutiny. The NCAA's prohibition on payments to athletes has a direct and substantial effect on competition for student-athletes. The asserted justifications for the restraints are either not cognizable under the Sherman Act, are not furthered by the restraint, or are achievable through less restrictive alternatives. Accordingly, no elaborate balancing is required - the restraints must be unlawful under Section 1. Although the legal analysis seems simple, the implications of a judicial finding of illegality may be complex. The following section addresses several nonlegal objections to and ramifications of a free market system for bidding for student-athletes' services.

IV. Nonlegal Objections To A Free Market Approach

Although the legal justifications for limiting payments to college athletes are insufficient to support the NCAA's restraints, there are several "nonlegal" reasons why a decisionmaker may fear finding an antitrust violation. Some of these reasons are serious; others are overstated. This Article concludes that whatever practical difficulties exist, they are more appropriately handled through legislative action than through either the private decisionmaking of entities that benefit from the otherwise illegal restraints or judicial decisions contorting the antitrust laws.

279 *See* REPORT No. 1, *supra* note 8, at 48.
280 *Id.* at 55.

A. *Effect on High Schools*

A decisionmaker may fear that finding the NCAA restraints on payments to athletes illegal will similarly require payments to high school students or at least create the same abuses in high schools that now exist in colleges.

Finding the NCAA members to be in violation of the antitrust laws would not require a similar finding for high schools. Although there is a National Federation of State High School Associations, it is an informal organization that lacks the powers and revenues of the NCAA.[281] There is no national agreement prohibiting payments to athletes that is policed by an elaborate investigative and enforcement mechanism. Moreover, at least for public schools, agreement is not necessary. Zoning laws allocate student-athletes; there is no bidding for their services. High schools, as a rule, neither award scholarships nor make "illegal payments." Public high schools, of course, should also be immune from suit under the state action doctrine.[282]

The fear that the professionalization of college sports will create abuses in high schools analogous to those now plaguing colleges has some basis in reality. There is already a trend toward the commercialization of high school athletics.[283] Nevertheless, the problems for high schools should not approach those of colleges. The revenue potential of high school sports is much less than that of college sports and there is almost no national, and significantly less local, "recruiting" of student-athletes. Moreover, it is unclear why recruitment of college athletes through price, rather than nonprice, competition should exacerbate the trend toward commercialization in high schools. Professional baseball has recruited athletes directly out of high school, and, despite substantial signing bonuses to baseball stars, high school baseball appears no more commercialized than prep football or basketball. In any event, what problems do develop are properly handled by state legislators or school boards, not the NCAA.

B. *High School Students and Contract Negotiations*

A free market system would require colleges and universities to negotiate contracts with students while they were still in high school. This may prove disruptive to the student-athlete. Some also might argue that the high school student is too immature to handle both the negotiations and the money that would be involved.

It is hard to imagine that contract negotiations could be more disruptive to the high school student than the current recruitment ordeal already is. For some, hundreds of schools attempt to maintain constant contact.[284] Often, the only way prep phenoms survive their senior year is to have an advisor or coach screen recruiters. Such advisors could just as easily help in contract negotiations.

281 *See* G. WONG, *supra* note 5, at 7-9.
282 *See supra* notes 115-16 and accompanying text.
283 *See* N.Y. Times, Mar. 5, 1989, at 1, col. 1; N.Y. Times, Mar. 6, 1989, at 39, col. 1.
284 *See supra* notes 42-44.

A free market system might increase year-to-year costs if student-athletes sought to negotiate new contracts. A partial solution would be to sign players to four-year contracts.[285] The prevalence of requests for contract renegotiation, however, makes this a less than totally satisfactory answer. A provision for mandatory arbitration before an impartial arbitrator might be permissible and prevent extended disruptions. Nevertheless, this Article acknowledges that a free market system will increase net transaction costs. Such costs, however, cannot justify the NCAA's restraints any more than the elimination of search costs justifies a price fix.

The costs associated with a new contract would assume greater proportions if the student-athlete was free to negotiate with all schools every year. Constant transfer to the highest bidder could be very disruptive to his or her education.[286] The NCAA's current transfer policy, requiring student-athletes to sit out one year if they change schools, should discourage such "school-hopping."[287] A formal transfer rule might not even be necessary. If eligibility rules required substantial progress toward a degree and a transfer caused a student-athlete to lose credits, the eligibility rules alone might be sufficient to discourage salary motivated transfers and protect educational interests.

The concern that high school students could not handle the large amount of money that the best athletes might receive is easily dismissed. Such reasoning is excessively paternalistic and overbroad. Why pay high school students for any service? Furthermore, graduation from school does not ensure maturity. If necessary, the advisors helping student-athletes in contract negotiations could also assist in money management. Professional baseball teams pay very attractive salaries and signing bonuses to young high school athletes without any apparent repercussions. There is no reason to believe football or basketball players are less fiscally responsible than baseball stars. Moreover, the concern, even if valid, would at most justify requiring athletes' salaries to be placed in a trust fund, not the elimination of all compensation. In any event, the NCAA, which stands to benefit from its decision not to pay athletes, is not the entity that is best suited to make judgments about the ability of students to handle large sums of money.

285 The NCAA would need to modify the one year limitation on financial aid awards contained in Bylaw 15.3.3. *See* 1989-90 NCAA MANUAL 142 (1989).

286 The additional possibility of student-athletes forming labor unions and striking their "employers" is discussed *infra* notes 309-19 and accompanying text.

287 *See* 1989-90 NCAA MANUAL 119 (1989). The NCAA's transfer policy should survive challenge under the antitrust laws. *Cf.* Weiss v. Eastern College Athletic Conference, 563 F. Supp. 192 (E.D. Pa. 1983) (boycott allegation); English v. NCAA, 439 So. 2d 1218, 1224 (La. App. 1983) (court finds transfer rule reasonable), *cert. denied*, 441 So. 2d 747 (La. 1983). The transfer rule only indirectly affects price. A player may still transfer and play after one year if that player's original school's wage offer is unsatisfactory. Moreover, the original school would have the incentive to bargain in good faith because it would not want to undermine future recruiting. The effect that does result from the restraint could be justified by the desire to preserve educational values, the true purpose of higher education. Although academic eligibility rules may accomplish the same function, rigorous less restrictive alternative analysis may not be required because the restraint has only a small, indirect effect on competition. *See also infra* notes 320-23 and accompanying text.

