Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete

Christopher L. Chin
ILLEGAL PROCEDURES: THE NCAA'S UNLAWFUL
RESTRAINT OF THE STUDENT-ATHLETE

I. INTRODUCTION

During the past ten years, there has been a flood of antitrust litigation concerning professional sports organizations.1 Acknowledging that many professional sports organizations have historically restrained trade, some courts have struck down many long-standing practices of sports organizations for violating the Sherman Antitrust Act (Sherman Act).2

In the field of athletics, though, the biggest violator of antitrust laws may not be a professional sports organization; this distinction potentially belongs to the National Collegiate Athletic Association (NCAA), the governing body of intercollegiate athletics. Although antitrust litigation has diminished some of its regulatory power,3 the NCAA still retains substantial power over its member universities and their athletic programs.

The NCAA retains its power because of the judiciary's traditional view of the NCAA and its athletic programs.4 College athletics in the United States have always been linked to the images of the universities themselves.5 Under this traditional view, amateur athletics have been an incidental undertaking, subordinate to the universities' essential task of providing an education.6 The athlete under this view is

4. See infra part III.
6. Id.; see also NCAA, 1992-93 NCAA MANUAL 1 (Article 1 (Constitution)) (stating that purposes of NCAA and intercollegiate athletics are to promote and develop educational leadership, physical fitness and sports participation as recreational pursuit).

1213
truly an "amateur," who participates in a sport for the sheer love of the game.\textsuperscript{7}

In spite of increasing media coverage and increasing commercialization of college athletics,\textsuperscript{8} the NCAA still clings to the ideal of the "amateur" student-athlete in regulating its members and student-athletes.\textsuperscript{9} As a result, the NCAA has been able to evade application of antitrust laws by hiding behind its stated educational goals.\textsuperscript{10} In the end, the student-athlete, the main producer of revenues in intercollegiate athletics, is the one most adversely affected.\textsuperscript{11}

This Comment analyzes a student-athlete’s rights under current antitrust laws. Part II traces the NCAA’s rise from its humble beginnings to its current status as a monopolistic cartel.\textsuperscript{12} Part III examines the history of antitrust laws as applied to the NCAA in the market for student-athletes and the rationale behind the extensive case law backing the NCAA.\textsuperscript{13} Part IV outlines a cause of action that the student-athlete could bring against the NCAA and argues that the market for student-athletes, which has traditionally been considered noncommercial, is in fact commercial. As a result, the rationale that courts have provided in backing the NCAA has been based on a fallacious, unrealistic concept.\textsuperscript{14} Part V examines two plans of reform the NCAA could undertake and concludes that although educational reform would most benefit the student-athlete, financial reform is a more likely result.\textsuperscript{15}


\textsuperscript{9} Eugene D. Gulland et al., \textit{Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges}, 52 FORDHAM L. REV. 717, 722 (1984); see also NCAA, supra note 6, at 1 (Article 1.3.1 (Constitution)) ("The competitive athletics programs of the colleges are designed to be a vital part of the educational system.").


\textsuperscript{11} \textit{Should College Athletes Be Paid Salaries?}, supra note 10, at 56. This Comment concentrates particularly on problems involving football and men’s basketball, the main revenue producers in intercollegiate athletics. See Lee Goldman, \textit{Sports and Antitrust: Should College Students Be Paid to Play?}, 65 NOTRE DAME L. REV. 206, 206 (1990).

\textsuperscript{12} See infra part II.

\textsuperscript{13} See infra part III.

\textsuperscript{14} See infra part IV.

\textsuperscript{15} See infra part V.
II. THE HISTORY AND PROBLEMS OF THE NCAA

A. The History of the NCAA

Before the advent of university control of intercollegiate athletics in the early twentieth century, there was little formal organization of intercollegiate athletics, and control was provided by either alumni or students.\textsuperscript{16} While participants tried to formulate rules to protect players, intercollegiate athletics, particularly football, were still brutally violent.\textsuperscript{17} Furthermore, dishonorable activities were prevalent.\textsuperscript{18} In response to these problems, sixty-two schools formed the Intercollegiate Athletic Association of the United States (IAAUS), and institutional control of intercollegiate athletics began.\textsuperscript{19} The purpose of the IAAUS was to organize a set of rules addressing the problems faced by college football; this formal organization probably saved college football.\textsuperscript{20} The IAAUS changed its name to the NCAA in 1910.\textsuperscript{21}

In its present form, the NCAA is an unincorporated association composed of approximately 960 four-year colleges and universities located throughout the United States.\textsuperscript{22} It is the leading organization in the field of college athletics.\textsuperscript{23} The policies of the NCAA are established by member universities and colleges at annual conventions, and these policies are implemented by the NCAA Council.\textsuperscript{24} While individual member institutions control their own athletic programs, they are bound

\footnotesize{\textsuperscript{16} Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 YALE L.J. 655, 656 (1978). For a more complete history of college athletics during the pre-NCAA period, see HOWARD SAVAGE, AMERICAN COLLEGE ATHLETICS 13-29 (1929).


\textsuperscript{18} For example, hired athletes began to appear on college rosters. \textit{Id.}

\textsuperscript{19} \textit{Id.} University control of intercollegiate athletics began when 38 schools ratified the IAAUS Constitution in 1906. Note, \textit{supra} note 16, at 656 n.5.

\textsuperscript{20} Note, \textit{supra} note 16, at 656 n.5.

\textsuperscript{21} \textit{Id.}


\textsuperscript{23} Organizations other than the NCAA include the National Association of Intercollegiate Athletics (NAIA) and the College Football Association (CFA). See SPERBER, \textit{supra} note 22, at 247.

\textsuperscript{24} Justice, 577 F. Supp. at 361. The NCAA Council is a 44-person group that functions as the NCAA’s board of directors. NCAA, \textit{supra} note 6, at 17 (Article 4.1 (Constitution)); SPERBER, \textit{supra} note 22, at 309. The NCAA Council has the power to interpret the NCAA Constitution and its bylaws. NCAA, \textit{supra} note 6, at 21 (Article 4.2.3 (Constitution)).}
to comply with the NCAA’s rules and regulations and are subject to discipline under these rules.25

Today, the NCAA’s stated fundamental purpose is to maintain the character of amateur intercollegiate athletics as one distinct from the character of professional athletics.26 Because the principal difference between professional and collegiate sports is the payment of salaries to the athletes, the NCAA’s primary purpose is to prevent the commercial influences of professional sports from destroying the unique product of intercollegiate athletics.27 The NCAA has developed extensive eligibility rules to maintain the “clear line of demarcation” between professional and intercollegiate athletics.28

B. Two Conflicting Goals

By enforcing its stated goals, the NCAA acts as a “monitor of the academic integrity of its members’ programs.”29 At the same time, the

25. Kelly W. Bhirdo et al., Comment, McCormack v. National Collegiate Athletic Association: College Athletics Sanctions from an Antitrust and Civil Rights Perspective, 15 J.C. & U.L. 459, 459 n.1 (1989); see NCAA, supra note 6, at 8 (Article 3.2 (Constitution)). For example, each school sets its own annual budget and controls the conduct of its athletics programs. NCAA, supra note 6, at 7 (Article 3 (Constitution)). The NCAA designates each member university as a member of Division I, II or III for legislative and competitive purposes. Id. at 329 (Article 20.01.2 (Operating Bylaw)). Some universities are allowed to have certain sports classified in a division other than the division in which it holds membership. Id. This Comment analyzes problems in Division I institutions, which have the largest athletic budgets, receive the most television exposure and revenues, and, consequently, abuse the rules the most. RICHARD E. LAPCHICK & JOHN B. SLAUGHTER, THE RULES OF THE GAME 114 (1989). A Division I school is one that sponsors a minimum of “(a) Six varsity intercollegiate sports, including at least two team sports . . . and involving all-male teams or mixed teams of males and females, and (b) Six varsity intercollegiate sports, including at least two team sports . . . and involving all-female teams.” NCAA, supra note 6, at 341 (Article 20.9.3 (Operating Bylaw)).

26. The “Purposes and Fundamental Policy” section of the NCAA Constitution states that the NCAA eligibility rules exist to maintain amateur 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 between intercollegiate athletics and professional sports.” NCAA, supra note 6, at 1 (Article 1.3.1 (Constitution)).

27. See id.

28. See id. at 67-202 (Articles 12-16 (Operating Bylaws)). These eligibility rules address the universities’ recruitment of student-athletes, the academic requirements of student-athletes, and the amount of financial aid and scholarships available to student-athletes. Id. If a university or a student-athlete violates an eligibility rule, the NCAA may impose several penalties. Id. at 323-37 (Article 19.4 (Operating Bylaw)). Some of these penalties are permanent ineligibility of an athlete, forfeiture of contests in which the ineligible athlete participated, and fines and probation for the school. Id. By maintaining this clear line of demarcation and enforcing its rules, the NCAA promotes the use of athletics as a tool to further the educational and social development of students. Id. at 1 (Article 1.3.1 (Constitution)).

29. Weistart, supra note 5, at 175.
NCAA operates as an economic regulator and promoter. In this capacity, the NCAA encourages sports competition among member schools and attempts to increase the attention the general public gives the events. As an economic promoter, the NCAA has performed extremely well. The problem arises, however, when the NCAA attempts to reconcile these two goals.

In theory, the NCAA's goal of ensuring that intercollegiate athletics retain a character distinct from professional sports is admirable: A distinction between the two levels of sports is proper, because a student-athlete's main concern should be to gain an education, not to generate revenue or make money. It is also appropriate that persons with an interest in preserving amateurism assume the task of regulation. In light of promoting education, then, if a regulation affects the academic integrity of the student-athlete, courts should give a great deal of deference to the NCAA. On the other hand, when the NCAA acts in an entrepreneurial manner, it acts much like a business entity. In this situation, courts should more strictly scrutinize the NCAA's regulations. Although some NCAA regulation is appropriate, stricter scrutiny of these types of NCAA regulations is justified because such scrutiny prevents the organization from operating as a cartel.

30. Id.
31. Id.
33. Weistart, supra note 5, at 175.
34. Id. Regulations that further the goal of preserving the academic perspective include: defining limits on financial support that can be received by amateur athletes, admission requirements and limitations on the period of eligibility. Id. at 175-76.
37. See Weistart, supra note 5, at 177; infra notes 121-25 and accompanying text.
38. Weistart, supra note 5, at 177. For example, the NCAA should be able to limit direct payments to its athletes. If it had no regulations governing payments to athletes, college athletics would become in essence a professional sport.
39. A "cartel" is an organization of firms that makes agreements concerning such matters as prices, outputs, market areas, the use and construction of productive capacity and advertis-
The NCAA is structured as a single organization attempting to further both academic integrity and economic interests—two goals that are very difficult to reconcile. The problem arises when the NCAA, in an attempt to further its economic interests, asserts a regulatory power appropriate only to further its goals of academic integrity. When the NCAA does this, it is asserting too much power, and may be violating antitrust laws.

