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THE ELIGIBILITY PARADOX

ALFRED DENNIS MATHEWSON*

"The only reason many of them are in college 'is to play ball' . . . There's no pressure . . . to keep [athletes] in school, any more than any other student."¹

The collegiate and sports worlds are abuzz about the recent case *Cureton v. NCAA*.² A federal district court held that the National Collegiate Athletic Association's ("NCAA") use of standardized test scores in its initial eligibility requirements violated Title VI of the Civil Rights Act of 1964.³ Those who agreed that the NCAA's rules slammed the door of educational opportunity in the faces of African-American athletes have hailed the decision. Those who disagreed saw the standards as necessary to prevent colleges and universities, who are more interested in their athletic prowess than intellectual growth, from exploiting the same athletes that have criticized the court's decision. The NCAA responded by empanelling a "blue ribbon" committee that considered, but later rejected, the return of universal freshman ineligibility in lieu of a uniform minimum standard.

None of the above groups would be shocked to learn that the speaker of the opening italicized quotation above is a university president speaking in the 1990s. They may, however, be surprised to learn that, as regrettable as the speaker's sentiments may be, the comment accurately represents the current state of the law. Under existing law, a university owes no obligation to a scholarship athlete other than an opportunity to participate in its athletic program and

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1. *College President Assesses Athletes*, Editorial, ALBUQUERQUE J., Aug. 11, 1995, at A12 (quoting J. Michael Ovenduff, former President of New Mexico State University).

2. 37 F. Supp. 2d 687 (E.D. Pa. 1999), *rev'd* 198 F.3d 107 (3d Cir. 1999).

3. See *Cureton*, 37 F. Supp. 2d at 689 (examining impact of standardized test scores on eligibility requirements).

to sit in a classroom.⁴ The obligation to obtain value from that opportunity is imposed squarely on the shoulders of each individual athlete. A former college athlete has described the university's obligation in critical terms. He observed that a university provides student-athletes, in exchange for their participation, something that costs the university very little extra to provide: the opportunity to take classes that will be offered regardless of whether the student-athletes are there or not.⁵ His point was that student-athletes may not value the educational opportunity very highly if universities are unwilling to invest additional dollars in it.

Nevertheless, universities intend educational opportunities to comprise the core of compensation paid to student-athletes, hoping that any benefits derived from professional preparation are incidental to, or a mere by-product of, the educational opportunity.⁶ Whether the educational opportunity is valuable depends almost entirely on the actions of the student-athlete off the playing field. The athlete's ability to place value on the educational opportunity is constrained by his or her motivation and preparation for a college education. Without a legal obligation imposed on universities to render the educational opportunity valuable, this paradox has led to a system of governing principles that ostensibly enhance aca-

4. See Alfred Dennis Mathewson, *Intercollegiate Athletics and the Assignment of Legal Rights*, 35 ST. LOUIS U. L.J. 39, 39-44, 49, 73-79 (1990) (discussing university's duties to its student-athletes).

5. Based on comments made by Phil Abney to my Sports Law class in March 1995. Mr. Abney played basketball for the University of New Mexico and was one of the participants in the infamous "Lobogate" of 1979. Mr. Abney stated the university permits the athlete to sit in a classroom, which it will provide whether the athlete is there or not. Consequently, he argued that the university is permitted to compensate athletes with an educational opportunity, which costs the university virtually nothing to provide. His conclusion is generally correct but does not take into account the opportunity cost the university incurs if the athlete takes up a seat which the university would sell to someone else, nor does it take into account the cost of special academic advisory services. His conclusion is limited to the provision of the educational opportunity and does not apply to the provision of training and development of athletic skills for professional sports. Nevertheless, Mr. Abney's recognition of the provision of a benefit at a limited cost to the university is not novel. See I.R.C. § 132(b)(1)-(2) (1999) (allowing employees to exclude from gross income value of fringe benefits which are "offered for sale to customers in the ordinary course of the line of business of the employer" and where "the employer incurs no substantial additional cost (including foregone revenue) in providing such service to the employee.").

6. See *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (1972) (noting that contract law governs relationship between student-athletes and their universities). Contrary to the popular view, the athletic scholarship is not the major source of compensation for scholarship athletes. It certainly is not the source of compensation for walk-ons. Student-athletes provide their services as athletes primarily in exchange for an educational opportunity and professional preparation.

demic value, though actually result in the systemic suppression of the value – actual and perceived – given to student-athletes in exchange for their participation in intercollegiate athletics.⁷

This Article offers proof of this conclusion and proposes a solution. Part I begins the proof with a challenge to the prevailing orthodoxy that educational primacy is the central governing principle of the NCAA. Instead it argues that the NCAA, as a voluntary governing association, is an organization whose primary mission and function is the regulation of athletics. Athletics primacy is, thus, the central governing principle. Accordingly, all of its rules and bylaws, including those affecting academics, should be viewed as promoting the sports activities. It is the promotion of academic values by an institution driven primarily by athletics values that creates the paradox.

Part II argues that the major structural catalyst for the suppression of value is the concept of student eligibility created by the NCAA, as an athletics governing organization. NCAA Bylaws devote nearly fifty pages to the eligibility of student-athletes for participation in intercollegiate athletics.⁸ While eligibility rules are not inherently flawed, the existing rules utilize a *de minimis* concept, which provides universities with substantial incentives to maintain, and discourages them from investing in or exceeding, the minimum eligibility requirements. Consequently, the contemporary eligibility framework serves to enhance the value of the entertainment produced by its members but suppresses the perceived and actual value of the educational opportunity offered by its members to student-athletes in exchange for their athletic skill.⁹

Some commentators have called for doctrinal solutions to this systemic suppression of value, such as judicial application of the im-

7. See Mathewson, *supra* note 4, at 86 (suggesting code of intercollegiate athletics or arbitration systems as means to value education and athletics); see also Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 273-78 (1994) (criticizing values underlying amateur/education model of value as "anachronistic"). The suppression of the value of the educational opportunity has the effect of increasing the perceived value of the professional opportunity, which for most athletes is equivalent to a lottery ticket that for most is a losing one.

8. See Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 530-33 (1995) (discussing eligibility requirements of NCAA).

9. See Davis, *supra* note 7, at 270-71 (outlining relationship among amateur college athletics, education and commercialism). In professional sports, eligibility questions are rare. Theoretically, nearly everyone is eligible. The big fights are over the value to be returned to athletes.

plied duty of good faith in contract law.¹⁰ A perennial chorus sings loudly for the abandonment of amateurism and for the payment of athletes in revenue producing sports.¹¹ Others with more moderate voices have called for varying degrees of systemic reform.¹² Apart from the chorus, few have urged a serious examination of the fundamental concept of eligibility.

Part III argues that the solution lies not in further changes in the legal regime but rather in the reform of the eligibility framework. It argues that the NCAA should develop a framework that separates the concept of athletic eligibility from academic achievement. It urges the NCAA to adopt a narrow concept of athletic eligibility and use academic standards to increase the educational value rendered to student-athletes. This argument may startle some, but as will be demonstrated, it is the most plausible way to assure that colleges and universities honor their bargains with student-athletes and provide them with real value in exchange for their athletic participation.

10. See Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 747-48 (1991) (discussing application of contract law to college/university and student-athlete relationship).

11. See William Gerberding, *Historical Perspective of Amateurism*, 22 J.C. & U.L. 11, 18-19 (1995) (forecasting end of amateur college athletics in near future); C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL'Y 125, 126-127 (1996) (suggesting stipends be made available to student-athletes in college); Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 83 (1995) (stating, "[U]niversity recruiting for . . . athletes is a commercial activity that should be subject to traditional antitrust analysis."); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 27 (1991) (stating, "[C]ollege athletes require more money than allowed under the existing rules."); Vladimir P. Belo, Note, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 154 (1996) (arguing student-athletes deserve "some share of the monies generated by their own unique personas and talent."); Leonard M. Shulman, Comment, *Compensation for Collegiate Athletes: A Run for More Than the Roses*, 22 SAN DIEGO L. REV. 701, 702 (1985) (asserting that college athletes should receive financial compensation above traditional scholarships and financial aid).

12. See e.g., Broyles, *supra* note 8, at 530-33 (discussing eligibility requirements of NCAA); Robert N. Davis, *Athletic Reform: Missing the Bases in University Athletics*, 20 CAP. U. L. REV. 597, 600-08 (1991) (criticizing NCAA's lack of reforms regarding relationship among academics, commercialism and athlete-institution); Rodney K. Smith, *Little Ado About Something: Playing Games With the Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 584-85 (1991) (arguing only hope for true reform lies in accreditation, academic impact statement and general plans); Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 123 (1993) (stating his goal is "a blueprint for restructuring, not a call for demolition.").