C. *Inequitable Treatment of Academic Superstars*

Several colleagues have objected that payments to student-athletes cannot be justified if academic superstars are not similarly rewarded. Not only is the treatment inequitable, but it makes a troubling statement about our society's priorities.

There is no inequity in treatment between superstar athletes and academicians. Each is rewarded according to their value in the free market system. Superstar athletes attract huge revenues to the university. Exceptional students, as a rule, do not.

It is sad that society seems to value athletes more than academicians. This author would certainly prefer Bo Jackson's salary to his own. Nevertheless, our capitalist system does not provide rankings of occupations' intrinsic worth. Many might wish to reward special education teachers or social workers more than Sylvester Stallone or Brian Bosworth. Those judgments, however, are left to the operation of the free market. Student-athletes should not be treated disparately.

D. *Loss of Non-Revenue Sports*

The athletic departments of many universities subsidize "minor" sports such as skiing, volleyball, or golf with the revenues produced by their basketball and football programs. It might be feared that payments to basketball and football players will jeopardize the support for the nonrevenue producing sports.

Allowing the free market to determine college athletes' compensation may have only a limited effect on nonrevenue producing sports. Under NCAA rules, a university must offer a designated minimum number of varsity sports to be eligible for division I classification.[288] Such classification is necessary to participate in the NCAA division I basketball tournament and the major college bowl games. In short, it will be necessary to maintain the minimum number of varsity sports if the university wishes to continue receiving its substantial revenues from the "major" sports.[289]

In any event, this objection to operation of the free market merely represents a revenue concern. There is no reason student-athletes should be the ones to provide the subsidies necessary to operate the nonrevenue producing sports. Rather, the revenues should be raised by donations from those who are interested in the sport, alumni contributions, increases in tuition or taxpayer assessments. This does raise, however, the more general objection that payments to athletes will increase costs to the university and its constituency.

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288 *See* 1989-90 NCAA MANUAL 283 (1989).

289 There may be some reduction in the number of nonrevenue producing sports sponsored by NCAA members. The average division I school now sponsors 17.5 sports. *See* NCAA News, July 5, 1989, at 3, col. 4. NCAA division I-A membership requirements demand members maintain programs in only 14 sports. *See* 1989-90 NCAA MANUAL 285 (1989). Thus, at least three programs, on average, could be eliminated without risking division I-A status. Of course, a greater effect on the nonrevenue producing sports might result if NCAA members voted to repeal the minimum sponsorship requirements.

E. *Increased Costs to the University*

There is little question that universities' costs will be increased if the antitrust laws are enforced. Nevertheless, the amount of increase may not be as large as some would imagine and should not jeopardize the schools' educational mission.[290]

First, many schools, will, as the Ivy League has already done, choose not to bid for student-athletes' services. They will reorder their priorities or find it impossible to compete with the major university programs. Remember, the antitrust laws do not require payments to athletes. Section 1 only prohibits *agreements* among competitors affecting price.

Second, for those schools wishing to bid for student-athletes, payments will not approach the salary obligations of professional teams. Revenues from collegiate sport are generally not as great as from professional competitions. Consequently, star players do not have the same value to schools that they have to professional teams. Salaries of student-athletes should also be significantly lower than that of professional athletes because they do not have as much talent as professionals, their salaries must incorporate the greater risk involved in the evaluation of less well-developed abilities, and they have a "useful life" of a maximum of four years.[291] For many student-athletes, their free market value will not exceed the value of their scholarship.

Third, "bidding" schools may be able to fund their wage offers through cost savings from a reduction in nonprice competition expenses. If players are paid, it may not be necessary to incur the same recruitment costs, exorbitant salaries for coaches, or stadium or workout room expenditures that are now used to distinguish schools and attract top athletes. In short, there will be no reason to "cheat" on the cartel agreement through nonprice competition if no agreement restricting price competition exists.

In any event, any resulting increase in costs should not harm the schools' educational mission. At most major universities, "virtually all" funds from the revenue producing sports go to athletic departments rather than academic budgets.[292] Athletic departments should be expected to operate within their budgets in a free market just like every other business.

F. *Effect of Treble Damage Liability*

Individual member schools, in addition to the NCAA, would be subject to suit.[293] Although athletic departments may properly be expected to budget for free market costs, many will not have the funds available to

290 Cost savings from the NCAA's restictions alone cannot be a legal justification. If it were, schools could justify agreements limiting teachers' pay or raising tuition costs.

291 The NCAA limits student-athletes to four years of athletic competition. *See* 1989-90 NCAA MANUAL 106 (1989).

292 *See* Gup, *supra* note 10, at 55; Jensen, *supra* note 5, at 43-44 & n.38.

293 *But see supra* note 116 and *infra* note 300. To have standing for treble damages, a plaintiff must demonstrate injury to "business or property." Clayton Act § 4, 15 U.S.C. § 15 (1986). College athletes could easily satisy this requirement. *Cf.* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (payment of a higher price for goods purchased for personal use is injury to "property").

cover unexpected treble damage awards. These costs and their effect on the academic budget are not so easily dismissed.

A judge finding the NCAA's restraints in violation of the Sherman Act might seek to avoid the impact of treble damage liability by either finding individual plaintiffs' damages excessively speculative, holding that plaintiffs failed to mitigate damages through a professional career, or denying treble damages on public policy grounds. Such reasoning, however, would be disingenuous and possibly subject to reversal. Although the precise damage any individual student-athlete suffered would be difficult to prove, precision is not required once liability has been established. To establish their damages, plaintiffs need only show "a just and reasonable estimate . . . based on relevant data."[294] Published accounts of the value of Patrick Ewing and Herschel Walker to their respective universities suggest that expert testimony would be available.[295] Comparisons between the attendance figures, enrollment, applications and alumni donations before and after the student matriculated could provide a relevant basis for those estimates. Damages should not be denied because plaintiffs did not sign a professional contract to mitigate their injury. A professional career is not a substitute for a college career. The student should not be forced to sacrifice an education to mitigate damages. In any event, such mitigation might not be feasible. There are several restrictions on the ability of athletes to seek professional careers before college graduation.[296] Finally, a judge could not deny treble damages on public policy grounds. The plain language of Section 4 of the Clayton Act,[297] by the use of the words "shall recover," makes the imposition of treble damages mandatory.[298]

Despite the very real prospect of treble damage liability, the potential damage to schools' educational goals may not be as great as first appears. First, the athletic department budgets should be able to absorb some of the damage award.[299] Second, public universities may be immune from any damage award under the eleventh amendment.[300] The

294 Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 124 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). Damages are denied only when estimates are based on pure speculation and conjecture. *See id.* at 264; Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 580 (5th Cir. 1980).

