

Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications

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I. INTRODUCTION

Universities operating major intercollegiate athletic programs are heading for, if not already in, a crisis. Putting to the side the still-to-be-ascertained causes of the horrendous child sex abuse scandal at

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Pennsylvania State University (Penn State),¹ corruption continues to affect major football and basketball programs,² exacerbated by a failure of imagination and will in identifying and deterring corruption, and by a lack of consensus on what constitutes “corruption” when football and men’s basketball stars generate millions of dollars but cannot enjoy a lifestyle commensurate with many peer students. Current levels of spending are nonsustainable at many schools.³ Even where intercollegiate athletic programs are sustained primarily by football and basketball revenues, otherwise visionary and questioning college presidents have yet to question publicly why these revenues should subsidize nonrevenue sports at the expense of financially pressed classroom activities. Contrary to the National Collegiate Athletic Association (NCAA) Constitution, major football programs do not operate “in keeping with prudent management and fiscal practices”;⁴ neither the NCAA nor the leading conferences take meaningful steps to avoid the sort of destructive competition that wastes money without improving the quality of the product for fans or the “opportunities for athletics competition as an integral part of a quality educational experience” for student-athletes.⁵

Countless stakeholders are victimized by unfair aspects of the status quo. Primarily, these are ordinary students and faculty facing budgetary constraints exacerbated by the subsidization of unsupportable athletic programs. In addition, students, alumni, and athletes suffer when favored teams are penalized for NCAA rules violations for which they had no role; would-be student-athletes might have greater opportunities for athletic competition at a level below Division I, but for wasteful spending on existing programs; and star

1. See, e.g., L. Jon Wertheim & David Epstein, *This Is Penn State*, SPORTS ILLUSTRATED, Nov. 21, 2011, at 40. This Essay’s focus is on economic and commercial issues related to college sports. The ongoing scandal at Penn State has too many uncertain facts, and as a Penn State professor, I may be too close to the issue to analyze it meaningfully as part of this Essay. The issue is treated briefly *infra* note 16 and accompanying text.

2. See, e.g., William C. Rhoden, *Biggest Hypocrisy Money Can Buy*, N.Y. TIMES, June 3, 2011, at B16 (identifying the Ohio State football scandal where players sold memorabilia for money); Pete Thamel, *Suspected Point-Shaving Scheme Shows Gambling Remains Persistent Issue*, N.Y. TIMES, Apr. 13, 2011, at B16 (highlighting the point-shaving scandal at University of San Diego).

3. See, e.g., Leon Stafford, *An ‘Arms Race’ in College Sports: University Administrators Say Athletics Spending Levels Need Overhaul*, ATLANTA J.-CONST., Jan. 13, 2010, at C1 (finding that university presidents think current spending levels on athletics are unsustainable because of the need to divert more financial resources to keep programs competitive).

4. NCAA CONST. art. 2.16 (2011).

5. *Id.*

players are economically exploited by current rules. Yet there are no possible reforms that do justice to these stakeholders without severely and adversely affecting other stakeholders who currently benefit from the existing unfair structure. Radical reform inevitably entails winners and losers, and losers will surely resist their existing positions of privilege.

This Essay sets forth an agenda for reform, explains why the agenda reflects sound public policy, and analyzes why and how the NCAA can implement the agenda in a manner consistent with the Sherman Antitrust Act.⁶ It builds upon four foundational principles:

Principle #1: Continued sponsorship of prudently managed, self-sustaining intercollegiate sports is a legitimate way for American colleges and universities to enrich the cultural experience of their faculty, students, alumni, and surrounding community.

Principle #2: Intercollegiate sports programs that are not self-sustaining have no greater claim on the surplus proceeds from the activities of other sports programs on campus than any other educational program offered by the university.

Principle #3: The equal opportunity purposes that underlie Title IX should be maintained.

Principle #4: Whatever the additional societal benefits that may result from Division I nonrevenue sports, they do not justify the cost of operating those sports, having regard for the societal benefits that can be achieved by operating these sports at the equivalent of an elite club or Division III level.

Applying these foundational principles in light of the problems facing intercollegiate athletics, this Essay offers a five-part Charter of Reform for intercollegiate athletics:

6. 15 U.S.C. § 1 (2006). The proposal's compliance with Title IX, 20 U.S.C. §§ 1681-88, is detailed in Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Title IX Implications* (unpublished manuscript), and summarized in note 42 *infra*.

Article I: Using newly created uniform accounting principles, NCAA member schools cannot sponsor any men's Division I sports unless their revenues from that sport match or exceed expenses.

Article II: Schools must operate sufficient women's Division I sports to provide female students with sports opportunities equal to male students.

Article III: NCAA member schools can offer other "elite club" sports on an equal basis to male and female students, limited to financial aid only for financial need or academic merit independent of athletic ability, with significant restrictions on coaching and travel.

Article IV: All Division I sports scholarships may be allocated on an equivalency basis—each sport is allocated a designated number of full scholarship equivalents, which may be awarded to student-athletes as full or partial scholarships; the designated number for football is reduced from eighty-five to fifty-five.

Article V: Individual awards can range from one-quarter of the full cost of education to a sum including a full scholarship plus a cash subsidy to elite athletes, not to exceed one-half of the average full cost of education at Division I universities; compliance would be facilitated by strict auditing of top players, NCAA adoption of standard law enforcement techniques, and stiff penalties for all violators.

The case for this Charter of Reform proceeds as follows. Part II reviews the foundational principles and justifies them as the basis for reforming intercollegiate athletics. Part III details the five articles in the Charter of Reform. Part IV explains why the NCAA's adoption of the proposed Charter would not violate the antitrust laws.

II. FOUNDATIONAL PRINCIPLES

The final product of any reform proposal, whether adopted by the NCAA, the major college football conferences, or mandated by government, is likely to reflect a host of compromises necessary to secure the requisite political consensus.⁷ There is academic value in

7. For an example of a reform proposal explicitly suggesting a necessary compromise, see Matthew J. Mitten et al., *Targeted Reform of Commercialized*

more basic work that seeks to develop proposals anchored in foundational principles that can be independently justified. The five specific aspects of the Charter of Reform set forth in this Essay are based on four discrete underlying principles: (1) self-sustaining athletic programs enrich American culture and should be maintained, (2) subsidies for money-losing athletic programs have no inherent priority claim on surplus profits from other athletic programs, (3) Title IX principles should be maintained, and (4) cost-benefit analysis does not justify continued support for Division I sports that are not self-sustaining. This Part considers each of these foundational principles in turn.

Principle #1: Continued sponsorship of prudently managed, self-sustaining intercollegiate sports is a legitimate way for American colleges and universities to enrich the cultural experience of their faculty, students, alumni, and surrounding community.

College programs that are economically self-sustaining, primarily football and men's basketball, provide significant benefits to society.⁸ They enrich the cultural experience of university life for many faculty, students, alumni, and the regional community. These contests entertain millions.⁹ Particularly where universities are located in smaller college towns, popular contests provide a substantial boost for the local economy, bringing in fans who would otherwise not be visiting the community to patronize local hotels, restaurants, and stores.¹⁰ Sports programs provide an opportunity to unify the campus community.¹¹ Moreover, if prudently managed, many major programs

Intercollegiate Athletics, 47 SAN DIEGO L. REV. 779 (2010), which proposes that the NCAA be granted an antitrust exemption in return for adopting a host of desired reforms.

8. Steve Berkowitz & Jodi Upton, *Money Flows to College Sports*, USA TODAY, June 16, 2011, at A1 (finding from an NCAA report that in 2009-10, athletics programs at 22 of the 218 Division I public schools generated enough money from media rights contracts, ticket sales, donations and other sources (not including allocated revenue from institutional or government support or student fees) to cover their expenses).

9. See sources cited *infra* note 59.

10. With regard to claims that taxpayers should subsidize professional sports stadia because of the substantial boost to the local economy, economists generally agree that these benefits are vastly overstated because entertainment expenditures in major metropolitan areas are not likely to be affected by the presence of a professional football team. See *generally* SPORTS, JOBS, AND TAXES (Roger G. Noll & Andrew Zimbalist eds., 1997). Different considerations arise for college teams in remote locations.

11. See Eric Simons, *The Price of Excellence: Can Cal Afford Athletics?*, CAL. MAG., Spring 2010, available at <http://alumni.berkeley.edu/news/California-magazine/spring-2010-searchlight-gray-areas/price-excellence>.

can be operated commercially to generate significant surplus revenues. These funds can then be used to improve other university programs.¹²

By definition, self-sustaining intercollegiate sports do not impose any economic costs on colleges or universities. Given the significant benefits, sound policy would disfavor these programs only if they imposed noneconomic costs. In this regard, some critics claim that these programs harm the educational experience at most major universities.¹³ To be sure, there are specific examples of significant noneconomic costs—as in the cancellation of Friday classes following televised Thursday night football games.¹⁴ Although there is also some evidence that a change in the profile of students at elite, selective liberal arts colleges resulting from the admission of significant numbers of underqualified and uninterested athletes had an impact on the education of the remaining student body,¹⁵ it is not clear that these findings apply to the large universities that dominate Division I intercollegiate athletics.¹⁶

The benefits outlined above, weighed against the minimal costs, justify continued maintenance of these programs. Note that this cost-benefit analysis does not include additional justifications that are sometimes offered in support of intercollegiate athletics. This Essay

12. Under this proposal, significant surpluses from the University of Alabama's football team could be reallocated to teaching and research; if paying Nick Saban millions of dollars is a prudent way to realize these surpluses, Alabama should do so. See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 121.

13. See, e.g., WILLIAM C. DOWLING, *CONFESSIONS OF A SPOILSPORT: MY LIFE AND HARD TIMES FIGHTING SPORTS CORRUPTION AT AN OLD EASTERN UNIVERSITY* (2007); MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000); Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 622 n.29 (2003) (citing SPERBER, *supra*, at 60-61, claiming that athletic success raises admissions applicants but also college's "party atmosphere," which may be detrimental to education).

14. See, e.g., Mark Viera, *At Virginia Tech, Thursday Night Games Create a Commotion*, WASH. POST (Oct. 29, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/28/AR2009102804529.html> (discussing the pressure Virginia Tech administration places on faculty to cancel afternoon classes for a weekday football game in order to clear parking lots).

15. WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES* 70-79 (2003).

16. Early analysis of the Penn State scandal is that the commercial success of college football led senior administrators to cover up sexual abuse, allowing a predator to prey on young boys. See Wertheim & Epstein, *supra* note 1. It is too soon to tell whether this explanation for the administrative malfeasance is accurate and whether it is particularly linked to big-time college athletics, or whether it might be present in any large institution (would the University of California or MIT hush up a scandal involving a Nobel Prize winning professor attracting eight-figure research grants?).

does not claim that major programs ought to be maintained for the benefit of student-athletes. As detailed in Principle #4, the noneconomic benefits to student-athletes can be achieved at a far lower cost. Nor does society need colleges and universities to match highly profitable professional leagues with eager would-be professionals seeking training—these stakeholders can easily find other ways to obtain desired commercial results. Nor does this Essay make the claim that universities benefit by increased donations and other financial or noneconomic support because of intercollegiate athletics. Studies have not been able to support this anecdotally supported claim¹⁷ with statistically significant empirical evidence.¹⁸

Of course, where the commercial demand for football and basketball does not generate sufficient revenue to cover expenses, those sports would not be the only culturally enriching activities to receive subsidies from general university funds and student fees. University student affairs budgets often subsidize lectures, dramatic performances, and musical entertainment for the benefit of students and faculty. These subsidies are rarely controversial and seem to reflect a consensus within the university community that the entire community receives good value for money from the relatively modest cost of hosting these events. So it is theoretically possible that, among the 51 (of 120) Division I schools where football expenses exceeded revenues in 2010, many presidents and trustees may have reached a similar cost-benefit calculus.¹⁹

This theoretical possibility does not counsel, however, against the general principle that the use of funds otherwise available to a

17. Many university development officials will, of course, claim that it is easy to develop relations with prospective donors while celebrating a victory. Professor Michael Oriard, a noted observer of college sports—see, for example, MICHAEL ORIARD, *BOWLED OVER: BIG-TIME COLLEGE FOOTBALL FROM THE SIXTIES TO THE BCS ERA* (2009)—suggested in a guest lecture to my class that profiles of institutions like his own—Oregon State University—were higher due to its higher-profile membership in the Pac-10 Conference than schools that might otherwise be considered peer institutions, such as Colorado State University. CHARLES T. CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* 136-41 (2011) and Mitten et al., *supra* note 7, at 793-98 document further anecdotal “success stories,” although they do not purport to empirically demonstrate that investment in athletic success is prudent, nor do they analyze other anecdotes of less successful “investments.”

18. Joe Drape & Katie Thomas, *As Athletic Directors Compete, Big Money Flows to All Sports*, N.Y. TIMES, Sept. 3, 2010, at A1 (discussing how economists have found it difficult to quantify a link between investing in a high-profile athletic program and reaping presumed benefits, like alumni donations or higher application rates).

19. DANIEL L. FULKS, NCAA, *REVENUES AND EXPENSES 2004-2010: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT*, 28 tbl.3.6 (2011), available at <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf>.

university's general educational needs should not be used to subsidize Division I intercollegiate athletics. As has been demonstrated, there are too many schools pursuing "investments" in football success.²⁰ Why do presidents and trustees divert scarce funds from educational programs into football? There are several logical possibilities. One is that reports of financial losses are mere accounting tricks, and almost all Division I football programs actually make money. (If this is correct, then these programs will not be affected by the Charter of Reform.) A second explanation is that these officials systematically overestimate the likelihood that their "investment" will actually result in the sort of substantial benefits to an institution of higher learning that would warrant diverting funds from greater classroom instruction, to use one example. Finally, senior administrators and trustees may succumb to special-interest pressure by influential alumni, students, and the public, who wish to "consume" the entertainment value of big-time sports at their local university, even though enough consumers do not share their desires to support the activity commercially. These self-interested consumers use their influence, under the pretext of greater social benefit, to force less avid football fans among the students and faculty into accepting fewer teaching assistants and faculty, and higher student fees, to subsidize their personal tastes for an entertainment service that the market will not provide.²¹ As political officials correctly begin to turn away from the log rolling process of special-interest earmarking,²² likewise colleges and universities ought to reject the diversion of resources from the education of the many to the entertainment of an insufficient few.