I. THE PRINCIPLE OF ATHLETICS PRIMACY

Much of the law that has developed regarding the internal affairs of the NCAA and the rights and obligations of student-athletes is premised upon the NCAA's status as an educational organization.¹³ This educational character is derived from its membership, namely more than 1100 institutions of higher education.¹⁴ The NCAA has frequently taken the position in litigation that its rules and regulations are entitled to deference because of its educational nexus. For example, in *Hennessey v. NCAA*,¹⁵ a case brought by a coach challenging NCAA rules, the NCAA unsuccessfully asserted the defense that as an educational organization it was entitled to an exemption from the antitrust laws.¹⁶

Numerous judicial opinions reflect the influence of the educational character of the NCAA's activities. For example, in *Banks v. NCAA*,¹⁷ a case in which a student-athlete challenged the loss of amateur status, a majority of the court was strongly influenced by the educational nexus in upholding the NCAA's "No Agent" and "No Draft" rules.¹⁸ The cases that have been influenced by the educational nexus have not been limited to antitrust cases. For example, in *Walters v. Fullwood*,¹⁹ the New York Court of Appeals held

13. See JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* 1-8 (1979) (outlining regulation of amateur athletics and describing educational organizations' (such as NCAA) roles).

14. See *NCAA v. Roberts*, No. TCA 94-40413-WS, 1994 WL 750585, at *1 (N.D. Fla. Nov. 8, 1994) (describing NCAA as, "a voluntary association of approximately 1100 members including colleges, universities, and affiliated conferences and organizations located in each of the fifty states.").

15. 564 F.2d 1136 (5th Cir. 1977).

16. See *id.* at 1154 (holding for NCAA on merits). But see *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (holding against NCAA under similar facts).

17. 977 F.2d 1081 (7th Cir. 1992).

18. See *id.* at 1090 (upholding NCAA's "No-Draft" rule in football to prevent "profit making objectives . . . [from] overshadow[ing] educational objectives"). See NCAA, 1995-96 NCAA MANUAL [hereinafter NCAA MANUAL] § 12.3.1 (1995) (asserting "No-Agent" rule, which disqualifies student who enters into contract with sports agent for marketing of his or her athletic skill); NCAA MANUAL § 12.2.4.2 (asserting "No-Draft" rule that disqualifies student-athlete if he or she asks to be placed on draft list of professional sports league); see also NCAA MANUAL § 12.2.4.2.1 (providing limited exception for professional basketball). Student-athletes who play baseball are not subject to the rule because Major League Baseball does not require them to take any action to be eligible for the draft. See *Amateur Draft History*, at http://www.majorleaguebaseball.com/u/baseball/mlbcom/history/misc_draft.htm (last visited May 22, 2000) (stating history of and procedure for baseball draft of amateurs).

19. 675 F. Supp. 155 (S.D.N.Y. 1987).

that a contract between a student-athlete and a sports agent which violated NCAA rules was unenforceable on public policy grounds.²⁰

Scholars have long recognized the educational character of the NCAA. Indeed, a large amount of recent scholarship has addressed the educational nature of the NCAA.²¹ Yet, the NCAA and its members often have been exposed to strident criticism for proclaiming their educational roots while failing to recognize the significance of their role as economic actors engaged in the production and sale of athletic competition, especially in football and basketball. Professor Weistart was one of the first scholars to write of the tension between academic and economic, or as he termed it, "entrepreneurial functions."²² Weistart stated:

The NCAA fulfills at least two important functions in intercollegiate sports. It serves as a monitor of the academic integrity of its members' programs, a role which requires that it give particular attention to preserving the amateur character of the underlying activity. The NCAA also operates as an economic regulator and promoter. It seeks to foster sports competition among member schools and to increase the attention given the events by the general public.²³

He argued that external regulators, such as the judiciary, should subject NCAA regulations to careful scrutiny to ascertain which function the regulation serves and apply rules accordingly.²⁴

Professor Timothy Davis has found a similar dichotomy in conceptions of the nature of intercollegiate athletics in judicial opinions. He has argued that a careful review of judicial opinions reveals two competing models of intercollegiate athletics:²⁵ (1) an amateur/education paradigm, typified by cases such as *Banks*, and

20. See *id.* at 160 (declaring agency contract with student-athlete unenforceable on public policy grounds).

21. See John R. Allison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures and Processes Promote Educational Primacy for the Student Athlete?*, 44 U. KAN. L. REV. 1 (1995) (discussing NCAA tendencies to promote educational primacy). See generally *Sports Law Symposium*, 67 DENV. U. L. REV. 111 (1990); *Symposium, The NCAA and the Student-Athlete*, 1995 WIS. L. REV. 545 (1995); *Symposium on the Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 543 (1991).

22. John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 177 (1983-84) (noting goal of NCAA as promoting amateur sports).

23. *Id.* at 173.

24. See *id.* at 177-80 (discussing suggested scrutiny level of NCAA regulations).

25. See Davis, *supra* note 7, at 273-82 (discussing competing models of intercollegiate athletics).

(2) a commercial/educational paradigm exemplified by cases such as *NCAA v. Board of Regents of the University of Oklahoma*.²⁶ These bipolar models mirror Weistart's distinct functions of the NCAA; but where Weistart saw tension between functions, Davis saw the dominance of one. Davis argued that the amateur/education model has been the dominant model in intercollegiate athletics jurisprudence.²⁷ He showed that the amateur/education model most frequently results in an irrebuttable presumption that intercollegiate athletics and the NCAA are primarily academic.²⁸ He would reverse the presumption and adopt the commercial/education model in light of existing realities.²⁹ The commercial/education model, however, would lead to a characterization of the NCAA as a primarily commercial organization.

Professor John Allison has also examined the character of the NCAA.³⁰ Allison worried that commercial and athletic purposes overshadowed educational concerns. In light of competing tensions, he sought to determine the viability of the educational mission by intercollegiate athletes. Rather than analyze the general character of the NCAA, he evaluated the "decisional structures and processes of the NCAA and its member institutions" in promoting the goal of educational primacy.³¹ Specifically, he examined what he termed, "one of the NCAA's most fundamental articulated principles: while a student-athlete matriculates at a college or university, his or her status as a student should take precedence over his or her status as an athlete."³² He doubted whether the structures examined promoted educational primacy.³³

The fundamental principle, as he defined it, is narrower than academic or educational functions and purposes contemplated by Professors Weistart and Davis. And, it is narrower than the educa-

26. 468 U.S. 85 (1984) (analyzing commercial benefit of amateur athletics).

27. See Davis, *supra* note 7, at 270 (stating, although two models exist, amateur/education model is more prominent).

28. See *id.* at 271, 278 (stating amateur/education model is based upon "anachronistic" values).

29. See *id.* at 326 (noting commercial/education model, though imperfect, is good "starting point for constructive debate").

30. See Allison, *supra* note 21, at 15-45 (discussing relationship between NCAA structures and policies in relation to its goals).

31. *Id.* at 15 (discussing application of NCAA goal of education).

32. *Id.* at 5-6 (defining "educational primacy").

33. See *id.* at 56 (stating, "[A] study of the decisional structures of the NCAA and many of its member institutions reveals several characteristics causing one to question whether they tend toward decision making that accurately promotes educational primacy.").

tional mission articulated in Article 1.3.1 of the NCAA Constitution, which provides:

BASIC PURPOSE. The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.³⁴

The references to educational systems and programs recognize the fundamental mission of member institutions is education and that athletics are merely one component of that mission. Professor Allison's fundamental principle is alluded to in the NCAA's purpose clause in the "integral part of the student body" language, but it is not clearly stated.³⁵

His fundamental principle of educational primacy, perhaps, may be gleaned from Article 2.2 of the NCAA Constitution on "The Principle of Student-Athlete Welfare."³⁶ Article 2.2.1 provides:

OVERALL EDUCATIONAL EXPERIENCE. It is the responsibility of each member institution to establish and maintain an environment in which a student-athlete's activities are conducted as an integral part of the student-athlete's educational experience.³⁷

Allison's articulation of the fundamental principle appears to be a statement of a common conceptualization of intercollegiate athletics rather than an express statement of NCAA policy or constitutional principles. This formulation is reflected in the works of other scholars. Professor Robert Davis criticized the 1991 "reform convention" for not doing enough to strengthen academic requirements for student-athletes.³⁸ Professor Ray Yasser also argued for

34. NCAA MANUAL, *supra* note 18, § 1.3.1.

35. *See id.* (outlining fundamental purpose and policy of NCAA). Note the absence of the preference placed on scholastic involvement over athletics in NCAA's purpose while Professor Allison asserts priority of scholastics.