295 *See, e.g.* Jennings & Zioiko, *Student Athletes, Athletes Agents and Five Year Eligibility: An Environment of Contractual Interference, Trade Restraint and High Stakes Payments*, 66 U. DET. L. REV. 179, 215 (1989); Koch, *supra* note 54, at 10, 24.

296 *See supra* notes 176-77 and accompanying text.

297 15 U.S.C. 15 (1988).

298 *See* Community Communications Co. v. City of Boulder, 455 U.S. 40, 65 n.2 (1982) (Rehnquist, J., dissenting); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 440-41 & n.30 (1978) (Stewart, J., dissenting); 454 U.S. at 442-43 & n.2 (Blackmun, J. dissenting); Everts v. Board of Trustees, 604 F. Supp. 40, 43-44 (D. Wyo. 1985); Grason Elec. Co. v. Sacramento Mun. Util. Dist., 526 F. Supp. 276, 281-82 (E.D. Cal. 1981).

299 *See supra* note 292 and accompanying text. Given the high priority placed on a successful athletic program, some major universities may choose to pay treble damage awards with academic, rather than athletic, department funds. *See, e.g.*, Justice v. NCAA, 577 F. Supp. 356, 373 (D. Ariz. 1983). It would be anomalous, however, to allow the distorted priorities of individual schools to justify direct restraints on competition.

300 Under the eleventh amendment, states are immune from private damage actions in federal court unless sovereign immunity has been unequivocably abrogated or waived. *See* Dellmuth v. Muth, 109 S. Ct. 2397 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 & n.1 (1985);

four year statute of limitations will also bar many claims against both public and private universities.[301] Third, many potential plaintiffs will choose not to sue their alma mater. The student-athletes with the largest potential claims will generally have already signed lucrative professional contracts and not need the additional damages and attendant bad publicity. Lesser athletes' claims should not be worth the litigation costs.[302] Finally, any damage claim may be offset by the benefits, *e.g.*, scholarship aid, athletic training and coaching, provided by the university. These may have been substantial, particularly for those athletes who successfully went on to a professional career.

The prospect of treble damages may not cause any greater injury than some of the sanctions imposed by the NCAA. Reports estimate that the University of Kentucky will lose over $2 million dollars from recently imposed NCAA sanctions.[303] The University has already tapped other sources of income to offset its losses.[304] Similarly, the Universities of Oklahoma and Florida successfully responded to NCAA punishments.[305] Even the complete elimination of SMU's football program did not destroy that school's academic program. Schools also successfully adjusted to the loss of television revenues following the Supreme Court's *Board of Regents* decision.[306] Thus, NCAA members have shown a resiliency in the past when they have faced unexpected revenue losses. There is no reason to expect that schools will be unable to adapt to treble damage awards. Finally, distributions from the NCAA's new billion dollar television contract could be used to finance any unexpected liabilities.[307] If a real problem remains, legislative intervention would be possible. Congress has demonstrated the ability to act quickly when the prospect of treble damage liability threatens to interfere with public policy.[308]

Edelman v. Jordan, 415 U.S. 651, 673 (1974). Whether a particular public university is considered an instrumentality of the state under the eleventh amendment depends on facts peculiar to each case. *See* Long v. Richardson, 525 F.2d 74, 76-77 (6th Cir. 1975). Most cases have found state universities to be within the amendment's protection. *See, e.g.*, Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971); Lachica v. Jaffe, 578 F. Supp. 83 (E.D. N.Y. 1983); Ewing v. Board of Regents of the University of Mich., 552 F. Supp. 881 (E.D. Mich. 1982); Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975).

301 Clayton Act § 4B, 15 U.S.C. § 15B (1988).

302 Plaintiffs who were athletic superstars in college, but did not make the transition to the professional game, because of injury or otherwise, would pose the greatest risk to university budgets. However, this class of potential plaintiffs should be relatively small.

303 *See* NCAA News, June 14, 1989, at 4, col. 1.

304 *Id.*

305 *See supra* note 236.

306 Fred Jacoby, Commissioner of the Southwest Conference, estimated that the deregulation of television rights "cut the rights fees about in half." NCAA News, June 14, 1989, at 5, col. 2; *see also* Koch, *supra* note 54, at 22 (estimating that total revenues collected by universities declined $42 million following the *Board of Regents* decision).

307 *See supra* note 3.

308 *See, e.g.*, Local Government Antitrust Act of 1984, P.L. 98-544, 15 U.S.C. § 35 (1988) (exempting municipalities from treble damage liability). Congress acted before any final treble damage judgment was assessed against a local government. *See* H.R. No. 98-965, 98th Cong., 2d Sess. 12 (1984).

G. *Impact on Other Laws*

For most purposes, student-athletes are not now considered "employees" of the university. If the free market system controlled compensation, that could change. That might affect the application of a wide range of laws, including labor, workers' compensation, minimum wage, tax, employment discrimination and pension laws. Most changes would only influence expenses or revenues. The application of the labor laws, however, presents the ugly prospect of striking students demanding curriculum changes. A full discussion of the effects a free market system would have on other laws is beyond the scope of this Article. A few comments about its effect on the labor laws,[309] however, illustrate that fears of wholesale substantive law changes and interference with academic interests may be overstated.