The problem faced by those who challenge the NCAA's regulations as antitrust violations has been one of separating the NCAA's two goals and showing that the NCAA has been pursuing commercial gains instead of educational gains. This problem is compounded by the fact that, in an amateur sports context, the true motives of a particular regulation can be masked with relative ease.

The NCAA obscures its cartel-like activities by acting as a purported self-regulatory organization with noncommercial goals. Courts have traditionally given more leeway to self-regulatory organizations than ordinary businesses under antitrust laws because self-regulatory or-

---

Weistart, supra note 5, at 177. But see id. at 176-77 (listing advantages of having single entity undertaking both endeavors).

41. Id.; see, e.g., NCAA v. Board of Regents, 468 U.S. 85, 119 (1984) ("[T]he NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are . . . within the NCAA's power to do so.").

42. See infra notes 121-25 and accompanying text.

43. When a plaintiff bringing suit against the NCAA shows that the NCAA is pursuing purely commercial gains, courts have held that the NCAA violated antitrust law. See infra notes 121-25 and accompanying text.

44. Weistart, supra note 5, at 177. By claiming that a regulation is furthering academic interests, the NCAA has been able to regulate activities that would normally be per se violations of the Sherman Act. See infra notes 92-95 and accompanying text.

45. A self-regulatory organization is a private organization that makes rules and sets standards regulating the conduct of its members' activities. Note, supra note 16, at 655. The term "self-regulatory" means that there are no external checks on the organization's rules. The reason that a self-regulatory organization is not subject to external checks is that a self-regulatory organization traditionally exercises its regulatory power for the benefit of a class broader than its own membership. Id. at 665-66. Some examples of self-regulatory organizations are bar associations, medical associations and school-accrediting agencies. Id. at 655 n.1.
ganizations traditionally pursued noncommercial goals. Thus, in addition to its role as a protector of "amateurism," the NCAA in past years has hidden behind its label as a self-regulatory organization and has further concealed its abuses of power. With such a potential for abuse, self-regulation is no longer adequate, and external judicial control becomes both necessary and proper.

III. THE NCAA AND ANTITRUST LAWS

A. Antitrust Laws Generally

Federal antitrust laws were enacted to prevent restraints on free competition in business and commercial transactions. Because every contract in a sense restraints trade, however, the Sherman Act prohibits only unreasonable restraints of trade. Section 1 of the Sherman Act forbids "[e]very contract, combination . . . or conspiracy, in restraint of trade." Section 2 addresses the unlawful exercise of monopoly power, stating that any "person who shall monopolize, or attempt to monopolize, or combine to conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony."

1. Section 1 of the Sherman Act

Courts employ two basic approaches in applying section 1 of the Sherman Act. A court can apply a per se rule, in which it labels certain restraints of trade as illegal, regardless of the reasons for the restraints

---

46. Id. at 663-64. This leniency was based on the theory that antitrust laws were not designed to apply to these organizations' activities, which were classified as "traditionally non-commercial." Id. at 664. This became the "traditionally noncommercial" doctrine, which originated in Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schs., Inc., 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

47. For example, the goal of academic integrity can be achieved without a football broadcast policy, or an NCAA-controlled basketball tournament, or an elaborate media orientation program. Weistart, supra note 5, at 176. Nevertheless, the NCAA regulates these activities. Because these practices relate solely to the commercial activities of the NCAA, the NCAA abuses its power as an educational protector in order to make commercial gains.

48. Again, because a self-regulatory organization's goals are traditionally noncommercial, there is generally no need for external regulation. Note, supra note 16, at 665. However, when commercial goals begin to dominate, and the organization begins to interfere with the economic autonomy of its members, self-regulation is no longer sufficient as a protection because the organization begins to act like a cartel. Weistart, supra note 5, at 175.

49. Weistart, supra note 5, at 177.
53. Id. § 2.
and without any extended inquiry.\textsuperscript{54} For example, both price fixing and group boycotts are per se violations of the Sherman Act.\textsuperscript{55} These violations are termed "naked restraints," because they are often imposed solely to inhibit competition.\textsuperscript{56} Thus, when activities are strictly anticompetitive, courts will apply the per se rule and will not inquire into the nature of the activity.\textsuperscript{57}

When conduct cannot be easily identified as anticompetitive, the courts apply a "rule-of-reason" analysis, conducting a broad inquiry into the nature, purpose and effect of the challenged arrangement before making a decision about its legality.\textsuperscript{58} Under this analysis, a court focuses on the "market impact" of a challenged restraint.\textsuperscript{59} This involves a two-fold inquiry.\textsuperscript{60} First, the court must identify the restraint's effect in a relevant market.\textsuperscript{61} Second, the court must analyze the procompetitive justifications for the challenged practice.\textsuperscript{62} In determining effects on competition, the court examines both the economic and noneconomic values associated with the activities.\textsuperscript{63} An apparently anticompetitive restraint


\textsuperscript{55} See, e.g., Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (holding that group boycott does not warrant rule-of-reason analysis because boycott clearly conflicts with principles of Sherman and Clayton Acts); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding that any form of price fixing is per se illegal under Sherman Act). Many argue that the NCAA engages in both of these practices. See, e.g., James V. Koch, A Troubled Cartel: The NCAA, 38 LAW & CONTEMP. PROBS. 135, 138 (1973); Note, supra note 16, at 659-60. In terms of the market for student-athletes, one example of price fixing is the limit the NCAA places on scholarships and other financial benefits that colleges may offer to student-athletes. Koch, supra, at 138. This "capping" fixes the price of each athlete's collegiate career, and in turn eliminates the student-athlete's ability to offer his or her services to the highest bidder. Bhirdo et al., supra note 25, at 464. A group boycott in an NCAA context would occur when the NCAA imposes sanctions against a member school prohibiting it from participating in competition. See McCormack v. NCAA, 845 F.2d 1338, 1342 (5th Cir. 1988).

\textsuperscript{56} Bhirdo et al., supra note 25, at 465.

\textsuperscript{57} SULLIVAN, supra note 54, § 67, at 182-83.

\textsuperscript{58} Bhirdo et al., supra note 25, at 465 (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).


\textsuperscript{61} Goldman, supra note 11, at 225. In addition to the identification of a relevant market, the party accused of the antitrust violation must have power within this market—it must have "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Without market power, the parties' agreement has no anticompetitive effect, and faces the discipline of the marketplace. Goldman, supra note 11, at 226.

\textsuperscript{62} Goldman, supra note 11, at 226.

\textsuperscript{63} Id. Examination of noneconomic considerations may no longer be a factor under the rule of reason. See Professional Engineers, 435 U.S. at 679; see also Barry Wertheimer, Note, Rethinking the Rule of Reason: From Professional Engineers to NCAA, 1984 DUKE L.J. 1297 (1984) (discussing whether noneconomic considerations can be examined under rule-of-reason
ILLEGAL PROCEDURES

will be upheld only if it is the least restrictive alternative, is reasonably necessary or furthers a legitimate purpose. Courts traditionally have used rule-of-reason analysis when nonprofit or noncommercial institutions are involved, and they have consistently used rule-of-reason analysis in deciding cases brought against the NCAA.

2. Section 2 of the Sherman Act

Section 2 of the Sherman Act makes it a crime to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" any part of interstate or foreign commerce. An organization has violated section 2 if it "deliberately follow[s] a course of market conduct through which it has obtained or maintained power to control price or exclude competition in some part of the trade or commerce covered by the act."

In determining whether a violation of section 2 has occurred, courts first attempt to define the relevant market in which to measure the alleged monopoly power. The definition of the relevant market is important. If a court broadly defines the relevant market, the likelihood that a monopoly exists decreases, because a broadly defined relevant market re-
quires a broader, more pervasive power on the part of the organization.\textsuperscript{70} Conversely, if a court narrowly defines the relevant market, it will more likely find that a monopoly exists.\textsuperscript{71}

After the relevant market has been defined, courts apply a two-prong test to determine whether an unlawful monopoly exists under section 2.\textsuperscript{72} Under this test, an unlawful monopoly exists if a court finds that both: (1) the organization has monopoly power in the relevant market; and (2) the organization has willfully acquired or maintained that power as distinguished from growing or developing as a consequence of a superior product, business acumen or historic accident.\textsuperscript{73}

**B. Litigation Involving the NCAA**

In terms of regulatory power, the NCAA is clearly the dominant organization in intercollegiate athletics.\textsuperscript{74} It is the only entity with substantial power over intercollegiate athletics in the United States.\textsuperscript{75} Because the NCAA's power is so great, a college wanting to operate a "big-time" program\textsuperscript{76} in one of the major college sports, and an athlete wanting to participate in these programs, has no choice but to conform to the NCAA's rules.\textsuperscript{77}

With such a dominant position in the world of college athletics, it is easy to characterize the NCAA as a cartel.\textsuperscript{78} Some of the NCAA's cartel-like activities include: (1) setting the maximum price that a university can pay for participants in its intercollegiate athletic programs;\textsuperscript{79} (2) regulating the quantity of athletes that a university can purchase in a given

\textsuperscript{70} See Gaines, 746 F. Supp. at 745.

\textsuperscript{71} See id.

\textsuperscript{72} SULLIVAN, supra note 54, \S\ 8, at 30.

\textsuperscript{73} Grinnell, 384 U.S. at 570-71.

\textsuperscript{74} See Koch, supra note 55, at 135.

\textsuperscript{75} See Justice v. NCAA, 577 F. Supp. 356, 361 (D. Ariz. 1983). Although there are other organizations such as the NAIA and the CFA, their powers are relatively inconsequential. Weistart, supra note 5, at 171-72.

\textsuperscript{76} "Big-time" in this context refers to highly commercialized intercollegiate athletics at the Division I level. Rodney K. Smith, Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics, 20 CAP. U. L. REV. 567, 569 (1991). The most highly commercialized sports are men's basketball and football. Examples of schools operating big-time programs are the University of Miami in football, and Duke University in basketball. SPERBER, supra note 22, at 39, 42-43.

\textsuperscript{77} Weistart, supra note 5, at 172. These regulations are both broad-ranging and detailed, dealing with issues such as an athlete's initial eligibility, his or her ability to afford tuition and his or her course of study. Id. As for the university, the NCAA regulates its relationships with its athletes and coaching staffs, and the economic returns from its sports ventures. Id.

