

Radical Reform of Intercollegiate Athletics: Antitrust, Title IX, and Public Policy Implications

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Universities operating major intercollegiate athletic programs are heading for, if not already in, a crisis. Scandals continue to rock major football and basketball programs,¹ 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 non-sustainable at many schools.² Even where intercollegiate athletic programs are sustained primarily by football and basketball revenues, otherwise visionary and questioning college presidents have yet to publicly question why these revenues should subsidize non-revenue sports at the expense of financially-pressed classroom activities. Contrary to the NCAA Constitution, major football programs do not operate “in keeping with prudent management and fiscal practices”³; and 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.⁴

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¹ 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, Aug. 13, 2011, at B16 (highlighting the point-shaving scandal at University of San Diego).

² See, e.g., Leon Stafford, College Sports 'Arms Race' Not Sustainable, Say University Presidents, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 12, 2010 (finding that university presidents think current spending levels on athletics is unsustainable because of the need to divert more financial resources to keep programs competitive).

³ NCAA CONST. ART. 2.16.

⁴ *Id.*

Countless stakeholders are victimized by unfair aspects of the *status quo*. The greatest number of victims 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 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 Article sets for 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,⁵ and applicable regulations under Title IX.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 non-revenue sports, they do not justify the cost of operating those sports, having regard for the societal

⁵ 15 U.S.C. § 1.

⁶ 20 U.S.C. §§1681-1688 (1972); 34 C.F.R. § 106.41 (1974) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.").

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 Article offers a five-part Charter of Reform for intercollegiate athletics:

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 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, that may be awarded to student-athletes as full or partial scholarships); the designated number for football is reduced from 85 to 55.

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 I reviews the foundational principles and justifies them as the basis for reforming intercollegiate athletics. Part II details the five articles in the Charter of Reform. Part III explains why the NCAA's adoption of the proposed Charter would not violate the antitrust laws. Part IV explains why implementation of the proposed Charter would not violate Title IX. An Epilogue briefly discusses recent NCAA reform proposals in light of the arguments set forth in this Article.

I. FOUNDATIONAL PRINCIPLES

The final product of any reform proposals, 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 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 Article are based on four discrete underlying principles: (1) self-sustaining athletic programs enrich American culture and should be maintained; and (2) subsidies for money-losing athletic programs no inherent priority claim on surplus profits from other athletic programs; (3) Title IX principles should be maintained; (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 basketball⁸) provide significant benefits to society. They enrich the cultural experience of university life for many faculty, students, alumni, and the regional community.⁹ These contests entertain

⁷ For an example of a reform proposal explicitly suggesting a necessary compromise, see Matthew J. Mitten et al., *Targeted Reform of Commercialized 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, *Athletics Departments See Surge Financially in Down Economy*, USA TODAY, June 16, 2011 (finding from an NCAA report that in 2009-10, athletics programs at 22 of the 228 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 Eric Lindsey, *UK Athletics an 'Important Asset' for University*, New President Says, University of Kentucky Blog, Aug. 1, 2011, <http://www.ukathletics.com/blog/2011/08/uk-athletics-an-important-asset-for-university-new-president-says.html> (Last visited Aug. 24, 2011)(quoting President Capilouto reasoning that as a self-sustaining athletics program, the program contributes not only to student-athletes, but to academics as well, including scholarships, advertising, and

millions.¹⁰ 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.¹¹ Sports programs provide an opportunity to unify the campus community.¹² Moreover, if prudently managed, many major programs can be operated commercially to generate significant surplus revenues. These funds can then be used to improve other university programs (see Principle #2).¹³

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 non-economic costs. In this regard, some critics claim that these programs harm the educational experience at most major universities.¹⁴

supporting research initiatives).

¹⁰ Matt Peloquin, *2010 College Football TV Ratings*, SPORTS BUSINESS DAILY, Dec. 17, 2010, <http://collegesportsinfo.com/2010/12/17/2010-college-football-tv-ratings>(showing 6.9 million viewers for SEC games and 2.96 million for ESPN's 75 college football telecast).

¹¹ 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 pro football team. *See generally* SPORTS, JOBS & TAXES (ROGER G. NOLL AND ANDREW ZIMBALIST, EDS. 1997). Different considerations arise for college teams in remote locations.

¹² *See* Eric Simons, *The Price of Excellence: Can Cal Afford Athletics?*, CALIFORNIA MONTHLY (Spring 2010), at 66.

¹³ Sometimes conflating prudent management with broader philosophical objections to payment of significant salaries to individuals responsible for bringing in significant revenues, there are frequent suggestions that federal legislation should permit major universities to agree to limit coaches salaries. These arguments are beyond the scope of this Article, which confines itself to prudent management. Under this proposal, significant surpluses from the University of Alabama's football team would 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.

¹⁴ *See, e.g.*, MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000); WILLIAM C. DOWLING, *CONFESSIONS OF A SPOILSPORT: MY LIFE AND HARD TIMES FIGHTING SPORTS CORRUPTION AT AN OLD EASTERN UNIVERSITY* (Pennsylvania State University Press 2007); 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 (2003) (Citing *Beer and Circus*, claiming that athletic success raises admissions applicants but also college's "party atmosphere," which may be detrimental to education).

To be sure, there are specific examples of significant non-economic costs – as in the cancellation of Friday classes following televised Thursday night football games.¹⁵ 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,¹⁶ it is not clear that these findings apply to the large universities that dominate Division I intercollegiate athletics.

The benefits outlined above, weighed against the minimal costs, justify continued maintenance of these programs. Note that this cost-benefit analysis does not include two additional justifications that are sometimes offered in support of intercollegiate athletics. This Article does not claim that major programs ought to be maintained for the benefit of student-athletes. As detailed in Principle #4, the non-economic 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 Article make the claim that universities benefit by increased donations and other financial or non-economic support because of intercollegiate athletics. Although there are surely anecdotes of instances where athletics does facilitate benefits to universities,¹⁷ studies

¹⁵ Brian Maffly, *Afternoon Classes Canceled for University of Utah Football Opener*, THE SALT LAKE TRIBUNE, August 27, 2011, at State (Discussing the University of Utah's decision to cancel Thursday afternoon classes to deal with traffic issues student and faculty faced in the past when trying to get on campus during a weekday football game); Mark Viera, *At Virginia Tech, Thursday Night Games Create a Commotion*, THE WASHINGTON POST, October 29, 2009, 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); Sandra McKee, *Navy Eyes Are Still Smiling*, THE BALTIMORE SUN, November 05, 2007, http://articles.baltimoresun.com/2007-11-05/sports/0711050022_1_notre-dame-navy-winning-attitude (Discussing when Navy snapped its 43 game losing streak to Notre Dame in football, the naval academy's commandant of midshipmen, Capt. Peg Klein, canceled classes the following Monday).

¹⁶ WILLIAM G. BOWEN & SARAH L. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003) (finding that recruited athletes at these schools more likely to gain admission than are other applicants with similar academic credentials leading to underperformance in the classroom).

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, e.g., MICHAEL ORIARD, BOWLED OVER:

have not been able to support this claim 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 (relatively modest) cost of hosting these events. So it is theoretically possible that, among the fifty-one (of 120) Division I schools where football expenses exceeded revenues in 2010,¹⁹ many presidents and trustees may have reached a similar cost-benefit calculus.

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

BIG-TIME COLLEGE FOOTBALL FROM THE SIXTIES TO THE BCS ERA (2009); MICHAEL ORIARD, *READING FOOTBALL: HOW THE POPULAR PRESS CREATED AN AMERICAN SPECTACLE* (1993), suggested in a guest lecture to my class that profiles of institutions like his own – Oregon State University – was 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. Mitten et al., *supra* note __, at 793-98, and CHARLES CLOTFELTER, *BIG TIME SPORTS IN AMERICAN UNIVERSITIES* (2011) 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*, *THE NEW YORK TIMES*, September 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, *Revenues and Expenses 2004-2010: NCAA Division I Intercollegiate Athletics Program Report*, Table 3.6, *available at* <http://www.ncaapublications.com/productdownloads/2010RevExp.pdf>.

²⁰ *See, e.g.*, WILLIAM C. DOWLING, *CONFESSIONS OF A SPOILSPORT: MY LIFE AND HARD TIMES FIGHTING SPORTS CORRUPTION AT AN OLD EASTERN UNIVERSITY* (2007). Professor Fulks' study, *supra* note __, found that 51 schools "invested" an average of \$2.8 million on money-losing football programs. That is a considerable

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 that 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 over-estimate the likelihood that their “investment” will actually result in the sort of substantial benefits to an institutional 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 commercially support the activity. 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

amount of bad investment.

²¹ As a native Californian residing in central Pennsylvania, I would welcome non-stop jet service between State College and LAX or SFO. As there is insufficient demand, I regularly endure missed connections at regional hubs. Of course, like athletic boosters at the 51 schools that lose money on football, I would prefer that the taxpayers of Pennsylvania subsidize semi-weekly non-stop jets, and if I had sufficiently political pull in Harrisburg I would pretextually claim that such service benefits the Commonwealth of Pennsylvania and its flagship state university.

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 __. 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 non-essential 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., President Barack Obama, Weekly Address (Nov. 13, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/11/13/weekly-address-president-obama-calls-earmark-reform> (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).

reject the diversion of resources from the education of the many to the entertainment of an insufficient few.

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 non-revenue 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

²³ try for a major text on economics of higher ed; if can't find quickly, please email Prof John Cheslock in Ed here at Penn State and tell him you are my RA looking to find this

²⁴ cite, perhaps from same place. try also publications from Natl Assn of College and U Bus Officers (NACUBO). Athletic Assoc Dir Richard Kaluza is another potential source.

²⁵ NCAA CONST. art 20.9.4. Although beyond the scope of this Article, this by-law is vulnerable to challenge on antitrust grounds as well as being unsound policy for the reasons articulated under the Principle.

²⁶ *Site Map*, Penn State Univ., <http://www.gopsusports.com/s-finder/psu-s-finder.html> (last visited Sept. 7, 2011) (Listing the 15 men's sports and 14 women's sports offered at Penn State University); *Michigan Athletics*, Mich. Univ., <http://www.mgoblue.com/school-bio/mich-varsity-sports.html> (last visited Sept. 7, 2011) (Listing the 13 men's sports and 14 women's sports offered at Michigan University); *Texas Athletics Review: Fiscal Year 2009-10*, The Univ. of Tex. Intercollegiate Athletics Dep'ts, (Nov. 2010), http://www.texassports.com/auto_pdf/p_hotos/s_chools/tex/genrel/auto_pdf/athletics-review-2010-11 (Listing the 9 men's sports and 11 women's sports offered at the University of Texas); *Scoreboard*, Ohio State Univ., <http://www.ohiostatebuckeyes.com/scoreboard/> (last visited Sept. 8, 2011) (Listing the 18 men's sports and 19 women's sports available at Ohio State University); *2010-11 Season in Review*, UCLA, <http://www.uclabruins.com/genrel/2010-11-year-in-review.html> (last visited Sept. 8, 2011) (Listing the 10 men's sports and 12 women's sports offered at UCLA); *Gator Composite Schedule*, Univ. of Fla.,

There is no evidence that maintaining successful Division I non-revenue sports programs materially aids commercially profitable football and men's basketball programs. Any university decision to spend these surplus funds on non-revenue sports – whether from taxpayers, student fees, university endowment funds, or commercial profits – reflects a policy judgment that funding the lacrosse and golf 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. As discussed in Part IV, this policy goal is currently required by regulations issued by the Department of Education under Title IX,²⁷ and this legal requirement ought to be retained.