Payments to student-athletes would not necessarily require application of the labor laws. The NLRA does not define the term employee. Whether a particular individual or group should be classified as an employee depends on the facts and is left to the informed discretion of the National Labor Relations Board.[310] For policy reasons, persons who are literally "employees" nonetheless may be excluded from coverage under the Act.[311] Student-athletes are now paid scholarships and provided meals and athletic training. They also receive indirect benefits from college exposure. Despite these forms of compensation, they have not been subject to coverage by the labor laws. Two policy justifications support this result: the fiction that student-athletes are students first and the belief that college sport is itself educational. Making compensation more explicit may not undermine either policy justification for excluding student-athletes from the Act's coverage, particularly if educational restrictions are maintained or enhanced.[312] In an analogous context, the National Labor Relations Board has excluded interns, residents and clinical fellows from coverage under the Act, even though their salaries may exceed $20,000 per year.[313]

Even if the labor laws are applied to college athletes, educational interests would not have to be affected.[314] Eligibility rules requiring students to progress toward a degree should discourage students from strik-

309 These comments primarily address federal labor law. The National Labor Relations Act ("NLRA") exempts public employers from its coverage. *See* 29 U.S.C. § 152 (1982). Public universities may be subject to generally analogous public sector labor laws.

310 *See* Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 496 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981).

311 *Id.* at 497.

312 In some areas of the law, however, student scholarships are deemed to create "employee status" when such payments are for services rendered. *See, e.g.*, Van Horn v. Industrial Accident Comm'n, 219 Cal. App. 2d 457, 33 Cal. Rptr. 169 (1963) (workers' compensation); University of Denver v. Nemeth, 127 Colo. 385, 257 P.2d 423 (1953) (same); Parr v. United States, 469 F.2d 1156 (5th Cir. 1972) (taxation of medical residents' income). Explicit payment contracts would obviously satisfy that prerequisite for statutory coverage. It would also be easier to semantically categorize student-athletes as professionals and view them as athletes, not students, if they were paid in cash, rather than in scholarships and other services.

313 *See* Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 253 (1976).

314 Collective bargaining over noneducational interests, *e.g.*, pressures to play with injuries or the maintenance of athletic facilities, on the other hand, seems entirely appropriate.

ing classes, as opposed to games. Additionally, athletic departments could be maintained separately from academic departments to ensure institutional educational policies did not become a "term or condition of employment" for which bargaining was required.[315] The NLRB or state labor board could even exempt such items from bargaining. They might view curriculum requirements as defining the school's product and consider it a management perogative[316] or exempt academic issues from bargaining on public policy grounds.[317] Moreover, the NLRA only requires bargaining, not agreement.[318] A school could always stand firm against changes in curriculum or educational requirements. Experience at the professional level suggests that hard bargaining may result in some missed games and disrupted schedules. These costs, however, are no different from those that exist for all businesses.

In any event, the appropriate recourse for those concerned with the potential impact of payments to college athletes on labor and all other laws is the legislature. Student-athletes could easily be excluded from the definition of "employee" in any statute.[319] Thus, the impact of substantive law changes on university interests, even if serious, could not justify the NCAA's direct restraints on competition.

H. *Impact on Other NCAA Rules*

Decisionmakers may fear that application of the antitrust laws to the NCAA's amateurism restriction will encourage litigation against the NCAA and jeopardize other NCAA rules. In particular, they may fear NCAA educational regulations, such as its satisfactory progress requirements, will come under attack. There is, of course, no guarantee against litigation. Some of the NCAA's eligibility rules have already been chal-

315 *See* 29 U.S.C. §§ 151, 157, 158(a)(5) (1982). The power of the athletic department over "labor" negotiations could be defined in part 6 of the NCAA's rules. *See* 1989-90 NCAA MANUAL 39-41 (1989). The athletic departments at several universities already are separately incorporated and conduct their own labor negotiations. *See* N.Y. Times, June 8, 1986, § 5, at 1, col. 1. Athletic eligibility rules, as opposed to curriculum policies, might be considered a term or condition of employment for which bargaining would be required. The NCAA's minimum eligibility requirements, however, should be maintained without disruption. Separate bargaining units for each university would probably be required. *See* R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 66-92 (1976). A nationwide unit would likely be too fragmented to have much power or effect. Thus, bargaining at the national level would not force changes in the eligibility rules. At the university level, student-athletes would agree to follow the NCAA rules because noncompliance would mean NCAA sanctions that would injure both parties to the negotiation.

316 *Cf.* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (no duty to bargain over partial closing because "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business").

317 *Cf.* University of Mich. v. Employment Relations Comm'n, 389 Mich. 96, 204 N.W.2d 218 (1973) (court exempted academic issues from bargaining to harmonize the requirements of the labor act with a constitutional provision mandating Board of Regents autonomy).

318 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); NLRB v. American Ins. Co., 343 U.S. 395, 404 (1952).

319 *See, e.g.*, Cal. Lab. Code § 3352 (West Supp. 1989) (excluding amateur athletes from the workers compensation statute).

lenged.[320] The NCAA's educational restrictions, however, should withstand antitrust scrutiny.[321]

Educational rules are easily distinguished from the NCAA's amateurism restrictions and should quickly be upheld under the Rule of Reason. Such rules, unlike the NCAA amateurism restrictions, do not directly affect price and therefore are not presumptively unlawful. They do not require the same rigorous examination of less restrictive alternatives that the NCAA's amateurism restrictions demand.[322] The rules more directly further the true purpose of the university members - preserving or enhancing educational values, than do the amateurism restraints. Furthermore, the primary antitrust injury asserted from educational eligibility rules would be a reduction in competition among the smaller pool of eligible student-athletes. To the extent competition was affected, higher wages would be required. That would injure, not benefit, NCAA members. Thus, there would be more reason to believe the NCAA was unbiased in weighing the harms and benefits from its educational rules. Hence, less reason for judicial or governmental intervention than exists for the NCAA amateurism restraints.

The NCAA might argue that even if it prevailed under the Rule of Reason, the prospect of multiple litigation would have a chilling effect on enactment or enforcement of educational restrictions. This argument has some force. Nevertheless, precedent could be quickly established to support summary judgment or 12(b)(6) motions in later cases. No matter what the governing law, there is always the possibility of frivolous suits. The NCAA's argument would logically require the NCAA to have complete antitrust immunity. That position has previously been rejected.[323]

I. *Transition Period*

The transition from a loosely run cartel with restrictions on payments to a free market system of college athlete compensation may not be smooth. Some teams will choose to bid for the services of student-athletes; others, e.g., Ivy League schools, will not. Ideally, bidding schools would compete against each other and nonbidding schools would form their own leagues or conferences. Schools, however, arrange schedules years in advance. Thus, at least initially, there may be some noncompetitive contests. Subsequently, there may be a constant shifting in the composition of conferences as teams change their decision about whether to pay college athletes.