\textsuperscript{78} See supra note 39 for a definition of a cartel.

\textsuperscript{79} For example, the NCAA regulates the amount of scholarship money that a school can give its athletes. NCAA, supra note 6, at 162 (Article 15.01.7 (Operating Bylaw)).
time period;\textsuperscript{80} (3) periodically informing member universities about transactions, costs, market conditions and sales techniques;\textsuperscript{81} (4) pooling and distributing portions of the association’s profits, particularly those that result from intercollegiate football and basketball;\textsuperscript{82} and (5) policing the behavior of its members and levying sanctions against those members that violate its rules and regulations.\textsuperscript{83}

1. Section 1 antitrust litigation

Until recently, the NCAA and other self-regulatory organizations were able to evade application of antitrust laws altogether.\textsuperscript{84} Immunity was justified because antitrust laws did not apply to organizations whose activities were noncommercial.\textsuperscript{85} Under this theory, the Sherman Act simply was not intended to apply to a self-regulatory organization with noncommercial goals like the NCAA.\textsuperscript{86}

The United States Supreme Court, however, rejected this theory in \textit{Goldfarb v. Virginia State Bar}.\textsuperscript{87} The Court held that price fixing by a bar association was illegal under the Sherman Act and ruled that professional self-regulatory organizations are not immune from antitrust scrutiny.\textsuperscript{88} The Court stated that “[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.”\textsuperscript{89}

As a result of the \textit{Goldfarb} decision, the NCAA’s anticompetitive practices are susceptible to antitrust laws.\textsuperscript{90} Even when courts apply an antitrust analysis, however, they apply a relaxed antitrust standard.\textsuperscript{91} Under this standard, many of the NCAA’s regulations, which might in
other contexts be per se violations of the Sherman Act, are reviewed under the more lenient rule-of-reason analysis. The reason for this relaxed standard again lies in the view of the student-athlete as an "amateur": Courts and even Congress have accorded special consideration to the distinctive goals of educational institutions.

In applying the rule-of-reason analysis to cases involving the NCAA, courts have recognized that the NCAA acts in two relevant markets with two purposes: the purely commercial, profit-driven market in an effort to maximize revenues and the noncommercial, educational market in order to preserve amateurism. When the NCAA regulates in a purely commercial market, its activities are purely commercial, and courts have held that it is subject to high antitrust scrutiny. In this situation, the NCAA regulation being scrutinized is less likely to withstand the attack, because the NCAA's noncommercial goals are not being furthered and it is exceeding its regulatory power. On the other hand, when the NCAA attempts to "maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA [athletics]," it acts in order to maintain the identity of college athletics. As a result, even if the regulation has commercial effects, a

92. See Note, supra note 16, at 667 ("[W]hen faced with conduct that would be per se illegal in an ordinary commercial context, the court examines the conduct under the rule of reason . . . ").

93. Applying per se rules may not be appropriate when a self-regulatory organization is involved, because these organizations are theoretically interested in benefitting a class greater than the regulated group. Id. at 666-67. If per se rules were applied to these organizations, a great deal of legitimate and publicly desired activities might be prohibited. See id. Per se application would also be unfair because courts would be unable to hold a hearing on the justifications for the regulation's existence. See id. at 665-66. Thus, instead of simply striking down a regulation, under a rule-of-reason analysis, if a self-regulatory organization guilty of what otherwise would be a per se violation can show a reasonable noncommercial purpose, its conduct would be deemed reasonable under the Sherman Act. Id. at 669; see Hennessey, 564 F.2d at 1152.

94. Gulland et al., supra note 9, at 722-23.


96. See, e.g., NCAA v. Board of Regents, 468 U.S. 85 (1984) (holding that television restrictions on college football games are purely commercial and therefore violate Sherman Act); Gaines, 746 F. Supp. at 743 (holding that NCAA eligibility rules are noncommercial and do not violate Sherman Act).

97. When the regulation is related to a purely commercial market, the NCAA's interest in maintaining amateurism is not furthered, and therefore the regulation arguably is not procompetitive. See Board of Regents, 468 U.S. at 119 ("The television plan . . . imposes a restriction on one source of revenue that is more important to some colleges than to others. . . . [T]he NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan."); infra part IV.B.

court will probably deem the regulation reasonable, regardless of its regulatory effects.\textsuperscript{99}

Plaintiffs who bring suit against the NCAA often have problems separating the NCAA’s commercial and noncommercial activities. Traditionally, when courts have applied antitrust law to an NCAA regulation, they rarely have ruled the regulation to be related to a purely commercial market.\textsuperscript{100} As a result, once a court finds that the NCAA regulation is related to the NCAA’s noncommercial goals, it generally will uphold the regulation as being procompetitive.\textsuperscript{101}

Thus, under the rule-of-reason analysis, most NCAA regulations have withstood scrutiny. Because the NCAA can easily mask its regulations behind its stated educational objectives,\textsuperscript{102} the burden of proving that the NCAA acts in purely commercial markets has been a difficult one.\textsuperscript{103} Consequently, courts often find that the relevant market being regulated is a noncommercial one. Once the market is deemed noncom-

\textsuperscript{99} See Board of Regents, 468 U.S. at 118; see also, e.g., Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

\textsuperscript{100} See, e.g., McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (holding that NCAA eligibility rules imposing “Death Penalty” on Southern Methodist University’s football program were reasonable and therefore did not violate antitrust law); Hennessey, 546 F.2d at 1136 (upholding rules limiting number of coaching staff members under rule-of-reason analysis); Gaines, 746 F. Supp. at 738 (holding that eligibility rules relating to NFL Draft exist to protect amateurism and therefore are not unreasonably anticompetitive); Justice, 577 F. Supp. at 356 (holding that NCAA’s imposition of sanctions on University of Arizona was not manifestly anticompetitive group boycott and that per se rules did not apply); Jones, 392 F. Supp. at 295 (holding that anticompetitive effect of NCAA rules was merely incidental result of NCAA’s educational goals).

\textsuperscript{101} Courts generally have held these restrictions reasonable based on the premise that they preserve amateurism, maintain the identity of intercollegiate athletics as being distinct from professional athletics and to prevent the commercialization of intercollegiate athletics at the expense of educational values. See Goldman, supra note 11, at 232.

\textsuperscript{102} See Weistart, supra note 5, at 177. The United States Supreme Court in NCAA v. Board of Regents, 468 U.S. 85 (1984), stated that eligibility rules are assumed to be reasonable and not anticompetitive because they “enhance public interest in intercollegiate athletics.” Id. at 117.

\textsuperscript{103} An examination of antitrust litigation against the NCAA is evidence of this difficulty. See infra notes 105-19 and accompanying text.
mercial, courts take into account the NCAA's educational objectives and find the regulation to be reasonable.¹⁰⁴

Illustrative of the courts' traditional treatment of the NCAA is *Hennessey v. NCAA.*¹⁰⁵ In *Hennessey,* a college football coach challenged an NCAA rule limiting the size of school coaching staffs as a violation of antitrust laws; the court upheld the rule.¹⁰⁶ The court first acknowledged that college athletics is a commercial venture: "'[A]mateur athletics [is] a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises.'"¹⁰⁷ The NCAA was engaged in a group boycott, normally a per se violation;¹⁰⁸ however, the court refused to apply a per se approach in examining the restriction.¹⁰⁹ Instead, it held that a rule-of-reason analysis was proper, not because of the nature of the practice, but because the market involved was not purely commercial.¹¹⁰ Because the market was not purely commercial, the important, education-oriented goals of the NCAA would be overlooked under a rigid, per se analysis.¹¹¹ After balancing the commercial impact of the restriction against the objectives of "preserv[ing] and foster[ing] competition in intercollegiate athletics" and maintaining "the programs in[ ] their traditional role as amateur sports operating as part of the educational processes,"¹¹² the court held that the restriction was reasonable.¹¹³

Another representative case is *Banks v. NCAA,*¹¹⁴ in which a former college football player sought to invalidate the NCAA's no-draft and no-agent rules. In 1990, Braxston Banks hired an agent and entered the National Football League (NFL) draft, even though he had one year of college eligibility remaining. Although no professional team chose Banks in the draft and although he received no compensation from any team or agent, the NCAA declared him ineligible to play college football.¹¹⁵ Banks sued for a preliminary injunction against the NCAA and his school, the University of Notre Dame, to prevent enforcement of the no-draft and no-agent rules.

---

¹⁰⁴ See, e.g., McCormack, 845 F.2d at 1343; Justice, 577 F. Supp. at 382.
¹⁰⁵ 564 F.2d 1136 (5th Cir. 1977).
¹⁰⁶ Id. at 1154.
¹⁰⁷ Id. at 1149 n.14.
¹⁰⁸ Note, supra note 16, at 667 (citing Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977)).
¹⁰⁹ Hennessey, 564 F.2d at 1151.
¹¹⁰ Id. at 1151-53.
¹¹¹ Id. at 1152-53.
¹¹² Id. at 1153.
¹¹³ Id. at 1154.
¹¹⁴ 977 F.2d 1081 (7th Cir. 1992).
¹¹⁵ Id. at 1083-84.
Banks argued that these rules violated section 1 of the Sherman Act because they were concerted boycotts of his football skills by NCAA institutions and they restricted his mobility in the football players’ market.116 Under the rule-of-reason analysis, the court held that there was a market in which Banks could have alleged an anticompetitive impact.117 Because Banks failed to properly identify the proper market, however, the court dismissed the case.118 Even if a proper market had been identified, the court indicated that the rules satisfied the rule of reason.119

Only when an NCAA regulation is clearly and unequivocally related to a purely commercial market will the courts find a regulation anticompetitive and thus in violation of antitrust law. The landmark case of NCAA v. Board of Regents120 involved such a situation. Board of Regents was a suit by several universities against the NCAA after the NCAA had disciplined the universities for forming their own group and negotiating their own network television contract.121

The Supreme Court based its holding on the premise that college athletics is not simply a sideline to academics, but rather a commercial venture.122 The Court ruled in favor of the universities, holding that the NCAA’s practice of asserting an exclusive right and arranging the broadcasting of games on behalf of its member colleges amounted to illegal price fixing.123 Additionally, the Court held that the NCAA’s practice