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.²⁸ 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.²⁹

<http://www.gatorzone.com/schedule/> (last visited Sept. 8, 2011) (Listing the 8 men's sports and 11 women's sports offered at the University of Florida); *Sports Finder*, Univ. of Notre Dame, <http://www.und.com/s-finder/nd-s-finder.html> (last visited Sept. 8, 2011) (Listing the 12 men's sports and 12 women's sports offered at the University of Notre Dame).

²⁷ See text accompanying notes ___-___ *infra*.

²⁸ Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, NAT'L BUREAU OF ECON. RESEARCH, 1 (Feb. 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").

²⁹ Kimberly A. Yuracko, *One for You and Me: Is Title IX's Sex-Based*

Principle #4: Whatever the additional societal benefits that are achieved by maintaining current funding for Division I non-revenue 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 above, 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 \$2,868,000.³⁰

In analyzing the benefits of Division I non-revenue 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.³¹ These programs (club sports at Division I schools, 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; teams generally play within a smaller geographic region to minimize travel.³² The direct benefits of

Proportionality Requirement for College Varsity Athletic Positions Defensible?, 97 Nw. U. L. Rev. 731, 731 (2003).

³⁰ Fulks, *supra* note ___, Table 3.6.

³¹ Bill Pennington, *Open Membership: Rapid Rise of College Club Teams Creates a Whole New Level of Success*, N.Y. TIMES, Dec. 2, 2008, at 11 (Estimating that two million college students play competitive club sports); Denise M. DeHass, *1981-82 - 2007-08 NCAA Sports Sponsorship and Participation Rates Report*, (April 2009), at 63-64 <http://www.ncaapublications.com/productdownloads/PR2009.pdf> (Reporting 163,211 students participating in Division 3 athletics during the 2007-2008 academic year).

³² *Undergraduate Scholarships*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Academics/Undergraduate+Scholarships> (last updated Mar. 30, 2011) (Stating that Division III member schools do not offer athletic scholarships); *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); *See also* Tarik El-Bashir, *TCU is Heading to Big East*, THE WASHINGTON POST, November 30, 2010, at D01 (Discussing how Texas

club and Division III intercollegiate athletics are 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.³³

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

Non-revenue 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 non-revenue 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 woman's Division I soccer team has an annual budget of almost \$500,000,³⁴ not counting the internal transfer of funds to cover the equivalent of fourteen full athletic scholarships, a value of almost \$34,000.³⁵ The budget for four well-funded club sports – men's and

Christian University's decision to join the Big East athletic conference will require member schools to travel over 1,400 miles for certain athletic matches, but will give TCU a chance at an automatic BCS bid).

³³ NCAA CONST. art. 2.2.

³⁴ *2009-10 Operating Expenditures*, UNIVERSITY BUDGET OFFICE, <http://www.budget.psu.edu/openbudget/budgetdetail.asp?type= A&FY= 20092010&Adm inArea= 066&Fundtype= 03&dept= 0668662400&budget= N>.

³⁵ NCAA, 2011-12 NCAA DIVISION I MANUAL § 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 14 scholarships). The value of a Penn State

women's rugby and ice hockey – is \$416,575.³⁶

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 inuit 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.

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This Article's effort to develop a coherent agenda for intercollegiate athletics reform is based on an explicit articulation of four foundational principles that support such an agenda. Applying policy-oriented principles of cost-benefit analysis, the Article concludes that prudently managed, economically self-sustaining intercollegiate sports programs should be maintained, while the risks of special-interest capture counsel against maintenance of Division I sports that are not self-sustaining. This is based in large measure on a rejection of two potential claims by defenders of the status quo: that non-revenue intercollegiate sports have a privileged claim on the surplus funds generated by revenue sports, compared to other university programs; and that there are public benefits to athletes in Division I non-revenue sports or others that justify those sports' subsidization, when compared to the benefits of operating Division III or club sports. The one exception to this analysis is an overriding public interest in equal opportunity for women, which justifies a sharply reduced but continued operation of Division I sports for woman to provide female student-athletes with the same number of scholarship opportunities as their male counterparts.

scholarship was estimated in Jay Paterno, *Pay Student-Athletes? They're Already Getting a Great Deal*, Statecollege.com, June 2, 2011, available at <http://www.statecollege.com/news/columns/jay-paterno-pay-studentathletes-theyre-already-getting-a-great-deal-766175/>

³⁶ <http://www.budget.psu.edu/OpenBudget/budgetdetail.asp?type=B&FY=20102011&AdminArea=027&Fundtype=01&dept=0271897800&budget=N>

II THE CHARTER OF REFORM

The foundational principles set forth in Part I lead to a sensible, principled, and workable Charter of Reform, that will save universities millions of dollars by eliminating athletics expenditures that are not cost-effective, and diverting these savings to educational programs. To summarize, the Charter would terminate Division I men's "non-revenue" 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 non-need 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

As reflected in the title, this Article is explicitly intended to decimate men's Division I sports, which are generally not cost-justified. It would bar NCAA member schools from operating a men's sport on the Division I level unless sport-specific revenues matched expenses. 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" (GAIAPP). Under an approach tentatively outlined here, it is possible that almost all Division I football and basketball programs would be considered to be 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 requirement must be that the university has 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 practices of

subsidizing 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 fee by those seeking to manufacturer and sell licensed merchandise.³⁷ 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.

Sports-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 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) were of the opinion 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.

³⁷ Where merchandise is not sport-specific, GAIAPP would have to devise uniform formula to allocate licensing revenue to specific sports.

True donations from individuals or foundations whose personal values want to support Division I athletics would also count. Indeed, a refusal to subsidize specific men's non-revenue 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 \$80,000,000 to create an endowment to start such a program.³⁸ 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 were raised.³⁹

The principal accounting issues that will determine whether or not a program is self-sustaining fall on the expense side of the ledger. Because athletic accounting has historically been used primarily for internal university decisionmaking, 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. Other universities do not count scholarships as real expenses.⁴⁰ In adopting GAIAAP, the NCAA should have regard for the current fiscal crisis in higher education, and to 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

³⁸ Pat Borzi, *Reshuffling Blurs Picture, Jeopardizing Conferences*, N.Y. TIMES, July 17, 2011, at 8 (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).

³⁹ Steve Yanda, *Not Your Average Comeback*, THE WASHINGTON POST, June 18, 2011, at D03.

⁴⁰ find examples of each.

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 non-athlete 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 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 dis-served 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.⁴¹ 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

⁴¹ Union of European Football Associations (UEFA), UEFA Club Licensing and Financial Fair Play Regulations (2010), Art. 59.

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 non-athletic programs, costing an amount equal to the proposed athletic subsidy, that would otherwise not be offered.⁴² Then, for a period not to exceed three years, the Trustees could openly vote to forego 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.

The likely effect of implementing Article I of this Charter will be to 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.

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

⁴² 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 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.

offered at the Division I level, then additional women's Division I sports would also have to be offered.⁴³ Because Foundational 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, forego 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 radically change the nature of intercollegiate athletic conferences. Typically, intercollegiate athletics features multi-sport 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 an already existing practice, most notably with regard to Men's Ice Hockey and Women's Lacrosse.⁴⁴

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, under-funded women's sports. Such an offering involves more costs to the university (particularly coaching and travel costs) than if the university were to offer 68 scholarship equivalents in fully-funded sports. Moreover, the experience of relatively equalized athletic competition is compromised, and in some sense the experience is unequal, if Division I female athletes at fully-funded programs compete against athletes from under-funded programs. It is difficult to see the public policy benefits to a university of offering 10 under-funded sports in lieu of five fully-funded sports; certainly Principle #3's commitment to equal opportunity does not support such an approach, which likely would tempt university administrators primarily to appease narrow constituencies who seek to avoid the elimination of Division I-level offering of their favored women's sport. Such appeasement is not a legitimate public policy justification for taking funds from non-athletic university programs.

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*, THE NEW YORK TIMES, Sept. 18, 2010, at 4. This break from the conference is also seen in women's lacrosse, where, for example, the University of Florida and the

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.⁴⁵

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.

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 non-commercial 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 this substantial sum of saved funds on expanded, cost-justified opportunities for intercollegiate athletic participation at this reduced-cost level, or more traditional classroom opportunities.

From the beginning, intercollegiate sport has been commercialized

Penn State University's women's lacrosse teams play together in the American Lacrosse Conference, even though the schools belong to the Southeastern Conference and the Big 12 Conference respectively. *A Decade of Excellence*, AM. LACROSSE CONFERENCE, <http://www.americanlacrosseconference.org/> (last visited Oct. 23, 2011). Other examples of varsity teams playing in a league different from their traditional conference include men's volleyball, men's wrestling, women's gymnastics, and women's field hockey. *EIVA Member Institutions*, EASTERN INTERCOLLEGIATE VOLLEYBALL ASSOCIATION, <http://www.eivavolleyball.com/information/members/index> (last visited Oct. 23, 2011); EWL Wrestling, Eastern Wrestling League, <http://ewlwrestling.com> (last visited Oct. 23, 2011); *Welcome to EAGL*, EAST ATLANTIC GYMNASTICS LEAGUE, <http://eaglgymnastics.com/> (last visited October 23, 2011); NorPac, The Northern Pacific Field Hockey Conference, <http://www.norpacfieldhockey.com/about/index.html> (last visited Oct. 23, 2011).

⁴⁵ Further details as to how schools comply with Title IX in the operation of their programs is discussed in text accompanying notes __-__, *infra*.

with prominent payment for athletic services.⁴⁶ The first intercollegiate athletic contest, a boat race between Harvard and Yale, was primarily conceived and financed by the Boston & Maine Railroad.⁴⁷ Fielding Yost, the legendary six-time national champion coach of the University of Michigan, famously took a leave of absence from West Virginia University in 1896, having played for the Mountaineers in defeat against the then-powerhouse Lafayette Leopards, to enroll at Lafayette and join them in a historic victory over the University of Pennsylvania, and then returned to re-enroll at West Virginia.⁴⁸

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 athletics ability.⁴⁹ Use of athletic scholarships began as many schools did not abide by the so-called “Sanity Code.”⁵⁰

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/mines by getting a football scholarship.⁵¹ Ironically, Title IX’s requirement that schools increase scholarship offerings for female student-athletes actually led to an increase in scholarship offering for male 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

⁴⁶ RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 27 (1990) (Explaining how at the first American intercollegiate contest, a railroad superintendent transported and housed both teams because of the potential profit he envisioned from the event).

⁴⁷ *Sport: 72nd Rowing*, TIME MAGAZINE, July 2, 1934, <http://www.time.com/time/magazine/article/0,9171,754347,00.html>

⁴⁸ *Foot-Ball Team Personnel*, 23 THE LAFAYETTE 98, 100 no.13 (Jan. 15, 1897) available at <http://cdm.lafayette.edu>.

⁴⁹ Daniel E. Lazaroff, *The NCAA in Its Second Century*, 86 OR. L. REV. 329, 333 (2007).

⁵⁰ *Sport: What Price Football?*, TIME MAGAZINE, Jan. 23, 1950, <http://www.time.com/time/magazine/article/0,9171,858594,00.html>.