This problem also may not be as serious as first appears. In effect, this is just the competitive balance argument previously rejected.[324] Even without price competition for student-athletes, there are profound

320 *See, e.g.*, Jones v. Wichita State Univ., 698 F.2d 1082 (10th Cir. 1983); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974).

321 A complete analysis of the antitrust implications of all NCAA rules is beyond the scope of this Article.

322 *See supra* notes 202-03 and accompanying text.

323 *See supra* notes 84-109 and accompanying text.

324 *See supra* notes 246-55 and accompanying text.

imbalances among and within conferences. Northwestern does not fare well against the University of Michigan; North Carolina regularly beats Wake Forest. Athletic budgets vary widely.[325] A free market may just convert the unequal nonprice competition to unequal price competition. Moreover, if the professional experience is any example, a free market will not result in one team buying all the best talent.[326]

Eventually, conferences could sort themselves out to form "bidding" and "nonbidding" conferences. It might even be permissible to have conference rules against payments.[327] Individual conferences, unlike the NCAA, would probably not have market power. Moreover, there would be too many conferences to have mutual interdependence result in all conferences choosing not to pay.[328] Thus, student-athletes would have at least some choice among education/money options.

If "nonpaying" conferences were formed, there might be a possibility of in-conference cheating. A team could improve its in-conference standing and earn increased revenues by making "illegal" payments to student-athletes. That incentive, however, would not be as great as presently exists. The potential revenues from cheating in nonbidding conferences would not match those now received by the top major colleges. The incentive to cheat would be further reduced if conference schools shared revenues. Moreover, the superstar athlete would likely not choose a "nonbidding" school. The exposure would not be as great and the compensation offer, because it would have to be secret, would probably be less than at openly bidding schools. The value of more marginal players, on the other hand, may not exceed the cost of a scholarship and hence may not warrant any "illegal" bidding. The experience in the Ivy League and division III provides some reassurance. Despite limiting scholarships to need, cheating has not appeared to be epidemic. Thus, there should not be significant shifts in the composition of conferences caused by some members cheating on the conference agreement.

J. *New Abuses*

If a free market system for paying college athletes were to be adopted, new abuses may take the place of existing problems. For example, schools might seek to flunk high-paid, but disappointing student-athletes. Agents or advisors might encourage choices that maximize their revenues rather than their clients' interests.

Both possibilities, although real, are not different in kind than problems that currently exist. Moreover, there are more narrowly tai-

325 *See supra* note 251.

326 Teams have the self-interest in avoiding such dominance because fan appeal diminishes. Additionally, marginal revenues generated by signing a star player decrease with each additional signing. *See* Noll, *Attendance and Price Setting*, in GOVERNMENT AND THE SPORTS BUSINESS, 115, 123-24, 135-36 (R. Noll. ed. 1974). Therefore, a team without any stars should outbid a team that already has several top players.

327 *See supra* note 133.

328 A conference that chose to pay student-athletes would have a huge recruiting advantage and could garner enhanced attendance and television revenues. Unlike the current system, teams would not have to fear NCAA sanctions or loss of NCAA membership benefits to reap those immediate rewards.

lored methods to deal with those abuses than eliminating all payments to college athletes.

The fear that schools would deliberately fail disappointing student-athletes gives too little credit to teachers and administrators. Most act scrupulously. Moreover, the normal litigation possibilities exist to protect against this abuse.[329] In any event, schools now have an incentive to flunk nonproductive players. Athletic scholarships are limited and a student-athlete's scholarship cannot be revoked for poor performance or injury.[330] Thus, flunking the nonproductive student-athlete, or encouraging the student to drop athletics voluntarily, can open a scholarship opportunity for a more promising prospect.[331] Payments to athletes should not significantly increase the prevalence of this type of abuse. Additionally, it would be absurd to allow schools to justify their restraints by claiming that without them they would act unscrupulously.

The apprehension that agents or advisors will compromise their clients' interests also does not justify the NCAA's restraints. Advisors now have some incentives that may conflict with those of their advisees. They may seek jobs or benefits for themselves in exchange for encouraging their advisees to attend a particular university. Payments to athletes should not significantly increase the incidence of unsavory advisors. In any event, agents can be directly regulated through the common law fiduciary duty of loyalty. There is also the prospect of legislative action if abuses seem widespread.[332]

V. Benefits of a Free Market System

If there were no other benefits, application of the antitrust laws to college athletes could be justified as preserving the rule of law. The judicial system requires consistent interpretation of governing legal principles. Disingenuous analysis and exceptions to suit expediency undermine respect for the law. A thorough antitrust analysis establishes that the NCAA's amateurism restrictions violate Section 1 of the Sherman Act. The NCAA rules impose direct restraints on the student-athlete labor market. Those restraints depress wages, misallocate resources and result in market inefficiencies. Stubborn adherence to naive views about major college athletics or speculative and overstated fears about changing the status quo should not be allowed to overrule reasoned analysis.

Operation of the free market would correct many of the market inefficiencies that result from the artificial suppression of athletes' wages. If

329 There would not seem to be excessive proof problems. Academic work can be reviewed and the people pressured might be encouraged to come forward. *See e.g.*, Monaghan, *Fired Teacher Wins Suit Against Officials at University of Georgia, Is Awarded $2.5 Million*, CHRON. HIGHER EDUC., Feb. 19, 1986, at 29 (jury agreed that Jan Kemp was dismissed because she refused to grant preferred treatment to student-athletes).

330 *See* 1989-90 NCAA MANUAL 143 (1989).

331 *See, e.g.*, D. EITZEN & G. SAGE, *supra* note 104, at 129.