36. *See id.* § 2.2 (articulating NCAA principle of student-athlete welfare).

37. *Id.* § 2.2.1.

38. *See* Davis, *supra* note 12, at 605 (relating that "Reform Convention" is "misnomer").

substantial changes in the standards applied for admission of student-athletes.³⁹

I do not disagree with Professor Allison's articulation of the fundamental principle or its recognition by the NCAA. The point is that the principle leads to analyses of the NCAA with a character that it does not have – a mistake Allison did not make. Significantly, he assessed the extent to which the NCAA and member institutions abide by the principle.⁴⁰ He demonstrated that it is the members of the NCAA who are governed by educational primacy.⁴¹ In doing so, his analysis failed to recognize that the ability of the NCAA to implement a principle of educational primacy is limited by its essential character, which is not that of an educational organization. The NCAA, as a voluntary association, exists as an organization that is separate and distinct from its individual members. This separate existence not only has been acknowledged by the United States Supreme Court but has also formed the basis for its decision in *NCAA v. Tarkanian*.⁴² Lower federal courts also have been influenced by these separate legal personas.⁴³ Separate existence includes a separate and distinct purpose from its member institutions whose missions are driven by educational primacy. Universities, as educational institutions, are required to place student status over athlete status because it is their mission to do so, not because of NCAA rules.

The commercial versus educational classification distracts from a more accurate dichotomy. The NCAA is an organization governed by the principle of athletics primacy. The NCAA does not exist to advance the learning of mathematics, physics, history, literature, English or music. Nor does it exist to foster research to advance the cause of science, or to publish scholarly papers on Fermat's Last Theorem. Nor does it have as a major goal the training of school teachers. It does not even exist to further teaching

39. See Yasser, *supra* note 12, at 135-36 (criticizing "special admit" policy for athletes in college admissions).

40. See Allison, *supra* note 21, at 15-16 (discussing extent to which NCAA members abide by its stated principles).

41. See *id.* at 15 (reasserting NCAA's primary goal of education).

42. 488 U.S. 179, 191-98 (1988) (holding that NCAA was not "state actor" when it investigated and suspended UNLV head basketball coach, Jerry Tarkanian).

43. See *Regents of the Univ. of Minn. v. NCAA*, 560 F.2d 352, 355 (8th Cir. 1977) (noting separation between NCAA and members); see also *California State Univ., Hayward v. NCAA*, 47 Cal. App. 3d 533, 543-44 (1975) (holding that district court did not abuse its discretion when it enjoined NCAA from enforcing rule until trial on merits of constitutionality of rule).

and research in physical education or sports administration and management. Its members do. Its members must be educational institutions whose missions necessarily are driven by educational primacy.

The NCAA is, and should be seen and accepted as, an athletic organization whose principal function is to regulate athletic competitions involving athletes who are students at its member universities.⁴⁴ This view is clearly articulated in the purposes of the NCAA set forth in Article 1 of its constitution. The purpose articles begin and end with the NCAA's regulation of intercollegiate athletics competition. Article 1.2(a) provides that the NCAA is, "To initiate, stimulate and improve intercollegiate athletics programs for student-athletes"⁴⁵ Similarly, Article 1.2(i) provides that the NCAA exists "[t]o study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level."⁴⁶ Nine purposes are set forth in Article 1.2.⁴⁷ Each purpose explicitly pertains to athletics.⁴⁸

An invaluable contribution by Professor Allison was his focus on NCAA member institutions as repositories of educational primacy. His analysis also found them lacking in that they did not live up to educational primacy in the operation of their athletic programs.⁴⁹ My analysis diverges from his to the extent that he views the NCAA as bearing an educational burden equal to that of member institutions. In my view, member institutions alone are governed by educational primacy, but any interest the NCAA has in educational concerns is necessarily subordinate to the principle of athletics primacy.

This Article will demonstrate the adverse effect of athletic primacy on the academic standards adopted by the NCAA. However well intentioned, the principal interest of the NCAA in academic

44. NCAA MANUAL, *supra* note 18, § 1.2 (1995) (articulating purposes of NCAA). Article 1 states, "The purposes of this Association are: (a) to initiate, stimulate and improve intercollegiate athletics programs . . . and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit; . . . (i) [t]o study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities . . . can maintain their athletics programs on a high level." *Id.*

45. *Id.* § 1.2(a).

46. *Id.* § 1.2(i).

47. *See id.* § 1.2 (listing nine general purposes of NCAA).

48. *See id.* (articulating that purpose of NCAA involves athletics).

49. *See Allison, supra* note 21, at 55-59 (discussing educational primacy in athletic procedures).

regulations is not the academic achievement of student-athletes, but its athletics regulatory purpose. This point was implicit in the Supreme Court's opinion in *NCAA v. Board of Regents of the University of Oklahoma*.⁵⁰ Consider the case of NCAA limitations on the number of scholarships member universities may offer in each sport. Such limits arise out of athletic concerns rather than educational ones. If Oooh University offers only 100 athletic scholarships to comply with NCAA scholarship limits when it can afford to offer 1000 athletic scholarships, the rules of the governing association have the effect of reducing the number of students obtaining scholarships. If NCAA imposed no scholarship limits, Oooh University would offer 1000 scholarships and reduce the number of athletes available for other institutions. NCAA limits on scholarships flow from its interest in the distribution of athletic talent and controlling the costs of operating athletic programs.⁵¹ The rule promotes athletic policy while suppressing academic concerns.

One of the more prominent examples of academic rules dictated by athletics primacy is the NCAA's influence in the establishment of minimum standards for high school college-preparatory curricula – at least for athletes – in the United States. In *Jones v. Wichita State University*,⁵² the NCAA asserted that it should not be in the business of establishing high school curricula, but it abandoned this position in the face of widespread criticism of the exploitation of student-athletes by member institutions. Beginning with the passage of the infamous Proposition 48 and its controversial progeny now codified in Bylaw 14.3.1.1, the NCAA, acting to further the integrity of intercollegiate athletics competition, has attempted to influence substantially the core courses which high schools must offer to college bound students. The shaping of academic standards with policies rooted in athletics primacy has led to the infringement of the legitimate educational functions of high schools and unfairly excludes athletes who have vigorously pursued academic achieve-

50. 468 U.S. 85, 101-02 (1984) (stating, "[t]he NCAA seeks to market a particular brand of football – college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . . 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.").

51. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1029-33 (1995) (explaining how rational economic actors engaged in nonproductive arms races to "keep up with the Joneses").

52. 698 F.2d 1082, 1087 (10th Cir. 1983) (upholding trial court's denial of preliminary injunction prohibiting NCAA from declaring athlete ineligible).

ment. For example, Bylaw 14.3.1.1 established core course requirements, with the NCAA as the arbiter of which courses qualify as core courses. The implementation of the rule has resulted in one major controversy after another. For example, the Governor of Minnesota publicly criticized the NCAA when it determined that an honors English course could not qualify as a core course and adversely affected the athletic eligibility of 160 Minnesota students.⁵³

The NCAA's position was encouraged, if not sanctioned, by the courts in *NCAA v. Tarkanian* in which the Supreme Court held that the NCAA was not a state actor and therefore not limited by constitutional constraints.⁵⁴ That decision was buttressed by subsequent cases such as *NCAA v. Miller*,⁵⁵ in which the United States Court of Appeals for the Ninth Circuit held that the enactment of a statute by Nevada regulating the NCAA's enforcement process was unconstitutional.⁵⁶ Although the Ninth Circuit reached the correct result on the particular statute, it apparently was blinded to the conundrum it left. Under *Miller*, the NCAA is free to coerce school districts in establishing high school curricula for children required by state law to attend school, but states are constitutionally prohibited from regulating the NCAA enforcement of rules affecting those same students.