⁵¹ Cong. Rec. 6109, 6289 (1998) (claiming college athletics as one of the few ways out for children in poor urban areas). See also Michael Chapman, *All the Right Moves*, LUCILLE BALL PRODS., TWENTIETH CENTURY FOX FILM CORP. (1983) (Tom Cruise plays high school senior from working class Pennsylvania town consigned to work in steel mills in lieu of dreams of a architecture career unless football scholarship comes through).

costs of higher education. At the same time, the rosters of Division I non-revenue teams feature significant numbers of students from upper-middle class and affluent households.⁵² 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 can't afford the fees and many expenses associated with this level of youth competition.⁵³

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 well 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 multi-million dollar operation: when a young man commits to play football for Penn State or 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, that may be awarded to student-athletes as full or partial scholarships); the designated number for football is reduced from 85 to 55

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

⁵² see if you can find a citation to this; RA TO LOOK AGAIN

⁵³ Joseph Blackburn, The Financial Cost of Playing AAU Travel Baseball, or its Equivalent (Unpublished paper on file with author) (estimates cost to parents for player aged 10-18 in excess of \$7,500 per year).

principal purposes of universities are teaching, research, and service, college presidents legitimately forego profit-maximizing strategies for college football that conflict with non-commercial educational goals. Otherwise, though, 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 to 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 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.⁵⁴ One important aspect of this design would be rules that limit expenditures that were unlikely to be recouped in increase 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.⁵⁵ 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 won’t 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.⁵⁶

⁵⁴ Economists call this inquiry “contest theory.” For an application of contest theory to sports competitions, see Stefan Szymanski, *The Economic Design of Sporting Contexts*, 41 J. ECON. LIT. 1137, 1140-46 (2003).

⁵⁵ *Id.* at 1142-45, 1173.

⁵⁶ An oral legend at Penn State involve involving 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

NASCAR rules are thus designed to achieve “parity, safety, and cost savings.”⁵⁷ The first two goals maximize fan appeal, and the latter goal maximizes profits with an optimal revenue stream.

Because college presidents legitimately may prefer non-commercial goods to profit-maximization, universities might actually want to encourage spending unnecessary to maximize fan appeal that serves educational purposes, such as tutoring and counseling services for student-athletes. In similar fashion, universities might forego revenue-maximizing opportunities, such as Thursday night football, because of the disruption to campus life that such events cause.⁵⁸ However, absent specific non-commercial goals, it is imprudent for university leaders to fail to fully implement the NCAA By-law 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.⁵⁹ Moreover, the reduction scholarships and ability to offer partial scholarships will likely alter the distribution of playing talent among

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 a Ohio State assistant coach was dispatched on a private jet to fly to the game so he too could be in attendance.

⁵⁷ ROBERT G. HAGSTROM, *THE NASCAR WAY: THE BUSINESS THAT DRIVES THE SPORT* 35-36 (1998).

⁵⁸ See note ___ *supra*.

⁵⁹ 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. *How Do Athletic Scholarships Work?*, NCAA (2011), available at http://www.ncaa.org/wps/wcm/connect/19481c00474f411daed6ee071e1ceb2b/BBD_HowScholarWork.pdf?MOD=AJPERES&CACHEID=19481c00474f411daed6ee071e1ceb2b. Since athletic budgets would save on 60 scholarships (because the reduction from 85 to 55 in men’s football would result, under the principles of this Charter, in a similar reduction of 30 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. Because, as discussed at text accompanying notes ___-___, *supra*, conventional accounting may not reflect actual university expenses, the actual cost savings might be limited to the out-of-pocket expenditures for room, board, books, and other incidental expenses. If these expenses exceed \$17,000 per student, the seven-figure savings noted in the text will be achieved.

member schools in a manner likely to make college football *more* attractive and therefore increase overall revenues. In addition, Article IV serves an important non-commercial goal of facilitating a more informed decision by a prospective student-athletes 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 forego 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.⁶⁰ 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.

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.⁶¹ This is particularly true of younger talent, whose long-

⁶⁰ Current NCAA rules permit up to 20 non-scholarship football players to "walk on" to the team. NCAA By-law 17.11.2.1.2. The number of walk-ons at Division I teams varies widely. http://www.ncaa.org/wps/wcm/connect/b2bbf90042e3226c956bfdfdd1ce0240/Questions_As_You_Consider_College_FAQ.pdf?MOD=AJPERES&CACHEID=b2bbf90042e3226c956bfdfdd1ce0240; far fewer than maximum typically walk-on to the Northwestern Wildcats squad. Northwestern University, *Northwestern Adds One More Walk-on to 2010 Squad* (June 17, 2010), <http://www.nusports.com/sports/m-footbl/spec-rel/061710aab.html>; Northwestern University, *Nine Non-Scholarship Players to Join Northwestern in 2011*, (June 16, 2011), <http://www.nusports.com/sports/m-footbl/spec-rel/061611aac.html>.

⁶¹ 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 1A (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 Factory Workers*, 33

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 doesn't 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 1992-94 when Division I rules reduced the number of football scholarships from ninety-two to eight-five.⁶² Players of a given modest ability, who might previously have received one of the last scholarship offers at dominant school, now accepted scholarships at less dominant programs. The result was a narrowing of the gap between the elite and very good teams.

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 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. Ole Miss Coach Houston Nutt and Arizona State Coach Dennis Erickson, however, might offer Beta a full ride, because of great confidence that Beta would start for the Rebels or the Sun Devils. Because the likely effect of this redistribution of talent is from the dominant schools in Division I BCS conferences to the other schools in these major conferences, Article IV 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.⁶³ 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 in attendance and television ratings. First, because top schools play at capacity and

ANTITRUST BULL. 641 (1997).

⁶² William C. Rhoden, *N.C.A.A. Cuts Practice, Scholarships and Season*, THE NEW YORK TIMES, Jan. 10, 2011 (“The 10 percent cut in football will reduce the annual limit of scholarships per school to 92 from 95 in Division I-A during the 1992-93 academic year, to 88 during the 1993-94 year and to 85 during the 1994-95 year”).

⁶³ Szymanski, *supra* note ____, at 1153.

lesser schools do not,⁶⁴ increased balance will result in greater attendance: Indiana will attract more fans, and people who lust for returned glory won't give up their season tickets at Michigan Stadium. In Major League Baseball, there is actually an argument that increased parity may hurt television ratings: high ratings are dependent on big-market teams' participation.⁶⁵ In Division I football, the distribution of hard core fans is likely more 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 TV ratings will be relatively unaffected.

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.⁶⁶ 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 non-existent. So why is evidence so weak relating to a positive relation between competitive balance and fan appeal in leagues like the major European soccer leagues and Major League Baseball? And why would college football be different?

⁶⁴ 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 <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/stats/football/attendance>. Additional data for Illinois can be found at UNIVERSITY OF ILLINOIS, 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 Indiana University, *History*, at 28, available at http://iuhoosiers.cstv.com/auto_pdf/p_hotos/s_schools/ind/sports/m-footbl/auto_pdf/06expftblhist (last visited Oct. 31, 2011), and from various club- and season-specific cites linked to <http://espn.go.com/college-football/team/schedule>.

⁶⁵ Interview with David Hill, SPORTS BUS. DAILY, Sept. 15, 2011 (Fox Sports chief observes that the baseball television audience is regionalized, with national appeal limited to the Philadelphia Phillies, Boston Red Sox, New York Yankees, Texas Rangers, and Chicago Cubs).

⁶⁶ The concept was first expressed in the economic literature in Walter Neale, *The Peculiar Economics of Professional Sport*, 78 Q. J. ECON. 1 (1964).

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, so season-long outcome uncertainty evaporated early on for many teams (in some cases, before Spring Training!). 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 Yankees and Red Sox always in contention and the Pittsburgh Pirates and Kansas City Royals never in contention than a regime of parity.

European soccer features other dynamics. Fans want to see top domestic teams excel so that they can thrive in the UEFA Champions League, a concurrent tournament played against top clubs from other countries.⁶⁷ More importantly, European soccer features the promotion and relegation of teams between tiers of soccer, so that the worst three teams in the English Premier League are relegated to the second-tier competition, oddly named “Championship.” Thus, even though midway through the season many teams have little chance of finishing in the top six to play in European tournaments, those that do not risk being relegated. Hence, outcome uncertainty is high, even though competitive balance is low.

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

Moreover, Article IV, increases revenues at the same time it serves 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, The Pennsylvania State University, widely advertises that it is the number one choice among

⁶⁷ Thomas Hoehn and Stefan Szymanski, *The Americanization of European Football*, 28 *ECON. POLICY* 205 (1999).

corporate recruiters.⁶⁸ Top students vie for admission to the accounting program at my former employer, the University of Illinois at Urbana-Champaign, and it is not because of their opportunity to take advantage of the great cultural offerings at the famous Krannert Center nor the bucolic beauty of midwestern cornfields, but rather because the undergraduate accounting program is ranked number two in the country.⁶⁹

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 Arizona State Coach Erickson pleads with Beta to don the red and yellow and start for the Sun Devils instead of standing on the sidelines for the cardinal and gold of 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.⁷⁰

Article IV will provide high school athletes with valuable information. Erickson's claim that Beta is likely to start for Arizona 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

⁶⁸ *Wall Street Journal Ranks Penn State No.1 Among Corporate Recruiters*, PENN ST. UNIV. Dec. 6, 2010), <http://www.research.psu.edu/news/2010/wsj-ranking>. See also Teri Evans, *Penn State tops Recruiter Rankings*, WALL ST. J., Sept. 13, 2010.

⁶⁹ *Accounting Rankings*, U.S. NEWS & WORLD REPORT, <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/business-accounting> (last visited Oct. 23, 2011).

⁷⁰ Among the schools with the top-ranked 2011 recruiting classes, see ESPN, *Recruiting Database*, available at <http://espn.go.com/college-sports/football/recruiting/database> (last visited Oct. 29, 2011), 13 of 14 "5-star" recruits, and 167 of 281 "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 15th-ranked class selected Oklahoma, with no "5-star" recruits, 9 "4-star" recruits, and 8 "3-star" recruits. See ESPN, *Class of 2011 Team Football Recruiting Rankings*, available at <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 Oct. 29, 2011).

is, of course, free to prefer a top program.⁷¹ 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.⁷² 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 realistically serves a more modest goal of reducing the unnecessary costs of scandals. Reducing unnecessary cost is, after all, a key ingredient of prudent management.

Scandals involving improper payment to student-athletes impose significant costs on stakeholders. (In this regard, I do not count the oft-stated concerns that a scandal will adversely affect, in vague and undefined ways, a university's "reputation" or "integrity." I know of no studies showing any such actual long-term effect on a university's overall mission.) Member schools must pay for costly NCAA investigations; penalized schools suffer lost revenues; university officials caught violating

⁷¹ For example, NFL Pro Bowl quarterback Matt Cassel was a back-up quarterback at Southern California to Carson Palmer and then Matt Leinart. See *Matt Cassel Profile*, UNIV. OF S. CA., http://www.usctrojans.com/sports/m-footbl/mtt/cassel_matt00.html (last visited October 23, 2011).

⁷² See RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (2011).

rules lose their jobs, etc.⁷³ 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 non-commercial 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 from 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 leave 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.