20. See, e.g., DOWLING, *supra* note 13. Professor Fulks's study, FULKS, *supra* note 19, at 28 tbl.3.6, found that fifty-one schools "invested" an average of \$2.8 million on money-losing football programs. That is a considerable amount of bad investment.

21. There is a more economically sophisticated policy argument justifying maintenance of money-losing football programs: that, in economic terms, fans derive significant "utility" from the existence of teams that cannot be commercially exploited by the university. See CLOTFELTER, *supra* note 17, at 90-93. Two responses suffice to render this claim unpersuasive. First, this argument is limitless in a predominantly free market economy, where one can always argue that some reallocation of nonessential goods or services would advance utility. Second, as the principal reform advocated here is to bar a subsidy of athletics from education, it requires the assumption that a big time supporter of State U football who enjoys watching games on his couch without paying for it derives greater utility from this endeavor than a State U history student would derive from having a teaching assistant to lead a discussion section for a large American History course.

22. See, e.g., The President's Weekly Address, 2010 DAILY COMP. PRES. DOC. 978 (Nov. 13, 2010) (stressing the need to eliminate wasteful earmarks and add transparency to earmarks); Earmark Transparency Act of 2010, H.R. 5258, 111th Cong. (2010); Earmark Transparency Act, S.3335, 111th Cong. (2010).

Principle #2: Intercollegiate sports programs that are not self-sustaining have no greater claim on the surplus proceeds from the activities of other sports programs on campus than any other educational program offered by the university.

Few major colleges and universities operate on an “independent profit center” basis, where each academic or administrative unit presumptively is allowed to spend all revenues generated by its own operations.²³ Yet, where successful football and basketball programs do generate surpluses, the common practice is for the university administration to allow these funds to be spent at the discretion of the athletic director on nonrevenue sports.²⁴

In part, this policy is required by NCAA rules mandating that members wishing to participate in Division I football and basketball offer a minimum of fourteen sports at the Division I level.²⁵ However, many major programs sponsor far more than the legally required minima.²⁶

There is no evidence that maintaining successful Division I nonrevenue sports programs materially aids commercially profitable football and men’s basketball programs. Any university decision to spend these surplus funds on nonrevenue sports—whether from taxpayers, student fees, university endowment funds, or commercial profits—reflects a policy judgment that funding the lacrosse and golf

23. RONALD EHRENBERG, CORNELL HIGHER EDUCATION RESEARCH INSTITUTE SURVEY OF THE RESOURCE ALLOCATION METHODOLOGIES EMPLOYED AT PUBLIC AND PRIVATE RESEARCH AND DOCTORAL UNIVERSITIES 2 (2000), available at http://www.ilr.cornell.edu/cheri/surveys/upload/cherisurvey1999_03.pdf (finding that 63% of surveyed private institutions and 92% of surveyed public institutions did not use independent profit center methods).

24. Steve Wieberg, *NCAA President: Time To Discuss Players Getting Sliver of Revenue Pie*, USA TODAY (Mar. 30, 2011, 10:48:07 PM), http://www.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four_N.htm (“The spigot of TV and other revenue is open only for football and basketball, and often must subsidize at least a dozen more men’s and women’s sports.”).

25. NCAA BYLAWS art. 20.9.4 (2011). Although beyond the scope of this Essay, in addition to being unsound policy for reasons articulated under this Principle, this bylaw is also vulnerable to an antitrust challenge if it could be shown to be imposed for commercial reasons (such as to prevent lower-revenue schools from competing more effectively with their wealthier rivals because of the need to invest in other sports).

26. Ohio State sponsors thirty-seven sports. *Ohio State Buckeyes Official Athletic Site*, OHIOSTATE BUCKEYES, <http://www.ohiostatebuckeyes.com> (mouse over “sports”) (last visited Feb. 26, 2012). Michigan sponsors twenty-seven. *University of Michigan Athletics Varsity Sports*, MGOBLUE.COM, <http://www.mgoblue.com/school-bio/mich-varsity-sports.html> (last visited Feb. 26, 2012). At financially strapped UCLA, twenty-two sports are sponsored. *2010-11 Season in Review*, UCLABRUINS, <http://www.uclabruins.com/genrel/2010-11-year-in-review.html> (last visited Feb. 26, 2012).

teams is a better use of these funds than funding additional teaching assistants for the history department. As detailed in Principle #4, that policy judgment is unpersuasive.

Principle #3: The equal opportunity purposes that underlie Title IX should be maintained.

One public policy argument that independently justifies the use of university funds (either surplus from commercially profitable football and/or men's basketball, or other university sources) to subsidize sports programs at the Division I level, even though they are not economically self-sustaining, is the pursuit of equal educational opportunity for men and women.

Demand by women and girls to participate in interscholastic and intercollegiate sports has grown exponentially since Title IX's enactment in 1972. Empirical evidence strongly supports the public benefits to increased athletic participation among girls and women.²⁷ The social benefits of subsidizing women's sports extends beyond fans and student-athletes because of the strong evidence that Title IX has had a transformative effect on the opportunities for girls and women to participate in sports.²⁸

Principle #4: Whatever the additional societal benefits that are achieved by maintaining current funding for Division I nonrevenue sports, they do not justify the costs, having regard for the societal benefits that can be achieved by operating those sports at the equivalent of an elite club or Division III level.

As noted, self-sustaining, prudently managed programs provide substantial benefits and impose few costs. In contrast, programs that are not economically self-sufficient impose significant economic costs on universities. The fifty-one Division I-A schools whose football expenses exceeded revenues reported a median revenue loss of \$2,868,000.²⁹

27. Betsey Stevenson, *Beyond the Classroom: Using Title IX To Measure the Return to High School Sports* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 15728, 2010), available at <http://bpp.wharton.upenn.edu/betseys/papers/TitleIX.pdf> ("Many studies have documented a positive relationship between participation in high school athletics and educational aspirations, educational attainment, and wages later in life.").

28. Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 Nw. U. L. REV. 731, 731 (2003).

29. FULKS, *supra* note 19, at 28 tbl.3.6.

In analyzing the benefits of Division I nonrevenue sports, policy makers must consider the experience of the hundreds of thousands of student-athletes who participate in intercollegiate sports at the club and Division III level at American universities.³⁰ These programs (club sports at Division I schools and all sports at Division III schools) are distinguished from Division I programs in a number of ways: they generally do not provide athletic-based financial aid (students remain eligible for merit scholarships offered without regard to athletic ability and need-based aid); while coaching is important, it is restricted; and teams generally play within a smaller geographic region to minimize travel.³¹ The direct benefits of club and Division III intercollegiate athletics almost exclusively accrue to the participating student-athletes: fitness, teamwork, dedication to competition, rewards for success, etc. In short, these sports fulfill the NCAA's ideal that athletic participation should primarily be for the "physical, mental, and social benefits" derived by the athletes.³²

To be sure, there are some indirect beneficiaries. Parents, family, and friends can share in the pride of athletic accomplishment of student-athletes. These club and Division III sports, however, do *not* benefit spectators, the campus community, or the local economy in the same way that commercially successful sports do. To the extent that colleges and universities attract academically desirable students to their institution on the strength of the number and quality of intercollegiate opportunities, they would be free to continue to offer academic-merit scholarships to these student-athletes who could continue to participate

30. Bill Pennington, *Rapid Rise of College Club Teams Creates a Whole New Level of Success*, N.Y. TIMES, Dec. 2, 2008, at B11 (estimating that two million college students play competitive club sports); DENISE M. DEHASS, NCAA, 1981-82—2007-08 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 63-64 (2009), available at <http://www.ncaapublications.com/productdownloads/PR2009.pdf> (reporting 163,211 students participating in Division 3 athletics during the 2007-2008 academic year).

31. *Seven SCAC Schools To Form New DIII Conference*, NCAA (June 8, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/June/Seven+SCAC+schools+to+form+new+DIII+conference> (explaining that seven Division III schools are leaving the Southern Collegiate Athletic Conference to form a new conference in order to be more regional, because that will reduce travels costs and missed classes); *Undergraduate Scholarships*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Academics/Undergraduate+Scholarships> (last updated Jan. 31, 2012) (stating that Division III member schools do not offer athletic scholarships); see also Tarik El-Bashir, *TCU Is Heading to Big East*, WASH. POST, Nov. 30, 2010, at D1 (discussing how Texas Christian University's (TCU) decision to join the Big East athletic conference will require member schools to travel almost 1400 miles for certain athletic matches, but will give TCU a chance at an automatic BCS bid).

32. NCAA CONST. art. 2.9 (2011).

in intercollegiate athletics at a level equivalent to elite clubs or Division III.

Nonrevenue Division I sports provide a wonderful opportunity for elite student-athletes to compete against each other and derive the physical, mental, and social benefits of intercollegiate athletics participation. They provide indirect benefits to parents, family, and friends to share in the pride of athletic success. In some cases, alumni who formerly played the sport remain close to and follow the successes of their alma mater. However, when the social benefits of nonrevenue Division I sports are compared to club and Division III sports, it becomes difficult to conclude that continued subsidization of these sports is warranted as a matter of public policy. To use my home university as an illustration, the Penn State Nittany Lions women's Division I soccer team has an annual budget of almost \$500,000,³³ not counting the internal transfer of funds to cover the equivalent of fourteen full athletic scholarships, a total value exceeding \$475,000.³⁴ The budget for four well-funded club sports—men's and women's rugby and ice hockey—is \$326,211.³⁵

Unless, contrary to the claim set forth in Principle #2, varsity soccer has some privileged claim to the surplus profits from football, the question for those administering public policy in the university setting (university administrators and trustees) is whether students in large lecture classes ought to have additional teaching assistants, or whether student-athletes who lack financial need and do not qualify for academic scholarships ought to have athletic scholarships, multiple coaches, and travel widely across the nation or region. When compared to the “physical, mental, and social benefits” that their club sports colleagues obtain—despite no scholarships, limited coaching, and regional travel—this seems hard to justify.

33. *2009-10 Operating Expenditures*, PENN ST. U. BUDGET OFF., <http://www.budget.psu.edu/openbudget/budgetdetail.asp?type=A&FY=20092010&AdminArea=066&Fundtype=03&dept=0668662400&budget=N> (last visited Feb. 26, 2012).

34. NCAA BYLAWS art 15.5.3.1.2 (2011) (listing the maximum value of financial aid that an institution may provide in an academic year to women's soccer is the equivalent of fourteen scholarships). The value of a Penn State scholarship was estimated in Jay Paterno, *Pay Student-Athletes? They're Already Getting a Great Deal*, STATECOLLEGE.COM (June 2, 2011 5:52 AM), <http://www.statecollege.com/news/columns/jay-paterno-pay-studentathletes-theyre-already-getting-a-great-deal-766175/>.

35. *2010-11 Operating Budget*, PENN ST. U. BUDGET OFF., <http://www.budget.psu.edu/OpenBudget/budgetdetail.asp?type=B&FY=20102011&AdminArea=027&Fundtype=01&dept=0271897800&budget=N> (last visited Feb. 26, 2012).

III. THE CHARTER OF REFORM

The foundational principles set forth in Part II lead to a sensible, principled, and workable Charter of Reform, which will save universities millions of dollars by eliminating athletics expenditures that are not cost-effective, diverting these savings to educational programs. To summarize, the Charter would terminate Division I men's "nonrevenue" sports, limit Division I women's sports to those necessary to match the heavily reduced men's offerings, while offering a more equitable and market-based allocation of reduced nonneed athletic scholarships available in major sports. It would also allow those athletes whose efforts contribute significantly to campus revenues to share modestly in these riches, while sharpening enforcement against under-the-table payments. This Part provides the details for such a charter.

Article I: Using newly created uniform accounting principles, NCAA member schools cannot sponsor any men's Division I sports unless their revenues from that sport match expenses.

This proposal would bar NCAA member schools from operating a men's sport on the Division I level unless sport-specific revenues matched expenses, because "nonrevenue" sports are not cost-justified. The precise impact on football and basketball would depend on important decisions that NCAA implementing legislation would address in creating a system of uniform "generally accepted intercollegiate athletics accounting principles" (GAIAAP). As tentatively outlined here, almost all Division I football and basketball programs might be considered self-sustaining from revenues. It is likely that only a fraction of current men's sports programs in other sports would be sustainable. As with current collegiate ice hockey, these programs could continue at those few schools where revenues match expenses, most likely with sports-specific conferences.

The requirement that sport-specific revenues meet expenses can be achieved by a wide variety of revenue sources. The key is that the university received the funds either in return for goods or services directly related to the school's sponsorship of the specific sport or from donations expressly conditioned on expenditure for that sport. This ensures that universities discontinue the current subsidization of men's sports from surplus football or basketball profits or from funds that would otherwise be available for general educational purposes.

Commercial revenue streams include any money that a university receives in return for selling something. Currently, major athletic

programs receive millions of dollars in revenue in return for allowing fans to view sporting entertainment (live, in the form of live gate, and at home or in sports taverns, in the form of television and streaming video). Thus, revenues from tickets, “donations” required as a condition of securing prime seats, luxury suite/box rentals, and sale of broadcast rights all would be included. Game-day events often attract ancillary profits to the university from concessions, parking, and the like. University logos associated with athletic teams often attract hefty license fees by those seeking to manufacture and sell licensed merchandise.³⁶ In addition, corporate sponsors make commercial decisions to advertise to college sports fans and to tap into the loyalty of alumni, students, and the public for well-regarded universities; they are granted access to this audience in return for substantial sums. These too could be included as sport-specific revenues.