Similar results were reached by the United States Court of Appeals for the Third Circuit in *NCAA v. Smith*⁵⁷ and *Cureton v. NCAA*⁵⁸ involving, respectively, the applicability of Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964. Member institutions are subject to both statutes and NCAA rules. These cases asked whether the statutes should apply to the NCAA when collective compliance by members with NCAA rules results in a violation. The courts in both cases analyzed the NCAA as an organization separate and distinct from its members.⁵⁹

53. See Doug Bedell, *For NCAA, Rules Are Easier to Make Than Enforce*, DALLAS MORNING NEWS, Jan. 3, 1998, at 9B (using Minnesota as example of confusing NCAA eligibility standards).

54. 488 U.S. 179, 191-98 (1988) (ruling on suspension of UNLV head basketball coach Jerry Tarkanian).

55. 10 F.3d 633 (9th Cir. 1993).

56. See *id.* at 635, 640 (finding for NCAA); see generally *NCAA v. Roberts*, No. TCA 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994) (reaching same result with similar Florida statute).

57. 525 U.S. 459, 465, 470 (1999) (stating Third Circuit held NCAA subject to Title IX, but vacating and remanding that judgment).

58. 37 F. Supp. 2d 687, 692-96 (E.D. Pa. 1999), *rev'd* 198 F.3d 107 (3d Cir. 1999) (holding NCAA is not subject to Title VI).

59. See *Smith*, 525 U.S. at 462-63 (stating NCAA is institution separate from its member universities); *Cureton*, 37 F. Supp. 2d at 690 (same).

The adverse impact of athletically driven initial eligibility rules has been challenged by student-athletes in litigation over determinations by the NCAA's Initial Eligibility Clearinghouse that resulted in universities declaring otherwise eligible students ineligible from participation in NCAA competition. In *Phillip v. Fairfield University*,⁶⁰ a student-athlete accepted a full athletic scholarship but was declared ineligible when the Initial Eligibility Clearinghouse determined that he was entitled to .33 credit hours for math courses instead of the .5 established by his high school principal and state and city boards of education.⁶¹ The trial court granted a preliminary injunction permitting the student-athlete to receive financial aid and to play basketball.⁶² A similar result was reached in a case involving a University of New Mexico basketball player, Kenny Thomas.⁶³ In that case, a University of New Mexico student was declared ineligible to participate in his freshman year on the basketball team because the Clearinghouse determined that a science course he took in the first semester of his freshman year of high school did not count as a core course.⁶⁴ The NCAA has recently reverted to its original formal position that each high school will determine whether a course is a core course.⁶⁵ In a related development, perhaps with more significant consequences, the NCAA settled a lawsuit brought by the Justice Department alleging that initial eligibility rules violated the Americans with Disabilities Act.⁶⁶

60. 118 F.3d 131 (2d Cir. 1997).

61. See *id.* at 135 (allowing injunction to stand but remanding for correct application of Connecticut law on duty of good faith in contract law).

62. See *Phillip v. NCAA*, 960 F. Supp. 552, 557-58 (D. Conn. 1997) (granting injunction for plaintiff based on equity principles).

63. See Chris Tomasson, *NCAA Oks Settlement for Thomas*, ALBUQUERQUE J., May 24, 1997, at A1 (noting Albuquerque judge granted preliminary injunction on November 3, 1995, allowing Kenny Thomas to play basketball as college freshman). Nineteen months later, Thomas' suit against NCAA and the University of New Mexico settled. *Id.*

64. See *id.* (noting Thomas' agreement to sit out fall semester of his senior year pursuant to settlement); see also John A. Reding & Peter C. Meier, *Athletes Cry 'Foul!' Over NCAA Rules: Lawsuits Challenging the Implementation of High School 'Core Course' Eligibility Rules Shatter Association's Image of Invincibility*, NAT'L L.J., Nov. 17, 1997, at B7 (discussing Darren Phillip's settlement as similar to Thomas' settlement).

65. See NCAA MANUAL, *supra* note 18, § 14.3.1.3 (outlining criteria for "core-curriculum requirements").

66. See Naftali Bendavid & Bob Sakamoto, *Enabling Legislation for Learning-Disabled Students*, CHI. TRIB., May 27, 1998, at N1 (noting NCAA considered classes taken by learning-disabled students as "remedial" and insufficient for college athletics eligibility).

Pursuant to the settlement, the NCAA agreed to count classes for learning disabled students as core courses.⁶⁷

In *Cureton v. NCAA*, the court held that the NCAA's initial eligibility standards violated the antidiscrimination provisions of Title VI of the Civil Rights Act of 1964.⁶⁸ The plaintiffs were African-American athletes who were "A" students in high school, but who did not attain the minimum SAT or ACT score.⁶⁹ The students were denied athletic scholarships, although otherwise eligible for admission.⁷⁰ That is, institutions driven by educational primacy were willing to admit the plaintiffs as students but those students could not under the rules of the NCAA receive financial aid or participate in the intercollegiate athletic programs of Division I institutions.⁷¹

Athletics primacy was also demonstrated in *NCAA v. Smith*,⁷² where NCAA rules on participation in athletics by graduate students were at issue. NCAA rules prescribe four years of participation for individuals over a five-year period. The five-year period is tied to the normal period in which students are expected to complete an undergraduate degree. The rules contemplate that some students may complete their undergraduate education in less time, in which case they may participate as a graduate student. Again, however, the rules contemplate that participation as a graduate student will be at the same institution as where participation in the athletic program as an undergraduate occurred and the undergraduate degree was obtained. These rules are driven purely by athletic concerns and are inconsistent with the educational path of a significant number of students. Many, if not most, students, who pursue graduate programs, matriculate at institutions other than their undergraduate alma mater. In *Smith*, the student followed the traditional graduate pattern and enrolled in a different institution for her graduate degree. She sought a waiver from the rule denying

67. *See id.* (adding NCAA will place "learning-disability experts" on eligibility committees and will take into consideration students' learning-disabilities when formulating decisions about eligibility); *see also* Mark Asher, *NCAA to Lower Test Scores and Help Learning Disabled*, AUSTIN AM. STATESMAN, May 27, 1998, at C1 (discussing that Cedric Dempsey, NCAA President, has also announced that he will recommend lowering of minimum standardized test scores now required to receive athletic scholarship, practice or play as freshman).

68. 37 F. Supp. 2d 687, 696 (E.D. Pa. 1999), *rev'd* 198 F.3d 107 (3d Cir. 1999) (holding NCAA is subject to Title VI).

69. *See id.* at 689 (describing plaintiffs in action).

70. *See id.* at 690-91 (explaining that students could attend college or university at their own expense but could not participate in athletic program).

71. *See id.* (stressing disparity between NCAA and its member institutions).

72. 525 U.S. 459, 463-64 (1999) (outlining facts of case).

her eligibility as provided under NCAA rules. When the NCAA refused to grant the waiver, she challenged the rule on Title IX grounds.

There can be little doubt that academic eligibility rules emanating from an organization driven by athletics primacy leads to anomalies. Individual member institutions driven by educational primacy are the best determiners of academic eligibility for student-athletes on their campuses. It is not disputable that "home rule" policies led to the exploitation of student-athletes in the past.⁷³ It is also true that those policies failed because the law imposes no binding obligation on universities to provide educational value to student-athletes.⁷⁴ It remains true, however, that one university has no greater interest in the academic qualifications of student-athletes at another institution than it has for students who are not athletes. Collective action at the governing association level affecting only student-athletes is necessarily driven by athletic, not educational motives.

II. THE FUNCTION OF ATHLETIC ELIGIBILITY

A. Eligibility in General

Nowhere does the principle of athletics primacy conflict with the delivery of an educational opportunity as strongly as it does over the concept of athletic eligibility. The concept is unknown on the playground and is of limited utility in professional sports. It necessarily thrives in athletic competition associated with educational institutions. The core question, indeed the essence of athletic eligibility, is whether a person may participate in the playing arena. It is not synonymous to, nor should it be confused with, academic admissibility. Eligibility involves a standard of qualification and a command. The eligibility standard sets the characteristics that an athlete must possess in order to qualify to participate.⁷⁵ The command applies to the institutions that field teams. They are ordered to use only those athletes on their teams engaged in interscholastic competition, who have the requisite qualifying characteristics.

73. See Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141, 143 (1997) (noting racism as one effect of policies). For a discussion of how the NCAA's maintained the "home rule" policy for initial eligibility until 1965, see *infra* notes 99-118 and accompanying text.