A recurring theme regarding college sports scandals is the widespread view that major university athletic programs are economically exploiting the student-athletes that fans pay to watch.⁷⁴ Although a consensus will never be achieved on this issue, adoption of Article V would likely to shrink significantly the number of fans, players, coaches,

⁷³ A costly example recently involved recruiting violations and dismissal of Indiana basketball coach Kelvin Sampson. See Colombo, *supra* note ___, at 153 n.186. In addition, scandalized universities typically hire new coaches, often at premium salaries, with attendant additional costs for new staff, increased recruiting budgets, and the like.

⁷⁴ See, e.g., Allie Grasgreen, *Near-rebuke of NCAA Reforms*, INSIDE HIGHER ED (Nov. 2, 2011) (reporting on congressional hearing featuring testimony estimating that full athletic scholarships fall \$3,500 short of the full cost of education and that the top football and men's basketball players generate between \$121,000 and \$265,000 per year for their schools).

administrators, and media who believe that the system is exploitive. Third party cheating is not reported in professional sports, although salary caps result in many players receiving less than the full market value for their services.

Implementation of Article V will significantly reduce the number of student-athletes who actually are exploited in the economic sense, that is, players 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. Baseball "sabermetricians" have developed a statistic using this foundational concept: Value Over Replacement Player (VORP).⁷⁵ 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.⁷⁶

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. Stars are likely exploited, although quantifying the amount of exploitation would need to take into account their opportunity to develop and showcase their talent for their professional career. (This is why, for example, some athletes might

⁷⁵ Rob Neyer, *The world according to VORP*, ESPN Insider (originally published Feb. 2, 2007), available at http://sports.espn.go.com/mlb/hotstove06/columns/story?columnist=neyer_rob&id=2751842

⁷⁶ 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 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.

prefer following implementation of Article IV to attend USC or Alabama on a partial scholarship than another school offering a more generous financial aid package.)

The perception of exploitation would be significantly limited if NCAA rules permitted 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. Certainly, a sleazy agent and a late-blooming senior star who is receiving a one-half scholarship are just as likely to arrange under-the-table cash payments. 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 economically exploit their image and publicity rights.⁷⁷ Under this alternative, the NCAA could pattern its practices after those of the National Football League 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,⁷⁸ the funds could be placed into a trust fund for the student-athlete’s use after the expiration of intercollegiate eligibility.⁷⁹

Seizing on an increased consensus that the rules are fair, Article V proposes sensible and strict enforcement mechanisms. First, as with baseball (earned in the Black Sox scandal), enforcement needs to be

⁷⁷ 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 Cas. (CCH) ¶76,899 (N.D. Cal.).

⁷⁸ *See* text accompanying notes __-__, *infra*.

⁷⁹ My thanks to Brian Barcaro for this idea.

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.⁸⁰

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 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 re-orient the incentives of those who cheat.

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.⁸¹ 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.⁸² Some of these statutes provide their own remedies.⁸³ In

⁸⁰ See Raynell Brown, Stephen Ross & S. Douglas Webster, *Exploiting Kids: The Scandal in Agent Recruiting of Athletically-Gifted Teens*, PENN ST. INST. FOR SPORTS LAW, POLICY AND RESEARCH, 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.

⁸¹ John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141 (2006).

⁸² See, e.g., Sports Agent Responsibility and Trust Act, Pub. L. No. 108-304

addition, many states permit tort recovery for institutions damaged by a third party's violation of statutory law.⁸⁴

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.⁸⁵ 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 *Walters v. United States*,⁸⁶ the court of appeals rejected the use of the federal mail fraud statute⁸⁷ to prosecute an agent who had provided significant cash, loans, and a back-dated contract for agent representation. However, the court reasoned that 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.⁸⁸ 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 co-conspirator, 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

(2004); Tex. Occ. Code Ann. § 2051.351(a)(14) (West 2011) (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").

⁸³ E.g. Tex. Occ. Code Ann. § 2051.551(a) (West 2011) (permitting "an institution of higher education adversely affected by an athlete agent's violation of this chapter" to file a suit for damages)

⁸⁴ *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")

⁸⁵ See *2011-12 Guide for the College-Bound Student Athlete*, NCAA, 11-13 <http://www.ncaapublications.com/productdownloads/CBSA.pdf> (describing the requirements to be considered a NCAA amateur athlete).

⁸⁶ 997 F.2d 1219 (7th Cir. 1993).

⁸⁷ 18 U.S.C. § 1341.

⁸⁸ *Walters*, 997 F.2d at 1224.

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 NFLPA and the 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.⁸⁹ Players associations do have understandable concerns that their members not be deprived of the agent of their choice. In the short-run, a multi-year suspension of an agent caught violating these rules would deprive existing professionals of their desired agents. 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 advisor 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.⁹⁰ 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 minimize the likelihood of continued cheating. This combination is fairer to athletes and to schools and facilitates means to avoid embarrassing scandals.

III

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

⁸⁹ NFLPA Regulations Governing Contract Advisors, §2, ¶B(2), *reprinted at* PAUL C. WEILER ET AL., DOCUMENTARY AND STATUTORY SUPP. TO SPORTS AND THE LAW 222 (4th ed. 2011). George Cohen, *Ethics and Representation of Professional Athletes*, 4 MARQ. SPORTS L.J. 149, 156 (1993).

⁹⁰ *E.g.* Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties*, THE N. Y. TIMES, June 10, 2010 (Describing improper benefits given to former Heisman winner Reggie Bush and basketball player O. J. Mayo while playing for the University of Southern California); Jack Cavanaugh, *UMass and UConn Lose '96 Honors*, THE N. Y. TIMES, May 9, 1997 (discussing illegal gifts accepted by Marcus Camby of the University of Massachusetts and Kirk King and Ricky Moore of the University of Connecticut).

intercollegiate athletics. The claim here is not that federal antitrust law mandates any of the reforms.⁹¹ 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 the antitrust laws to block reforms that they oppose. First, except as necessary to comply with the principle of gender equality in sports participation, member schools would agree that institutions cannot compete in NCAA-sponsored Division I sports unless the sport is financially self-supporting. Second, member schools would agree that other sports would only be offered subject to agreed-upon limits, including no athletic scholarships, reduced coaching, and restricted in-season travel. Third, elite football programs would all agree to reduce the number of football scholarships each team can offer from eighty-five to fifty-five and that these scholarships could be awarded on a partial basis. Fourth, elite football programs would agree that, within a budget of fifty-five scholarships, an individual player could receive a cash supplement totalling as much as one-half of a typical scholarship. As detailed below, each of these agreements should be considered lawful under proper Sherman Act analysis.

A. General Antitrust Principles Applicable to NCAA rules

Three general principles anchor any antitrust analysis of NCAA rules. First, the Supreme Court has held that antitrust laws apply to commercial restraints imposed by NCAA member institutions, but not to agreements that are non-commercial. Second, the Court applies a "rule of reason" in analyzing commercial restraints, which focuses on the quantity and quality of output and price. Third, the court uses 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 One of the Sherman Act prohibits conspiracies in restraint

⁹¹ 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 already lengthy discussion.

of trade.⁹² The principal purpose of this section is to prevent economic entities from agreeing among themselves to reduce competition in order to increase their profits.⁹³ The fact that the economic entity is a not-for-profit institution does not fundamentally change the analysis where it appears that it is motivated by a desire for increased revenues or profits. Thus, in *NCAA v. Board of Regents of the University of Oklahoma*,⁹⁴ 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. The Court properly rejected Justice White's dissenting argument that the NCAA's non-profit 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.⁹⁵

In contrast, courts have rejected antitrust scrutiny of NCAA rules that are designed for non-commercial ends. This implements long-standing Supreme Court precedent that opens the possibility for consideration non-commercial goals of non-profit entities.⁹⁶ Thus, in *Smith v. NCAA*,⁹⁷ the court of appeals considered a challenge to an NCAA

⁹² 15 U.S.C. §1 (2004).

⁹³ See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 214-15 (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).

⁹⁴ 468 U.S. 85 (1984).

⁹⁵ Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 77 (2001).

⁹⁶ While rejecting a claim that professional services did not constitute "trade" for antitrust purposes, the Supreme Court expressly noted in *Goldfarb v. Virginia St. Bar*, 421 U.S. 773, 788 n.17 (1975), that the fact that restraint operates in something other than a classic business is relevant to determining that the practice violates the Sherman Act.

⁹⁷ 138 F.2d 180 (3d Cir. 1998), *aff'd on other grounds*, 525 U.S. 459 (1999). See also *Bowers v. N.C.A.A.*, 475 F.3d 524, 531 (3d Cir. 2007) (noting we held that "eligibility rules are not related to the NCAA's commercial or business activities" because "rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics." (quoting *Smith*, 138 F.2d at 185), *Pocono Invitational Sports Camp, Inc. v.*

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. 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."⁹⁸ An empirical examination of roll call votes at NCAA conventions when decisions were made on a one-school, one-vote basis confirms that schools tend to vote on rules that directly affect the financial bottom-line in accordance with their economic self-interest, but votes on academic reform or related policies cannot be well-explained in the same way.⁹⁹

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.¹⁰⁰ The "hallmark" of an 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."¹⁰¹ 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

N.C.A.A., 317 F.Supp.2d 569, 582 (E.D. Pa. 2004) (same).

⁹⁸ *Id.* at 187.

⁹⁹ Lawrence DeBrock and Wallace Hendricks, *Roll Call Voting in the NCAA*, 12 J. L. ECON. & ORG. 497 (1996).

¹⁰⁰ Justice Stevens has authored both decisions so holding. He first wrote in *Board of Regents*, 468 U.S. at 101, that "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved," repeating the claim in *American Needle, Inc. v. NFL*, 130 S.Ct. 2201, 2216 (2010) (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. The regulations agreed to by rival professional sports clubs or the NCAA member schools are determined in auto racing by an independent entity, NASCAR. Regulations for the professional cricket league in India (the Indian Premier League) are determined by a league board appointed by the country's national governing board for the sport, not the clubs participating in the competition. PAUL C. WEILER ET AL., *SPORTS AND THE LAW* 549-51 (4th ed. 2010).

¹⁰¹ *Bd. of Regents*, 468 U.S. at 107.

making output responsive to consumer preference.¹⁰²

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 pro-competitive. Third, the plaintiff can rebut this showing by demonstrating that the actual restraint is overly restrictive and not reasonably necessary.¹⁰³ Although there is broad language in some antitrust precedents that suggest that sports restraints are subject to some *gestalt* balancing of harms and benefits,¹⁰⁴ there are no reported cases where a court has struck down a restraint shown to be reasonably necessary to achieve a legitimate pro-competitive purpose.

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 By-laws contain a wide variety of rules that regulate these competitions. By their own terms, NCAA by-laws only govern NCAA-sponsored competitions. The by-laws expressly provide that they govern “all teams in sports recognized by the member institution as varsity intercollegiate sports.”¹⁰⁵ 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 does not have a NCAA men’s soccer team, choosing instead to participate in the Premier Development League, a semi-professional league for players under age twenty three. Although BYU players are not paid,¹⁰⁶ providing payment would not affect the status of BYU as a member of the NCAA

¹⁰² *Id.* At 102.

¹⁰³ *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

¹⁰⁴ *See, e.g., North Am. Soccer Lg. v. NFL*, 670 F.2d 1249, 1259 (2d Cir. 1982), quoting *National Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 691 (1978) (inquiry is “whether the challenged agreement is one that promotes competition or one that suppresses competition) and *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (“true test of legality is whether the restraint is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition”).