Sport-specific donations from outside sources also would be counted in determining whether a sport was self-sustaining. This could include commercial “donations”: for example, the Big Ten Conference presidents might decide, both for football and academic reasons, to preserve Division I competition for all twelve members and use revenue sharing to boost the income of less commercially-successful programs. Professional sports leagues who have been free-riding on college sports could provide their own subsidy: for example, Major League Baseball (MLB) could provide funds sufficient to allow a core of Sunbelt teams to continue to offer Division I baseball. If the national governing boards of Olympic sports (such as swimming, gymnastics, or track and field) believed that an elite intercollegiate athletic competition would be a useful way for them to spend their developmental funds (note, however, that no other Olympic power does it this way), they could award grants to applicant schools to enable them to continue to offer the sport at the Division I level.

True donations from individuals or foundations would also count. Indeed, a refusal to subsidize specific men’s nonrevenue sports has directly led to generous donations by alumni and supports of major university athletic programs. For example, Penn State would not upgrade facilities or expenses for a Division I men’s ice hockey team unless funds made the program self-supporting; a generous alumnus (who shortly thereafter purchased the Buffalo Sabres) donated over

36. Where merchandise is not sport-specific, GAIAPP would have to devise a formula to allocate licensing revenue to specific sports.

\$80,000,000 to create an endowment to start such a program.³⁷ With regard to program maintenance, the California Golden Bears baseball team was marked for elimination, but the Chancellor reversed the decision after \$10,000,000 in donations was raised.³⁸

The principal accounting issues that will determine whether or not a program is self-sustaining fall on the expense side of the ledger. There is a wide variance in the treatment of expenses, in particular two major items. First, universities have built expensive facilities for their athletic teams, either financed internally or through debt. Once built, athletic programs might or might not be charged an imputed rent or charged for debt service. Second, universities vary in how their budgets reflect athletic scholarships. Some university accounting schemes charge the athletic program the full costs of a scholarship and internally transfer funds from athletic revenues to the general fund.³⁹ Other universities may not count scholarships as real expenses. In adopting GAIAAP, the NCAA should have regard for the current fiscal crisis in higher education and assure prudent management going forward.

This suggests that sunk costs incurred prior to the implementation of the Charter—such as debt service on existing facilities—should not count as expenses for purposes of article I. Because the purpose of article I is to force universities to decide whether to maintain or eliminate Division I men's sports based on fiscal prudence, expenses that the university remains liable to pay regardless of that decision should not affect the decision.

Different considerations affect the treatment of athletic scholarships. Most Division I universities do not operate under strict capacity limits for their undergraduate student body. If Division I programs were discontinued, student-athletes receiving scholarships would not likely be replaced by nonathlete students paying full tuition at these schools. Thus, an accounting scheme that counts the cost of tuition (likely to be many multiples of the actual marginal cost of educating a single student) is already providing an effective subsidy for the university's general funds. Under this view, tuition would not

37. Pat Borzi, *Reshuffling Blurs Picture, Jeopardizing Conferences*, N.Y. TIMES, July 17, 2011, at SP8 (discussing Terry Pegula's \$88 million dollar donation to Penn State primarily to finance an arena that would allow Penn State's men's and women's hockey teams to compete at the varsity level).

38. Steve Yanda, *Not Your Average Comeback*, WASH. POST, June 18, 2011, at D3.

39. See, e.g., *Understanding Tuition*, U. MICH. (Aug. 2011), <http://vpcomm.umich.edu/pa/key/understandingtuition.html> (stating that the Athletics Department pays for scholarships for student-athletes).

count as an expense. Out-of-pocket expenses related to an athletic scholarship, such as food, books, room (if off campus or in a campus dormitory that would otherwise have been occupied by a full fee paying student), and the like, would count as expenses.

The concept of prudent management does not require any commercial operation to break even each and every year. The goals of the Charter of Reform would be disserved if a university was required to discontinue a program whenever unanticipated decreases in revenues or increases in expenditures caused a generally sustainable program to incur a temporary deficit. Likewise, schools should have the freedom to make prudent investments designed to be recouped through increased revenues in the medium term (three to five years). Drawing on the principles of Financial Fair Play adopted by European soccer's regulatory body, the requirement that sports be self-sustaining should be measured over a period of three years.⁴⁰ In addition, a wholly independent group of financial and business experts should be able to grant limited and special waivers to programs in extraordinary circumstances where even a three-year deficit is likely to be corrected.

As explained in Principle #1, the risk of capture by special interests justifies the policy that bars the university from diverting funds otherwise available to other educational programs to subsidize the athletic program. This bright-line policy is warranted even though there are some universities for whom a modest subsidy generates sufficient benefits to the university's profile to render the expenditure a prudent investment. To the extent that the special-interest capture fear is exaggerated, an alternative would permit a university's board of trustees to avoid the force of article I, using a special procedure to minimize the risk of capture. Under this alternative, every three years a university's athletic officials would have to place on the public record an estimate, followed by a detailed account of their revenues and expenses, of the precise sum of the internal university "investment" required to maintain a sport at the Division I level. Next, the university's deans and directors of other educational and service units would prepare and publicly provide to the trustees a specific list of nonathletic programs that could be funded with the money saved by eliminating the athletic subsidy.⁴¹ Then, for a period not to exceed

40. UNION OF EUROPEAN FOOTBALL ASSOCIATIONS (UEFA), UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS art. 59 (2010), *available at* http://www.uefa.com/MultimediaFiles/Download/uefaorg/clublicensing/01/50/09/12/1500912_DOWNLOAD.pdf.

41. A scheme where the president would propose such a list creates too much of a risk that the president would simply suggest unattractive alternatives. The report should be

three years, the trustees could openly vote to forgo the educational alternatives proposed, in favor of continuing the athletic “investment.”

Article II: Schools must operate sufficient women’s Division I sports to provide female students with sports opportunities equal to male students.

Implementing article I of this Charter will likely limit Division I men’s programs at most schools to football and basketball. Under current NCAA rules (with the additional limitation described below in article IV of this Charter), this will mean that schools will offer the equivalent of sixty-eight full scholarships to male athletes. Under article II, each school would operate a sufficient number of women’s sports to provide an equivalent number of athletic scholarships to female student-athletes. Schools would presumably consider climate, geography, recruiting base, tradition, rivalries, and other factors in selecting the sports most suited for their own institutional needs and aspirations.⁴²

To illustrate, a program that sponsored women’s teams in basketball, volleyball, soccer, softball, and swimming would, under current NCAA rules, provide athletic-based aid in the equivalent of sixty-seven scholarships, which would comply with article II. If, due to fan support, donations, or outside sponsorship, additional men’s sports were offered at the Division I level, then additional women’s

signed by each dean and director (or dissents noted). Thus, deans hoping to be seriously considered for promotion (as deans of more prestigious colleges or as provosts) would have an incentive to produce the best academic alternatives possible.

42. Although a full examination of the legal issues relating to the Charter’s conformance to Title IX is beyond the scope of this space-limited symposium contribution, it is unlikely that the Charter would be successfully challenged by female athletes, whose sports would be reduced (albeit to a lesser degree than male sports). Courts give great deference to interpretive rulings of the Department of Education’s Office of Civil Rights (OCR). *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994). OCR’s policy interpretation concludes that an otherwise nondiscriminatory program complies with Title IX when “proportionately equal amounts of financial assistance (scholarship aid) are available to men’s and women’s athletic programs.” Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86). The *Policy Interpretation* continues that a university complies where “intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.” *Id.* at 71,418. Modifying article II to reflect enrollments that are not equal would appear to satisfy this proposal.

In the final analysis, parsing the *Policy Interpretation* may be unnecessary: if the NCAA really adopted a radical reform, it is likely the Secretary of Education would be specifically invited to determine whether the Charter complied with Title IX, and any determination would likely be upheld by the courts.

Division I sports would also have to be offered.⁴³ Because Principle #3 concludes that the social transformational benefits of equal opportunity are an independent social benefit of Division I women's sports, these sports need not be necessarily financed from revenues generated by men's athletic programs, although universities may, if they choose, forgo Division I men's sports that would be self-sustaining if they do not wish to use other funds to support women's sports.

It is true that one effect of this radical reform is to change the nature of intercollegiate athletic conferences radically. Typically, intercollegiate athletics features multisport competition against the same rivals in the same athletic conference. Although enough schools may opt for the same women's sports to permit continued play against rivals who also play football and men's basketball (most likely in women's basketball; certainly likely in Big Ten and Pac-12 volleyball and Pac-12 and SEC softball), in other cases universities will need to organize sport-specific conferences. However, this development would simply expand traditional practices in several sports.⁴⁴

Article II also requires substantially equal funding and support for club and Division III-level offerings at traditional Division I schools. Although operating without the benefit of athletic financial aid, this means that schools must provide substantially equal coaching and travel opportunities for men's and women's sports operating at that level.

Article III: NCAA member schools can offer other sports on an equal basis to male and female students, limited to financial aid only for financial need or academic merit, with significant restrictions on coaching and travel.

43. NCAA rules do not require schools to fully fund sponsored sports; the scholarship numbers are maxima, not minima. However, Principle #3's argument in favor of equal opportunity is in some ways a modification of the more general claim in Principle #1 that general university funds should not be spent on Division I-level intercollegiate athletics. Therefore, the general principle of prudent management leads to the conclusion that schools should not offer multiple, underfunded women's sports. Such an offering involves more costs to the university (particularly coaching and travel costs) than if the university were to offer sixty-eight scholarship equivalents in fully funded sports.

44. For example, the University of Wisconsin and the University of Michigan are both members of the Big 10 Conference, but their men's hockey teams play in the Western Collegiate Hockey Association and the Central Collegiate Hockey Association, respectively. Mark Viera, *Donation Will Allow Penn State To Field Division I Hockey Teams*, N.Y. TIMES, Sept. 18, 2010, at D4.

The effect of implementing articles I and II will mean that most sports at current Division I schools will operate at the equivalent of an elite club or Division III level: no athletic scholarships, limited coaching, and limited travel. The result will be significant financial savings for universities, with a far less adverse impact on the overall experience received by affected student-athletes. Indeed, operating noncommercial sports with minimal spectator interest in this manner is far more consistent with the NCAA's stated ideals than the status quo. Following implementation, senior university administrators can apply their traditional budget allocation discretion to determine whether to spend the substantial sum of saved funds on expanded, cost-justified opportunities for intercollegiate athletic participation at this reduced-cost level or for more traditional classroom opportunities.

Initially, the NCAA sought to promote the ideas of amateurism—that students should participate in intercollegiate athletics for the physical, mental, and social benefits—by barring aid based on athletic ability.⁴⁵ Use of athletic scholarships began as many schools did not abide by the so-called “Sanity Code.”⁴⁶

At the time, athletic scholarships became a significant means for social mobility. Working class and poor kids with athletic talent could escape poverty or the mills or mines by getting a football scholarship.⁴⁷ Ironically, Title IX's requirement that schools increase scholarship offerings for female student-athletes actually led to an increase in scholarship offerings for male student-athletes as well.

Unlike the 1950s, however, today there is a wide array of need-based financial aid available to students whose families cannot support the costs of higher education. Indeed, many top programs recruit student-athletes almost exclusively from participants in traveling club teams that provide training and elite competitive opportunities that are simply unavailable to poor and working-class families who cannot afford the many fees and expenses associated with this level of youth competition.⁴⁸

45. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

46. *What Price Football?*, TIME, Jan. 23, 1950, at 47.

47. 144 CONG. REC. 6289 (1998) (claiming college athletics is one of the few ways out for children in poor urban areas); see also ALL THE RIGHT MOVES (Lucille Ball Productions, Twentieth Century Fox Film Corporation 1983) (depicting Tom Cruise playing a high school senior from a working class Pennsylvania town consigned to work in steel mills in lieu of dreams of an architecture career unless football scholarship comes through).

48. Joseph Blackburn, *The Financial Cost of Playing AAU Travel Baseball, or Its Equivalent* (unpublished manuscript on file with author) (estimating cost to parents for player aged ten to eighteen in excess of \$7500 per year).

Travel is perhaps the prime example of the point set forth in Principle #1 that the vastly higher costs of Division I athletics are not cost-justified for most sports in light of the similar physical, mental, and social benefits derived from participation in club or Division III athletics. What public interest is served by having the Seton Hall tennis team fly to Milwaukee to play Big East rival Marquette?

Moreover, breaking the tie between receipt of financial aid and athletics participation will allow students to choose for themselves when athletics, as an integral part of their college education, is worth pursuing. Division I athletes may currently feel compelled to continue at their "job" despite a preference to focus more on studies. This compulsion may be justified as an essential way to ensure stability of a multimillion-dollar operation: when a young man commits to play football for Penn State or the University of Alabama (Alabama), many others rely on that decision. Such an exception to principles of amateurism has no equivalent justification for Seton Hall tennis.

Article IV: All Division I sports scholarships may be allocated on an equivalency basis (each sport is allocated a designated number of full scholarship equivalents, which may be awarded to student-athletes as full or partial scholarships); the designated number for football is reduced from eighty-five to fifty-five.

The foundational principle that major college football programs should be prudently managed applies both to unilateral management decisions at individual universities and to collective management decisions made by the NCAA and the major football conferences. Because the principal purposes of universities are teaching, research, and service, college presidents legitimately forgo profit-maximizing strategies for college football that conflict with noncommercial educational goals. Otherwise, prudent management requires that universities seek to maximize commercial revenue and minimize expenses so that the maximum amount of surplus funds are generated for other worthy goals. Permitting Division I football programs to offer eighty-five scholarships to eighty-five athletes is not prudent management: significant costs savings would accrue by reducing the total number of scholarships to fifty-five, and by permitting partial scholarships, the sport is likely to become modestly more popular, thus increasing overall revenues.

As a thought experiment, consider an alternate universe where the elite college football competition was organized by an independent commercial entity (like, for example, the way in which the National

Association of Stock Car Auto Racing (NASCAR) organizes stock car racing). This entity would design the competition to provide a level of quality that would result in the most cost-effective combination of high revenues with low costs.⁴⁹ One important aspect of this design would be rules that limit expenditures that were unlikely to be recouped in increased revenues across the sport. This is particularly true where there is a “high discriminatory power” to a sporting contest: where a competitor who spends just a bit more than a rival substantially increases its probability of success.⁵⁰ In lay terms, a prudent organizer seeks to restrain wasteful expenditures that contribute little to the overall popularity of the sport but that each participant must spend lest they fall behind.