74. See Mathewson, *supra* note 4, at 53-73 (asserting failure of policies due to failure to impose legal obligations).

75. WEBSTER'S NEW COLLEGIATE DICTIONARY 404 (10th ed. 1995) (defining word "eligible").

The eligibility standard in NCAA-sponsored intercollegiate athletics rests on two bedrock characteristics expressed by Justice Stevens in *NCAA v. Board of Regents of Oklahoma*: the athletes must be amateurs and students.⁷⁶ The dual requirement is explicitly prescribed in NCAA bylaws with one additional word: "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."⁷⁷ Although the existence of an athlete is normally presumed, the use of the terms "athlete" and "athletics" in the fundamental eligibility standard shows its function is clearly related to athletics primacy.

The eligibility command to member institutions is set forth in NCAA Bylaw 14.01.1, which provides, "An institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements."⁷⁸ Translated into the bedrock principles, a university may not use an athlete in intercollegiate athletic competition unless the athlete is a student and an amateur, as defined under NCAA rules. The command contemplates more than a prohibition on passive university subjects. It imposes an affirmative obligation on universities to police athletic eligibility. A university that uses an ineligible student-athlete is subject to forfeiture of all competitions in which that athlete participates.⁷⁹ Moreover, the failure of a university to treat the obligation to police as significant, even though it does not knowingly use ineligible players, could subject it to severe penalties.⁸⁰ All eligibility rules, whether standards or commands, in Articles 12 through 14 of the NCAA Bylaws, relate exclusively to these two characteristics.

B. The Amateurism Standard

Article 12 of the NCAA Bylaws is devoted to the amateurism characteristic. It specifies the amateur eligibility standard.⁸¹ The standard contains two broad principles, one *subjective*, the other *objective*. The subjective standard defines an amateur student-athlete

76. 468 U.S. 85, 101-02 (1984) (analyzing structure and tradition of college football).

77. See NCAA MANUAL, *supra* note 18, § 12.01.1.

78. *Id.* § 14.01.1.

79. See *id.* § 19.6.1(b) (discussing forfeiture as one among many penalties for rule violations).

80. See *id.* § 19.01.5 (discussing scope and nature of NCAA penalties).

81. See *id.* § 12.01.1 (stating only amateurs are permitted to participate in intercollegiate athletics); see also *id.* § 14.01.3.1 (repeating basic amateur eligibility standard).

as "one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation."⁸² The objective principle articulated in numerous provisions focuses on whether a student-athlete has received or receives compensation in exchange for athletic skill. The principle may be distilled from those provisions. An amateur student-athlete is one who does not receive, and has never received, any compensation in exchange for athletic skill except as authorized by NCAA rules.⁸³

Under the NCAA's "Principle of Rules Compliance," each member institution is required to operate its intercollegiate athletics program in compliance with all NCAA rules and regulations.⁸⁴ The effect of this principle is the amateurism command to member universities. A member university may not directly or indirectly pay, apart from permitted financial aid, a student-athlete for his or her participation in athletics. The amateur eligibility standard directly and intentionally suppresses the value that universities pay student-athletes in exchange for their participation. This suppression is not limited to what the university may pay. Student-athletes may not accept, or have ever accepted, compensation from the university or any other source for their athletic skill.⁸⁵ Once an athlete accepts any amount of remuneration that has not been authorized, no matter how small, he or she is permanently ineligible for further intercollegiate participation.⁸⁶

There are three justifications for this amateur standard. First, universities are engaged in the business of education, and the oper-

82. See NCAA MANUAL, *supra* note 18, § 12.02.1 (defining "amateur student-athlete").

83. See Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (1978) (adopting definition of "amateur" as athlete who is not compensated for skill). Amateur is one who does not play and has not played for pay except as authorized by the rules of the appropriate sports governing body. See NCAA MANUAL, *supra* note 18, § 12.01.4 (stating that scholarships are not considered pay under NCAA rules).

84. See NCAA MANUAL, *supra* note 18, § 2.7.1 (noting responsibility of each institution to monitor compliance requirements); see also NCAA MANUAL, *supra* note 18, § 12.4 (allowing certain types of employment for student-athletes).

85. See *id.* § 12.4.2 (discussing specific athletically related employment activities). The NCAA is currently discussing changes to its amateurism rules relating to payments for athletic skill received by an athlete before college. Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14 ANTITRUST 46 (Spring 2000) (outlining recent changes to NCAA rules and regulations).

86. See *id.* § 16.01.1 (outlining possible effects of student-athlete's acceptance of unauthorized compensation). But see *id.* § 14.12.1 (discussing restoration of eligibility and how athlete's eligibility may be restored if university successfully appeals to NCAA); *id.* § 14.12.2 (asserting that athlete does not have right to appeal on his or her own).

ation of their athletic programs should be subordinated to educational primacy. Accordingly, athletic programs are either a part of their educational programs as stated in the NCAA constitution or incidental to them.⁸⁷ It is an educational norm that students receive academic credit but may not also receive compensation for academic work.⁸⁸ Some students, such as graduate students, and those engaged in co-operative educational programs, often have the option of pursuing projects with private employers for course credit or compensation, but not both. This normative proposition would hold in intercollegiate athletics if student-athletes received course credit for their athletic participation. Not only do they not receive such credit, the awarding of such credit is essentially prohibited under NCAA rules.⁸⁹ In light of that fact, the strength of the educational basis for the amateur rule is diluted.

Even so, the theoretical principle of amateurism is consistent with educational primacy. A university that paid salaries to student-athletes in exchange for their participation or used professional players may lose sight of educational primacy in its athletic program. Participants would be expected, in contravention of Professor Allison's educational primary principle, to be athletes first, as universities would expect them to provide athletic performances commensurate with their compensation. Moreover, the compensation of student-athletes as employees would usher in radical changes in the structure of intercollegiate athletic programs. Athletic departments that currently operate specific programs costing more than the revenues that they generate would cease to do so as

87. See Davis, *supra* note 7, at 270-73 (alluding to importance of college athletics). The percentage of student-athletes in the student body is perhaps the most powerful argument for incidentality. Intercollegiate athletics competition is offered to an extremely small portion of the total student population. Most universities probably offer less than 600 hundred participation opportunities. The percentage of the student body that participates will vary. In a large university of 60,000 students, the percentage is about 1%. In a small university of 2000 students, the percentage would be about 30%, but small universities would be expected to have a smaller program.

88. See *id.* at 276 (discussing orchestra and dance as examples where goal is to "define and develop useful skills"). There are exceptions for co-operative education programs.

89. See generally NCAA MANUAL, *supra* note 18, § 16 (discussing awards, benefits, and expenses for enrolled student-athletes). Under NCAA rules, a university may not provide a benefit to student-athletes not provided to students in general. This includes any type of treatment, including course scheduling, special courses and the like. Since universities do not have participation opportunities for all students in intercollegiate athletic competition, awarding credit to student-athletes so engaged would violate the special benefit rule. The special benefit rule often produces unjust results. Theoretically, a student-athlete who obtains a quarter from a coach to make a call from a pay telephone violates the special benefit rule.

the magnitude of labor costs turn then into profit-oriented operations.⁹⁰

That argument, though, has an inherent flaw. The NCAA mandates amateurism to prevent its members, institutions of higher education, from harming student-athletes. "We would pay you for generating all the revenue you do, but we would hurt if we did." Universities through institutional enforcement of educational primacy could control these harms. Just because an institution pays student-athletes for generating revenue does not mean it must abolish educational primacy.

The second justification for NCAA mandated amateurism is driven by athletic concerns.⁹¹ The amateur standard helps preserve competitive balance on the playing field. Universities field teams which compete against others with athletes of high caliber, but which are not yet the best athletes in the world. Professional athletes do not possess status as such merely because they are paid; they are paid because the quality of their athletic skill is high enough that someone is willing to pay compensation for their performance. If amateurism in intercollegiate athletics were abolished, universities would pay the best athletes to play for them, thereby producing disparities in the caliber of teams and creating a competitive imbalance in the playing arena. Moreover, universities would disregard educational primacy and use "ringers" or athletes who are students in name only. There are two flaws with this justification. For one thing, the evil to be avoided very closely resembles the status quo. For another, the evil is something that educational institutions might do, not the student-athlete. As stated above, educational primacy could still be maintained.