332 Fifteen states already have rules governing the conduct of professional sports agents. *See* Rodgers, *States Revamp Defense Against Agents*, 6 SPORTS LAW. 1 n.1 (Winter 1988-89); *see also* Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701 (1987).

the gap between the marginal value and cost of athletes is reduced, schools will no longer have the incentive to compete for student-athletes' services through inefficient forms of nonprice warfare. Excessive recruitment costs, coaches salaries and capital expenditures may be eliminated. Additionally, the high school student whose greatest value is as a student-athlete will be encouraged to attend college rather than employ his talents where they are less valuable. Society, as well as the student-athlete, benefits.

Application of the antitrust laws to the NCAA's amateurism restrictions is justified by much more than jurisprudential and economic policies. Compensating student-athletes introduces some measure of fairness to an otherwise inequitable system. Student-athletes generate millions of dollars for their universities. Football and basketball players risk their health playing what are often brutal sports. Yet, college athletes are denied compensation by the NCAA and "forced to live with the fiction that they, like flowers, exist on air, sunshine and water."[333] NCAA rules make it almost impossible for the student-athlete to earn spending money or accept payments for incidental expenses.[334] The NCAA rules even deny student-athletes full use of government grants.[335] The majority have less than twenty-five dollars per month to satisfy personal needs.[336] College athletes do receive an education, but many schools devalue that education by channeling academically unprepared athletes

333 *See* Neff, *Scorecard*, SPORTS ILLUSTRATED, Apr. 18, 1988, at 21.

334 *Id.*

335 A student athlete can receive only $1400 in Pell Grant money above a full scholarship. *See* 1989-90 NCAA MANUAL 139 (1989). The remaining $900 goes to the university. As of Aug. 1, 1990, student-athletes will be able to receive up to $1700 in Pell Grant money. *See* NCAA News, Jan. 22, 1990, at 26, col. 1.

336 *See supra* note 9. Several writers in the popular press, as well as a few coaches, have recommended stipends for college athletes above their scholarship to remedy this perceived inequity. *See, e.g.* N.Y. Times, Apr. 27, 1988, at D25, col. 1; Dallas Morning News, July 1, 1985, at 4A, col. 1. This Article agrees that stipends represent an improvement over the existing system of compensation in college athletics. It is doubtful, however, that NCAA members will choose to share their wealth, *see supra* notes 105-06 and accompanying text, and in any event, a stipend is only a partial solution. Some inequity would remain because better athletes would not receive their fair market value. Consequently, cheating to attract the star players would continue, albeit at a reduced rate. Additionally, the NCAA still would need to supervise recruiting and campus activity to ensure that payment limits were not exceeded. This would use resources that otherwise might be available to enforce educational restrictions. Moreover, the combined impact of technical and flagrant rules violations still would breed cynicism and disrespect for the law. The stipend proposal does not go far enough. The stipend proposal also remains an antitrust violation. NCAA members would have to agree on the price to pay athletes. The only change from the current system would be the amount of the agreed upon compensation. The antitrust analysis, therefore, would be virtually identical to the analysis presented earlier. *See supra* notes 81-280 and accompanying text.

A government-established stipend would avoid the antitrust dilemma. The legislature would be an impartial decisionmaker uninfluenced by the cost savings a low stipend would provide. Nevertheless, it is not generally the function of the government to make judgments about the worth of particular occupations and government regulation has generally proven to be inefficient. *See, e.g.*, L. SCHWARTZ, J. FLYNN, & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST 444 (6th ed. 1983); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1231-35 (1969); Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 619, 643 (1969). Unless the stipend proposal contained a creative indexing feature, it either would require constant government supervision or would become quickly outdated. Accordingly, this article also rejects government regulation, at least until either courts refuse to apply the antitrust laws or experience demonstrates that a free market approach is unworkable.

into "gut" courses and demanding so many practice hours that successful completion of classes becomes all but impossible.[337] In any event, what athletes really receive in exchange for their efforts is merely the cost of tuition, not the value of an education.[338] That compensation is plainly inequitable. For example, in 1987, the University of Nebraska football program reportedly generated nearly $11 million in revenues, but distributed only $150,000 in scholarships to football players.[339] Such statistics have prompted some to call football players "slave labor."[340] Although this description is a bit melodramatic, it is shameful that college athletics has reached a state that could foster such opinions.

Paying student-athletes their free market value also would reduce the hypocrisy that now plagues major college athletics. Major college programs have themselves commercialized amateur athletics, usually at the expense of educational values. No longer is the sports program's constituency the athlete or the student body. Television networks, boosters and fans take priority.[341] Some NCAA regulations are brazenly hypocritical. For example, student-athletes cannot market their name or likeness or use their athletic ability to raise funds for themselves. The same activities are permitted, however, if the money collected is contributed directly to the university.[342] The money generated from college athletics has reached such levels that it is almost inevitable that all persons involved in big-time college athletics develop a "win-at-all costs" mentality that compromises educational interests.[343] Yet, the major colleges continue to pursue the fiction that they are engaged in amateur athletics. As one critic has said, "if it's really amateur athletics, let everyone in the gate free."[344] Application of the antitrust laws to the NCAA's amateurism restrictions would end this hypocrisy.

Most importantly, compensating student-athletes may go far to restoring societal norms and values.[345] A system that prevents student-athletes from receiving a minimum income for personal expenses encourages the athlete to receive "under-the-table" payments from alumni

337 *See* N. Y. Times, Sept. 10, 1989, at 1, col. 2 (more than one third of American colleges with major men's basketball programs have player graduation rates below 20%. N.Y. Times, Oct. 19, 1984, at A27, col. 1; *see also supra* notes 268-69 and accompanying text; *infra* note 353.

338 The student-athlete always could choose to obtain an education with their own funds (or a loan).

339 *See* Omaha World-Herald, Apr. 1, 1988, at 13, col. 1.

340 *See, e.g.*, Lieber, *Pro Football; Extra Points*, SPORTS ILLUSTRATED, Dec. 9, 1985, at 74; Neff, *supra* note 333, at 21.

341 *See supra* notes 98-102, 260-66 and accompanying text.

342 *See* 1989-90 NCAA MANUAL 59, 63-64 (1989).

343 *See supra* notes 260-66 and accompanying text.