To illustrate, consider a variety of highly detailed and technical engineering rules that NASCAR has adopted to limit particular kinds of innovative additions to the race car. Racing teams have an incentive to spend considerable sums to permit their cars to race a few seconds faster per lap. Although NASCAR fans will not notice the difference, each team is compelled to join this “rat race.” Prudent management bars these wasteful expenditures and channels teams’ incentives into expenditures, creating features that will actually maintain or increase fan appeal.⁵¹ NASCAR rules are thus designed to achieve “parity, safety, and cost” savings.⁵² The first two goals maximize fan appeal, and the latter goal maximizes profits with an optimal revenue stream.

Because college presidents legitimately may prefer noncommercial goods to profit-maximization, universities might actually want to encourage spending unnecessary funds to maximize fan appeal that serves educational purposes, such as tutoring and counseling services for student-athletes. In similar fashion, universities might forgo revenue-maximizing opportunities, such as Thursday night football,

49. Economists call this inquiry “contest theory.” For an application of contest theory sports competitions, see Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LITERATURE 1137, 1140-46 (2003).

50. *Id.* at 1142-45, 1173.

51. An oral legend at Penn State involved wasted expenditures surrounding the recruiting of Western Pennsylvania star athlete Terelle Pryor. In order to demonstrate Penn State’s continuing interest, Defensive Coordinator Tom Bradley drove over two hours to Jeannette High School to watch Pryor play *basketball*. Not to be outdone, an Ohio State booster in the crowd, noticing Bradley prominently sitting in the crowd, phoned Columbus, and an Ohio State assistant coach was dispatched on a private jet to fly to the game so he too could be in attendance.

52. ROBERT G. HAGSTROM, *THE NASCAR WAY: THE BUSINESS THAT DRIVES THE SPORT* 35 (1998).

because of the disruption to campus life that such events cause.⁵³ However, absent specific noncommercial goals, it is imprudent for university leaders to fail to implement fully the NCAA Bylaw on prudent management by permitting their football teams to engage in expenditures that are not reasonably necessary to maintain or increase revenues. And when, as is often the case, no single team can cut its own imprudent expenditures, collective action is required. Cost savings from reducing the number of football scholarships to fifty-five will result in seven-figure savings to most institutions.⁵⁴

Moreover, the reduction in the number of scholarships and the ability to offer partial scholarships will likely alter the distribution of playing talent among member schools in a manner likely to make college football *more* attractive and therefore increase overall revenues. In addition, article IV serves an important noncommercial goal of facilitating a more informed decision by a prospective student-athlete in selecting the college of his choice.

Although a reduction in compensation for services rendered will often result in fewer talented people offering their services, this phenomena is unlikely to occur in college football. Top stars are going to receive full scholarships (indeed, article V, below, proposes the option of modest cash supplements to a full scholarship), financially needy players can supplement their athletic aid with a Pell Grant or other need-based support, and others are not going to forgo intercollegiate athletic competition and a chance (however remote) that their talent might blossom to pursue a professional football career because they are only receiving a partial scholarship.⁵⁵ Thus, the reduction in overall expenditures on college football players is not likely to result in a noticeable reduction in the overall quality of college football.

53. See Viera, *supra* note 14.

54. The typical full scholarship has a yearly value of \$15,000 for in-state public schools, \$25,000 for out-of-state public schools, and \$35,000 for private schools. NCAA, HOW DO ATHLETIC SCHOLARSHIPS WORK? (2011), available at http://www.ncaa.org/wps/wcm/connect/19481c00474f411daed6ee071e1ceb2b/BBD_HowScholarWork.pdf?MOD=AJPERE&CACHEID=19481c00474f411daed6ee071e1ceb2b. Because athletic budgets would save on sixty scholarships (because the reduction from eighty-five to fifty-five in men's football would result, under the principles of this Charter, in a similar reduction of thirty scholarships in women's sports), the savings totals would range from around \$1 million for a public school relying almost entirely on in-state student-athletes to over \$2 million for private schools.

55. The interest in noncompensated participation in Division I football is sufficiently high that current NCAA rules bar more than twenty nonscholarship football players from "walking on" a team. See NCAA BYLAWS art. 17.9.2.1.2 (2011).

Article IV will, however, affect the *allocation* of players among teams. In functioning markets, human as well as tangible assets go where they are most highly valued. In sports, stars often go to weaker teams, where their contributions are likely to make a bigger difference to the team's success.⁵⁶ This is particularly true of younger talent, whose long-term professional prospects are usually better served by more playing time for a lesser team than warming the bench for a dominant team. Currently, however, this process does not function in Division I football, where at top schools all football players receive the same full athletic scholarship.

Some observers have suggested that a modest version of this phenomena occurred between 1992 to 1994 when Division I rules reduced the number of football scholarships from ninety-two to eighty-five. Players of a given modest ability, who might previously have received one of the last scholarship offers at dominant school, accepted scholarships at less dominant programs. The result was a narrowing of the gap between the elite and very good teams.⁵⁷

Under article IV, coaches of top programs could not offer a full scholarship to all desired players. Consider two star high school running backs, five-star prospect Andy Alpha and four-star prospect Bobby Beta. Assuming coaches shared the assessment of recruiting evaluators, Alabama Coach Nick Saban or University of Oregon Coach Chip Kelley would be likely to offer a full scholarship to Alpha, being able to afford only a partial scholarship to Beta, as Alpha is the most likely star. Incoming Washington State University (Washington State) Coach Mike Leach or University of Mississippi Coach Hugh Freeze, however, might offer Beta a full ride because of great confidence that Beta would start for the Cougars or the Rebels. Because the likely effect of this redistribution of talent is from the dominant schools in Division I Bowl Championship Series (BCS) conferences to the other schools in these major conferences, article IV

56. See, e.g., Jack Curry, *Wetteland Closes, but It's with Texas*, N.Y. TIMES, Dec. 16, 1996, at C1; Kevin Lonnquist, *Signed, Sealed, Delivered: Yankees MVP Relief Pitcher Teams up with Rangers for Four Years, \$ 23 Million*, ARLINGTON MORNING NEWS, Dec. 17, 1996, at A1 (discussing how pitcher John Wetteland saved all four World Series victories for the 1996 New York Yankees but was not given a serious offer because the Yankees also had Mariano Rivera; instead Wetteland signed with Texas, which had a terrible bullpen). One study showed that free agency tended to lead to a move of pitchers from better to worse teams. Stephen F. Ross & Robert B. Lucke, *Why Highly Paid Athletes Deserve More Antitrust Protection than Ordinary Unionized Workers*, 42 ANTITRUST BULL. 641, 655-56 (1997).

57. See William C. Rhoden, *N.C.A.A. Cuts Practice, Scholarships and Seasons*, N.Y. TIMES, Jan. 10, 1991, available at <http://www.nytimes.com/1991/01/10/sports/ncaa-cuts-practice-scholarships-and-seasons.html?pagewanted=all&src=pm>.

will likely result in a greater distribution of top talent across more Division I football squads, resulting in greater competitive balance.

The economic literature is famously mixed in analyzing empirical evidence that competitive balance in major professional sports increases fan appeal.⁵⁸ There are logical grounds to believe, however, that increased balance among the teams in the major college football conferences will indeed increase fan appeal, as measured by attendance and television ratings. First, because top schools play at capacity and lesser schools do not,⁵⁹ increased balance will result in greater attendance: Indiana University will attract more fans, and people who lust for returned glory will not give up their season tickets at the Michigan Stadium. In Division I football, the distribution of hard-core fans is widespread, and more casual fans are keen to see top matchups, regardless of who they are. Thus, local ratings for the improved teams will increase, avid fans of dominant powers will keep watching, and national television ratings will be relatively unaffected, in contrast to MLB, which sees a drop in ratings if the playoffs feature smaller market teams.⁶⁰

The lack of empirical support for the claim that fans prefer more balanced competitions is superficially puzzling. Sports economics is premised on the theory that a unique attraction of sports is outcome uncertainty.⁶¹ Increased imbalance makes it more likely that the outcome of individual games are more certain, the outcome of the season-long competition is even more certain, and the likelihood that doormats become champions and dominant teams become doormats is nonexistent. So why is evidence so weak relating to a positive relation

58. Szymanski, *supra* note 49, at 1153-55.

59. To illustrate, the legendary programs at Penn State and Ohio State saw average home crowds from 2001-10 of 106,439 and 104,750, respectively. In contrast, Illinois (averaging 4.7 wins per season during the decade) attracted an average live gate of 52,673, while Indiana (averaging 4.1 wins per season), attracted an average live gate of 34,983. This data has been aggregated from several sources. The NCAA provides data at *NCAA Football Attendance*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/stats/football/attendance/index.html> (last visited Feb. 26, 2012). Additional data for Illinois can be found at UNIV. OF ILL., THE RECORD BOOK 111-12 (2011), available at http://grfx.cstv.com/photos/schools/ill/sports/m-footbl/auto_pdf/2011-12/misc_non_event/2011_FB_RecordBook5_v2.pdf. Additional data for Indiana can be found at *Football Archives*, INDIANA HOOSIERS, <http://iuhoosiers.cstv.com/sports/m-footbl/archive/ind-m-footbl-archive.html> (last visited Feb. 26, 2012), and at *History*, INDIANA HOOSIERS, http://iuhoosiers.cstv.com/auto_pdf/p_hotos/schools/ind/sports/m-footbl/auto_pdf/06expftblhist (last visited Feb. 26, 2012).

60. *TBS' LCS Audience Down 44% with Smaller Markets, NFL Primetime Competition*, SPORTS BUS. DAILY, Oct. 18, 2011, available at <http://www.sportsbusinessdaily.com/Daily/Issues/2011/10/18/Media/MLB-ratings.aspx>.

61. The concept was first expressed in the economic literature in Walter C. Neale, *The Peculiar Economics of Professional Sports*, 78 Q. J. ECON. 1 (1964).

between competitive balance and fan appeal in leagues like the Major European soccer leagues and MLB? And why would college football be different?

One problem with the empirical evidence is that some sports economists, who began their study with a focus on baseball, conflated the outcome-uncertainty concept with competitive balance. Until the introduction of the three-division/wildcard concept in 1995, MLB teams that did not win their league or division championship had nothing to play for; season-long outcome uncertainty evaporated early on for many teams. Moreover, because of the need to fill stadia for eighty-one games, there is reason to suspect that overall attendance might actually be higher with teams like the New York Yankees and the Boston Red Sox always in contention and the Pittsburgh Pirates and Kansas City Royals never in contention than a regime of parity.

The closest sport to college football (large nationwide audience, few games that often sell out) is the National Football League (NFL), which features significant parity among teams. This reasoning suggests that article IV not only saves millions of dollars in expenditures, but it eliminates expenditures that are truly “wasteful,” because the cost savings will result in greater, not reduced, revenue.

Moreover, article IV increases revenues while at the same time serving an important goal of allowing student-athletes to make more informed decisions about the college of their choice. Highly recruited high school football players are not alone in selecting a college that will best further their professional aspirations. My current employer, Penn State, widely advertises that it is the number one choice among corporate recruiters.⁶²

The current system of offering all football players a full scholarship creates a significant information asymmetry. Although coaches can truthfully tell Andy Alpha, Bobby Beta, and Gary Gamma that they each have a chance to start if they work hard and excel, competitive elite players tend to overestimate their own ability, and coaches have a much better sense of potential talent than an eighteen-year-old. When Washington State Coach Leach pleads with Beta to don the crimson and gray and start for the Cougars instead of standing on the sidelines for the cardinal and gold of the University of Southern

62. *Wall Street Journal Ranks Penn State No.1 Among Corporate Recruiters*, PENN ST. U. (Dec. 6, 2010), <http://www.research.psu.edu/news/2010/wsj-ranking>; *see also* Teri Evans, *Penn State, Texas A&M Top the List*, WALL ST. J., Sept. 13, 2010, at B1.

California (USC), it is likely to fall on deaf ears. This is why the distribution of top recruits is skewed to a small handful of teams.⁶³

Article IV will provide high school athletes with valuable information. Leach's claim that Beta is likely to start for Washington State and unlikely to start for USC will likely be validated when Trojan Coach Lane Kiffin offers a full ride to Alpha and a half-scholarship to Beta. Beta is, of course, free to prefer a top program.⁶⁴ But that choice is an informed one, not one based on misinformation.

Article V: Individual awards can range from one-quarter of the full cost of education to a sum including a full scholarship plus a cash subsidy to elite athletes not to exceed one-half of the average full cost of education at Division I universities; compliance would be facilitated by strict auditing of top players, NCAA adoption of standard law enforcement techniques, and stiff penalties for all violators.

For over a century, critics of college football have bemoaned widespread cheating by university officials or supporters who have paid athletes in contravention of the rules of college sport in order to permit their university to gain a competitive advantage.⁶⁵ For over a century, these critics have warned that the crises du jour, unlike all past crises, represent the demise of college football. History suggests, however, that American college football fans have not, and will not in the foreseeable future, lose their century-plus fascination with the sport, despite the recurring scandals.

Article V is therefore not proposed as an essential ingredient to save college football. Although reforms such as those advocated in articles I, II, and IV may well become fiscally inevitable, article V

63. Among the schools with the top-ranked 2011 recruiting classes, *see Recruiting Database*, ESPN, <http://espn.go.com/college-sports/football/recruiting/database> (last visited Feb. 26, 2012), 13 of 14 "5-star" recruits, and 167 of 287 "4-star" recruits, went to the top 15 programs. There was skewing even within this elite group: Florida State attracted 1 "5-star" recruit, 17 "4-star" recruits, and 7 "3-star" recruits; under a star-point ranking system, the 11th-ranked class, Oklahoma, had no "5-star" recruits, 9 "4-star" recruits, and 8 "3-star" recruits. *See Class of 2011 Team Football Recruiting Rankings*, ESPN, <http://insider.espn.go.com/college-football/recruiting/classrankings?classyear=2011&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fcollege-football%2frecruiting%2fclassrankings%3fclassyear%3d2011> (last visited Feb. 26, 2012).