The third reason is that observed by the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*.⁹² The members of the NCAA are engaged in the production and sale of a spe-

90. See generally Davis, *supra* note 7, at 322-26 (noting pragmatic concerns). University athletic departments are not profiting maximizers as they are constrained by educational primacy. The disavowal of educational primacy as a constraint would lead to a very different environment for student-athletes. Student-athlete welfare is a major concern of the NCAA. The "Principle of Student-Athlete Welfare" is second only to the "Principle of Institutional Control and Responsibility" in the NCAA constitution. See also NCAA MANUAL, *supra* note 18, § 2.2 (stating, "Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational welfare of student-athletes.").

91. For a discussion of athletics and amateurism, see *infra* notes 92-95 and accompanying text.

92. 468 U.S. 85, 106-13 (1984) (holding that record supported district court's conclusion that NCAA unreasonably restrained trade under Sherman Act).

cific product: amateur college athletics.⁹³ There is great economic demand among sports fans for such competition. The spectator demand may be, although uncertain, substantially less for intercollegiate athletic competitions with paid athletes. Revenues for college athletic programs would be lower. The most compelling reason for suppressing the value given to student-athletes in exchange for their participation through the maintenance of mandatory amateurism is economic advantage to NCAA member institutions.⁹⁴ If universities can honor educational primacy in operating athletic programs, the maintenance of "a clear line of demarcation between intercollegiate athletics and professional sports" is not essential other than to preserve an economic market.⁹⁵

The line of demarcation is the formal justification provided by the NCAA.⁹⁶ The line is drawn, however, at compensation in form only. Colleges and universities compensate student-athletes, and NCAA rules merely regulate the amount and form of that compensation. It is true that student-athletes are not permitted to receive compensation for their athletic skill from anyone. This includes endorsement income. It is also true that the compensation limitation applies to periods before the athlete became subject to NCAA rules. NCAA members may not use athletes who have ever received compensation. Although these explicit limitations do differentiate intercollegiate athletics from professional sports, the line between them is not visible to observers of both. Notwithstanding the compensation limitations, intercollegiate athletics offer athletic competition among elite athletes just like professional sports. What truly distinguishes intercollegiate athletics is the use of students who are relatively young adults.⁹⁷ This occurs because of the "Five-Year Rule," which calls for the student-athlete to complete his or her participation in intercollegiate competition within five years.⁹⁸ To

93. See *id.* at 101 (stating, "what the NCAA . . . market[s] . . . is competition itself – contests between competing institutions.").

94. See Broyles, *supra* note 8, at 540-41 & n.291 (outlining benefits to colleges and universities). Student-athletes may also benefit from mandated amateurism to the extent that it makes additional participation opportunities available.

95. NCAA CONST. art. 1.3.1; see also *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102 (stating that fact that student-athletes are not paid is integral part of "product" NCAA markets).

96. See NCAA CONST. art. 1.3.1 (articulating purpose of NCAA).

97. See Mathewson, *supra* note 4, at 39 (noting that most student-athletes are eighteen to twenty-four years old).

98. See NCAA MANUAL, *supra* note 18, § 14.2.1. Eligibility rules do not provide an express age limit so there are exceptions. Athletes who choose military service before attending college may begin their eligibility at an older age because they are exempt from the Five-Year Rule. See *id.* § 14.2.1.2 (discussing service exemp-

the extent that compensation provides any demarcation, it is one of degree. Intercollegiate athletics involve modestly compensated athletes. Unfortunately, the emphasis on amateurism ties the regulation of compensation to eligibility – a linkage that permeates academic issues as well.

As a practical matter, the class of athletes who qualify as amateurs is larger than the class of athletes who also qualify as students. Athletes must qualify for both categories at the time they begin intercollegiate athletic competition and until eligibility expires. To field teams, universities must recruit from the pool of those who not only meet the amateur standards but also qualify for college student status.

C. The Student Standard

The standards for student eligibility are set forth in Article 14 of the NCAA Bylaws. These standards are cumbersome and befitting of an organization subject to the constraint of athletic primacy. For virtually all purposes, other than athletics at universities governed by educational primacy, a student is anyone who is enrolled as a student to take classes and who pays the required tuition. Under Article 14 of the NCAA Bylaws, it is not enough for an athlete to be enrolled as a student and to matriculate as such. Consequently, not all students qualify as students under NCAA student eligibility standards.

The NCAA rules view the term “student-athlete” as a substantive, rather than formalistic, one.⁹⁹ In general, to be eligible as a student-athlete, a student must “be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain satisfactory progress toward a baccalaureate or equivalent degree.”¹⁰⁰ This bylaw, on its face, is uncontroversial. Eligibility as a student-athlete, however, does not begin here. This bylaw provision prescribes a general principle of the minimum requirements necessary for continuing eligibility. Article 14 makes it clear that actions of the student-athlete prior to enrollment must be considered for a determination of initial eligibility. Initial eligibility re-

tions to the Five-Year Rule). The NCAA has also carved out a special exception for women who attended college when there were fewer participation opportunities for them and subsequently return to college. *See id.* § 14.2.1.4 (discussing female student-athletes enrolled prior to 1981-82).

99. *See id.* § 14.01.2; *see also Bd. of Regents of Univ. of Okla.*, 468 U.S. at 98 n.16 (noting purpose of NCAA is to insure that student-athlete is fully integrated into academic endeavors).

100. NCAA MANUAL, *supra* note 18, § 14.01.2.

quires a determination that amateur status exists and that a student-athlete's academic background meets certain objective standards showing that the student is capable of college work.

Unfortunately, NCAA eligibility rules defining student status suppress the perceived value that universities pay student-athletes in exchange for their participation. To begin, the definition of student status is driven by athletic concerns rather than academic or institutional ones. An amateur athlete is eligible to participate in intercollegiate athletics if the athlete is a student. Students may be further classified as full or part-time, depending upon the number of classes for which they have enrolled.¹⁰¹

The NCAA has promulgated uniform minimum academic entry requirements to determine which amateur athletes qualify for student status, and are, therefore, eligible for participation in athletics. The uniform standards have been promulgated because each university has its own standards for determining who should be offered student status, and these standards vary substantially from university to university. Uniform standards are used in intercollegiate athletics for two principal purposes. First, the rules prevent the exploitation of athletes who are unprepared for college. Second, and perhaps more importantly, the rules are designed to maintain competitive balance in the arena. A basic assumption is that there is a class of superb athletes whose academic prowess is inversely related to their athletic ability. To allow some universities access to that pool because of lower entry standards would provide those universities a competitive advantage over universities whose academic standards preclude access. Minimum standards help market intercollegiate competition to the public as amateur competition, but uniform minimum standards are not essential. In practice, universities do employ different minimum entry standards. For example, the minimum standards at Ivy League institutions are higher than at many other NCAA member institutions.

Uniform minimum academic entry standards have evolved through several stages. Nearly thirty years ago, the NCAA employed the infamous "1.600 Rule." An incoming freshman was eligible for student status if the athlete predicted a 1.600 grade point average for his or her freshman year. Freshmen, however, were not eligible for varsity competition. Because the rule had such modest expectations, some conferences, most notably the Atlantic Coast Confer-

101. To be eligible as a student-athlete, full-time status is required. *See id.* § 14.01.2 (requiring full-time status); *see also id.* § 14.1.6.2.2 (defining full-time as twelve hours).

ence, established significantly higher ground floors.¹⁰² Aside from its modesty, the 1.600 rule was controversial for other reasons. The predicted grade point average was computed by using the scholastic grade point average and a standardized test score. Although the 1.600 rule was challenged unsuccessfully in *Parish v. NCAA*,¹⁰³ the standardized test score component was dropped so that a 2.0 high school grade point average was required for eligibility.¹⁰⁴ In 1983, the NCAA enacted the infamous "Proposition 48," which required an athlete to have a minimum standardized test score and a minimum scholastic average in certain core subjects.¹⁰⁵ Most recently, the NCAA has made the Proposition 48 standards more stringent with the promulgation of the additionally controversial Proposition 16.¹⁰⁶

Both Proposition 48 and Proposition 16 are as much public relations policies as they are academic substance policies. Their principal function was not to increase the value of the educational opportunity afforded to student-athletes, but to lessen the image that the NCAA and its members were offering professional sports. The principal motive behind these uniform standards was based on the premise that competitive balance in the sports arena required that those universities with higher entry standards should not suffer a competitive disadvantage when competing against universities with lower entry standards.