344 Lieber, *supra* note 340, at 74.

345 The NCAA apparently believes increased enforcement can restore respect for universities' athletic programs. *See, e.g.*, NCAA News, May 24, 1989, at 7. col. 1. Increased enforcement is not a satisfactory solution to the problems besetting college athletics. Enforcement efforts do little, if anything, to remedy resource misallocation or the inequity and hypocrisy that plague the system. In the short run, such efforts only highlight the abuses that besmirch schools' reputations. In the long run, increased enforcement may deter some cheating, but it cannot eliminate it. The incentives to cheat are too great and the avenues and "points of initiative" too numerous. Reliance on increased enforcement to correct the problems facing college sports is reminiscent of promises to collect delinquent payments from tax cheaters to avoid raising taxes. Both are naive, may incur greater expense than they save, and are generally suggested to avoid greater political accoutability.

or agents. It is no coincidence that most of the clients Norby Walters fraudulently signed to representation contracts prior to their graduation were poor.[346] Aware that schools, athletic directors and coaches are reaping the rewards of successful programs, athletes find it easy to justify accepting such "illegal" payments.[347] The gap between the student-athlete's value and cost to the university, on the other hand, ensures that such "illegal" offers of payment will be made.[348] The "win-at-all costs" mentality that the commercialization of sports has produced makes coaches and other administrators willing to overlook, if not contribute to, these delinquencies.[349] Academic standards may similarly be relaxed to prevent losing the services of contributing athletes. The wrong message is being conveyed and its effects are beginning to appear on the police blotter.[350] As Dr. Harry Edwards has observed:

> [Y]oung people who have been systematically instructed by word and example in the fine art of lying, cheating, and self-delusion, manipulation and ripping off have in extraordinary numbers become precisely what we have programmed them to be: self deluded, lying, cheating, manipulative rip-off artists.[351]

Besides furthering economic policies and respect for the law, and promoting fairness and ethical values, prohibiting the NCAA's amateurism restrictions may improve educational interests. As suggested earlier, payments can fund continuing education, create additional incentives to maintain academic eligibility, and be structured to encourage graduation or other desirable academic achievements.[352]

In any event, a free market system could and should be supplemented with increased educational regulation and enforcement that directly promotes academics.[353] The NCAA could more rigidly restrict hours of practice and the length of season and limit games to week-

346 *See* N.Y. Times, Feb. 26, 1989, at 27, col. 1.

347 *See supra* note 20 and accompanying text.

348 *See supra* notes 52-53 and accompanying text.

349 The detailed and inflexible regulatory scheme also creates unknowing or good faith rules violations. For example, it is a violation for an assistant coach to drive a student to his parent's funeral even if the student reimburses the coach for the appropriate gas expense. *See* 1989-90 NCAA MANUAL 164 (1989).

350 *See supra* note 18 and accompanying text.

351 N.Y. Times, May 19, 1985, at D22, col. 1; *see also supra* notes 19-21 and accompanying text.

352 *See supra* notes 272-74 and accompanying text.

353 Some commentators suggest that a super-league be established in which there would be no academic requirements. *See, e.g.*, J. MICHENER, *supra* note 270, at 249-50. Underlying this proposal is the belief that a large number of students are ill-equipped for and uninterested in pursuing an education. Such high school students should not be forced to choose between foregoing what is the primary feeder system to professional sports or pursuing a sham academic career. This Article rejects such proposals.

The extent of academic fraud resulting from the admission of unmotivated and unprepared students may not be as great as commentators and anecdotal evidence suggest. Over 95% of incoming student-athletes surveyed said getting a degree was important to them. *See* REPORT NO. 1, *supra* note 8, at 6-7. The greatest obstacle to academic success may not be motivation or preparation for college, but the time demands of major-college athletics. Athletes spend more time in practice during season than preparing and attending classes. *Id.* at 25-26. They say their status as athletes makes it harder to keep up and that if they had an extra 60 minutes each week, they would spend the largest part of that time on academics. *Id.* at 44-48; REPORT NO. 3, *supra* note 9, at 37, 42. Thus, the

ends.[354] It could tighten and better enforce educational eligibility requirements. Satisfactory progress toward a degree could be defined, rather than left to the discretion of individual schools. Passage of core courses could be required.[355] A reporting requirement detailing courses taken and grades received could be imposed.[356] Academic support pro-

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academic abuses that exist can be reduced by limiting practice sessions or requiring a proportional amount of time spent in study periods.

Even if the "super league" proponents do not overstate the prevalence of academic abuses, their solution is not narrowly tailored to remedy the perceived problem. Rather than eliminate all educational requirements, more direct alternatives can be adopted to prevent or reduce academic fraud. Professors might be required to sign certification forms that student-athletes attended classes and received no special treatment. Violators could be penalized with loss of tenure or salary. Students could be required to sign similar acknowledgements, with penalties deducted from their salaries or enforced through suits for fraud. *See* D. HOFFMAN & M. GREENBERG, *supra* note 20, at 82. If the number of ill-equipped students admitted is believed to create the perceived problem, affirmative action admissions through the athletic department might be limited, *see infra* note 357 and accompanying text, and noncredit remedial tutorials could be required. The primary objection to the super league proposal, however, is that it undervalues the importance and beneficial effects of the NCAA's educational requirements. The vast majority of student-athletes do not make it to the pros, *see* D. EITZEN & G. SAGE, *supra* note 104, at 287, yet an unrealistic number of students believe that they will be the exception. *See* REPORT No. 1, *supra* note 8, at 7; REPORT No. 3, *supra* note 9, at 50. If left to their own devices many would not attend classes. By imposing educational restrictions, the students that do not go on to professional sports can be better equipped to enter alternative careers. Even students who do not receive a degree benefit from their presence on campus. Not only are the classes they do attend potentially beneficial, but exposure to a different environment and a world of ideas can be socially and intellectually expanding. Moreover, if education were only optional, some athletes who wanted an education might be forced to choose the noneducation alternative. The pressure to succeed in college athletics, the showcase for the pros, might be too intense to risk the competitive disadvantage that hours spent in and preparing for classes would impose. Educational requirements may be paternalistic, but the evidence suggests that this is an area where paternalism may be required. Until critics present more convincing proof of rampant and unsolvable academic abuses, this Article prefers to strengthen, not eliminate, academic regulations.