¹⁰⁵ NCAA CONST. art 3, §2, cl. 4.5 (amended 2010).

¹⁰⁶ *See* <http://byusoccer.com/blog/>

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.¹⁰⁷

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."¹⁰⁸ Today, many NCAA member institutions offer club sports that are not subject to NCAA rules. Likewise, if NCAA member institutions wished to offer semi-professional sporting competitions, they too should simply fall outside the NCAA rubric. To illustrate, Major League Baseball could enter into an agreement with Southeastern Conference (SEC) schools to withdraw from NCAA baseball and to participate in their own competition, subsidized by MLB, that 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 non-sustaining intercollegiate athletics could form their own competition, either in football or other traditional non-revenue 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 separately sponsor non-NCAA sports at an elite level. NCAA members did act in this unlawful manner in the early 1980s, prior to the successful

¹⁰⁷ Richard Demak, *The Field Tough Eggheads in Caltech Football*, SPORTS ILLUS., Aug. 31, 1987.

¹⁰⁸ NCAA by-law Art 1.3.1.

antitrust challenge to NCAA restraints on college football broadcasts.¹⁰⁹ At that time, members with major football programs had formed the College Football Association 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.¹¹⁰ The matter was never independently litigated because the CFA members were happy to return to the NCAA fold once the Supreme Court had 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 non-commercial basis were voting on legislation that only affected the relative minority of schools operating sports that generate substantial commercial revenues.¹¹¹ Current NCAA governance procedures allow greater leeway for Division I schools to set their own rules appropriate to their own situation.¹¹² The most plausible way to implement this Charter of Reform is for it to be 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 wish 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

¹⁰⁹ *Bd. of Regents*, 468 U.S. at 85.

¹¹⁰ *Bd. of Regents of Univ. of Oklahoma v. N.C.A.A.*, 546 F.Supp. 1276, 1324, 25 (W.D. Okla. 1982), *aff'd in part, rev'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

¹¹¹ *See Board of Regents*, 468 U.S. at 118.

¹¹² NCAA Division I Constitution, Art. 4.

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, 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-sustaining¹¹³; and (2) an agreement among schools not to operate sports that are not self-sustaining.¹¹⁴ Parsing the particular agreements demonstrates that these agreements are either reasonable restraints of trade or non-commercial 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 affect, 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).¹¹⁵ 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

¹¹³ 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.

¹¹⁴ 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 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.

¹¹⁵ *Board of Regents*, 468 U.S. at 101; Heather Gibson, Cynthia Willming, Andrew Holdnak, "We're Gators. Not Just Gator Fans": *Serious Leisure and University of Florida Football*, 34 J. LEISURE RES. (2002).

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, Texas, Alabama, and Southern California will have adopted an agreement that reduces output from schools like Rutgers,¹¹⁶ 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 non-sports contexts, a joint venture's decision to exclude others is not normally seen as a restraint of trade. Others are free to form their own joint venture.¹¹⁷ (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,¹¹⁸ 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.¹¹⁹ In the market for college football,

¹¹⁶ Curtis Eichelberger, *Rutgers Big Ten Decision May Put School's Sports Programs Deeper in Debt*, BLOOMBERG (June 8, 2010, 3:41 PM) available at <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, Wake Forest, and Duke all lost money on their football programs. *For Longhorns, Money Grows on Football Programs Instead of Trees*, AOL NEWS (June 30, 2010, 8:00 AM), available at <http://www.aolnews.com/2010/06/30/for-longhorns-money-grows-on-football-program-instead-of-trees/>.

¹¹⁷ H.R. Rep. No. 98-1044, at 9 (1984) (Conference Report to National Cooperative Research Act).

¹¹⁸ This is a highly controversial topic. See HOVENKAMP, *supra* note __, at 336 (calling doctrine "troublesome, incoherent and unmanageable").

¹¹⁹ Two sports cases invoking the doctrine are illustrative. In *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), 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. In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), the

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 non-commercial 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 multi-year period does not constitute a restraint of trade in a commercial context.

An even stronger argument, however, is that the restraint is non-commercial. 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 FBS (I-AA) school) could announce a partnership with the New York Yankees to play in Yankee Stadium and broadcast games on the YES 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 were insufficient to keep Oklahoma State in the black, the could continue to compete in Division I as long as oil baron T. Boone Pickens was footing the bill.¹²⁰

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 non-commercial 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

plaintiff challenged a contract term between the operator of RFK Stadium in Washington and the NFL Redskins club barring a lease with another football team.

¹²⁰ Jenni Carlson, *OSU Megabooster Boone Pickens Riding as High as His Cowboys are Ranked*, THE OKLAHOMAN (Oct. 26, 2011) <http://newsok.com/osu-megabooster-boone-pickens-riding-as-high-as-his-cowboys-are-ranked/article/3617230> (reporting Pickens' donations to the Oklahoma State University's athletic department to be valued at \$300 million).

the targeted firms operate.¹²¹ 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*¹²² is instructive. Unlike the agreement limiting Division I men's sports to self-supporting operations, the court 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 is motivated by "public service or ethical norms."¹²³ 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.¹²⁴ In a similar fashion, an agreement to allocate educational resources solely to non-athletic educational programs, or to athletic programs tailored primarily for the benefit of the student-athlete (Division III or club-level competition), means that scarce resources are available for financial aid or educational quality improvements.¹²⁵

The purposes of the Sherman Act are furthered when rivals compete for consumers' patronage through providing choices that provide consumers with their preferred mix of price, output, and quality.¹²⁶ 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

¹²¹ IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST 177 (3d ed. 2006).

¹²² 5 F.3d 658 (3d Cir. 1993).

¹²³ *Id.* at 672, quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349 (1982).

¹²⁴ *Id.* at 675.

¹²⁵ Although antitrust defendants cannot justify anticompetitive commercial arrangements resulting in increased profits with arguments that they further non-economic social values, courts should consider the degree to which non-commercial decisions further social as well as procompetitive values. *Brown University*, 5 F.3d at 675 n.10.

¹²⁶ Neil W. Averitt and Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007).

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 UK Monopolies and Merger Commission blocked the acquisition of Manchester United by News Corporation, the owner of the Sky Sports 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.¹²⁷

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 non-commercial 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 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 pro-competitive 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 non-revenue sports, which do not attract significant audiences anyway, will affect non-athletes’ 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

¹²⁷ The Company File, *BSkyB bid for Man Utd “Kicked Out”*, B.B.C. NEWS, March 17, 1999, <http://news.bbc.co.uk/2/hi/business/298072.stm>

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 Super-Subsidized Sports Association, and compete outside the NCAA umbrella in competitions with likeminded 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.¹²⁸ 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 non-profit motivation of schools is highly relevant to the antitrust analysis. Thus, the court of appeals remanded for more detailed analysis a district court order barring a cartel agreement among the Ivy League schools and MIT to agree on how much need-based financial aid to award to students.¹²⁹ The case was eventually settled, allowing the colleges to agree among themselves not to compete for students by offering merit-based scholarships.¹³⁰ 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 was therefore increased demand for the ‘product’ of elite higher education.¹³¹ If Harvard and Yale 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 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

¹²⁸ HOVENKAMP, *supra* note ___, at 92.

¹²⁹ *Brown University, supra*.

¹³⁰ William H. Honan, *M.I.T. Wins Right to Share Financial Aid Data in Antitrust Accord*, N.Y. TIMES, Dec. 23, 1993, at A13.

¹³¹ *Brown University*, 5 F.3d at 674-75.

the opportunity to participate in intercollegiate sports, universities can use the savings from Division I non-revenue sports to expand their offering of club sports.

Moreover, limiting club sports as outlined above is a legitimate way to maximize the non-economic 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.¹³² 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*.¹³³ The NCAA had adopted a 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 “restricted earnings” coach whose salary could not exceed \$16,000 per year.¹³⁴ The court of appeals struck down the salary limit. The many ways in which the holding that the NCAA’s restricted earnings rule is distinguishable from Article IV of the Charter reveals 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.¹³⁵ 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

¹³² *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984).

¹³³ 134 F3d 1010 (10th Cir. 1998).

¹³⁴ *Id.* At 1020.

¹³⁵ *Id.* at 1020-21, *discussing* *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977).

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. If the Charter's Article I (barring economically non-sustainable Division I sports) passes antitrust muster,¹³⁶ 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 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

¹³⁶ See text accompanying notes ___-___ *supra*.

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,¹³⁷ 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.¹³⁸

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.¹³⁹ Likewise, no cartel can justify its behavior on

¹³⁷ *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.*

¹³⁸ *Cf. NCAA v. Board of Regents*, *supra*, at 113.

¹³⁹ *See HOVENKAMP*, *supra* note ___, at 171 (demonstrating erroneous reasoning of *Balmoral Cinema v. Allied Artist Pictures Corp.*, 885 F.2d 313, 317 (6th Cir. 1989), to effect that anti-competitive 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 and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 235 n.213 (2008):

In *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), the court rejected the defendants' attempt to justify an alleged buying cartel by claiming it would result in lower prices to consumers. The court stated that the public interest would be furthered by “free competition” among buyers. *Id.* at 988 (quoting *Speegle v. Bd. of Fire Underwriters*, 172 P.2d 867, 873 (Cal. 1946)). In *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998), the Tenth Circuit rebuffed the defendant's argument that its ceiling on the salaries Division I colleges could pay entry-level basketball coaches was a reasonable restraint because it lowered the costs of college basketball. The court declared that “cost-cutting by itself is not a valid procompetitive justification. If it were, any

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 *NCAA v. 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.¹⁴⁰ In similar fashion, the court of appeals 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.¹⁴¹ A prior decision of the D.C. Circuit in *Smith v. Pro Football, Inc.*¹⁴² 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 produce at a lower cost.¹⁴³ This view ignores the possibility that an agreement allows existing firms to offer a superior product at the same cost, thereby increasing output.¹⁴⁴ Moreover, a refusal to determine the

group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises." *Id.* at 1022. While the court stated that cost-cutting "by itself" is not valid defense, the court later asserted that lowering costs "arguably is beneficial to the members of the industry and ultimately their consumers." *Id.* at 1023 (quoting Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 *Tul. L. Rev.* 2631, 2643 (1996)). Like *Knevelbaard Dairies*, therefore, *Law* appears to have rejected a pass-on defense to buyer price fixing.

¹⁴⁰ *Board of Regents*, 468 U.S. at 117.

¹⁴¹ *Mackey v. NFL*, 543 F.2d 606, 621 (8th Cir. 1976).

¹⁴² *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

¹⁴³ *Id.* at 1186-87.

¹⁴⁴ Kirkwood and Lande, *supra* note ___, at 236, conclude that buyer-side restrictions without an anti-consumer 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." Put another way, where suppliers are disadvantaged by a scheme that is reasonably necessary to allow increased competition and a superior product for consumers, it would be inconsistent with antitrust's "consumer protection mission", *id.* at 237, for antitrust law to proscribe these

overall effect of a restraint is inconsistent with the general welfare approach to the rule of reason.¹⁴⁵

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 relationship with a players' union, and so protected by the so-called "non-statutory labor exemption."¹⁴⁶)

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.¹⁴⁷

The similar limit in college football is justified, however, for three 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.¹⁴⁸ 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.¹⁴⁹

agreements.