Academic critics often argue that minimum standards are necessary to increase the value of the educational opportunity received by student-athletes. Uniform minimum standards do increase the value of the educational opportunity to the extent that athletes are better prepared to handle college work. This point is attractive to many academics: if the university is going to pay athletes in the currency of educational opportunity, the university should not exploit athletes who are unable to spend the currency. Yet, this reasoning

102. The Atlantic Coast Conference required a controversial minimum 800 SAT score for years. See Duane Hoffman, *Triangle Suffers Major Bowl Famine*, NEWS OBSERVER, Dec. 31, 1993, at C5.

103. 361 F. Supp. 1220, 1221 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975) (noting that plaintiffs requested injunction against NCAA enforcement of ruling that would declare them ineligible to compete in interscholastic athletic competition).

104. See Shropshire, *supra* note 73, at 143 (discussing colorblind creation and revision of NCAA initial eligibility requirements for prospective student-athletes).

105. See Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 664-65 n.255 (1995) (discussing generally racism in collegiate athletics and its harmful consequences).

106. See NCAA MANUAL, *supra* note 18, § 14.3.1.1 (detailing additional criteria student-athletes must meet prior to college admission and graduation).

emphasizes the lack of responsibility universities assume for adding value to the education opportunity.

If an athlete meets the minimum entry requirements, doing so does not ensure student status unless the athlete also meets continuing academic eligibility standards.¹⁰⁷ The "satisfactory progress toward a degree" rule has been recognized as inadequate. For example, in *Hall v. University of Minnesota*,¹⁰⁸ an athlete had accumulated more than ninety credit hours over three years that did not count toward a degree.¹⁰⁹ The athlete sued successfully when the university terminated his athletic eligibility by denying him admission into a degree program.

The inefficacy of the standard was demonstrated publicly in the Jan Kemp and Norby Walters scandals. Jan Kemp, an instructor in an academic support program at the University of Georgia, exposed the manipulation of the program to maintain the academic eligibility of athletes.¹¹⁰ In *United States v. Walters*,¹¹¹ Walters was convicted of defrauding universities by signing agency contracts with student-athletes in violation of NCAA rules. The conviction was ultimately overturned.¹¹² As a defense to fraud charges, Walters asserted that he could not have defrauded universities because they were engaged in academic chicanery to maintain the academic eligibility of student-athletes.¹¹³ The defense was successful with respect to one count of fraud involving the University of Iowa.¹¹⁴

107. *See id.* § 14.01.1 (stating, "An institution shall not permit a student-athlete to represent it in intercollegiate athletics competition unless the student-athlete meets all applicable eligibility requirements."). A student-athlete must be enrolled in a program of studies leading to a baccalaureate degree or in a graduate or professional school at the university where the athlete attended as an undergraduate, in order to participate in intercollegiate athletics. *See id.* § 14.1.7.

108. 530 F. Supp. 104 (D. Minn. 1982).

109. *See id.* at 105 (stating that at defendant's general college, plaintiff enrolled in non-baccalaureate degree program that was terminated upon plaintiff's completion of approximately ninety credit hours).

110. *See Kemp v. Ervin*, 651 F. Supp. 495, 499 (N.D. Ga. 1986) (stating that "nine student athletes were 'exited' from the development studies program into regular university curriculum, though each student received a 'D' in English during their fourth quarter."). University policy requires students to achieve a minimum grade of "C".

111. 997 F.2d 1219 (7th Cir. 1993).

112. *See id.* at 1221 (mentioning that Walters signed fifty-eight college football players to contracts while they were still playing and offered money and cars to them).

113. *See Ken Stephens, Eligibility Stance in Need of Reform: Iowa President Draws Coaches' Ire for Vowing to Sideline Freshmen*, DALLAS MORNING NEWS, Apr. 22, 1989, at 14B.

114. *See id.*

The most famous demonstration of the failure of minimum entrance and satisfactory progress standards was the Kevin Ross debacle at Creighton University. Ross was recruited by the university and attended it for four years on a basketball scholarship. Although functionally illiterate, he maintained his eligibility for four basketball seasons. Out of a sense of embarrassment, the university paid for him to attend a prep school. He subsequently earned a graduate equivalency diploma and sued Creighton for the cost of tuition for a legitimate college education.¹¹⁵

As a result of those and other recent scandals, the NCAA has added teeth to the standard with a series of objective measures of satisfactory progress. Student-athletes must timely designate a major course of study and earn a minimum number of credit hours and cumulative grade point average toward the major.¹¹⁶ The premise of the reforms is that objective measures of progress should be used to assure that athletes are taking advantage of the educational opportunity given to them. The reforms, however, share the weakness of the earlier regime: the NCAA standards emphasize minimum value rather than facilitating the maximization of educational value. Universities maintain incentives to encourage students to avoid too much risk in pursuing an academic program because of the increased likelihood that eligibility will be lost. The NCAA declined to reconsider these reforms in the face of pressure from the Black Coaches Association,¹¹⁷ but is now reconsidering them in light of *Cureton v. NCAA*¹¹⁸ and other litigation.

III. THE SUPPRESSION OF VALUE

A. General

The suppression of compensation to student-athletes under the NCAA's amateurism standard has been addressed in antitrust law scholarship.¹¹⁹ This scholarship generally casts the NCAA as a

115. See *Ross v. Creighton Univ.*, 957 F.2d 410, 411-12 (7th Cir. 1992) (noting that Ross filed suit against Creighton alleging "educational malpractice" because he was not provided with adequate education and was not prepared for employment after college).

116. See NCAA MANUAL, *supra* note 18, § 14.4.3.

117. See Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 202-08 (1996) (noting that at 1996 NCAA Convention, NCAA rejected plan to redefine partial qualifiers so as to include student-athletes who would otherwise qualify under Proposition 48).

118. 198 F.3d 107 (3d Cir. 1999) (challenging minimum SAT score requirement for freshman-year varsity intercollegiate athletic participation).

119. The author notes that the legality of eligibility standards under the anti-trust laws is beyond the scope of this Article.

cartel of economic actors who agree to control costs by fixing the compensation members pay student-athletes in exchange for the students' participation in intercollegiate athletics.¹²⁰ If each university independently determined the amount of aid to be given to its student-athletes in furtherance of its educational mission, this suppression of value would not exist. Outside the athletics sphere, colleges and universities have shown a remarkable willingness to compete for students with financial aid. This competition results in higher financial aid awards to students. As a result, some colleges and universities have sought to control their costs by forming cartels to agree to uniform formulas for awarding financial aid.¹²¹ The cost containment agreements in intercollegiate athletics are far more pervasive. The magnitude of the suppression of value is generated through uniform collective action on the part of universities.

While effects of the value suppression of the amateur standards are obvious, the suppression of educational value is not. Indeed, the NCAA's definition of "amateur student-athlete" in and of itself is premised upon suppressing the value universities deliver to student-athletes in exchange for their participation. Two commentators writing after the promulgation of Proposition 48 examined its legality under antitrust laws, but they primarily explored the group boycott implications of the rule rather than its suppression of value.¹²² Two other commentators have concluded that NCAA rules on amateurism and academic standards do not suppress value.¹²³ One commentator, writing prior to recent NCAA reforms, found little evidence that "the NCAA is truly interested in reforms

120. See James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 15-16 (1986) (noting that NCAA has acted primarily as economic entity and supported activities leading to "cartelization"); see also Mitten, *supra* note 11, at 76 (stating that "invalidation of current NCAA restraints on price competition would allow universities to align themselves consistent with economic potential of their athletic programs").

121. See *United States v. Brown Univ.*, 5 F.3d 658, 677 (3d Cir. 1993) (mentioning "a trade-off may need to be made between providing some financial aid to a large number of the most needy students or allowing the free market to bestow the limited financial aid on the very few most talented who may not need financial aid to attain their academic goals.").

122. See Deborah E. Klein & William Buckley Briggs, *Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications under the Sherman Act*, 67 DENV. U. L. REV. 301, 302 (1990) (stating "[t]he Justice Department is investigating whether certain colleges and universities, by setting similar levels of tuition and financial aid, are in violation of the anti-trust laws.").

123. See Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? - An Economics and Legal Reinterpretation*, 32 ANTITRUST BULL. 373, 383 (1987) (mentioning that NCAA rules and regulations can enhance reputation to athletes and non-athletes associated with college athletics).

that have the effect of enhancing academic standards."¹²⁴ Furthermore, enhanced standards may also suppress educational value.