64. For example, NFL Professional Bowl quarterback Matt Cassel was a backup quarterback at Southern California to Carson Palmer and then Matt Leinart. *See Matt Cassel Profile*, USC TROJANS.COM, http://www.usctrojans.com/sports/m-footbl/mtt/cassel_matt00.html (last visited Feb. 26, 2012).

65. *See* RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (2011).

realistically serves a more modest goal of reducing the unnecessary costs of scandals.

Scandals involving improper payment to student-athletes impose significant costs on stakeholders: member schools must pay for costly NCAA investigations, penalized schools suffer lost revenues, university officials caught violating rules lose their jobs, etc.⁶⁶ The scandals are symptomatic of a deeper problem: there are strong incentives for third parties to cheat and a widespread view that such cheating is socially acceptable because student-athletes are economically exploited. Article V addresses this problem.

The current incentives for those involved in big-time college sports significantly distort efforts to achieve a prudently managed sport run in a manner consistent with public policy. Like baseball owners before the Black Sox scandal led to the creation of the office of Commissioner of Baseball, the decision makers in the member-run NCAA have conflicting incentives: rules designed to maximize fan appeal; promote integrity; and serve well-articulated noncommercial, educational goals need to be strictly enforced, but no one wants harsh penalties imposed on their own institution. Would-be agents and others weigh the future benefits of developing good relationships with college students with significant potential for professional success against the minimal penalties that they will suffer if it is revealed that they have conspired with student-athletes to break NCAA rules. Boosters seek personal glory among confidantes and personal access to star athletes, commodities purchased by under-the-table-cash-laden handshakes; again, the risks to the boosters are minimal under current enforcement schemes. Student-athletes, whose status as professionals-in-training often leaves them with a lifestyle below that of many of their fellow students, seek immediate financial benefits to themselves and family members from the benefits that under-the-table payments can secure.

Implementation of article V will significantly minimize the extent of economic exploitation of those student-athletes whose services in a free market would be valued at more than the cost of a full scholarship. Economists recognize that a professional athlete's economic value is the marginal revenue a club earns as a result of the player's performance, compared to the revenue that would be earned if the club were forced to employ the next likely alternative player.

66. A costly example recently involved recruiting violations and dismissal of Indiana basketball coach Kelvin Sampson. See Colombo, *supra* note 12, at 153 n.186.

Baseball “sabermetricians” have developed a statistic using this foundational concept: Value Over Replacement Player (VORP).⁶⁷ In a free market, a Division I starting football player’s value is the difference between his ability to contribute to wins and that of the alternative (either the second-string player on the same team or a starter at a lower-achieving school), measured by the likely effect of that variation on team success and the likely effect of team success on revenue. So measured, there are relatively few players whose own abilities are likely to exceed the value of their replacement by \$25,000-\$40,000, the sum of a current full athletic scholarship.⁶⁸

But even if there are *relatively* few players, among the scholarship recipients who are economically exploited at the most successful programs, this can still total a lot of individual players.

The perception of exploitation would be significantly limited if NCAA rules permitted a cash payment, that today might approximate \$15,000, on top of a full educational scholarship. Virtually any player at an elite school whose “fair market value” exceeded the full cost of education could surely attract a “Full Plus” scholarship at *some* Division I school. Cheating is likely to be less tolerated if under-the-table money is going to an athlete who is receiving as much as \$15,000, or who could have chosen to attend a school where he had such an offer but voluntarily chose instead to accept a lower financial aid package at his current institution. To be sure, many stakeholders’ incentives to cheat would not be affected by article V. The principle claim is that others will find this behavior less tolerable, and thus support stricter enforcement mechanisms.

A more complex but perhaps less costly alternative would be to retain the maximum aid at the full cost of education but to end the collective NCAA policy barring schools from competing for players by allowing them to exploit their image and publicity rights

67. Rob Neyer, *The World According to VORP*, ESPN INSIDER (Feb. 2, 2007), http://sports.espn.go.com/mlb/hotstove06/columns/story?columnist=neyer_rob&id=2751842.

68. See *supra* note 54 and accompanying text. Studies estimating a significantly greater degree of exploitation often ignore the competitive dynamic of a free labor market. A starting point guard for a good basketball program might well generate over \$200,000 in revenue. However, competition from other potential point guards can drive down his free market salary considerably. In a competitive market, a team would rather pay \$40,000 to a less-talented player whose contributions will generate \$190,000 in revenue than pay \$200,000 to a top point guard whose contributions will generate \$220,000 in revenue. Moreover, because top college football and basketball programs feature sold-out arenas and long-term television deals, the additional revenue that a star player can bring in, even if he takes the team to the national championship, is not likely to be that great.

economically.⁶⁹ Under this alternative, the NCAA could pattern its practices after those of the NFL and its players association, allowing players to exploit image rights and sharing in the economic benefits of collective image rights. To the extent that players' earnings would exceed a level necessary to maintain a clear line of demarcation between professional and collegiate sports,⁷⁰ the funds could be placed into a trust fund for the student-athlete's use after the expiration of intercollegiate eligibility.⁷¹

Seizing on an increased consensus that the rules are fair, article V proposes sensible and strict enforcement mechanisms. First, as with baseball (learned in the Black Sox scandal), enforcement needs to be independent of member schools' governance, through the creation of an NCAA Inspector General, a leading law enforcement official who, like the Director of the Federal Bureau of Investigation, would serve a single ten-year term. Second, the Inspector General would be given adequate resources not only to investigate complaints but to audit both players and their families and close friends.⁷²

Third, because under-the-table payments are "victimless" consensual crimes, they need to be detected and prosecuted like similar offenses, such as drug distribution, insider stock trading, or price fixing. Typical detection schemes for these crimes include stiff penalties for those caught, generous amnesty for those who come forward to target others, and a general priority of targeting the more culpable. If student-athletes caught receiving funds were allowed total or near-total amnesty if they provided evidence sufficient to target boosters and would-be agents, this would significantly reorient the incentives of those who cheat.

69. Insofar as the NCAA policy requires players to perpetually forfeit their image rights, even after graduation, it is the subject of current antitrust litigation. *See, e.g.*, *O'Bannon v. NCAA*, 2010-1 Trade Cases (CCH) ¶ 76,899 (N.D. Cal. 2010).

70. *See infra* text accompanying notes 147-149.

71. My thanks to Brian Barcaro for this idea.

72. *See* Raynell Brown, Stephen Ross & S. Douglas Webster, *Exploiting Kids: The Scandal in Agent Recruiting of Athletically-Gifted Teens* 24 (May 2009) (unpublished manuscript), available at http://law.psu.edu/_file/Sports%20Law%20Policy%20and%20Research%20Institute/Exploiting_Kids_the_Scandal_in_Agent_Recruiting_of_Athletically_Gifted_Teens.pdf. Like other law enforcement officials targeting a suspect in a criminal investigation, the ability to get information from third parties is limited. Here, an independent arbitral panel should be given the power to revoke the eligibility of a student-athlete if appropriate in the circumstances where there is reason to believe that a family member or friend may have received things of value due to the player's athletic skill, and they will not submit to an audit. In addition, third parties may have an incentive to cooperate to avoid liability if exposed later.

Fourth, stiff penalties need to be applied, particularly to the boosters, agents, and others providing unapproved financial supplements to a player's financial aid package. One attractive option that NCAA member schools can employ under existing law is aggressive use of civil litigation, suing violators for intentional interference with contractual relations. This well-accepted tort can also provide universities with punitive damages.⁷³ Federal law and many state statutes prohibit agents or others from providing items of value to student-athletes or their families in a manner that would result in rendering the athlete ineligible for continued college sports.⁷⁴ Some of these statutes provide their own remedies.⁷⁵ In addition, many states permit tort recovery for institutions damaged by a third party's violation of statutory law.⁷⁶

Another basis for penalizing those who would provide college athletes or their families with under-the-table payments would be to prosecute them criminally for conspiracy to defraud universities. In order to receive financial aid, college athletes must sign a statement certifying that they have not received any improper financial or tangible items of value.⁷⁷ Most agents and boosters are aware of these rules, and so providing under-the-table payments reflects an agreement between the payor and the athlete to permit the athlete to continue to draw financial aid from the university under false pretenses. In *United States v. Walters*, the United States Court of Appeals for the Seventh Circuit rejected the use of the federal mail fraud statute⁷⁸ to prosecute an agent who had provided significant cash, loans, and a backdated contract for agent representation.⁷⁹ However, the court reasoned that

73. John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, 141-49 (2006).

74. See, e.g., Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801-7807 (2006); TEX. OCC. CODE ANN. § 2051.351(a)(14) (West 2011) (finding that an athlete agent may not "commit an act or cause a person to commit an act on the athlete agent's behalf that causes an athlete to violate a rule of the national association for the promotion and regulation of intercollegiate athletics of which the athlete's institution of higher education is a member").

75. E.g., TEX. OCC. CODE ANN. § 2051.551(a) (permitting "[a]n institution of higher education adversely affected by an athlete agent's . . . violation of this chapter" to file a suit for damages).

76. *Id.*; CAL. BUS. & PROF. CODE § 18897.6 (West 2011) ("No athlete agent or athlete agent's representative or employee shall, directly or indirectly, offer or provide money or any other thing of benefit or value to a student athlete.").

77. See NCAA, 2011-12 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 11-13 (2011), available at <http://www.ncaapublications.com/productdownloads/CBSA.pdf> (describing the requirements to be considered a NCAA amateur athlete).

78. 18 U.S.C. § 1341 (2006).

79. 997 F.2d 1219 (7th Cir. 1993).

the federal statute required proof that the accused had profited from a scheme to defraud; otherwise, as the court observed, someone who uses a telephone or the mail to play a practical joke on a friend would violate the law.⁸⁰ However, the government could prosecute an agent or booster, consistent with *Walters*, by alleging that the actual fraud was committed by the athlete, and the agent/booster was the coconspirator, rather than the principal, and abetted the athlete's effort to keep gifts and an athletic scholarship.

With regard to agents, a final means of stricter enforcement would be to persuade the players' unions, particularly in football and basketball, to impose harsher penalties on agents who have provided improper payments. Indeed, both the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA) have rules that clearly outlaw the payment of anything of value to an athlete to secure their business, even after the athlete is a professional.⁸¹ Players associations do have understandable concerns that their members not be deprived of the agent of their choice. In the short run, a multiyear suspension of an agent caught violating these rules would deprive existing professionals of their desired agent. However, in the long run, strict penalties that lessen under-the-table payments enhance the unions' desire to facilitate a free and well-informed selection of advisors whose talents are critically important to an athlete's career. Often, scandals come to light because the player realizes that the agent most willing to provide under-the-table cash is not the best agent to negotiate a contract.⁸² Countless other athletes, though, may have remained with sleazy agents for fear of exposure, instead of being free to select the agent of their choice. These athletes would be better served by stricter penalties by the players associations.

In sum, article V proposes a combination of increased financial assistance for the elite stars whose contributions result in significant revenues for their colleges, with tough enforcement of revised rules to

80. *Id.* at 1224.

81. NFLPA REGULATIONS GOVERNING CONTRACT ADVISORS § 3(B)(2) (2007), reprinted in PAUL C. WEILER ET AL., DOCUMENTS AND STATUTORY SUPPLEMENT TO SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 222 (4th ed. 2011); see George Cohen, *Ethics and the Representation of Professional Athletes*, 4 MARQ. SPORTS L.J. 149, 156 (1993).

82. For descriptions of scandals coming to light when improper payments came to light when an agent was no longer representing the athlete with whom he had conspired to violate NCAA rules, see, for example, Jack Cavanaugh, *UMass and UConn Lose '96 Honors*, N.Y. TIMES, May 9, 1997, at B21 (regarding former UMass Minuteman Marcus Camby and former UConn Huskies Kirk King and Ricky Moore), and Lynn Zinser, *U.S.C. Receives Harsh Penalties from N.C.A.A.*, N.Y. TIMES, June 11, 2010, at B9 (regarding former USC Trojans Reggie Bush and O.J. Mayo).

minimize the likelihood of continued cheating. This combination is fairer to athletes and to schools and facilitates means to avoid embarrassing scandals.

IV. THE CHARTER OF REFORM AND ANTITRUST LAW

The prior discussion set forth five reform proposals implementing four foundational principles that anchor sound public policy with regard to intercollegiate athletics. The claim here is not that federal antitrust law mandates any of the reforms.⁸³ Rather, this Part discusses why NCAA member schools' adoption of the Charter of Reform would not violate the Sherman Act. After a discussion of general principles, this Part focuses on four specific aspects of the Charter that may draw the attention of those seeking to use antitrust laws to block reforms that they oppose.

A. *General Antitrust Principles Applicable to NCAA Rules*

Three general principles anchor any antitrust analysis of NCAA rules. First, the United States Supreme Court has held that antitrust laws apply only to *commercial* restraints imposed by NCAA member institutions. Second, the Court applies a "rule of reason" in analyzing commercial restraints, which focuses on the quantity and quality of output and price. Third, courts use a three-step analysis in applying this rule of reason. To be found unreasonable, a commercial restraint must have a demonstrable anticompetitive effect and either lack a legitimate justification or be found unnecessary to achieve the defendants' legitimate goals.

Section 1 of the Sherman Act prohibits conspiracies in restraint of trade.⁸⁴ The principal purpose of this section is to prevent economic entities from agreeing among themselves to reduce competition in order to increase their profits.⁸⁵ The fact that the economic entity is a not-for-profit institution does not fundamentally change the analysis where it appears that the entity is motivated by a desire for increased revenues or profits. Thus, in *NCAA v. Board of Regents of the*

83. The thesis is that these NCAA rules should be changed on policy grounds. A full analysis of current NCAA rules is beyond the scope of this Essay.

84. 15 U.S.C. § 1 (2006).

85. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 214-15 (3d ed. 2005) (stating that antitrust law scrutinizes joint activity because it involves private actors seeking private gains and trade-restraining conduct reduces output lower than, and raises prices higher than, competition would produce).