¹⁴⁵ Reiter v. Sonotone, 442 U.S. 330, 343 (1979) (Sherman Act is a "consumer welfare prescription").

¹⁴⁶ Wood v. NBA, 809 F.2d 954 (2d. Cir. 1987).

¹⁴⁷ 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 (JAMES A.R. NAFZIGER & STEPHEN F. ROSS, EDS. 2011).

¹⁴⁸ *Board of Regents*, 468 U.S. at 101-02.

¹⁴⁹ For a discussion of why restriction football programs to 55 equivalency scholarships would improve competitive balance, see text accompanying notes ___-___ *supra*.

Unlike the NFL, where almost all teams play at capacity, and Major League Baseball, where virtually no teams can fill their stadium for eighty-one home dates, in major college football the most successful schools play at or near capacity for almost all their games, while lesser schools only do so when they have rare contending seasons.¹⁵⁰ This suggests that if the scholarship limits improve the ability of Indiana or Illinois to compete against Ohio State or Penn State, there will be a net positive effect on overall attendance: there will be more Hoosier and Illini fans, and those who lust for returned glory won't give up their seats at Beaver or Ohio Stadium.¹⁵¹ The college football television audience divides between avid fans of particular teams and more casual fans (and gamblers) who are keen to see top match-ups, regardless of who they are. As with live attendance, localized television ratings should increase for improved teams, and are unlikely to drop significantly for perennial powers who return slightly to the pack (this proposal will not entirely eliminate the various advantages of traditional powers). Unlike MLB, which sees a drop in ratings if the playoffs feature smaller market teams,¹⁵² national ratings would likely be unaffected by a change in competitive balance.

With regard to professional leagues, economists have observed limited or non-existent empirical support for the claim that fans care about competitive balance at all.¹⁵³ These results have led observers to consider why, contrary to conventional wisdom, the overall balance of a league may not demonstrably result in greater attendance and television ratings. Consideration of the context in which these professional sports operate suggest that these concerns are inapplicable to college football. First, the closest American sport to college football (large television audience for games featuring non-local teams, a short regular season with frequent sellouts) is the National Football League, which does feature significant

¹⁵⁰ See note ___ *supra* (citing attendance data).

¹⁵¹ Consider the recent on- and off-field fortunes of the University of Michigan. From 2001-07, Michigan averaged 9.1 wins per season, drawing crowds averaging 110,519. From 2008-10, the Wolverines won three, five, and seven games respectively, and saw average crowds of 109,776. This data has been aggregated from Univ. of Michigan, *All-Time University of Michigan Football Record* (Jan. 15, 2010), available at <http://bentley.umich.edu/athdept/football/misc/fbrecord.htm>, and NCAA statistics, *supra* note ___.

¹⁵² *TBS' LCS Audience Down 44% With Smaller Markets, NFL Primetime Competition*, SPORTS BUS. D. (Oct. 18, 2011).

¹⁵³ Szymanski, *supra* note __, at 1153-56.

balance. Second, other North American leagues, based in part on exclusive geographic territories and in part on inevitable differences in market size, feature widely varying fan bases, so that parity might harm attendance and television ratings. (Consider, by way of contrast, the record-setting Super Bowl television ratings in 2011 from the contest between the Green Bay Packers and the Pittsburgh Steelers¹⁵⁴ and a similar World Series or NBA Finals match-up between small market teams.) European soccer leagues are notable for competitive imbalance; their popularity can be explained by the existence of a system of promotion and relegation, so that poor-performing teams maintain fan interest by the prospect of losing their place in the major competition,¹⁵⁵ and by the unusual dual-competition where top teams compete each year both in domestic leagues and in a European-wide Champions League, thus generating more popular interest in having these teams dominate.¹⁵⁶

Finally, there is an additional benefit of the scholarship reduction, paired with the move to partial scholarships, for college athletes themselves. (The effect on the student-athletes is also different from the effect of a salary cap on professional teams, 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.) An important component of competition that the antitrust laws facilitate consumer choice about matters beyond quantity and price.¹⁵⁷ As described in Part II, 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 program and university best suited for his needs. The courts have explicitly recognized that the rule of reason permits colleges to justify otherwise anti-competitive agreements that serve to enhance student choice.¹⁵⁸

¹⁵⁴ Sam Schechner, *Super Bowl Sets Viewing Record as Pro Football Defies TV Trend*, WALL STREET JOURNAL, Feb. 8, 2011, at 7 (Reporting Nielsen ratings of approximately 111 million viewers, an increase of 4.2% over the record set in 2010).

¹⁵⁵ STEPHEN F. ROSS AND STEFAN SZYMANSKI, *FANS OF THE WORLD, UNITE! A (CAPITALIST) MANIFESTO FOR SPORTS CONSUMERS* 67-69 (2008).

¹⁵⁶ Hoehn & Szymanski, *supra* note __.

¹⁵⁷ Averitt & Lande, *supra* note __.

¹⁵⁸ *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); HARLOW G. UNGER, *ENCYCLOPEDIA OF AMERICAN EDUCATION: Q TO Z* 816 (3d ed. 2007) (Referencing the Overlap agreement that expressly allows elite schools to agree to bar merit scholarships)

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 85 to 55) 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.¹⁵⁹ The best reasoning, however, comes in *dicta* from the Supreme Court:

the 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, 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

¹⁵⁹ See, e.g., *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (failure to allege impact in a discernable 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).

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.¹⁶⁰

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

The NCAA, in short, "[exists] 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.¹⁶¹

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, that is vastly more popular than minor league baseball. Why is college football so much more popular? According to Justice Stevens, because the NCAA has engaged in product differentiation. 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.

¹⁶⁰ *Board of Regents*, 468 U.S. at 101-02 (emphasis added).

¹⁶¹ *Id.* at 122 (White, J., dissenting) (citation omitted to *Association 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).

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.¹⁶² This concept has been extensively criticized as incoherent or inappropriate for modern times.¹⁶³ 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 intercollegiate athletics and professional sports."¹⁶⁴ 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 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."¹⁶⁵ As the Third

¹⁶² NCAA Const. Art. 2.9.

¹⁶³ SR to get cites.

¹⁶⁴ 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 text accompanying note __ *supra*.

¹⁶⁵ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380-81 (1967) (emphasis added). The wording dates back to the pathmarking decision by Judge

Circuit has noted, plaintiffs cannot succeed in an antitrust challenge to a business practice whenever “the imagination of lawyers” might “conjure up some method of achieving the business purpose in question which would result in a somewhat lesser restriction on trade.”¹⁶⁶

Other jurisdictions have helpfully articulated this doctrine in their countries as requiring an antitrust challenger to present a “counter-factual” that is a “commercially reasonable alternative.”¹⁶⁷ 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 non-pretextual, and reflects a good faith concern that less restrictive alternatives would injure their business enterprise.¹⁶⁸

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.¹⁶⁹ Moreover, as Justice Stevens had the opportunity to note, as an alumnus

William Howard Taft in *United States v. Addyston Pipe & Steel*, 85 Fed. 217, 283 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

¹⁶⁶ *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975).

¹⁶⁷ *Rugby Union Players' Ass'n v Commerce Comm'n* (No 2), [1997] 3 NZLR 301, 320-21 (HC (Commercial List)).

¹⁶⁸ 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. National Football League*, 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 non-legitimate goal of holding down player salaries.

¹⁶⁹ *Board of Regents*, 468 U.S. at 119.

of Northwestern University, the current level of imbalance in college football did not suggest that the restraint had any success.¹⁷⁰

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,¹⁷¹ limiting the amount of compensation to the equivalent of 55 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.

IV

THE CHARTER OF REFORM AND TITLE IX

The specific reforms proposed here are based on fundamental principles that include a principle of equality of opportunity between men and women, the same principle that underlies Title IX of the Educational Amendments Act of 1972.¹⁷² However, among the many stakeholders who will be adversely affected by the Charter of Reform are a large number of young women, and their families, who will oppose a plan that significantly reduces their opportunity to receive athletic scholarships without regard to financial need, and in some cases to compete at the very highest level in their chosen sport. Of course, at most schools the Charter will result in an even greater reduction in the number and size of athletic

¹⁷⁰ *Id.* at 118 n. 62:

It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in intercollegiate football. See 546 F.Supp., at 1310-1311. Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

¹⁷¹ See text accompanying notes ___-___, *supra*.

¹⁷² 20 U.S.C. §1681 (2011).

scholarship, and the opportunities to compete at the very highest level, for male athletes.¹⁷³ However, adversely affected women have a legal weapon not available to their male counterparts: a claim that the Charter violates Title IX.

This Part will analyze potential legal challenges to the Charter based on Title IX. After reviewing the statutory language and regulatory interpretation of the statute by the Department of Education, the Part

¹⁷³ To provide a couple of illustrations, Penn State has an enrollment that is 55.2% male and 44.8% female. PROGRESS AND PERFORMANCE, Percentage of undergraduate enrollment by demographic group (2010), *available at* <http://www.psu.edu/president/pia/progress/goal4/PerformanceMeasures/UndergradDemo/index.html?format=print>. Under the Charter of Reform, men's football, basketball and (due to a huge endowment gift) ice hockey are economically self-sustaining. Let us further assume that men's wrestling would be self-sustaining, because of Penn State's long tradition and local interest in the sport, Mark Viera, *Penn State's Wrestling Hire Turns Heads*, N.Y. Times, 20 Apr. 2009, <http://thequad.blogs.nytimes.com/2009/04/20/penn-states-wrestling-hire-turns-heads/>; Centre Daily Times Staff Reports, *PSU-Iowa Match Sold Out*, Centre Daily Times, Oct. 19, 2011, <http://www.centredaily.com/2011/10/19/2955419/psu-iowa-match-sold-out.html#storylink=misearch>., by generating sufficient alumni donations. Therefore, under the Charter, Penn State would continue to offer the equivalent of 95.9 full scholarships to male athletes (55 in football, 13 in basketball, 18 in ice hockey, and 9.9 in wrestling). NCAA By-laws, Arts. 15.5.6.1 (football), 15.5.5.1 (men's basketball), 15.5.7 (men's ice hockey), 15.5.3.1.1 (wrestling). To maintain the 55.2/44.8 ratio of the student body, Penn State would, under Article II of the Charter, sponsor Division I women's sports offering the equivalent of 88.5 full scholarships. Suppose Penn State chose to sponsor women's Division I teams in Basketball (15), Ice Hockey (18), Volleyball (12), Soccer (14), Lacrosse (12), and Track & Field (18). *See generally* NCAA By-laws Art. 15.5. The effect of the Charter of Reform would be to eliminate Division I opportunities for male student athletes in baseball, track & field, fencing, golf, gymnastics, lacrosse, soccer, swimming & diving, tennis, and volleyball (with an equivalency of 81 scholarships, and Division opportunities for female student athletes in fencing, field hockey, golf, gymnastics, swimming & diving, and tennis (with an equivalency of 57 scholarships). *See* <http://www.gopsusports.com/s-finder/psu-s-finder.html> (last visited Oct. 27, 2011).