116. Id. at 1084.
117. Id. at 1087 ("[W]e do not dispute that [Banks] could have alleged an anticompetitive impact.").
118. Id. at 1087-88.
119. Id. at 1089.
120. 468 U.S. 85 (1984). This case is a "landmark" one only in the sense that a court finally acknowledged that the NCAA participated in purely commercial, monopolistic behavior. Id. at 119-20; Charlotte Low, NCAA’s TV Pact on Football Held Antitrust Violation In Suit by Colleges, L.A. DAILY J., June 28, 1984, at 1.
121. Board of Regents, 468 U.S. at 94-95.
122. Id. at 120 ("[C]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.").
123. Id. ("[B]y curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.").
limited output by reducing the number of college football games available to television viewers.\textsuperscript{124}

Board of Regents does not represent the downfall of the NCAA, however. Regulation of television contracts involves a purely commercial market and is part of the NCAA's commercial goal—television contracts have nothing to do with the universities, their athletes or education.\textsuperscript{125} Because the market involved was purely commercial, the NCAA's eligibility rules were not involved. Consequently, the NCAA's procompetitive justifications for regulation were not implicated.\textsuperscript{126} On the other hand, when a university or an athlete is involved in the commercial aspect of college athletics, the line between commercial and non-commercial markets is much less clear. In this situation, the NCAA can argue that the regulation is related to its goals of preserving amateurism and promoting fair competition. As a result, courts have generally held that these regulations are procompetitive and are therefore reasonable.\textsuperscript{127}

2. Section 2 litigation

While actions brought against the NCAA under section 2 are rare, they also have been, for the most part, unsuccessful. Illustrative of the courts' treatment of actions brought under section 2 is Gaines \textit{v.} NCAA,\textsuperscript{128} a case involving a college football player and the NFL Draft.\textsuperscript{129} The plaintiff, Bradford Gaines, left school after his junior year and applied for the NFL Draft. After no team drafted him, he applied for and was denied reinstatement as an eligible athlete for intercollegiate competition.\textsuperscript{130} He brought suit against the NCAA, arguing that by preventing undrafted underclassmen from returning to college play, the NCAA engaged in the exercise of unlawful monopoly power in violation of section 2.\textsuperscript{131}

\textsuperscript{124} \textit{Id.}
\textsuperscript{125} See \textit{id.} at 119 ("[T]he NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan."), \textit{Board of Regents} held that the relevant market was the live college football television market. \textit{Id.} at 111-13.
\textsuperscript{126} \textit{Id.} at 119.
\textsuperscript{128} 746 F. Supp. 738 (M.D. Tenn. 1990).
\textsuperscript{129} The draft is the mechanism by which players entering the NFL are allocated to teams. Robert A. McCormick & Matthew C. McKinnon, \textit{Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws,} 33 EMORY L.J. 375, 387 n.60 (1984).
\textsuperscript{130} Gaines, 746 F. Supp. at 740-41.
\textsuperscript{131} \textit{Id.} at 741.
In determining the relevant market in which to examine the alleged monopoly power, the court considered two possibilities: (1) the market for major college football services, which consists of football players at Division I-A schools in the NCAA; and (2) the professional football recruitment market. The court, however, did not decide which market was the relevant market, and instead proceeded directly to the two-prong test.

The court spent relatively little time analyzing whether the NCAA had monopoly power under the first prong, primarily because Gaines' argument failed the second prong of the test. Under the second prong, the court ruled that the NCAA did not willfully acquire or maintain its monopoly power. Instead, the court determined that the NCAA had legitimate business reasons for refusing to reinstate Gaines. The court found that the preservation of college football's amateur appeal was a legitimate reason: "[T]his regulation by the NCAA in fact makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." Thus, the court ruled that, even though the NCAA had monopoly power, its legitimate business concerns in this situation justified its rules, and therefore such rules could not be "unreasonably exclusionary" or "anticompetitive" under the second element of a section 2 analysis.

Other courts also have flatly rejected arguments under the "willful acquisition" element of the second prong of the test. For example, in Jones v. NCAA, the plaintiff, who had played professional hockey

132. For a list of the requirements that must be met to qualify as a Division I-A football team, see NCAA, supra note 6, at 344-46 (Article 20.9.6 (Operating Bylaw)).
133. Gaines, 746 F. Supp. at 745. These proposed relevant markets are actually the markets that each party argued was the relevant market—Gaines argued for the former, the NCAA for the latter. Id.
134. Id. See supra notes 72-73 for a discussion of the two-prong test.
135. Gaines, 746 F. Supp. at 745. In the market for intercollegiate athletics, the NCAA clearly has monopoly power. Goldman, supra note 11, at 226-27 ("The NCAA rules college sports. NCAA regulations directly restrain price competition and result in compensations [to student-athletes] below fair market levels."). See Goldman, supra note 11, at 226-31 for a discussion of why the intercollegiate athletic market, and not a broader general entertainment market, is the relevant market regarding student-athletes.
137. Id. "The United States Supreme Court has stated that an entity with monopoly power does not violate § 2 [of the Sherman Act] by refusing to deal with a competitor if there are valid business reasons for the refusal." Id. (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597, 605 (1985)).
138. Id.
139. Id.
before attending college, sued the NCAA after being declared ineligible.\textsuperscript{141} The court held that the NCAA's eligibility rules were not made for the purpose of forming a monopoly.\textsuperscript{142} Additionally, it ruled that the NCAA's domination in the field was the result of its own "skill, foresight and industry."\textsuperscript{143} Consequently, the court held that the second prong was not satisfied, and denied the plaintiff's request for injunctive relief.\textsuperscript{144}

Thus, while the courts have applied antitrust laws to the NCAA's regulations, they have traditionally been very lenient in their scrutiny. The modern trend in antitrust litigation is that while courts recognize the NCAA's actions in commercial markets, they still defer to the stated goal of intercollegiate athletics as a part of the educational system. Consequently, under both sections 1 and 2, the NCAA has generally been able to avoid antitrust liability.

IV. A Student-Athlete's Cause of Action Against the NCAA

Although a student-athlete has never prevailed in a suit against the NCAA for antitrust violations,\textsuperscript{145} and in spite of rather substantial case law supporting the NCAA's positions, the obstacles blocking success are not as insurmountable as they seem. The NCAA is less protected than it appears to be because the judicial system consistently has relied on the NCAA's stated academic goals in striking down antitrust challenges.\textsuperscript{146} In both section 1 and section 2 cases, the predominant factor upon which courts have relied to strike down challenges has been the goal being pursued by the NCAA's regulations of the student-athlete.\textsuperscript{147} Under this

\begin{itemize}
\item \textsuperscript{141} Id. at 297-98.
\item \textsuperscript{142} Id. at 304.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{146} See, e.g., McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that NCAA eligibility rules imposing "Death Penalty" on Southern Methodist University's men's football program were reasonable and therefore did not violate antitrust law); Gaines, 746 F. Supp. at 746 (holding that eligibility rules relating to NFL Draft exist to protect amateurism and therefore are not unreasonably anticompetitive); Justice, 577 F. Supp. at 356 (holding that NCAA's imposition of sanctions on University of Arizona was reasonably related to NCAA's legitimate goals of preserving amateurism and promoting fair competition); Jones, 392 F. Supp. at 304 (holding that anticompetitive effect of NCAA rules was merely incidental result of NCAA's educational goals).
\item \textsuperscript{147} Recall that under § 1, what might otherwise be per se violations are normally examined under a rule-of-reason analysis in order to give the NCAA a chance to reconcile its regulations with its academic objectives. See supra notes 91-100 and accompanying text.
\end{itemize}
view, courts have viewed the market for college athletes as a noncommercial one, related to the furtherance of academic goals.\textsuperscript{148} Because regulations relating to these markets exist for the benefit of amateur sports, they are viewed as procompetitive.\textsuperscript{149}

These stated academic goals, while admirable, are in fact illusory—the NCAA runs intercollegiate athletics as a purely commercial venture.\textsuperscript{150} In attacking an NCAA regulation, the best strategy for the student-athlete is to attack the NCAA’s stated fundamental purpose of pursuing academic goals. If a student-athlete can successfully show that the NCAA’s true motives are purely commercial, courts will not consider the regulations to be related to preserving amateurism. The NCAA would then be stripped of its protection as an organization with procompetitive goals, because the basis for the courts’ deference to the NCAA’s judgment would not exist. Consequently, if the NCAA were to be judged purely as a commercial entity, its rules would be more likely to be held unreasonably anticompetitive and would consequently fall to antitrust attack.\textsuperscript{151}

A suit by a student-athlete should attack an eligibility rule that specifically restricts the student,\textsuperscript{152} and the student-athlete could ask for either monetary damages or injunctive relief.\textsuperscript{153} Specific eligibility rules would be easiest to attack because the sole purpose of these rules is to restrict the student-athletes.\textsuperscript{154} Consequently, because a student-athlete

---

\textsuperscript{148} In the educational context, there arguably is no “market,” because intercollegiate athletics exist to foster educational goals, not commercial gain.

\textsuperscript{149} NCAA v. Board of Regents, 468 U.S. 85, 102 (1984).

\textsuperscript{150} See infra part IV.B. Each university is responsible for making sure that it adheres to the NCAA rules. NCAA, supra note 6, at 8 (Article 3 (Constitution)). Because this responsibility usually rests on athletic administrators whose main goal is to field winning teams and generate revenues, many administrators ignore the academic well-being of the student-athlete. Robert Sullivan, \textit{A Study in Frustration}, \textit{Sports Illustrated}, June 19, 1989, at 94.

\textsuperscript{151} For example, if the courts did not apply a relaxed antitrust standard, the NCAA regulations involving price fixing and group boycotting would be per se violations of the Sherman Act. See supra note 55.

\textsuperscript{152} For example, a student could attack eligibility rules that directly limit the amount of financial aid he or she can get, NCAA, supra note 6, at 164 (Article 15.1 (Operating Bylaw)), that limit the right to transfer without losing athletic eligibility, \textit{id.} at 147-55 (Article 14.6 (Operating Bylaw)), and that limit rights concerning professional drafts, \textit{id.} at 71 (Article 12.2.5.1 (Operating Bylaw)). This Comment does not address any possible claims a university might have against regulations that directly restrict it.