University of Oklahoma, the Supreme Court reviewed a challenge to an agreement that significantly limited the number of college football games that could be broadcast each Saturday; the Court's reasoning was not markedly different from the likely decision regarding a similar agreement among professional teams.⁸⁶ The Court properly rejected Justice White's dissenting argument that the NCAA's nonprofit orientation warranted significant deviation from standard antitrust analysis; in regard to this particular restraint, it would be hard to imagine how university presidents would act any differently if they *were* seeking purely to maximize profits. Significantly, the Sherman Act does not permit firms, regardless of structure, to reduce output or raise price because the resulting monopoly profits will be used for worthy causes.⁸⁷

In contrast, courts have rejected antitrust scrutiny of NCAA rules that are designed for noncommercial ends. This implements long-standing Supreme Court precedent that recognizes the possibility for differential analysis of agreements reflecting nonprofit entities' noncommercial goals.⁸⁸ Thus, in *Smith v. NCAA*, the United States Court of Appeals for the Third Circuit considered a challenge to an NCAA rule that limited eligibility to undergraduate students, with a limited exception for students doing graduate work at the same institution where they competed as undergraduates.⁸⁹ The court determined that NCAA rules establishing academic standards for student-athletes and defining amateurism are not subject to review under antitrust law because they "are not related to the NCAA's commercial or business activities," and because they "allow for the survival of the product, amateur sports, and allow for an even playing field."⁹⁰

Second, the Supreme Court has made it clear that sporting competitions require some agreement among the member schools, so that rules that might be blatantly illegal in other contexts will be considered carefully under a rule of reason.⁹¹ The "hallmark" of an

86. 468 U.S. 85 (1984).

87. Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 76-77 (2001).

88. While rejecting a claim that professional services did not constitute "trade" for antitrust purposes, the Supreme Court expressly noted in *Goldfarb v. Virginia State Bar* that the fact that restraint operates in something other than a classic business is relevant to determining that the practice violates the Sherman Act. 421 U.S. 773, 788 n.17 (1975).

89. 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

90. *Id.* at 185, 187.

91. Justice Stevens authored both decisions so holding. He first wrote in *Board of Regents* that "a certain degree of cooperation is necessary if the type of competition that [the

agreement constituting an unreasonable restraint of trade is that “[p]rice is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.”⁹² The Court observed that many NCAA rules would be sustained against antitrust challenge, because they make college sports more attractive by differentiating the product from its athletic equivalent of minor league professional sports, thus increasing output and making output responsive to consumer preference.⁹³

Finally, courts apply a three-part test to determine whether a restraint is reasonable. First, the plaintiff must show an actual restraint on competition: evidence that the restriction has affected price or the quantity or quality of output. Second, the defendant may justify a restraint by showing that its purpose is legitimate and procompetitive. Third, the plaintiff can rebut this showing by demonstrating that the actual restraint is overly restrictive and not reasonably necessary.⁹⁴ Although there is broad language in some antitrust precedents that suggests that sports restraints are subject to some *gestalt* balancing of harms and benefits,⁹⁵ there are no reported cases where a court has struck down a restraint shown to be reasonably necessary to achieve a legitimate procompetitive purpose.

NCAA] and its member institutions seek to market is to be preserved.” 468 U.S. at 117. He repeated the claim in *American Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (stating that NFL teams “must cooperate in the production and scheduling of games”). Although the procompetitive benefits of cooperation among professional sports clubs or colleges otherwise in competition justifies the application of the rule of reason, Justice Stevens is, with all respect, simply incorrect that this cooperation is essential for a sporting competition to exist. For example, the regulations agreed to by rival professional sports clubs or the NCAA member schools are determined in auto racing by an independent entity, NASCAR. PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 549-51 (4th ed. 2011).

92. *Bd. of Regents*, 468 U.S. at 107.

93. *Id.* at 101-02.

94. *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

95. *See, e.g., N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1258-59 (2d Cir. 1982) (“[The] inquiry [is] ‘whether the challenged agreement is one that promotes competition or one that suppresses competition’ . . .” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 691 (1978)); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”)).

B. Specific Antitrust Limitation on the NCAA: Rules Can Only Limit Members' Participation in Sports Under NCAA Jurisdiction

The NCAA sponsors and regulates a wide number of intercollegiate athletic sporting competitions. The NCAA Bylaws contain a wide variety of rules that regulate these competitions. By their own terms, NCAA Bylaws only govern NCAA-sponsored competitions. The NCAA Constitution expressly provides that the Bylaws govern “all teams in sports recognized by the member institution as varsity intercollegiate sports.”⁹⁶ If an institution does not award “varsity letters” or other traditional amateur indicia of “varsity” sports, the sport does not have to fall within the NCAA’s jurisdiction. To illustrate, Brigham Young University (BYU) does not have a NCAA men’s soccer team, choosing instead to participate in the Premier Development League, a semiprofessional league for players under the age of twenty-three. Although BYU players are not paid,⁹⁷ providing payment would not affect the status of BYU as a member of the NCAA participating in other sports. Or, at the other extreme, the California Institute of Technology competes in some sports as a member of NCAA’s Division III but has sponsored a football team that includes faculty and graduate students and competes against community colleges, military football teams, and others outside the NCAA framework.⁹⁸

Under a proper interpretation of current NCAA rules, member institutions are free to sponsor sports teams outside NCAA jurisdiction and not classify them as “varsity sports.” As the Supreme Court has recognized, the NCAA seeks to market a particular type of athletic competition, differentiated from and much more popular than minor league professional sports, based on the NCAA’s “fundamental policy” that seeks to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁹⁹ Today, many NCAA member institutions offer club sports that are not subject to NCAA rules. Likewise, if NCAA member institutions wished to offer semiprofessional sporting competitions, they too should simply fall outside the NCAA rubric. To illustrate, MLB could enter into an

96. NCAA CONST. art. 3.2.4.5 (2011).

97. See *Final Game of the Season*, BYU MEN’S SOCCER (July 20, 2011), <http://byusoccer.com/blog/2011/07/final-game-of-the-season/>.

98. Richard Demak, *They Field Tough Eggheads in Caltech Football*, SPORTS ILLUSTRATED, Aug. 31, 1987, at 8.

99. NCAA CONST. art. 1.3.1.

agreement with Southeastern Conference (SEC) schools to withdraw from NCAA baseball and to participate in their own competition, subsidized by MLB, which would allow professional clubs to pay students to attend school while playing baseball. As long as the sport was not characterized as “varsity,” and SEC schools did not play regular-season matches against other NCAA schools, the current rules permit such an agreement. In similar fashion, universities that did not share the Charter’s antagonism toward diverting scarce resources from history teaching assistants or chemistry labs to subsidize nonsustaining intercollegiate athletics could form their own competition, either in football or other traditional nonrevenue sports.

A strong case can be made, however, that NCAA members would violate the Sherman Act if they adopted rule changes, or if the NCAA were to adopt a strained interpretation of existing rules, to bar schools from participating in NCAA-sponsored competitions if they chose to sponsor non-NCAA sports separately at an elite level. NCAA members did act in this unlawful manner in the early 1980s, prior to the successful antitrust challenge to NCAA restraints on college football broadcasts.¹⁰⁰ At that time, members with major football programs had formed the College Football Association (CFA) and, when the CFA considered sponsoring its own football program outside the jurisdiction of the NCAA, the NCAA informed members that they would be ineligible to participate in *other* NCAA-sponsored sports if they followed that course.¹⁰¹ The matter was never independently litigated, because the CFA members were happy to return to the NCAA fold once the Supreme Court struck down the disputed television restraints.

The *Board of Regents* litigation highlighted a problem that has seriously affected NCAA governance, where the vast majority of schools operating sports on a noncommercial basis were voting on legislation that only affected the relative minority of schools operating sports that generate substantial commercial revenues.¹⁰² Current NCAA governance procedures allow greater leeway for Division I schools to set their own rules appropriate to their own situation.¹⁰³ The most plausible way to implement this Charter of Reform is for it to be

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

101. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1324-25 (W.D. Okla. 1982), *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984).

102. See *Bd. of Regents*, 468 U.S. at 118.

103. NCAA CONST., *supra* note 4, § 4.01.1.

adopted with the support of a majority of universities currently competing at the top level of intercollegiate sports (currently called the Division I Football Bowl Subdivision). If a minority of elite athletic programs prefer to operate in a different manner, the Sherman Act ought to constrain the ability of the majority to force their unwilling compliance by refusing to allow them to participate in other sporting competitions where the minority is in full compliance with NCAA rules. Allowing those who do not wish to operate under the Charter of Reform to try to form their own competitions outside the NCAA rubric makes it far easier for the Charter of Reform to withstand antitrust scrutiny.

C. The Agreement To Operate Expensive Division I Sports Only Where Revenues Match Expenses or Where Necessary To Comply with Title IX

Implementing the Charter will transform most men's Division I sports programs, and many women's Division I programs, from expensive, subsidized programs featuring athletic scholarships, extensive coaching, and significant travel, to reduced programs that are the equivalent of elite club or Division III sports. Clearly, stakeholders directly affiliated with these affected sports (athletes, parents, and coaches) will strongly oppose this policy initiative and would likely seek to prevent its implementation by claiming that the Charter constitutes an unreasonable restraint of trade in violation of the Sherman Act. Specifically, the Charter could be challenged as reflecting two allegedly distinct anticompetitive agreements: (1) an agreement among member schools that operate self-sustaining sports programs not to compete against those who are not self-sustaining;¹⁰⁴ and (2) an agreement among schools not to operate sports that are not self-sustaining.¹⁰⁵ Parsing the particular agreements demonstrates that these agreements are either reasonable restraints of trade or noncommercial in nature.

Under the rule of reason, the initial question is whether the restraint affects price or output. The Charter likely will have such an

104. This will likely occur primarily in football and basketball and among a small and elite number of programs still able to offer Division I ice hockey, baseball, and wrestling.

105. The Charter could also be challenged as an agreement among self-sustaining programs not to spend in excess of revenues. Because the hallmark of the Sherman Antitrust Act is the creation of competitive markets responsive to consumer preference, it is difficult to see how competition is restrained when firms do not behave in economically irrational ways to provide goods or services that consumers will not commercially support. In any event, the analysis in the text would suffice for this challenge as well.

effect, although in a very atypical way. The relevant market in which trade is allegedly restrained is characterized by a high degree of product differentiation (most fans differentiate college football from the NFL, and many fans are particularly avid supporters of particular college football programs).¹⁰⁶ Output will be reduced to the extent that certain differentiated products, for which there is insufficient consumer preference to generate revenues equal to cost, will no longer be available (or at least will not be available in competition with other Division I programs, which is what avid fans of these programs prefer). This output effect is quite different from a typical anticompetitive output reduction, where the effect of a restraint is to reduce the *defendants'* output, resulting in an increase in the price for the *defendants'* services, and allowing the *defendants to achieve greater profits* than would be available in a competitive market. Nor does the agreement exclude more efficient rivals, allowing the defendants to provide services unresponsive to the preferences of the *defendants'* consumers. Rather, with minimal direct impact on their own ability to generate surplus revenues over expenses, or the price or quality of output for *their* consumers, programs like Penn State, the University of Texas, Alabama, and USC will have adopted an agreement that reduces output from schools like Rutgers University¹⁰⁷—output that will unlikely have an impact on nationally televised games appealing to most football fans and will only have an impact on live gate and regionally televised games appealing to the relatively small number of avid fans of these schools who are insufficient in number to generate revenues necessary to be self-sustaining. Therefore, a strong argument can be made that the agreement does not have an anticompetitive effect at all.

In nonsports contexts, a joint venture's decision to exclude others is not normally seen as a restraint of trade. Others are free to form

106. *Bd. of Regents*, 468 U.S. at 101-02; Heather Gibson, Cynthia Willming & Andrew Holdnak, "We're Gators . . . Not Just Gator Fans": *Serious Leisure and University of Florida Football*, 34 J. LEISURE RES. 397 (2002).

107. Curtis Eichelberger, *Rutgers Big Ten Decision May Put School's Sports Programs Deeper in Debt*, BLOOMBERG (June 8, 2010, 2:41 PM), <http://www.bloomberg.com/news/2010-06-08/rutgers-big-ten-decision-may-put-school-s-sports-programs-deeper-in-debt.html> (stating that almost half of Rutgers University's athletic department's \$58.5 million dollars were from state subsidies and student fees). Another report suggested that Connecticut, Syracuse University, Wake Forest University, and Duke University all lost money on their football programs. Brett McMurphy, *For Longhorns, Money Grows on Football Program Instead of Trees*, AOL NEWS (June 30, 2010, 8:00 AM), <http://www.aolnews.com/2010/06/30/for-longhorns-money-grows-on-football-program-instead-of-trees/>.

their own joint venture.¹⁰⁸ (Likewise, anyone would be free, after the NCAA implements the Charter, to join and play in the “Subsidized Football Conference.”) Where a plaintiff can demonstrate that the joint venture is an “essential facility” to which access must be granted,¹⁰⁹ the focus of competitive concern is not with the rights of the plaintiff, nor the rights of consumers avidly loyal to the plaintiff’s differentiated product, but on the defendant’s ability to generate monopoly profits or to gain a commercially unfair advantage from the exclusion.¹¹⁰ In the market for college football, it is unlikely that the exclusion of football or basketball programs that were not self-sustaining would have any significant effect on the ability of the remaining teams to raise prices for tickets, television rights, licensing, or sponsorships, nor would the *defendants’* output be reduced. The only output excluded is from those who, for noncommercial reasons, desire to lose money to participate in an otherwise successful commercial venture. Therefore, a court should conclude that the Charter’s requirement that participation in Division I men’s sports be conditioned on revenues exceeding expenses over a multiyear period does not constitute a restraint of trade in a commercial context.