The same result occurs in more bare-bones athletic programs. Consider Washington State University, which would likely be required under the Charter to eliminate all men's sports other than football and basketball. Washington State's enrollment is approximately 48% male and 52% female. Thus, Article II of the Charter would authorize Cougar women's sports for the equivalent of 74 scholarships. Suppose Washington State chose to retain basketball (15), volleyball (12), track & field (18), soccer (14), tennis (8), and golf (6). This would result in the elimination of men's Division I sports in baseball, track & field, and golf, and women's sports in rowing and swimming. 48% is male and 52% is female, WASHINGTON STATE UNIVERSITY, <http://about.wsu.edu/about/facts.aspx> (last visited Oct. 21, 2011).

concludes that the policies reflected in Title IX and implementing regulations should lead the federal Department of Education to conclude that schools can implement the Charter consistently with Title IX, and that such a decision will almost certainly be upheld by the courts. Notwithstanding the unique role Title IX plays with regard to opportunities for student-athletes likely attending a particular Division I program primarily because of its offer of athletic aid, the Department should find that the Charter would satisfied the Department's current policy statement creating a safe harbor for Title IX compliance for programs providing opportunities for female athletes in proportion to their enrollments. Even if not within this safe harbor, the Department Charter would likely satisfy the requirement of equal opportunity explicated by the Department's regulations.

The governing legislation is fairly straightforward. Title IX provides that institutions receiving federal financial assistance – which includes virtually every major university, public or private – cannot “on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination.”¹⁷⁴ Parsing this text, or combing the legislative history for nuggets of congressional intent, is unnecessary because the courts have held, consistent with general administrative law principles,¹⁷⁵ that the relevant legal doctrines are those set forth in interpretive regulations issued by the Department of Education. As a court of appeals explained:

Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics. See, e.g., *Sex Discrimination Regulations, Hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong. 1st Sess. at 46, 54, 125, 129, 152, 177, 299-300 (1975); 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh); 117 Cong. Rec. 30,407 (1971) (same).* Congress therefore specifically directed the agency in charge of administering Title IX to issue, with respect to "intercollegiate athletic activities," regulations containing "reasonable provisions considering

¹⁷⁴ 20 U.S. C. § 1681(a).

¹⁷⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984).

the nature of particular sports." Pub. L. No. 93-380, 88 Stat. 484, 612. And where Congress has specifically delegated to an agency the responsibility to articulate standards governing a particular area, we must accord the ensuing regulation considerable deference. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (Where Congress has expressly delegated to an agency the power to "elucidate a specific provision of a statute by regulation," the resulting regulations should be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").¹⁷⁶

The Department of Education has issued two relevant interpretations. First, the Department followed informal rulemaking procedures to promulgate regulations.¹⁷⁷ The statute does not, the Department noted, require equal expenditures of money. Instead, the test for compliance is a comparison of the "availability, quality and kinds of benefits, opportunities and treatment afforded members of both sexes."¹⁷⁸ The regulations consider a host of factors to be taken into account, including "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."¹⁷⁹

Second, the Department's Office of Civil Rights issued a *Policy Interpretation on Title IX and Intercollegiate Athletics*.¹⁸⁰ Significantly, this Policy Interpretation states that the primary means of determining compliance is "whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic

¹⁷⁶ *Kelley v. University of Illinois*, 35 F.3d 265, 270 (7th Cir. 1994).

¹⁷⁷ The initial regulations can be found at 44 Fed. Reg. 71,415 (1979), codified at 34 C.F.R. pt. 106 & 45 C.F.R. pt. 86.

¹⁷⁸ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413 (hereinafter *Title IX Policy Interpretation*).

¹⁷⁹ 34 C.F.R. §106.41(c) (1990). The other factors listed are the provision of equipment and supplies; schedule of games and practice time; travel and per diem allowances; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of athletic facilities; provision of medial services; provision of housing and dining facilities and services; and publicity.

¹⁸⁰ *Title IX Policy Interpretation*, 44 Fed. Reg. at 71,413.

programs.”¹⁸¹ The Policy Interpretation continues in considerable detail, including an oft-cited “three-prong” test for compliance. The Interpretation states that “the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics.”¹⁸² Under this test, a university can comply with Title IX where (1) “intercollegiate level *participation opportunities* for male and female students are provided in numbers substantially proportionate to their respective enrollments,” or (2) there is a “history and continuing practice of program expansion which is demonstrably responsive to the development interests and abilities” of the underrepresented sex, or (3) “it can be demonstrated that the interests and abilities” of an underrepresented sex “have been fully and effectively accommodate in the present program.”¹⁸³

Several initial observations set the stage for the application of these principles to the Charter of Reform. First, the three-prong test serves as a “safe harbor” for universities to demonstrate compliance.¹⁸⁴ Several courts have held that universities are automatically in violation of Title IX if their “participation opportunities” are not proportionate to enrollment, there is no history of program expansion, and they cannot show that they have “fully and effectively” accommodated the interests and abilities of the underrepresented sex.¹⁸⁵ However, the Policy Interpretation makes

¹⁸¹ *Id.* at 71, 415.

¹⁸² In 1996, the Department of Education’s Office for Civil Rights released a letter detailing its clarification on the Three-Part Test stating that institutions may comply by satisfying one of the three prongs. The letter states that the test is one of many factors considered to determine compliance with Title IX and the 1975 Regulations. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, Department of Education (Jan. 16, 1996), *available* at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

¹⁸³ Title IX Policy Interpretation, 44 Fed. Reg. At 71, 418 (emphasis added).

¹⁸⁴ *See, e.g., McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 299 (2d Cir. 2004). This point was emphasized in *Kelley v. University of Illinois*. The court noted that the Department, rather than rigidly requiring schools to adopt parallel teams for men and women in every sport, allowed schools to comply with Title IX by showing an equal allocation of resources: “if compliance with Title IX is to be measured through this sort of analysis, it is only practical that schools be given some clear way to establish that they have satisfied the requirements of the statute. The substantial proportionality contained in Benchmark 1 merely establishes such a safe harbor.” 35 F.3d at 271.

¹⁸⁵ In *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993), the court wrote:

clear that

The Department will base its compliance determination under [the interpretation published in the Code of Federal Regulations] upon a determination of the following: a. Whether the policies of an institution are discriminatory in language or effect; or b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.¹⁸⁶

Second, current regulations have not acknowledged the fundamentally different policy issues that arise in preventing discrimination on the basis of sex in Division I athletic programs and in the programs of the overwhelming majority of federal fund recipients who operate athletic programs in NCAA Division III, public secondary schools, or other institutions where athletes are not recruited with scholarships. This difference can be seen when identifying the victims of discrimination and the beneficiaries of compliance. When a typical educational institution denies equal opportunities to female athletes, the victims are the students at that institution; when a typical institution adds programs to better accommodate female athletes, the beneficiaries are students at that institution. In contrast, when a Division I program is not

In effect, "substantial proportionality" between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX. In the absence of such gender balance, the institution must show that it has expanded and is continuing to expand opportunities for athletic participation by the underrepresented gender, or else it must fully and effectively accommodate the interests and abilities among members of the underrepresented gender.

Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) found a Title IX violation after determining that Brown University did not meet any of the three prongs. The view that an institution can only be found in compliance with Title IX by satisfying one of the three prongs of the Policy Interpretation is also shared by a leading Title IX scholar. See DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 69 (2010).

¹⁸⁶ *Title IX Policy Interpretation*, 44 Fed. Reg. At 71, 417.

in compliance by cutting or refusing to add women's programs, other than the remaining scholarship athletes, the victims are students who would have been successfully recruited at that institution but will likely receive athletic aid at another institution; when a Division I program adds a new woman's sport, the beneficiaries are athletes who now choose to attend that school as a scholarship recipient instead of another Division I school.

Third, because of the clear congressional intent that compliance with Title IX with regard to intercollegiate and interscholastic athletics be determined by the relevant cabinet department,¹⁸⁷ courts are inclined to be particularly deferential to the department's policy interpretation.¹⁸⁸ Given the magnitude and significance of the Charter of Reform, it is highly likely that senior officials in the Department of Education would be invited by stakeholders to weigh in on the myriad policy issues involved. If the Secretary of Education opposed the Charter and did not believe that it met the Department's definition of non-discrimination, the Policy Interpretation could easily be changed to outlaw the key elements of the Charter. On the other hand, if the Department favored the fundamental policies and specific proposals of the Charter, any ambiguity in the Policy Interpretation or the regulations could be clarified, and the Department's interpretation of Title IX would likely be accepted by a court in the event that those adversely affected by the Charter's proposals sought to litigate the issue.

These considerations should lead the Department to conclude that schools that implement the Charter of Reform meet both the Department's current requirements as well as the policies underlying them. Providing that institutions in fact provide equal treatment to Division I men's and women's sports with regards to the details set forth in §106.41(c)(2)-

¹⁸⁷ Initially the Department of Health, Education, and Welfare, and then the Department of Education. *See* 20 U.S.C. § 3441(a)(1) (transferring all education functions of the Department of Health, Education, and Welfare HEW to the Department of Education; *see also* 20 U.S.C. § 3441(a)(3) (transferring education-related Office of Civil Rights to the Department of Education). The court treats the "[Department of Education], acting through its [Office of Civil Rights], as the administrative agency charged with administering Title IX." *Cohen v. Brown Univ.*, 991 F.2d at 895.

¹⁸⁸ *Cohen v. Brown Univ.*, 991 F.2d 888, 896-97 (1st Cir. 1993); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 (2d Cir. 1999); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828-29 (10th Cir.1993); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042, 1046-47 (8th Cir. 2002).

(10),¹⁸⁹ and similar equal treatment to men's and women's sports operated at the club or Division III level, the selection of sports at the Division I level should be found to meet the requirement of §106.41(c)(1) that recipients "effectively accommodate the interests and abilities of members of both sexes."¹⁹⁰ The language used in this regulation is usefully contrasted with Prong Three of the Interpretive Policy, which gives institutions a safe harbor despite disproportionate participation by men and no expansion in women's programs if the institution can "*fully* and effectively accommodate" the interests and abilities of female students. Courts have repeatedly emphasized that Title IX does not require universities to fully meet the interests of all athletically-interested students; indeed, the word "accommodate" implies that all desires cannot be met and requires that the shortfall be met equally by male and female students.¹⁹¹

The repeated focus of the guidelines is on equal athletic *opportunity*. The Charter meets this requirement by insisting that institutions sponsor Division I teams in sufficient women's sports that the total number of scholarships awarded in women's sports is proportionate to the number awarded in men's sports.

The principal line of attack for attorneys seeking to block the Charter on Title IX grounds will likely be that institutions implementing the Charter are not in compliance where, as is probable, the number of non-scholarship "walk-ons" participating on Division I teams is disproportionately male. Of course, in addition to funding an equal number of athletic scholarships, compliant universities must be punctilious in assuring completely equal efforts to recruit walk-on athletes, provide an equal total expenditure for equipment, travel, coaching, facilities, and the like to Division I women's sports. (Indeed, this may involve marginally *more* spending on these items for Division I women's sports to compensate for the marginally greater expenditures related to walk-ons for men's teams). Likewise, spending on club or Division III sports must also be on a strictly equal basis. With these stipulations, a program should be found

¹⁸⁹ See note ___ *supra*.

¹⁹⁰ 34 C.F.R. §106.41(c)(1).

¹⁹¹ For example, in *Cohen* the court noted that, under the regulations, an institution with a 50% female enrollment and 500 men and 250 women interested in sports could satisfy Title IX by providing opportunities for 75 men and 75 women. Of course, this means that 175 female students' interests would not be accommodated. 91 F.2d at 899.

compliant with Title IX, as it is clear that the school provides female students with an equal *opportunity* to participate.