\textsuperscript{154} McCormack, 845 F.2d at 1342-43; see also Goldman, supra note 11, at 210-11 (“The NCAA’s amateurism rules seek to restrain the competition among its member institutions. . . .
is restricted from selling his or her labor—his or her athletic skills—to the highest bidder, arguably the student-athlete suffers an injury to his or her "business" of playing the sport.155

A. Standing

The first issue a court addresses in an antitrust suit is whether the plaintiff has standing.156 To establish standing, the plaintiff must show that the injuries suffered are of the type against which antitrust laws are meant to protect.157 The determination of standing depends on what type of damages the plaintiff is seeking. Once a plaintiff satisfies the prerequisites for relief by showing that the NCAA has violated the Sherman Act, a court will determine what type of damages should be awarded under the Clayton Act.158

1. Standing to recover monetary damages

Section 4 of the Clayton Act permits a plaintiff with standing to assert an antitrust claim to recover treble damages for violations of the Sherman Act.159 In determining whether a party is a "proper plaintiff," a court must examine: (1) whether the plaintiff's injuries or their causal link to the defendant are speculative; (2) whether other parties have been more directly harmed by the alleged violation; and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries or complex damage apportionment.160

In applying these factors to student-athletes, some courts have not used a rigid test, but instead have held that professional sports athletes have "surmounted the standing inquiry simply because their injuries have stemmed at least in part from restraints in the labor market itself."161 Similarly, the NCAA's eligibility rules are restrictions in the

155. See id. at 1342.
156. See id. at 1341; Hennessey v. NCAA, 564 F.2d 1136, 1147-48 (5th Cir. 1977); Justice, 577 F. Supp. at 375-78.
157. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 487-89 (1977) (holding that antitrust plaintiffs must prove "injury of the type that antitrust laws were intended to prevent").
labor market of intercollegiate athletics. Eligibility rules are aimed specifically at restricting the student-athlete's compensation, and are thus the direct cause of the student's injuries. Consequently, a student-athlete should have standing to sue for money damages.

2. Standing to compel injunctive relief

Section 16 of the Clayton Act permits courts to issue injunctive relief for antitrust violations. In order to obtain injunctive relief under section 16, the plaintiff must show: "(1) a threatened loss or injury cognizable in equity, (2) proximately resulting from the alleged antitrust violations."

To obtain injunctive relief, the plaintiff need not show injury to business or property as required in an action for monetary damages. Instead, courts require only a showing of a threatened injury. This threatened injury must be significant, however; speculative injuries are not sufficient to show standing. In a student-athlete's situation, the injury is real—the student-athlete is prevented from earning the highest price for his or

162. While the NCAA has consistently argued that it does not possess market power because the relevant market is the broad entertainment market, courts have generally held that it does. See NCAA v. Board of Regents, 468 U.S. 85, 111 (1984) ("[I]t is evident that [the NCAA] does possess market power. . . . [I]ntercollegiate football telecasts generate an audience uniquely attractive to advertisers and . . . competitors are unable to offer programming that can attract a similar audience."). In terms of the eligibility rules of the student-athlete, the NCAA possesses market power because student-athletes have no alternatives to intercollegiate athletics. Goldman, supra note 11, at 227-28.

163. McCormack, 845 F.2d at 1342. Note that in McCormack, the court stated that the student-athlete was not the party most directly injured. Instead, it held that the institution, Southern Methodist University, was the party most directly harmed. Id. The McCormack case is distinguishable because it involved the suspension of the school's football program, id. at 1340; it did not involve eligibility rules governing student-athletes.

164. See id.


166. City of Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980). Courts sitting in equity will also consider whether a plaintiff has an alternative remedy at law. Board of Regents v. NCAA, 546 F. Supp. 1276, 1325 (W.D. Okla. 1982), aff'd, 468 U.S. 85 (1984). Because the NCAA completely controls the market for student-athletes, damages to the student-athlete, while available, would be difficult to calculate. See id. Moreover, the student-athlete would have to file a lawsuit every year to recover money damages caused by the NCAA. Id.


her labor. Consequently, the plaintiff has a good argument that a threat of injury exists.

A plaintiff must also show that the significant threat of injury proximately results from a violation of antitrust laws, and must also show that the threat of injury is likely to continue or recur. Again, a student-athlete should be able to show that injury is proximately caused by the NCAA's regulation. By capping the amount of money that a student-athlete can receive, the NCAA engages in price fixing. This price fixing not only causes the student-athlete's injury, but is also a per se violation of antitrust laws. Consequently, a student-athlete also should have standing to request injunctive relief against the NCAA.

B. The Fallacy of the NCAA's Academic Goals

In the big-time market of intercollegiate athletics, the NCAA's academic goals are fallacious because neither the NCAA nor the student-athlete pursues them. The NCAA—with consent from a school's athletic department—regulates intercollegiate athletics with a single goal: to make money. In addition, many student-athletes participate in intercollegiate athletics as a stepping stone to professional sports.

In a suit against the NCAA, the student-athlete's main priority would be to show that the NCAA in fact regulates college athletics solely to make money. There are four arguments an athlete might employ.

169. See McCormack v. NCAA, 845 F.2d 1338, 1342 (5th Cir. 1988) (explaining that football players "in effect sell their labor" to university); cf. Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176 (5th Cir. 1976) (holding that selling of labor is commercial interest).

170. Of course, if an injury actually exists, the requirement of a threat of an injury is satisfied. Compare a student-athlete's injury with the injury alleged in Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983), in which the court held that the threatened injury of a loss of a potential professional contract after the NCAA had imposed sanctions on the university's football team was too speculative to give the plaintiffs standing. Justice, 577 F. Supp. at 376. A similar situation involving the student-athlete in the intercollegiate athletic market is distinguishable, because eligibility rules directly prevent the student-athlete from getting the highest price for his or her labor.

171. Id. at 376 (citing Zenith Radio v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969)).

172. See supra note 55.

173. See supra note 55.

174. Asking for injunctive relief may be a better strategy than seeking damages. If a court grants the injunction, the regulation would be declared invalid, and the student-athlete might be free to sell his or her services to the highest bidder. Cf. Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974) (holding that NFL enforcement of certain league rules, including standard player contract, was patently unreasonable and invalid under antitrust laws), cert. denied, 441 U.S. 967 (1979).


176. TELANDER, supra note 82, at 29.
These arguments concern: (1) the definition of "amateurism"; 177 (2) how a typical college athletic program is run; 178 (3) the academic requirements for student-athletes; 179 and (4) the NCAA enforcement process. 180

1. Amateurism

"An amateur student-athlete is 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." 181

While the concept of amateurism seems noble, it is in fact a myth. 182 The paradigm of an amateur athlete has traditionally been linked to the Olympic ideal, which mandates that amateur athletes participate in sports for the sheer love of the game. 183 However, even the tradition of this ideal is incorrect: The ancient Olympics had nothing to do with amateurism. 184 In fact, in ancient Greece, an athlete was required to be a professional to compete in the Olympics. 185 Thus, the NCAA's adherence to this traditional notion of amateurism is unreasonable.

Furthermore, financial incentives for participation have existed in intercollegiate athletics since the mid-1800s. 186 For example, the first intercollegiate competition in the United States, a crew race between Yale and Harvard universities in 1852, was funded by the Boston, Concord and Montreal Railroad Company. 187 The railroad paid both teams' expenses, and the winner of the race, Harvard, received an expensive set of matched black walnut oars. 188 Other examples included routine cash prizes for college track athletes, and cash prizes and silver goblets—which were supposedly worth twice what an average laborer might earn in a year—for winners of college rowing competitions. 189 Professionalism was also prevalent in the 1800s. The very first intercollegiate football game, between Rutgers and Princeton universities in 1869, featured four

177. See infra part IV.B.1.
178. See infra part IV.B.2.
179. See infra part IV.B.3.
180. See infra part IV.B.4.
181. NCAA, supra note 6, at 67 (Article 12.02.1 (Operating Bylaw)).
182. TELANDER, supra note 82, at 49.
183. Id. Note that even the International Olympic Committee has discarded its own ideal, as evidenced by the participation of professional basketball and tennis players in the 1992 Summer Olympics in Barcelona, Spain.
184. Id.
185. Id. To compete in the Olympics, an athlete had to prove that he was a full-time athlete, which meant that he had done nothing but train for three months prior to the games. Id.
186. Id. at 52.
187. Id.
188. Id.
189. Id.
athletes "who could have been ruled academically ineligible." Additionally, the University of Michigan football team of the 1890s had seven players with absolutely no connection with the university.

The question that naturally arises is: How did amateurism come to dominate college athletics? The adoption of this ideal can be directly attributed to the desire of athletic departments to make money. In the early 1900s, when university officials took control of college athletics, they realized how much money could be made. They also realized that revenue-producing sports had no place in the collegiate world, and, hence, heavily promoted the Olympic ideal to justify these sports' existence.

These same commercial motivations exist today, albeit in different forms. For example, under current tax laws, student-athletes are in fact contractual employees of the university. If an athletic scholarship was considered pay, the NCAA would lose its tax-exempt status. Thus, by maintaining the illusion that an athlete is not a paid employee, the NCAA saves a great deal of money in taxes.

2. The administration of athletic programs

The NCAA's commercial motives are also demonstrated by the way in which most college athletic departments are run. Typically, the athletic department is a separate entity from the university. It hires its own coaches, determines its own budget and buys its own equipment. This autonomy reflects the separation of the NCAA's purported interests: The universities are responsible for turning out educated, ethical,

190. Id.
191. Id.
192. Id. at 53-55.
193. Telander, supra note 7, at 96.
194. See id. The amateur label performs a number of important functions for the universities: "It allows the college sports industry to avoid the labor costs of open professionalism," and "it confers a 'special status' on intercollegiate athletics that makes it more compatible with the 'high culture' one associates with academic life." LAPCHICK & SLAUGHTER, supra note 25, at 79.
195. Sperber, supra note 22, at 205-06. The athletes' "pay" includes free tuition and fees, course textbooks, and room and board. Id. The Internal Revenue Service rule on barter and noncash payments is: "[I]f services are paid for in property [or] in exchange for other services, the fair market value of such other services taken in payment must be included in income." Treas. Reg. § 1.61-2(c) (1969). The IRS rule on educational assistance also seems to apply: "The exclusion from gross income for qualified scholarships is not available for that portion of any amount received which represents payment for . . . services by the student which are required as a condition for receiving the qualified scholarship." I.R.C. § 117(c) (1988).
196. Sperber, supra note 22, at 205.
197. Lapchick & Slaughter, supra note 25, at 114; Telander, supra note 82, at 642.
198. Telander, supra note 82, at 60.
well-rounded adults, while the athletics departments are responsible for generating revenues.\textsuperscript{199} This separation is further evinced by the fact that revenues generated by college athletics bypass the university and go straight into the coffers of the athletic department.\textsuperscript{200} The athletic department then uses the revenue to support only itself, by increasing its staff or building more athletic facilities.\textsuperscript{201}