354 The NCAA has some limits on practice hours and season length. *See* 1989-90 NCAA MANUAL 174-256 (1989). These restrictions could be strengthened. Recent studies confirm that the heavy time demands on college athletes result in missed classes and detract from academic performance, particularly during the athletic season. *See supra* note 353; *see also* REPORT No. 1, *supra* note 8, at 8E; REPORT No. 3, *supra* note 9, at 5E-6E.

The 1990 NCAA convention voted to reduce the length of the men's basketball season after a record 24 ballots and more than four hours of debate. *See* NCAA News, Jan. 17, 1990, at 18, col. 33. The games eliminated will probably be the games previously played during the Thanksgiving break. Consequently, the "landmark" legislation should not substantially reduce the time pressures on college athletes. Moreover, the new legislation does not take effect until the 1992-93 school year and there has already been talk that athletic directors, stung by lost revenues, may seek to modify the new legislation. *See, e.g.*, Sporting News, Jan. 22, 1990, at 34, col. 1; Detroit Free Press, Jan. 10, 1990, at 1C, col. 5.

355 *See* 1989-90 NCAA MANUAL 116 (1989). It is a travesty that a reputable school such as the University of Iowa can consider a student to be progressing toward a degree when the student take courses such as billiards, bowling, watercolor painting and jogging, and fail many of them. *See* N.Y. Times, Apr. 15, 1989, at 30, col. 1; *Notebook*, Sporting News, Apr. 3, 1989, at 42. The NCAA has established a set of core courses for high schools students. *See* 1989-90 NCAA MANUAL 110-11 (1989). Similar post-entry requirements could be developed for college athletes. The NCAA's powers may be limited by the diversity of interests of its member institutions and its desire to maintain institutional autonomy. *See* NCAA News, May 24, 1989, at 3, col. 2. Nevertheless, it should be possible to develop at least some minimum level requirements. Moreover, whatever requirements are adopted can be limited to defining athletes' eligibility; they do not have to apply to general academic standing. That is, if a school does not want to require its students to take, for example, a specified number of math courses, it does not have to enact such a requirement. Student-athletes failing to take the designated number of courses would be able to graduate just as any other student, but would not be eligible to participate in athletics.

356 NCAA rules now require schools to certify that student athletes representing the university are in good academic standing. *See* 1989-90 NCAA MANUAL 318 (1989). A requirement that specific

grams could be centrally mandated, not just left to the discretion of the member schools. The number of student-athlete affirmative action admittees could be limited to the same percentage of nonathlete students admitted under such programs.[357] Coaches could be given bonuses for successful student academic performance, rather than won-lost records. Athletes' dorms, cafeterias and special classes could be prohibited so that student-athletes become better integrated with nonathlete students. These regulations would be fully consistent with the antitrust laws.[358] Moreover, application of the antitrust laws to the NCAA's amateurism restrictions would free the NCAA from supervising its recruiting and financial aid regulations and enable it to focus on what should be its true mission — enhancing academic standards.

The application of the antitrust laws to the NCAA's amateurism restrictions will require some basic changes and create some practical difficulties. Costs may increase and schools may need to develop new revenue sources. Legislative modifications may be required. Nevertheless, the difficulties that will exist are not insurmountable and are more than offset by the tangible and intangible benefits that adherence to the rule of law would provide. A free market system with enhanced educational restrictions is economically sound and will go far toward cleaning up major college athletics and restoring respect to our previously revered institutions.

VI. Conclusion

Amateur athletics is a multi-million dollar industry in which its primary workers do not share in its rewards. Student-athletes are exploited by schools that defend their regulations as preventing the commercialization of college sports. Major college sports, however, have long been commercialized. Corporations sponsor bowl games, televison networks dictate starting times and the status of coaches rises and falls with their won-lost record. It is time that we recognize the NCAA's amateur rules for what they are: a direct restraint on price competition. The NCAA rules do not require amateurism, they require a limitation on pay. They are a cost savings device. The NCAA invokes the shibboleth of amateurism and the public and judiciary bob their heads. This is nonsense. Careful analysis of the NCAA's justifications demonstrate that the heavy

courses and grades be listed would not greatly increase the burden to the university, but would improve supervision. Perhaps enforcement could be further enhanced by permitting college athletes to act as "private attorneys general" with a statute of limitations extending past graduation for objectively verifiable violations of the reporting requirement.

357 There is evidence that some student-athletes do not succeed academically because they are not adequately prepared for university work. *See* REPORT No. 3, *supra* note 9, at 15-18. Coaches' incentives to win cause some to overlook these deficiencies. By limiting affirmative action admissions, some students may not get their choice of school, but they can get an education at a school which is better suited to their academic needs.

This proposal potentially invites some additional academic fraud. Unsavory school administrators may either doctor admission statistics or increase the number of nonqualified nonathletes admitted. This article would prefer to assume most schools would act scrupulously. If experience demonstrated otherwise, this requirement could be modified or eliminated.

358 *See supra* notes 321-23 and accompanying text.

burden to redeem a direct restraint on competition cannot be sustained. The amateurism restrictions are not necessary to further any legitimate interest. The NCAA is not a bad institution. Its members are not evil. Their amateurism restrictions, however, are illegal.

Everyone cherishes the athletes of the world who, like Ernie Banks, would love nothing more than to "play two." We prefer to believe athletes play for the love of the game. There is something pure about that. No one really believes this is true in major college athletics anymore. But there is a feeling that if we pretend it is true, if we believe hard enough, we can make it true. There would be nothing wrong with such self-delusion if nobody were injured. That, however, is not the case. Athletes, our schools, and ultimately all of society suffer. Students are deprived of their just rewards; hypocrisy and immorality flourish. It is time to admit the deception and apply the same laws to major college athletics that apply to all other commercial enterprises. Allowing the free market to operate will increase efficiency, and more importantly, provide a first step toward cleaning up the scandal that plagues our universities' campuses. True amateur athletics will not be eliminated. Many schools will choose not to compete with the "power elite." They will insist that student-athletes be students first. The major college programs, however, will be recognized for what they are and their student-athletes will be paid accordingly. If problems develop, government intervention remains a possibility. It is unlawful and inappropriate for schools, which may be economically motivated, to impose direct restraints on competition to cure speculative evils.