An even stronger argument, however, is that the restraint is noncommercial. The Charter does not exclude efficient rivals or new entry, as commercial restraints would. Immediately upon implementation of article I, Fordham University (a Division I Football Bowl Subdivision (I-AA) school) could announce a partnership with the New York Yankees to play in Yankee Stadium and broadcast games on the Yankees Entertainment and Sports Network, with a three-year plan designed to turn the Rams into New York’s premier college football program. Nor does the Charter exclude inefficient rivals from competing if they can receive sport-specific donations. Even if other revenue was insufficient to keep Oklahoma State in the black, the

108. H.R. REP. No. 98-1044, at 9 (1984) (Conf. Rep.).

109. This is a highly controversial topic. See HOVENKAMP, *supra* note 85, at 309 (calling the doctrine “troublesome, incoherent and unmanageable”).

110. Two sports cases invoking the doctrine are illustrative. In *Fishman v. Estate of Wirtz*, the plaintiffs claimed that the defendant owner of the Chicago-area arena best suited for professional basketball violated the antitrust law by refusing to execute a lease, thus allowing a related firm to win the competition for an NBA franchise. 807 F.2d 520, 525, 535-38 (7th Cir. 1986). In *Hecht v. Pro-Football, Inc.*, the plaintiff challenged a contract term between the operator of Robert F. Kennedy Memorial Stadium in Washington and the NFL Redskins club barring a lease with another football team. 570 F.2d 982, 985-86 (D.C. Cir. 1977).

Cowboys could continue to compete in Division I as long as oil baron T. Boone Pickens was footing the bill.¹¹¹

The only practice effectively precluded by article I is the use of funds that would otherwise go to educational purposes from being spent on expensive Division I athletic programs. As outlined above, the NCAA should ban this practice not because of commercial considerations, but rather the very specific noncommercial concern that university presidents and trustees are too likely to be “captured” by special interests who desire an entertainment product that the market will not support. No profit-maximizing enterprise would take this action. There is no direct *economic* benefit resulting from a lessening of competition in the market in which the targeted firms operate.¹¹² Rather, the net effect of the policy is to promote a wider consumer choice in the broader educational market.

In this regard, the court of appeals decision in *United States v. Brown University* is instructive.¹¹³ Unlike the agreement limiting Division I men’s sports to self-supporting operations, the Third Circuit observed that an agreement among elite academic schools to limit scholarships to those based on financial need would be consistent with the parties’ economic self-interest in revenue maximization. Nonetheless, the court remanded for a more detailed rule of reason analysis, observing the need for special care in predicting the economic consequences of a restraint when defendants claim that it was motivated by “public service or ethical norms.”¹¹⁴ Specifically, the court observed that an agreement to allocate financial aid solely on the basis of demonstrated need meant that available resources are spread among more needy students, increasing the number of students able to afford an education at an expensive elite private school.¹¹⁵ In a similar fashion, an agreement to allocate educational resources solely to nonathletic educational programs, or to athletic programs tailored primarily for the benefit of the student-athlete (Division III or club-

111. Jenni Carlson, *OSU Megabooster Boone Pickens Riding as High as His Cowboys Are Ranked*, NEWSOK (Oct. 26, 2011), <http://newsok.com/osu-megabooster-boone-pickens-riding-as-high-as-his-cowboys-are-ranked/article/3617230> (reporting Pickens’s donations to the Oklahoma State University’s athletic department to be valued at \$300 million).

112. IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 177 (3d ed. 2006).

113. 5 F.3d 658 (3d Cir. 1993).

114. *Id.* at 672 (quoting *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 349 (1982) (internal quotation marks omitted)).

115. *Id.* at 675.

level competition), means that scarce resources are available for financial aid or educational quality improvements.¹¹⁶

The purposes of the Sherman Act are furthered when rivals compete for consumers' patronage by putting forth choices that provide consumers with their preferred mix of price, output, and quality.¹¹⁷ Organizing a competition based on principles of prudent financial management serves these goals. It is more likely that universities will make investments in commercialized football and basketball designed to respond to consumer preferences if their rivals are also making similar investments than if rivals are participating in sporting competitions for alternative motivations. Indeed, the distortive effect of subsidies motivated by outside concerns has been recognized by other competition law regimes. For example, the United Kingdom Monopolies and Merger Commission (Commission) blocked the acquisition of Manchester United by News Corporation, the owner of the Sky Sports (Sky) satellite network, in part because the Commission found that the team would be operated principally to promote the value of programming on Sky rather than prudently as a soccer team.¹¹⁸

The flip side of article I can be characterized as an agreement among NCAA schools *not* to offer revenue-losing programs at the Division I level. It is true that this aspect of article I is output-reducing, to the extent that programs attract a live attendance and, in some cases, a television audience, even if revenues from these sources are insufficient to cover costs. But the purpose and effect of the agreement is not to permit the "conspirators" to raise price or increase profits; rather, it serves the noncommercial goal of limiting athletic subsidies from funds that can be used for educational purposes.

An agreement not to offer revenue-losing programs might also be characterized as an anticompetitive agreement not to compete in the broader market to obtain the best students to matriculate at the university and the best professors to accept offers to join the faculty. With regard to football and men's basketball, it may be true in some few cases that the benefits to the school from increased enrollment or

116. Although antitrust defendants cannot justify anticompetitive commercial arrangements resulting in increased profits with arguments that they further noneconomic social values, courts should consider the degree to which noncommercial decisions further social as well as procompetitive values. *Id.* at 675 n.10.

117. Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007).

118. *BSkyB Bid for Man Utd 'Kicked Out,'* BBC NEWS BUSINESS: THE COMPANY FILE (Mar. 17, 1999, 11:48 GMT), <http://news.bbc.co.uk/2/hi/business/298072.stm>.

faculty retention outweigh the costs of the annual subsidy. For these programs, however, the money-losing university's agreement is not the cause of the injury; rather, it is the procompetitive decision of the self-sustaining schools that effectively excludes those whose fan base is insufficient. With regard to other sports, it seems fanciful to claim that the reduced quality of nonrevenue sports, which do not attract significant audiences anyway, will affect nonathletes' desire to attend the school. Moreover, if State University wants to attract Hannah Highscore because of her phenomenal SAT results, they are free to award her a merit scholarship not based on athletics, and she can play sports for them.

D. The Agreement To Operate Sports Subsidized by General University Funds Only on a Club or Division III Level

Article III restricts most sports programs that are not sustainable to competitions featuring no athletic-based scholarship, limited coaching, and restricted travel. In analyzing an antitrust challenge to an agreement among NCAA members to implement this agreement, its precise scope bears emphasis. If a minority of NCAA member schools wish to form the Subsidized Sports Association, and compete outside the NCAA umbrella in competitions with like-minded institutions anxious to divert educational funds to intercollegiate athletics participation that is not cost-justified, they would be free to do so.

Antitrust law focuses on restraints on competition in relevant economic markets.¹¹⁹ There is no relevant economic market for soccer or golf at the Division I level. Any reduction in the quality of play is irrelevant because there are virtually no "consumers" of high quality play.

A bit more analysis is required to dispose of a claim that universities are restraining competition in the market for student enrollment. This is a relevant market, although the unique nonprofit motivation of schools is highly relevant to the antitrust analysis. Thus, the Third Circuit remanded for more detailed analysis a district court order barring a cartel agreement among the Ivy League schools and Massachusetts Institute of Technology to agree on how much need-based financial aid to award to students.¹²⁰ The case was eventually settled, allowing the colleges to agree among themselves not to

119. HOVENKAMP, *supra* note 85, at 92.

120. *Brown Univ.*, 5 F.3d at 661, 679.

compete for students by offering merit-based scholarships.¹²¹ The universities argued that limiting competition in this way and collectively channeling resources to need-based aid actually increased opportunities to attend elite schools and therefore increased demand for the “product” of elite higher education.¹²² If Harvard University and Yale University can agree not to compete for students by offering them merit-based scholarships, then it would seem to follow that Penn State and Ohio State University can agree not to compete for students by offering them athletics-based scholarships. Like the Ivies, Big Ten schools can also increase demand and opportunity by channeling those funds into other programs. Indeed, to the extent that tuition-paying students are attracted to an institution by the opportunity to participate in intercollegiate sports, universities can use the savings from Division I nonrevenue sports to expand their offering of club sports.

Moreover, limiting club sports, as outlined above, is a legitimate way to maximize the noneconomic goals of intercollegiate athletic competition. Competitive balance and a fair opportunity to compete are served when teams are playing with a level playing field. Federal courts have upheld restrictions on “minor” competitions precisely to allow them to compete.¹²³ Finally, it is not clear how a court could distinguish the limits advocated by article III of the Charter from existing limits in Division I. Division I schools already agree to limit financial aid to levels that, at least for elite students, are far below what they would receive in an unrestrained market; article III lowers the level of aid (students participating in these sports could not receive tuition waivers or cash for housing, food, and books, but could continue to receive tutoring and health services); Division I schools limit the number of coaches each team can have, while article III simply lessens the number further. It is difficult to see how article III’s additional limits on travel has any anticompetitive effect in any real market.

This discussion would not be complete without an analysis of *Law v. NCAA*.¹²⁴ That case involved an NCAA rule permitting Division I men’s basketball teams to hire three assistant coaches and then changed the rule to require one of these assistants to be a

121. William H. Honan, *M.I.T. Wins Right To Share Financial Aid Data in Antitrust Accord*, N.Y. TIMES, Dec. 23, 1993, at A13.

122. *Brown Univ.*, 5 F.3d at 674-75.

123. *See, e.g., M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984).

124. 134 F.3d 1010 (10th Cir. 1998).

“restricted earnings” coach whose salary could not exceed \$16,000 per year.¹²⁵ The United States Court of Appeals for the Tenth Circuit struck down the salary limit. There are many ways in which the holding on the NCAA’s restricted earnings rule is distinguishable from article IV of the Charter, revealing why the latter is likely to be found lawful.

First, in striking down the assistant coach salary cap, *Law* expressly distinguished another circuit opinion in *Hennessey v. NCAA*, which had upheld a limit on the *number* of coaches.¹²⁶ The restricted earnings rule was a “naked restriction on price” that immediately called for the defendants to justify their restraint; a justification on the number of coaches required an independent assessment of the reasonableness of the restraint. It is not clear that a ban on scholarships and restrictions on the number of coaches and the distance for permitted travel contemplated by the Charter’s article IV even restrains trade in a relevant economic market, because by definition these teams are not operated on a commercial basis.

Second, *Law* found that *Hennessey* had improperly placed the burden on the plaintiff, rather than the defendant, to show that a clear restraint of trade is not justifiable.¹²⁷ If the Charter’s article I (barring economically unsustainable Division I sports) passes antitrust muster,¹²⁸ then article III merely allows schools that cannot be commercially profitable in sporting competitions to agree on a uniform basis of competition against one another, which is a sufficient justification.

Moreover, unlike the blatant effort to save a few thousand dollars through a “salary cap” on an assistant coach in *Law*, article IV’s limits are reasonably necessary to ensure a balanced sporting competition that will give the maximum number of student-athletes the opportunity to gain the physical, social, and mental benefits of intercollegiate athletic participation. Such a justification was inconceivable with regard to the rule challenged in *Law*.

E. Reducing the Maximum Allowable Athletic Aid for Football and Allowing Partial Scholarship Offers

Distinct issues arise with regard to the proposal that football squads reduce the maximum athletic aid from eighty-five full scholarships to the equivalent of fifty-five scholarships, which could

125. *Id.* at 1020.

126. *Id.* at 1020-21 (discussing *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977)).

127. *Id.* at 1021.

128. *See supra* text accompanying notes 111-118.

be spread among more student-athletes in the form of partial scholarships (the process that is currently used for the vast majority of NCAA sports). Under current precedents, this rule would be considered a restraint of trade. However, careful analysis shows that the restraint is acceptable under the rule of reason, as a restraint that is reasonably necessary to improve competitive balance and thereby increase overall fan appeal for college football, as well as one that provides many student-athletes with greater information and facilitates a more informed choice of college.

An agreement among elite college football programs to reduce the number of football scholarships is a restraint of trade. Although one court of appeals incorrectly suggested that the agreement among schools to limit compensation for college football players to a scholarship means that there is no relevant economic market,¹²⁹ there clearly *would be* a relevant economic market if the member schools had not agreed to limit compensation! Although the proposed limit is unlikely to limit the number of young men willing to play Division I football, the compensation provided under article V is clearly less than what would “otherwise be” absent the agreement. An agreement among competitors that reduces the price of labor to less than what would “otherwise be” requires a justification to survive the rule of reason.¹³⁰

Before turning to the legitimate justifications for this restraint, a brief discussion is warranted because sports labor cases raise interesting issues of general antitrust applicability concerning the ability of firms to justify reducing competition in input markets in order to improve competition or consumer welfare in output markets. A buyers’ cartel cannot justify its conduct by proof that a portion of the below-market prices defendants pay for labor or inputs will be passed on to consumers in the form of lower prices.¹³¹ Likewise, no cartel can

129. *Banks v. NCAA*, 977 F.2d 1081, 1093-94 (7th Cir. 1992). The strength of the court’s conclusion is unclear, as the opinion noted that “Banks might possibly have been able to allege an anti-competitive impact on a relevant market through a more carefully drafted complaint or an amendment to his complaint.” *Id.* at 1094.

130. *Cf. NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984).

131. *See HOVENKAMP*, *supra* note 85, at 171 (demonstrating erroneous reasoning of *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 317 (6th Cir. 1989), to effect that anticompetitive bidding agreement among movie theaters was permissible because theaters paid less for films). *Balmoral Cinema’s* holding has not been followed by recent cases, as aptly discussed in John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 235-36 n.213 (2008) (citing *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000)); *Law*, 134 F.3d at 1010, 1022-23.

justify its behavior on the ground that the lower costs or higher prices that result allow more firms to stay in business, a justification that would legalize any anticompetitive scheme.