If “opportunities” were inflexibly interpreted to mean “actual participation” in every case, without regard to the overall expenditure of funds and operation of a program, then the only way that an institution could comply with Title IX would be to (a) bar non-scholarship students from participating on Division I teams, (b) collectively (through the NCAA) agree to significantly increase scholarship limits for each women’s sport (and then modify the Charter’s Article II to require funding of scholarships for female athletes likely to result in a number equal to the sum of scholarship athletes and walk-ons on the few remaining male teams operating at the Division I level, or (c) add sufficient additional Division I sports so that the end result is the same number of participants. None of these alternatives seem attractive, nor are they required by the anti-discrimination principles of Title IX, and this approach should be rejected by the Department’s Office of Civil Rights.

There are many reasons why barring walk-ons would be terrible social and sports-competitive policy. Barring an athlete who can obtain financial support from family or (if needy) from charitable or governmental sources that they cannot participate in Division I sports at their preferred educational institution is poor educational policy. Allowing teams to fill football rosters dramatically cut by the Charter’s reforms by walk-ons assures minimal quality in the event of injury.

Changing NCAA rules to significantly expand the number of scholarships offered in each women’s sports also makes little sense. It would distort competitive balance in these sports, as talented players would flock to the top teams. It would also mean, on the margin, that schools would be offering scholarships to mediocre volleyball and basketball players who will get no playing time. Nor could the NCAA precisely predict how many additional spots to authorize in order for most schools to be able to equalize the sum total of male scholarship athletes plus male walk-ons with female scholarship athletes.

Even this option is preferable, though, to the option that would grant relief to the disaffected female Division I athlete whose sport is being targeted for reduction to club status pursuant to the Charter. Consider the typical university, which under the Charter would offer Division I sports for men only in football or basketball. In such a case,

the cost of providing walk-on opportunities in those two sports would be relatively modest. However, to match these walk-ons, under the view that “opportunities” means “actual participation,” schools would have to sponsor two additional women’s sports at the Division I level, likely to cost over \$1 million. Consider further the implication of the view that “opportunities” means “actual participation,” in the context of a program operated under current rules where a university does not offer football. Although the Department of Education explicitly rejected the idea of requiring schools to offer identical sports, suppose a university with a fifty-fifty enrollment currently sponsored Division I sports for both men and women in basketball, baseball/softball, track & field, swimming, and golf. Suppose further that budget cuts required terminating programs, and the university proposed to eliminate both men’s and women’s swimming and golf, continuing to provide identical opportunities in the other three sports.¹⁹² Suppose further that, historically, these three sports attracted significantly more male than female walk-ons. Under the “actual participation” test, a female swimmer could successfully invoke Title IX to prevent the school from terminating swimming. Even if well-intentioned but narrow-minded bureaucrats in the Office of Civil Rights believe that the anti-discrimination principles of Title IX warrant that kind of wasteful expenditure, the Secretary of Education should be sensitive to the financial exigencies facing major universities and reject a bright-line rule that disparities in walk-ons automatically places a recipient of federal funds in violation of Title IX.

Of course, the flexible and holistic approach set forth in the Title IX regulations, where the Department of Education considers a wide variety of factors, is more open to evasion than an arbitrary bright-line standard. For example, Brown University shamefully sought to demonstrate compliance with Title IX by matching male rosters composed of highly recruited players with female rosters expected to be boosted from walk-ons from among the general campus population.¹⁹³ An arbitrary focus on claimed, rather than reasonable, participation opportunities would allow a school to short-change female programs by unrealistically projecting numbers of female walk-ons without regard to

¹⁹² Actually, under NCAA rules, more scholarships are available for female athletes in these sports. See NCAA By-laws Art. 15.5 (13 scholarships for men’s basketball, 15 for women’s basketball; 11.7 scholarships for baseball, 12 for softball; 12.6 scholarships for men’s track & field, 18 for women).

¹⁹³ *Cohen, supra*, 101 F.3d at 187 (criticizing this practice).

interest or the ability of a coaching staff to utilize these athletes in intercollegiate athletic competition.¹⁹⁴ To comply with both Article III of the Charter and Title IX, a university would bear the burden of showing that disproportionate male participation in Division I programs as walk-ons is purely the result of a difference in interest in participation for the chosen sports.¹⁹⁵

Perhaps the best argument in favor of interpreting Title IX to require equal participation rather than equal opportunity is that the former is an easily administered bright-line rule, while the latter is a murkier standard.¹⁹⁶ All bright-line rules are cheaper and easier to administer for the Department of Education, but increased administrative costs are justified when the clear rule is likely to be too overbroad or underinclusive.¹⁹⁷ The possibility that some institutions could fail to live up to their responsibilities advocated by Fundamental Principle #3 to provide a truly equal opportunity for female student-athletes (for example, by creating huge number of ‘roster spots’ for walk-ons on unattractive women’s teams) would not justify requiring financially strapped universities to support two additional women’s sports at the Division I level simply to provide scholarships for women who, because an insufficient number of women are interested in walking-on to participate in the most popular sports selected by the universities for women.

Either by determining that the differences in participation rates for walk-ons is not “substantial” under prong 1, or by determining that participation opportunities can include unused walk on “opportunities” where a school makes a clear showing of equal treatment, the Department of Education should make clear that this reform complies with Title IX.

¹⁹⁴ See, e.g., BRAKE, *supra* note __, at 125 (discussing Quinnipiac University’s creation of “target numbers for women’s squads” without input from women’s coaches and in some cases above what resources and staff could meaningfully support).

¹⁹⁵ The selection of women’s sports under Article II of this Charter should be designed with the goal of achieving the best accommodation of the interests and abilities of female students. If, for example, a disgruntled swimmer could demonstrate that far more female students would walk on to the swim team than to the gymnastics team, this could in some circumstances lead a court to find that terminating swimming rather than gymnastics was non-compliant.

¹⁹⁶ See BRAKE, *supra* note __ at 70 (appeal of three-prong test is ease of administration); see generally Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

¹⁹⁷ Indeed, the easiest-to-administer rule would require universities to offer identical funding for identical sports.

EPILOGUE

As this Article goes to press, NCAA leaders are moving quickly to adopt a series of reform proposals. This Epilogue briefly summarizes the proposals and discusses them in light of the analysis set forth above. The reforms adopted by the Division I Board of Directors include (1) permitting conferences to allow schools to add \$2,000 in financial aid to student-athletes receiving a full scholarship; (2) increasing the minimum standard of academic progress (including graduation rates) that programs must achieve to be eligible for post-season competition; (3) increasing high school and junior college minimum grade point averages for eligibility; (4) refining recruiting rules for basketball; (5) permitting schools to promise student-athletes that scholarships will be renewed throughout their matriculation, and promising not to revoke scholarships based on athletic performance.¹⁹⁸

The Charter of Reform is designed to address two major problems: the unjustified diversion of funds from teaching and research toward economically unsustainable Division I athletic programs, and the economic exploitation of a small number of elite students whose efforts disproportionately attract millions of dollars of revenues to major Division I schools (with the consequent widespread failure of student-athletes, third parties, and complicit school officials, to abide by existing rules.) The academic standards reforms adopted by the Board of Directors are beyond the scope of this Article. The reforms proposed by the NCAA Board fail to address, in any way, the economic crisis facing intercollegiate athletics; indeed, by increasing costs to financially strapped commercially-marginal programs, the proposal exacerbates the problem.

The additional \$2,000 offered to student-athletes is, under the analysis set forth above, a vastly imprecise and expensive way to solve current problems. Most student-athletes are not academically exploited. Those who have no other source of financial support other than their athletic scholarship should be able to obtain need-based additional support without regard to athletic ability. Assuming that the funds are apportioned to partial scholarship recipients as well, the proposal would entail an

¹⁹⁸ Associated Press, *NCAA Panel Approves Major Changes* (Oct. 27, 2011), available at http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes

additional \$492,000 for a fully-funded men's and women's Division I lacrosse program.¹⁹⁹ That money could provide an additional 31 history or English teaching assistants at Penn State.²⁰⁰ At the same time, the stipend is relatively modest for those players whose efforts attract millions in revenue, and is unlikely to facilitate a consensus necessary for vigorous enforcement of rules against under-the-table payments. Notably, the proposal is not tied to significant changes in rules enforcement outlined above.

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.

Entrenched stakeholders are likely to vigorously oppose proposals to bar the use of funds otherwise available for teaching and research to subsidize economically unsustainable men's Division I sports, to limit women's Division I sports to those providing equal scholarships to the decimated men's offerings, and to limit men's football scholarships to the equivalent of fifty-five per team. Others will challenge, as too commercial or insufficiently generous, the proposal to allow elite athletes to receive as much as \$15,000 in additional financial support. These groups are likely to attempt to challenge the NCAA's implementation of these proposals in court, most likely as restraints of trade in violation of the Sherman Act and as unequal treatment for women under Title IX.

A number of these agreements can be accurately characterized as commercial restraints of trade. However, a careful analysis shows that the Charter's commercially-related aspects would be considered reasonable restraints of trade, because they do not distort output among schools

¹⁹⁹ NCAA rules permit 12.6 scholarship equivalents for men's lacrosse and 12 scholarship equivalents for women's lacrosse. See NCAA By-laws, Art. 15.5.5.

²⁰⁰ The estimated value of a Penn State teaching assistant in those subjects is approximately \$15,000. <http://chronicle.com/stats/stipends/?inst=3179>.

choosing to comply, or increase their ability to raise prices or increase profits. Courts have held that non-commercial agreements among NCAA member institutions do not violate the rule of reason.

Compliance with the broad anti-discrimination principles of Title IX is based largely on interpretive regulations promulgated by the Department of Education's Office of Civil Rights. An approach that best fulfills the purposes of Title IX and is consistent with a fair reading of existing regulations should lead the Department to conclude that the Charter is compliant with Title IX. Courts would almost certainly accept regulatory approval in reviewing private litigation challenging the Charter.

As with any serious reform proposal in a complex society, there are winners and losers from implementation of the proposal. Those adversely affected include

- (1) Division I athletes who receive athletic scholarships in excess of financial need and benefit from instruction from large coaching staffs, and who enjoy widespread transcontinental travel to play opponents before few spectators;
- (2) Assistant coaches who are employed in sports that are not economically self-sustaining;
- (3) Students, faculty, administrators, trustees, and community sports fans who enjoy the entertainment of big-time football or basketball at their favorite university, even though they are insufficient in number to commercially support the expenses required to generate their sporting entertainment;
- (4) Unscrupulous third parties (boosters or those seeking to exploit the future professional prospects of student-athletes), ethically-challenged student-athletes, and complicit athletics officials, who currently evade rules against under-the-table payments with relatively impunity due to inept enforcement practices;
- (5) Coaches at dominant programs, who can 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 they have a greater opportunity to play

A handful of elite athletes will benefit from the Charter's proposal to allow a significant increase in financial support for the few whose efforts directly contribute to significant revenue. The challenge toward implementation is that other beneficiaries are far more dispersed.²⁰¹ These include football players who make a 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, and less successful institutions like Rutgers no longer take funds from educational missions in order to subsidize non-sustainable athletic programs.

²⁰¹ See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965), which generally describes 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. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 51-54 (4th ed. 2007).