Further evidence of the commercial nature of college athletics is the athletic scholarship. In response to the athletic departments' complaints over unproductive players on scholarship, the NCAA allowed universities to switch from the four-year guaranteed scholarship to the one-year renewable scholarship in 1972.\textsuperscript{202} As a result, the university can revoke the scholarship of an unproductive athlete after one year, making a scholarship available for a new recruit who has greater potential for success. This switch evinces the true commercial motives behind college athletics programs. If a university was actually concerned about the education of an athlete, it would guarantee the student-athletes' scholarships for four years. This would give the athlete a chance to obtain his or her degree regardless of his or her performance in athletics. By making scholarships revocable after one year, the university increases its chances for fielding a superior sports team, which invariably leads to increased revenue.\textsuperscript{203}

Once an athlete accepts a scholarship, the athletic department's goal is to maximize the athlete's production.\textsuperscript{204} The athletic department accomplishes this by severely limiting the athlete's right to "move freely."\textsuperscript{205} From the day a high school athlete signs a letter of intent with a university, that athlete must stay and work with that university's

\begin{itemize}
\item \textsuperscript{199} Id.
\item \textsuperscript{200} Telander, supra note 7, at 102-03.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Sperber, supra note 22, at 206-07; Harry M. Cross, The College Athlete and the Institution, 38 Law & Contemp. Probs. 151, 156 n.45 (1973). For the present rule on the renewal of athletic scholarships, see NCAA, supra note 6, at 172 (Article 15.3.5 (Operating Bylaw)).
\item \textsuperscript{203} By having a superior team, attendance at sporting events, television exposure and marketability increase. Deborah A. Katz, What Are the "Bases" in University Athletics? Comment on "Athletic Reform: Missing the Bases in University Athletics", 20 Cap. U. L. Rev. 611, 614 (1991). This in turn leads to increased revenue for the athletic department. Id.; Telander, supra note 7, at 102.
\item \textsuperscript{204} Sperber, supra note 22, at 210.
\item \textsuperscript{205} "Move freely" means either leaving for professional sports or transferring to a different school. Id. "Star" players would be most likely to move freely. Id. at 211.
\end{itemize}
program or face severe penalties.\textsuperscript{206} For example, an athlete who signs with a university but decides to attend another university without obtaining the first school's permission is penalized by being barred from intercollegiate sports for two years.\textsuperscript{207} This cancels two years—or fifty percent—of the athlete's eligibility to compete in intercollegiate athletics.\textsuperscript{208} Even if the university releases the athlete, NCAA rules still require the athlete to wait a year and forfeit one year of eligibility.\textsuperscript{209} Such strict rules are not intended to help an athlete get an education—most athletes can get an excellent education at one of several different universities.\textsuperscript{210} By severely restricting the athlete's movement, the university can immediately begin to reap the benefits of the athlete and be assured of his or her production for the next four years.

Another restriction designed to maximize the athlete's production is found in the agreements between the NCAA and both the National Basketball Association (NBA) and the NFL.\textsuperscript{211} These agreements required an athlete to complete all four years of eligibility before becoming eligible for the professional draft. Although these rules have been relaxed in recent years, and even though they probably violate antitrust laws,\textsuperscript{212} the NCAA still restricts movement by imposing harsh penalties for early movement to a professional sports league. These penalties include loss of any remaining intercollegiate eligibility for declaring for the draft, even if the athlete is not drafted,\textsuperscript{213} and levying fines against professional teams for approaching undergraduates prior to the draft.\textsuperscript{214}

The motivation for these rules is clear: money. For example, if a would-be Heisman Trophy\textsuperscript{215} candidate leaves school early, the school

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} at 210. The NCAA provides an extensive schedule of when in the high school athlete's senior year a student-athlete may sign. See NCAA, \textit{supra} note 6, at 81-118 (Article 13 (Operating Bylaw)).
\item \textsuperscript{207} NCAA, \textit{supra} note 6, at 147-55 (Article 14.6.1-.6 (Operating Bylaw)).
\item \textsuperscript{208} SPERBER, \textit{supra} note 22, at 210-11.
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} These rules exist for the benefit of athletic directors and coaches, who have invested their time recruiting the athletes, and who want to maximize the profit from their "investment" by having the athlete stay through all four years of his or her eligibility. \textit{Id.} at 210.
\item \textsuperscript{211} \textit{Id.} at 211-12.
\item \textsuperscript{212} \textit{Id.} at 212; \textit{see also} Boris v. United States Football League, No. 83-4980, 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984) (holding that eligibility rule requiring players to exhaust college football eligibility before becoming eligible for USFL violated Sherman Act).
\item \textsuperscript{213} \textit{See} Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990).
\item \textsuperscript{214} As part of the agreements between the professional leagues and the NCAA, the professional sports leagues impose these fines if a team approaches an undergraduate prior to the draft. \textit{See} SPERBER, \textit{supra} note 22, at 212.
\item \textsuperscript{215} The Heisman Trophy is awarded to the nation's top college football player by the New York Downtown Athletic Club. TELANDER, \textit{supra} note 82, at 27. Naturally, a team with a
might suffer lower attendance at its sporting events and canceled television appearances.\footnote{216} If large numbers of college athletes were to play for only two or three years, athletic programs would be financially burdened.\footnote{217} The revenue generated by the programs would decrease, and the athletic department would have trouble supporting itself. Money thus motivates the NCAA’s desire to maintain its draft restrictions with professional basketball and football.\footnote{218}

These factors highlight the athletic department’s desire to maximize the athletes’ production, and the NCAA’s role in promoting this goal. By restricting the movement of athletes and maximizing the athletes’ productivity, the NCAA has made its commercial motives its top priority.

3. Curricular requirements of student-athletes

Another factor that reflects the NCAA’s commercial motives is the preferential treatment that universities give to student-athletes. The universities’ preferential treatment begins before an athlete’s acceptance into the school\footnote{219} and lasts throughout his or her stay at the university.\footnote{220} This preferential treatment is reflected in the student-athletes’ lowered curricular requirements.

University acceptance rates for athletes indicate greater concern for successful athletic programs than educational growth.\footnote{221} This point is underscored by statistics involving special admissions.\footnote{222} Most universities reserve a portion of an entering class for “special admissions.” Generally, students who are accepted for special admission do not meet normal entrance requirements, but have faced disadvantaged back-

---

\footnote{216} Sperber, supra note 22, at 213.

\footnote{217} Id. A university would not have to lose large numbers of athletes to suffer a severe burden. If a school consistently lost its top three or four athletes after only two or three years of “production,” the performance of its teams would drop, and its financial pressures would increase.

\footnote{218} Coaches and athletic directors try to justify this restriction by arguing that undergraduates are not physically or mentally ready for the professional ranks. Id. at 212. However, many of the best professional players, such as the NBA’s Michael Jordan and Magic Johnson, left school early. Id.

\footnote{219} See generally Lapchick & Slaughter, supra note 25, at 17-20 (describing problems inherent in high school and college athletics).

\footnote{220} See Sperber, supra note 22, at 286-96.

\footnote{221} See Sullivan, supra note 150, at 94; A Plan for Cleaning Up College Sports, Sports Illustrated, Sept. 30, 1985, at 36.

\footnote{222} See A Plan for Cleaning Up College Sports, supra note 221, at 36.
grounds or have latent academic promise. At some schools, sixty percent of special admissions are athletes.

This skewed percentage of specially admitted athletes cannot be reconciled with latent academic promise. In fact, once in college, student-athletes' grade-point averages tend to be lower than those of other students. The university's motivation for allowing such a disparate number of student-athletes in through special admissions is consistent with its economic goals: Many of the best high school athletes do not meet the minimum entrance requirements to many universities. As a result, if a school wants to field a top-notch team, it needs these athletes, and the special admissions program is the only way to get them.

A student-athlete's special treatment often continues throughout his or her college career. Although athletes are required to meet minimum unit requirements, there often are no requirements as to what specific classes they must take. While these "hide-away curricula" keep the athletes eligible, they do not ensure the student's progression towards a degree. As a result, a great many student-athletes, many of whom can

223. Id. at 35.
224. Id. Another indicator of this problem is the percentage of special admissions that comprise a particular athletic team. For example, in 1989 over 85% of the University of Washington's football and men's basketball recruits were special admits. Craig Smith, UW Tops in "Special Admits"—85 Percent of Athletes Enter with Low Standards, SEATTLE TIMES, May 20, 1991, at B1.
225. A Plan for Cleaning Up College Sports, supra note 221, at 35. A study by the Center for the Study of Athletics at the American Institutes for Research revealed that the grade point averages (GPA) of football and men's basketball players and other student-athletes tended to be a half-grade lower than students involved in nonathletic extracurricular activities. Id. Student-athletes in sports other than football and basketball tended to have a GPA a quarter-grade lower than students in nonathletic extracurricular activities. Id. Not coincidentally, football and men's basketball are the main revenue generators in an athletic program. See SPERBER, supra note 22, at 279-80.
226. Again, many top high school athletes do not satisfy minimum entrance requirements because they receive preferential treatment as early as junior high school. Admiring teachers and principals often "help" star high school athletes by lowering their grading standards for those individuals. Ivey, supra note 8, at 138.
227. For example, at Ohio University, students on the basketball team had International Studies 369B, a four-credit course tied to the team's 14-day trip to Europe during the summer of 1986. Ted Gup, Foull, TIME, Apr. 3, 1989, at 54.
228. See SPERBER, supra note 22, at 279-80. At the 1991 NCAA Convention, delegates passed Proposal No. 81, which requires Division I institutions to define their own satisfactory progress rules. Davis, supra note 8, at 600. However, Proposal No. 81 only requires satisfactory progress to include successful completion of 50% of course requirements by student-athletes in their respective majors before the beginning of their fourth year. Id. Thus, while the proposal requires moderate progression towards a degree, an athlete can complete his athletic eligibility and still may require another year or more of school to graduate. See SPERBER, supra note 22, at 281. Additionally, many schools simply adjusted their academic curricula to create majors with easy requirements. Id. at 283-84.
barely read when entering college, never graduate. Even athletes who are good students have trouble keeping up in school, given the demands of unrealistic schedules imposed on student-athletes. Further, many universities with apparent high graduation rates among student-athletes inflate their statistics. To create the illusion that student-athletes are doing well academically, the NCAA excludes statistics of athletes who dropped out or transferred in "good standing." Because "bad academic standing" requires a grade-point average below D, many athletes who dropped out with grade-point averages above a D-average after using up their four years of eligibility are not included. Other schools base their statistics regarding the graduation rates of student-athletes on only those athletes who have made it to their senior year. Finally, while overall graduation rates for student-athletes have increased, graduation rates for football and men's basketball have in fact decreased. These manipulations mean that NCAA statistics do not accurately reflect actual academic progress and misrepresent the NCAA's success at fulfilling its stated educational goals.