However, restraints that are reasonably necessary to produce a better quality or cheaper product are permissible, even where the restraint adversely affects labor or input markets. The Supreme Court unequivocally held in *Board of Regents* that an agreement that restrained trade in one market (in that case, broadcasting) could be justified if shown to be reasonably necessary to promote a level of competitive balance that increases the popularity (and thus output) of a sporting competition to consumers.¹³² In similar fashion, United States Court of Appeals for the Eighth Circuit held in *Mackey v. NFL* that restraints in the labor market could also be justified if appropriately tailored to achieve the goal of competitive balance.¹³³ A prior decision of the United States Court of Appeals for the District of Columbia Circuit in *Smith v. Pro Football, Inc.*¹³⁴ is to the contrary, but it precedes *Board of Regents* and was poorly reasoned. In analyzing the procompetitive benefits of the NFL's rookie draft, *Smith* held that the only way that parties can increase competition is by encouraging new firms to enter the market or allow existing firms to offer a product at a lower cost.¹³⁵ This view ignores the possibility that an agreement allows existing firms to offer a superior product at the same cost, thereby increasing output.¹³⁶ Moreover, a refusal to determine the overall effect of a restraint is inconsistent with the general welfare approach to the rule of reason.¹³⁷

Limiting each university to the equivalent of fifty-five scholarships is the analytical equivalent of a salary cap adopted by many professional sports leagues. Although these caps are widespread, few judicial opinions have considered whether these caps are reasonable restraints of trade. (They either have gone unchallenged or are adopted by owners in leagues with a collective bargaining

132. 468 U.S. at 102, 117.

133. 543 F.2d 606, 621 (8th Cir. 1976).

134. 593 F.2d 1173 (D.C. Cir. 1978).

135. *Id.* at 1186-87.

136. Kirkwood & Lande conclude that buyer-side restrictions without an anticonsumer effect are an antitrust concern "only where suppliers have been exploited by the anticompetitive behavior of buyers, and only where consumers would not be forced to pay supracompetitive prices." Kirkwood & Lande, *supra* note 131, at 236.

137. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Sherman Antitrust Act is a "consumer welfare prescription").

relationship with a players' union and as such are protected by the so-called "non-statutory labor exemption."¹³⁸

In the professional context, salary caps can harm players by limiting the compensation they would receive absent the agreement to cap salaries. They can also harm fans: by preventing high-revenue but underachieving teams from spending more money to get better talent, competitive balance can be reduced.¹³⁹

The similar limit in college football is justified, however, for two reasons that are arguably distinct from the professional sports context. First, as the Supreme Court has explained, college football's popularity lies in its successful effort to differentiate itself from professional sports.¹⁴⁰ One important way that college football differs from professional sports is that, unlike woefully disappointing "big market" clubs like the Toronto Maple Leafs, New York Knicks, or (until 2004) Boston Red Sox, fans do not want college football programs to improve by simply increasing payroll.

Second, because of the nature of alumni loyalty as well as stadium capacity, the case that improved competitive balance would increase overall output and fan appeal is much more likely in college sports.¹⁴¹

In evaluating the effect of the scholarship reduction/equivalency reform on college athletes themselves, two other concerns become relevant. First, the effect on the student-athletes differs from the effect of a professional team salary cap in that poor students will be economically unaffected, because those receiving only a partial scholarship can supplement their athletic aid with need-based financial aid. Second, the equivalency feature is procompetitive in the sense that an important component of competition that the antitrust laws facilitate is consumer choice about matters beyond quantity and price.¹⁴² As described in Part III, article IV will require college football coaches to reveal their superior predictions about those recruited athletes most likely to start and contribute for their team and those more likely to remain on the bench. This will help the student-athlete choose the

138. *Wood v. NBA*, 809 F.2d 954, 956-59 (2d Cir. 1987).

139. This claim is detailed in Stephen F. Ross, *The NHL Labour Dispute and the Common Law, the Competition Act, and Public Policy*, 37 U.B.C. L. REV. 343, 384-91 (2004) and Stephen F. Ross, *Competition Law and Labor Markets*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 311, 311-21 (James A.R. Nafziger & Stephen F. Ross eds., 2011).

140. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984).

141. For a discussion of why restricting football programs to fifty-five equivalency scholarships would improve competitive balance, see *supra* text accompanying notes 56-57.

142. *Averitt & Lande*, *supra* note 117.

program and university best suited for his needs. The courts have explicitly recognized that the rule of reason permits colleges to justify otherwise anticompetitive agreements that serve to enhance student choice.¹⁴³

F. Increasing the Maximum Allowing Athletic Aid To Permit Cash Payments of up to One-Half a Typical Scholarship for Star Players

Under article V, coaches could allocate up to one and one-half scholarships from their existing limit (reduced for football under article IV from eighty-five to fifty-five) for star players. Because of the overall scholarship limits, it is likely that even in men's football and basketball, this "One Plus" scholarship would be awarded only for extraordinary athletes. There are two potential sources of antitrust concern with regard to article V. Some may worry that providing cash payments of \$15,000 would strip NCAA member schools of the defense that it needs to limit payments to student-athletes to promote the distinctiveness of college sports. Another fear is that once cash payments are authorized, schools could not justify limiting those payments to the equivalent of one-half of an academic scholarship. Neither concern need detain implementation of the Charter. Article V is consistent with the Supreme Court's view that restrictions in college sports are reasonably necessary to differentiate the product. Limiting payments to athletes to 150% of the value of a college scholarship can be justified both as necessary for product differentiation as well as to promote competitive balance.

Lower courts have consistently rejected the argument that the current limit of a full athletic scholarship constitutes a restraint of trade in violation of the Sherman Act.¹⁴⁴ The best reasoning, however, comes in dicta from the Supreme Court:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as,

143. *See, e.g.,* United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993) (reversing injunction barring elite schools from agreeing on scholarship offers in order to effectuate agreement barring merit scholarships).

144. *See, e.g.,* Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992) (failure to allege impact in a discernible market); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (upholding dismissal of complaint for failure to state a claim because complaint did not allege facts showing that rules did not enhance NCAA's goal of marketing college football distinctly from professional football).

for example, minor league baseball. In order to preserve the character and quality of the “product,” *athletes must not be paid*, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.¹⁴⁵

In contrast, the dissenting opinion by Justice White (joined by Justice Rehnquist) emphasized the nonprofit and amateurism goals of NCAA member schools:

The NCAA, in short, “exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.” In pursuing this goal, the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market.¹⁴⁶

What is notable about Justice Stevens’ opinion for the seven-justice majority is that it provides an entirely *commercial* justification for *commercial* restraints. That is, the NCAA engages in a commercially successful marketing strategy by offering a commercial entertainment product, college football, which is vastly more popular than minor league baseball. Why is college football so much more popular? According to Justice Stevens, the cause is the NCAA’s successful product differentiation strategy. Because successful product differentiation increases demand for (and thus output of) the product, the antitrust conclusion shall be that agreements reasonably necessary to promote this successful marketing strategy pass muster under the rule of reason.

In analyzing article V’s authorization to pay elite players a cash subsidy in excess of the costs of education, it is important to distinguish two goals that the NCAA articulates for intercollegiate athletics. One is amateurism.¹⁴⁷ This concept has been extensively

145. *Bd. of Regents*, 468 U.S. at 101-02 (emphasis added).

146. *Id.* at 122 (White, J., dissenting) (citation omitted) (quoting Ass’n for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 494 (D.D.C. 1983), *aff’d*, 735 F.2d 577 (D.C. Cir. 1984)).

147. NCAA CONST. art. 2.9 (2011).

criticized as incoherent or inappropriate for modern times.¹⁴⁸ Many philosophical articulations of amateurism are inconsistent with the current Division I practice of providing athletic scholarships. In any event, those who believe on philosophical or policy grounds that paying cash to student-athletes is a bad idea are not going to support article V. The other goal is to “maintain[] a clear line of demarcation between [inter]colleg[iate] athletics and professional sports.”¹⁴⁹ Considering the affluence of a significant number of college students today, a cash payment of \$15,000 is not going to permit a star player to enjoy a lifestyle that will be significantly distinct from the upper quintile of the student body at most universities that feature top football programs. As such, it is unlikely to erode the product differentiation between college football and minor league football, and thus it can be adopted without jeopardizing the remainder of NCAA rules.

The very same justification—product differentiation with professional sports—means that setting a limit on cash subsidy at approximately \$15,000 is reasonably necessary to maintain that differentiation. If wealthy teams could pay unlimited sums to college students, there is a significant risk that college sports could not attract the same degree of popularity (especially for those teams paying huge sums and not winning on the field).

To be sure, a star athlete might allege that, absent the restraint of trade inherent in article V, he might have received \$25,000 in cash; he might further allege that such a payment would not be viewed by fans as significantly different than \$15,000, and therefore the NCAA cannot justify the one plus half scholarship limit. Antitrust defendants are not subject to liability for failing to adopt a rule that is precisely the very least restrictive policy. The Supreme Court has noted that a restraint is reasonable, under the rule of reason, if it does not exceed “the limits *reasonably necessary* to meet the competitive problems.”¹⁵⁰

148. For a detailed critique of the notion that the purpose or effect of NCAA limits on compensation is to ensure that student-athletes are, consistent with the NCAA's stated ideals, primarily motivated by education and the physical and mental benefits of athletics participation, see ORIARD, *supra* note 17, at 197-224. See also Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 9-18 (1991) (tracing historical development of myth of Greek amateur ideals through elite British schools into American collegiate athletics).

149. NCAA CONST. art. 1.3.1. This is the goal recognized in *Board of Regents* as a legitimate justification under the rule of reason. See *supra* note 91 and accompanying text.

150. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380-81 (1967) (emphasis added). The wording dates back to the path-marking decision by Judge William Howard Taft

As the Third Circuit has noted, plaintiffs cannot succeed in an antitrust challenge to a business practice whenever “the imaginations of lawyers [might] conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade.”¹⁵¹

Other jurisdictions have helpfully articulated this doctrine in their countries as requiring an antitrust challenger to present a “counterfactual” that is a “commercially reasonable alternative.”¹⁵² Although an antitrust plaintiff need not prove the existence of a less restrictive alternative beyond any reasonable doubt, some benefit of the doubt should be extended where sporting organizations can claim that a practice is coherent and nonpretextual, and reflects a good faith concern that less restrictive alternatives would injure their business enterprise.¹⁵³

In the past, NCAA rules have not been particularly solicitous of the goal of maintaining competitive balance in sports. As the Supreme Court noted in rejecting competitive balance as a justification for severe restrictions on output for televised games, there was no evidence that the restraint was “even arguably tailored” to promote competitive balance.¹⁵⁴ Moreover, as Northwestern University alumnus John Paul Stevens had the opportunity to note, the current level of imbalance in college football did not suggest that the restraint had any success.¹⁵⁵

in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

151. *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975).

152. *Rugby Union Players' Ass'n v. Commerce Comm'n* (No. 2), [1997] 3 NZLR 301, 320-21 (HC (Commercial List)).

153. In contrast to the legitimate concerns that NCAA schools may have that cash payments significantly higher than one-half the value of a scholarship would impair their effort to maintain a clear differentiation with professional sports, consider the Rozelle Rule successfully challenged in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976). Although the NFL claimed that promoting competitive balance was the purpose of the rule giving the Commissioner the authority to require appropriate “compensation” when a team signed a player previously employed by another club, it is clear that the Commissioner’s exercise of his authority bore no relation to competitive balance. The most notable example introduced into the trial evidence concerned a Pro Bowl tight end signed by the expansion New Orleans Saints (who then had outstanding quarterback Archie Manning and little else) from the playoff-bound San Francisco 49ers. The 49ers were awarded two first round draft picks, whom they used to select a future Pro Bowl center and a future Pro Bowl tight end. This award could not possibly be understood to promote competitive balance. Rather, the scheme more persuasively revealed a league policy that sacrificed some degree of competitive balance (improving the Saints at the expense of the superior 49ers) in order to maintain the nonlegitimate goal of holding down player salaries.

154. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 119 (1984).

155. *Id.* at 118 n.62.

However, unlike the television restraint successfully challenged in *Board of Regents*, a limitation on the amount of cash supplements for individual players would promote competitive balance. As described above,¹⁵⁶ limiting the amount of compensation to the equivalent of fifty-five scholarships will have the effect of allocating players among teams in a more equal manner, which is likely to increase attendance and ratings for the weaker schools far more than it will harm attendance and ratings for traditionally dominant schools. Likewise, strict rules preventing wealthy and successful football programs, or their boosters, from supplementing this compensation, will further this goal of greater competitive balance in college sports.

V. CONCLUSION

Current NCAA rules and practices of member schools result in widespread and unjustified cross-subsidization of funds from football and basketball surpluses, from economically exploited star athletes whose efforts lead to significant revenue streams, and from funds that would otherwise be available for enhanced teaching and research. The Charter of Reform would eliminate this wasteful spending and facilitate a fairer allocation of resources, as well as tougher enforcement against under-the-table payments.

As with any serious reform proposal in a complex society, there are winners and losers from implementation of the proposal. Those adversely affected include many student-athletes who will lose scholarships awarded without regard to financial aid, assistant coaches in sports that are not economically self-sustaining, spectators seeking to have others subsidize big-time sports at their favorite university where revenues are insufficient to support expenses commercially, and coaches who benefit from their ability to lure less sophisticated high school recruits unlikely to star at their university, when with better information the athlete might select a less-successful program where he has a greater opportunity to play.

The challenge toward implementation is that other beneficiaries (except a handful of elite athletes receiving a “one plus” scholarship) are far more dispersed.¹⁵⁷ These include football players who make a

156. See *supra* text accompanying notes 56-57.

157. See, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 33-37 (1965) (describing generally how it is relatively easy for pressure groups to form to obtain significant benefits for a few, and relatively difficult for pressure groups to form to obtain small benefits for many). The existing literature is nicely summarized in WILLIAM N.

better-informed decision on where their talents are likely to be most valued, avid fans of less-successful teams and general fans who welcome greater competitive balance in Division I football, and those able to participate in potentially increased offerings of elite club-level sports at major universities. The greatest number of beneficiaries, however, are students and faculty who are likely to see an increase in funding for the principal missions of a university (teaching and research), as commercially successful institutions like Penn State and Texas provide additional millions of support from football and basketball surpluses to additional faculty, teaching assistants, and research grants, while less successful institutions like Rutgers no longer take funds from educational missions in order to subsidize unsustainable athletic programs.