This evidence supports the contention that the NCAA's goals are commercial. If academic concerns were foremost to the NCAA, curricular requirements would be stricter and would ensure a constant progression towards a degree, instead of merely keeping an athlete eligible. Furthermore, if the NCAA were concerned with promoting education, it

229. For example, Memphis State University's men's basketball team graduated only four players over a period of 10 years. Ivey, supra note 8, at 138. The NCAA annually publishes a compilation of athletes' graduation rates, but withholds the names of individual institutions. Gup, supra note 227, at 59. By publishing graduation rates in this manner, the NCAA can hide schools such as Memphis State. See Ivey, supra note 8, at 138.

230. Athletes in major sports practice up to 30 hours a week. Gup, supra note 227, at 54. Further, the student-athlete's total time commitment may be close to 80 hours per week during the playing season. LAPCHICK & SLAUGHTER, supra note 25, at 116.

231. SPERBER, supra note 22, at 298.

232. Id. at 9.

233. A "D" average translates into a 1.00 grade point average on a 4.00 scale. See id.

234. Id. at 298.

235. Id. at 9.

236. Sports Notebook, HOUSTON CHRON., Oct. 27, 1992, at 8 ("[G]raduation rates for student-athletes in the two major revenue sports—football and men's basketball—were lower in 1986 than in either of the preceding two years."); Grading Graduates, USA TODAY, Aug. 13, 1992, at 8A ("Overall, the NCAA found, athletes in all college sports do almost as well graduating as non-athletes. But the devil is in the details. Among the top 25 schools in football in 1987, 22 had players who graduated at a rate below that of the student body.").

237. Id. at 297-301.

238. By requiring progression towards a degree, by the time an athlete is a senior in college, he or she should be close to graduating. The NCAA could also impose a minimum graduation percentage for athletic teams, barring the team from post season tournaments or bowl games if it failed to meet the percentage. Again, the sports with the lowest graduation rates are the
would limit the number of student-athletes specially admitted, because their performance in school has been below average. Limiting the number of special admissions would also stimulate learning at the high school level, because prospective college athletes would know that they would not be specially admitted, and would have to meet the minimum academic requirements of the university. As the NCAA’s regulations now stand, they are designed to keep athletes eligible, with a minimum amount of time devoted to studies. With light academic schedules, athletes can more fully devote their time to their sport.

4. The NCAA’s enforcement process

Another practice that demonstrates the NCAA’s commercial goals is its efforts in enforcing its regulations. The problems with the NCAA’s enforcement procedures begin with the NCAA enforcement staff. The enforcement staff itself is small—thirteen enforcement representatives are responsible for policing hundreds of universities in the NCAA. Not surprisingly, with such a small staff, the investigative process can be haphazard. For example, roughly half of the cited NCAA rule violations in any given year are reported by the schools themselves. Additionally, the NCAA does not want “aggressive, law-enforcement-type” officers on its enforcement staff.

The NCAA’s priorities do not include vigorous enforcement of its regulations. If it were concerned about the corrupting influence of professionalism in college athletics, it would be more vigilant in disciplining schools that violate its rules. By becoming more vigilant, the NCAA could ensure that economic influences would not dominate intercollegiate athletics, and could better maintain the line between amateur and professional athletics. As the situation currently stands, however, by not heavily regulating the universities, the NCAA is, in effect, inviting schools to violate its rules.

A comparison of the NCAA’s enforcement budget and its public relations budget further reflects the NCAA’s ambivalence. In 1990-1991, sports that generate the most revenue—football and men’s basketball. Sports Notebook, supra note 236, at 8.

239. See supra note 236 and accompanying text.
240. See Sperber, supra note 22, at 302-06.
241. Johnson, supra note 32, at 60.
242. See id. at 60-62.
243. Id. at 62.
244. Id. at 61. The NCAA hired several former FBI agents in the mid-1980s, but they were dismissed soon thereafter, because “they created more problems than they solved.” Id.
245. See A Plan for Cleaning Up College Sports, supra note 221, at 36.
the NCAA spent $3.4 million on public relations and only $2.2 million on enforcement.\textsuperscript{246} In 1991-1992, $2.5 million was allotted for promotion and $2.3 million for enforcement.\textsuperscript{247} While the gap between the two has narrowed, public relations still takes priority over enforcement. Again, this can be tied to the NCAA’s commercial motive. By spending more money on public relations than on its undersized enforcement staff, the NCAA appears to be more concerned with increasing revenues than with promoting education.\textsuperscript{248}

Even when the NCAA enforces its regulations, its commercial motives are clear. For example, regulations governing similar activities in different sports vary depending on which sport is involved. Baseball, a non-revenue-producing college sport, has no restrictions on its professional draft.\textsuperscript{249} High school baseball stars can use agents and enter the professional draft without losing their college eligibility.\textsuperscript{250} On the other hand, because football and basketball are both revenue-producing college sports, the NCAA has severe restrictions regarding application for these drafts.\textsuperscript{251}

This disparity in treatment also occurs within a particular sport. For example, in 1990-1991, Robert Morris College was cited for making illegal cash payments to a player. As a result, the NCAA banned Robert Morris from participating in the NCAA Basketball Tournament and ordered the repayment of $88,145 it received from its 1989 tournament appearance.\textsuperscript{252} Because Robert Morris is not a big-time college basketball name, its punishment was quick and final.\textsuperscript{253} Conversely, when the University of Nevada, Las Vegas (UNLV) men’s basketball program was cited for thirty-eight NCAA violations—including the very same offense for which Robert Morris had been sanctioned—it was allowed to choose which year it would have to sit out the NCAA Tournament.\textsuperscript{254} Thus, UNLV—the defending national champion—was allowed to defer its punishment for a year, and was given a chance to defend its title.\textsuperscript{255} Be-

\begin{itemize}
  \item \textsuperscript{246} Johnson, supra note 32, at 61.
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} See id. at 61-62.
  \item \textsuperscript{249} Sperber, supra note 22, at 214.
  \item \textsuperscript{250} Id.
  \item \textsuperscript{251} See supra notes 211-18 and accompanying text.
  \item \textsuperscript{252} Johnson, supra note 32, at 62. It is also important to note that the enforcement staff did not discover the violation—Robert Morris reported the violation upon discovery of the infraction. Id.
  \item \textsuperscript{253} Id. at 60.
  \item \textsuperscript{254} Id. at 62.
  \item \textsuperscript{255} Ironically, UNLV lost to Duke University, Mike Penner, Duke Gets Its Revenge a Year Later, L.A. Times, Mar. 31, 1991, at Cl, whose program is often cited as one of the
\end{itemize}
cause UNLV is a big-time program and was ranked number one in Division I men's basketball, and because the NCAA Tournament conceivably would have lost revenue if UNLV were absent, the NCAA eased enforcement of its rules. Meanwhile, Robert Morris, which had honestly reported its violation, was forced to accept its punishment as it was imposed by the NCAA.257

Again, the NCAA's profit-making motives are clear. If the NCAA was truly concerned about the integrity of college athletics, it would even-handedly apply its rules. Instead, its rules are relaxed or tightened depending on the financial outcome of the decision.

C. Application of Antitrust Laws

If a student-athlete succeeded in showing that the NCAA's interests are purely commercial, many NCAA regulations governing the eligibility of the student-athlete would fail under antitrust scrutiny. In a section 1 suit, without the NCAA's educational rationale to fall back on, courts would not apply relaxed scrutiny, and would find many regulations to be per se invalid.258

Even if a court applies a rule-of-reason analysis, it would invariably rule as the Supreme Court ruled in NCAA v. Board of Regents of the University of Oklahoma.259 Under the rule-of-reason analysis, a court would find that rules restricting athletic scholarships and benefits are illegal price fixing. A court in this situation would use a rationale similar to the court in Board of Regents: The NCAA's commercial activities have a "direct and substantial anti-competitive effect on the marketplace" and therefore violate antitrust laws.260

shining examples of how college athletics should work. Mark Blaudschun, Mike Krzyzewski Has Developed Duke into the Class of College Basketball, BOSTON GLOBE, Apr. 3, 1992, at 55.

256. One of the primary reasons that the NCAA allowed UNLV to defer its punishment was that it was concerned about a potential lawsuit by UNLV contesting its punishment. NCAA Sought to Avoid Suit From UNLV, ST. PETERSBURG TIMES, Feb. 18, 1991, at 1C. Because the NCAA wanted to avoid any controversy surrounding the NCAA men's basketball tournament, which might have detrimentally affected revenues, it deferred UNLV's punishment. See id.

257. Robert Morris sued the NCAA, arguing that the NCAA's treatment of it was "arbitrary and capricious." Johnson, supra note 32, at 62. However, the school's complaint was never resolved. See id.

258. For example, regulations deemed to be price-fixing or group boycotts would be per se invalid, because the NCAA would be operating as a commercial enterprise and could no longer hide behind educational motives. See supra notes 54-55 and accompanying text.


260. See id. at 120.
In section 2 suits, plaintiffs have had difficulty with the second prong of the two-prong test. With the concept of amateurism eliminated, however, the purpose of the NCAA is clear: By imposing its regulations and restraining student-athletes, the NCAA willfully maintains its monopoly power. Therefore, whether the relevant market is the market for college athletes or the market for professional athletes, the NCAA's regulations inhibit both movement and price. Thus, in a purely commercial context, the NCAA's regulations exist solely to maintain the NCAA's monopoly, and therefore violate section 2.

If an NCAA regulation is found to be in violation of antitrust laws, the student-athlete would be able to recover either money damages, or he or she would be able to get injunctive relief. Money damages, while difficult to calculate, might be the difference between what the student-athlete receives now and what he or she would have received had there been no restrictions on them. Injunctive relief would invalidate the regulation, and would allow the student-athlete to sell his or her services to the highest bidder.

V. AVOIDING ANTITRUST VIOLATIONS

Because of the numerous problems with the present system, there has been a loud cry for reform. Some critics of the NCAA have recommended the establishment of a "minor league" for problem sports such as football. Others have encouraged legislation that would further academic goals. Practically, there are two possible plans for reform: one involving academic reform, the other involving financial reform. Although the academic plan would be more beneficial to student-athletes, in reality the financial plan is more feasible.

262. Telander, supra note 7, at 108.
263. Id. A bill, proposed by former NCAA and professional basketball player and current New Jersey Senator Bill Bradley, would have required schools to reveal the graduation rates of their athletes. H.R. 1454, 101st Cong., 1st Sess. (1989). While the NCAA voted for disclosing graduation rates at its 1990 convention, some feel that it would not have done so if the bill had not been pending in Congress. Ed Sherman, NCAA Hopes to Avoid Government "Intrusion", CHICAGO TRIB., Aug. 4, 1991, at Cl; Telander, supra note 7, at 107. The bill was subsequently enacted into law, and requires that an institution's graduation statistics be provided to prospective student-athletes prior to their signing letters of intent. 20 U.S.C. § 1092 (Supp. III 1991). For a discussion of six other bills relating to the NCAA and the student-athlete, see David Williams, II, Is the Federal Government Suiting up to Play in the Reform Game?, 20 CAP. U. L. REV. 621 (1991).
A. Academic Reform

The NCAA could avoid potential antitrust liability simply by enforcing its stated goals. If the NCAA and its members actually advocated athletics as part of the educational experience, then the NCAA would be shielded from antitrust liability, because it would act without a purely commercial motive.\textsuperscript{264}

To implement this solution, the NCAA and its members would have to emphasize the "student" in student-athlete.\textsuperscript{265} Emphasizing education would not only involve requiring class attendance and the publication of graduation rates, but would also emphasize the quality of the educational experience.\textsuperscript{266} Such a reform would allow athletes to at least partially complete a quality education, and to more fully enjoy the college experience.

1. Courses of study and academic programs

The emphasis on academics as well as athletics should begin prior to an athlete's college career. The NCAA should impose a ceiling on the percentage of special admissions given to student-athletes.\textsuperscript{267} Furthermore, all athletes should be required to attend an orientation session prior to their freshman year.\textsuperscript{268} During this orientation, their educational needs should be evaluated, and educational assistance should be either increased or decreased, depending on the need of the particular athlete. Workshops could also be presented outlining study skills, reading and writing skills, use of the library and basic computer skills.\textsuperscript{269}

Once the athlete has arrived at the campus, the school should continually make available academic support services. Academic support would include supervision by faculty advisors and tutoring by fellow students. The goal of the academic support service would be to help the student-athlete adjust to the increased study load in college. A school could also provide counseling to aid the student-athlete in balancing the demands of the academic environment with the rigors of the athletic environment.\textsuperscript{270}

\textsuperscript{264} See supra notes 33-35 and accompanying text.
\textsuperscript{265} LAPCHICK & SLAUGHTER, supra note 25, at 204. While the NCAA has passed some educational reforms, the student-athletes' educational interests are still inadequately protected. Davis, supra note 8, at 599.
\textsuperscript{266} LAPCHICK & SLAUGHTER, supra note 25, at 204.
\textsuperscript{267} By imposing such a ceiling, a high school athlete could not "slide by." A ceiling would also ensure that a majority of entering student-athletes had the ability to succeed in college.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Id.
In terms of the athlete's course of study, the school should closely monitor the athlete's progress in order to ensure that the athlete is in fact receiving a well-rounded education. Class attendance, as well as academic progress, should also be closely monitored by the school's academic advisors. If a particular student-athlete falls behind, additional tutoring should be required. Course credits should be evaluated regularly, and athletes should not be allowed to take classes solely for the purpose of maintaining eligibility. Instead, the evaluations should be made in terms of the athlete's interests and in terms of reasonable progress towards a degree.

Scholarship athletes should also be allowed to retain scholarships for a period of time after their eligibility expires. This gives the student-athlete an opportunity to complete his or her education and earn a degree, even if the athlete's eligibility has expired. Even former scholarship athletes should be given some benefits if they choose to return to school to complete their education. By guaranteeing athletes the opportunity to finish their educations, the NCAA would send a clear signal to athletes that education is in fact its primary goal.

The NCAA should also impose graduation requirements on universities based on the number of entering freshman student-athletes. By using these statistics, the NCAA could accurately gauge the percentage of graduating athletes. If a school fails to meet the requirements, it could be suspended from post-season play. By raising its academic standards, the NCAA would encourage the student-athlete to take academics seriously.

2. Athletic scheduling policies

Of course, with greater emphasis on education, there must be less of an emphasis on athletics. Changes in athletic policies should be designed to deemphasize athletics and reemphasize academic achievement. For example, freshman athletes should either be ineligible for competition or have their playing time limited. Such a restriction would alleviate the pressure on a freshman athlete, and allow the athlete to adjust to college academic and social life.

The NCAA would also have to take steps to balance the time spent on athletics and the time spent on education. The first step toward

271. Id.
272. Id. at 205.
273. Id.
274. For example, Professor Harry Edwards, a noted sociologist at the University of California, Berkeley, evaluated Pac-10 athletic programs and estimated that scholarship football
achieving this goal would be to restrict the number of games in a season. For example, the NCAA could limit a season to ten games in football and twenty-five in basketball, excluding tournament or bowl games.\textsuperscript{275} The NCAA could also restrict the number of hours an athlete could practice. Further, it could limit the amount of travel required of the athlete, for example setting a maximum number of class days an athlete could miss due to travel. Finally, athletes should not be expected to skip academic activities in order to participate in athletic activities. Instead, the student should be able to participate in both equally.

Another step toward encouraging education would be to reduce the effect of the “athletic subculture.”\textsuperscript{276} Eliminating athletic dormitories and athletic eating facilities and encouraging involvement in university-wide social and academic activities would allow athletes to mingle with the student body and more fully enjoy college life. However, because the NCAA probably is not willing to make the sacrifices in revenue necessary to implement any significant reform, its most plausible option in avoiding antitrust liability is loosening its restrictions on athletes’ compensation.\textsuperscript{277}

\textbf{B. Financial Reform}

While the ideal of the “student-athlete” is an admirable one, it is impossible to achieve under the NCAA’s current rules. The main pur-

---

\textsuperscript{1} See supra part IV.B.

\textsuperscript{2} LAPCHICK & SLAUGHTER, supra note 25, at 81. Presently, athletes receive little more than free tuition and some living expenses from their participation in college athletics. \textit{Id.} at 73. Coaches, on the other hand, sign product endorsement contracts and receive six-figure salaries, while the athletic departments reap the revenues from the athletes’ participation. \textit{Id.} at 81. By giving student-athletes higher compensation, the NCAA might be able to avoid antitrust litigation by an athlete who has become disenchanted with watching his or her school reap the benefits of a successful college athletic program by using the student-athletes’ labor. See supra part IV.B.
pose of big-time college athletics is to provide commercial entertainment.\textsuperscript{278} If commercial entertainment remains the primary goal of intercollegiate athletics, the NCAA and its members should acknowledge that educational values no longer exist as a major factor in the business world of big-time college athletics.\textsuperscript{279}

1. Increasing expense money available to athletes

One possibility that would not dramatically change the present system would be to simply increase the amount of expense money available to athletes.\textsuperscript{280} While potential antitrust liability will still exist,\textsuperscript{281} by recognizing that student-athletes are not regular students and give them adequate compensation, the NCAA will at least be giving the athlete what he or she feels is deserved.\textsuperscript{282} By giving athletes money for expenses and other incidentals, the status quo of the present system would not be upset.\textsuperscript{283} Additionally, increased payments would be “morally acceptable”: In terms of the concept of amateurism, the payments would merely represent a larger athletic scholarship.\textsuperscript{284} By giving athletes additional spending money, the NCAA and its members would acknowledge that participating in college athletics is essentially a full-time job, and that the athletes should be compensated accordingly.\textsuperscript{285}

2. The International Olympic Committee plan

A more ambitious financial reform would be to adopt a plan similar to that adopted by the International Olympic Committee (IOC). In Olympic sport, the IOC’s rules now permit athletes to accept living and training grants, endorsement fees, and in some instances, prize money.\textsuperscript{286} The athletes can then put the money earned from athletic competition into trust funds and use money from these funds to pay expenses.\textsuperscript{287} Af-

\textsuperscript{278} Sperber, supra note 22, at 345.

\textsuperscript{279} Id.

\textsuperscript{280} Lapchick & Slaughter, supra note 25, at 81.

\textsuperscript{281} If the NCAA does not dramatically alter its rules, it will still be engaged in illegal price fixing and group boycotts. See supra part III.

\textsuperscript{282} If the NCAA adequately compensates the student-athlete, he or she is less likely to question the moral legitimacy of the NCAA. Lapchick & Slaughter, supra note 25, at 82. If the student athlete is satisfied with the compensation received, he or she will be less likely to pursue antitrust litigation against the NCAA. See id.

\textsuperscript{283} Id.

\textsuperscript{284} Id.

\textsuperscript{285} See Sperber, supra note 22, at 348.

\textsuperscript{286} Lapchick & Slaughter, supra note 25, at 82.

\textsuperscript{287} Id.
ter the athlete has completed his or her athletic career, the money from the trust fund can be withdrawn.288

By adopting this system, the NCAA, like the IOC, would give the athletes adequate consideration for the services they render to universities and the public.289 Furthermore, because the IOC has already adopted such a plan, a similar NCAA plan would be considered within the boundaries of "amateurism."290 Such a system would acknowledge the commercial nature of intercollegiate athletics, and recognize that student-athletes are valuable contributors to its success.291

VI. CONCLUSION

The present system under which the NCAA operates promotes the pursuit of economic goals. In terms of academic goals, however, the system is woefully inadequate. If the NCAA is truly serious about its stated goals, it needs to take drastic steps to remedy the present situation. By recognizing that the student-athlete cannot handle the rigors of both full-time athletic and academic careers and by taking steps to ensure that both careers can co-exist, the NCAA could conceivably achieve its stated educational goals. Under such an academic reform, the NCAA would be protected from antitrust laws because its educational goals would be legitimate.

In light of the commercial success of big-time college athletics, however, true academic reform seems unlikely. If the NCAA and its members refuse to protect the academic careers of student-athletes, it should at least acknowledge the economic value of the student-athlete's participation and allow universities to compensate athletes accordingly. If it fails to do so, it faces potential antitrust liability.

Regardless of which reform the NCAA chooses to implement, one fact remains clear: The present system of intercollegiate athletics exploits the student-athlete, and the present system must be changed to adequately protect the student-athletes' interests.

Christopher L. Chin*

288. Id.
289. Id.
290. Id. See supra notes 162-76 for a discussion of the relationship between the NCAA and the Olympic ideal.
291. LAPCHICK & SLAUGHTER, supra note 25, at 82.
* This Comment is dedicated to my parents, Henry and Mimi Chin. I would also like to thank Professors David Burcham and Daniel Lazaroff for their helpful comments.