None of the previous analyses significantly explore the suppression of educational value resulting from the legal rules regarding the contractual relationship between student-athletes and their universities.¹²⁵ Under the terms of the contractual agreement, the student-athlete is obligated to maintain his or her academic and amateur eligibility as a condition of receiving the university's consideration, as established in the seminal case of *Taylor v. Wake Forest University*.¹²⁶ The student-athlete is also obligated to participate in his or her sport as a condition of receiving a scholarship.¹²⁷

In *Taylor*, a football player performed below the minimum academic standards at the university. He was allowed to reduce his participation level in order to improve his academic performance to eligibility levels. The player discovered that he could perform better in the classroom if he minimized his athletic participation. When he stopped participating in football practice during his sophomore year, the university revoked his athletic scholarship. After he graduated, he sued the university for tuition, and the court found in favor of the university.

Although *Taylor* is recognized as the seminal case establishing an athletic scholarship as a contract, the opinion is even more remarkable in its conceptualization of the terms of that contract. A scholarship athlete contracts with the university, but the university's obligation to provide value to an athlete is conditioned upon the athlete's eligibility. Athletic eligibility is in part based upon academic eligibility. In contract law parlance, athletic eligibility is both a condition precedent and a condition subsequent. Initial academic eligibility requirements are conditions precedent to athletic eligibility while continuing academic eligibility requirements are conditions subsequent. The conditional nature of eligibility provides the university with huge incentives to invest in recruiting eligible players and to maintain their eligibility. Student-athletes face similar incentives. Athletic eligibility, rather than academic achievement, is the structural mantra brought about by uniform athletic rules.

124. *Id.*

125. See Mathewson, *supra* note 4, at 49; see also Davis, *supra* note 10, at 769 (detailing existing contractual relationship).

126. 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (discussing that considerations in scholastic award included both academic and athletic or physical eligibility).

127. See *id.* (noting that this includes participation in and attendance at practice).

B. Impact in Intercollegiate Athletics

Unlike athletes in the secondary school setting and other amateur settings, college scholarship athletes theoretically sell their athletic services in exchange for an educational opportunity.¹²⁸ Conditions precedent in the collegiate setting lower the perceived value of that educational opportunity. Such conditions do so because they raise the price that the student-athlete must pay in exchange for the educational opportunity, which does not increase in value for a particular student-athlete.¹²⁹ Conditions subsequent suppress the perceived and actual value paid to college athletes. If a condition subsequent is not satisfied, the athlete is ineligible, and the university has no further obligation to provide the educational opportunity. Thus, the actual value paid to student-athletes may be suppressed. Likewise, the perceived value of the educational opportunity must be discounted by the probability that eligibility may be lost.¹³⁰ The contracts have renewable one-year terms. The failure to meet continuing eligibility standards means the renewal right and its value are lost. That lower perceived value should result in less persistence in academic pursuits by student-athletes and a concomitant reduction in the value of the educational opportunity. Thus, the "heart and soul" of the consideration to be paid to athletes by universities is suppressed by the very nature of the contractual arrangement.

The eligibility structure thus provides incentives to universities and students to focus primarily on athletic eligibility and engage in conduct that increases the probability that eligibility will be obtainable and maintainable.¹³¹ Universities must invest substantial amounts in athletic training and development in order to enhance the marketability of the university's athletic product that it sells and

128. The right of high school students to play sports is conditioned upon academic performance, but such students do not contract with schools to play in exchange for an education. The provision of an educational opportunity is not part of Olympic sports.

129. See Lawrence DeBrock et al., *The Economics of Persistence: Graduation Rates of Athletes as Labor Market Choice*, 31 J. HUM. RESOURCES 512, 516 (1996) (noting argument that student-athletes are like any other rational economic actor and choose labor opportunities based upon perceived value compared to other labor opportunities).

130. See *Taylor*, 191 S.E.2d at 381 (discussing termination of scholarship after two years). At the time of *Taylor*, universities could offer four-year scholarships. See *id.* at 380.

131. See Monica L. Emerick, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 874 (1997) (arguing that economic goals of athletic departments cause universities to stifle deliberately educational needs of student-athletes).

from which it derives value. If student-athletes lose their eligibility, the university loses its investment. Accordingly, universities have substantial incentives to help student-athletes maintain their eligibility. Academic advisors and support programs portend educational motivations, but their principal function is to assist in the maintenance of eligibility. Universities have disincentives for student-athletes to take risks by maximizing their academic achievement. The more difficult the course, the greater the risk of a grade that may destroy eligibility.

The incentive structure was demonstrated in *Hall v. University of Minnesota*¹³² and *Ross v. Creighton University*.¹³³ In *Hall*, the university permitted the student-athlete to accumulate credit that did not count toward a degree for the purpose of maintaining his eligibility for basketball. Administrators at the University of Minnesota took the institution's commitment to educational primacy seriously and refused to admit him into a degree granting program that they believed would be used by the student solely to continue his athletic eligibility. Although the case shows a structural flaw between those responsible for athletics and those responsible for academics within the university, the administrators did not act until after the university had maintained the athlete's eligibility for three years. The decision to deny him admission thus ended the university's obligation to provide him with any further value, educational or otherwise. In *Ross*, the university provided academic support to its student-athletes, including tutorial services. The principal thrust of the academic support program, as with many college athletic programs, was the maintenance of the student-athlete's athletic eligibility.

Neither of the student-athletes in *Hall* or *Ross* was blameless. The student-athlete in *Ross* did not take advantage of the university's academic support services or attend classes. Given his preparation level for college, those services probably had little meaningful value to him. Since he was contractually obligated to maintain his eligibility, he had substantial incentive to find other less rigorous paths to obtain that objective. The student-athlete in *Hall* behaved in a manner similar to the student in *Ross*. However, he explicitly stated his understanding that the university was only

132. 530 F. Supp. 104, 104-11 (D. Minn. 1982) (issuing injunction requiring university to admit Hall to degree program and to declare him eligible to compete in varsity basketball competition).

133. 957 F.2d 410, 416-17 (7th Cir. 1992) (noting that appellate court affirmed lower court's ruling that university is not liable in tort for educational malpractice where student-athlete fails to earn degree but holding that university may be liable for breach of contract where it made specific promises).

interested in his basketball ability and had no interest in providing him with a valuable college education. Many universities have academic support and tutorial services programs available for the entire student body. Student-athletes may use these services but are faced with the same constraints as the athletes in *Ross* and *Hall* – they must maintain eligibility.

Taylor conferred a legal blessing on this incentive structure when it held by implication that a university's obligation is limited to providing the minimum required standards for eligibility. The court found significant the fact that the player discontinued his participation at a time when he was performing above the minimum academic standards.¹³⁴ An analysis of its specific facts reveals clear judicial acceptance of the proposition that a student-athlete may not reduce his or her participation level in order to perform above the minimum eligibility standard. Furthermore, the court implied that it might have permitted reduced athletic participation only where the athlete was performing below minimum academic standards.

The NCAA could enforce its rules requiring member universities to honor the promises they make to their student-athletes in the recruitment process and otherwise. Since universities have an incentive to invest in attaining the minimum required, higher minimums should mean that universities would do more in order to meet those requirements. The thrust of the rules, however, is not to require universities to do more but to require student-athletes to do more to meet those minimums. Universities are required to find and use student-athletes for whom the education received will be more valuable, but they are not otherwise required to do anything to provide value.

The controversy is over those individuals with superior athletic skills but, presumably, "questionable" academic skills.¹³⁵ Uniform rules preclude members on the playing field from using exceptional athletes that competing institutions cannot match.¹³⁶ The

134. See *Taylor*, 191 S.E.2d at 381 (mentioning that despite improvement in plaintiff's grade point average, plaintiff chose not to participate in regular practice sessions with football team).

135. *Cureton* notes that when student-athletes take standardized tests that evaluate their performance, their academic skills become suspicious when their results return. See *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999) (noting that two African-American students, who failed to meet initial eligibility standards despite strong high school academic records, were challenging the "questionable" nature of their academic skills under federal anti-discrimination laws).

136. An institution subject to educational primacy with high academic standards is expected to forego potential student-athletes who do not meet the institu-

absence of those athletes reduces the value of professional training given to those student-athletes who are included by the universities. Thus, the actual value given by universities in exchange for participation decreases; however, since very few student-athletes have a meaningful opportunity for professional careers, this impact on value should be minimal.

Many well-intentioned reformers have attempted to address this problem with stricter academic standards, thus placing the burden on student-athletes, instead of on universities to increase the value of the educational opportunity.¹³⁷ Perhaps, the most influential reformer has been the Knight Commission, which made several unsurprising recommendations.¹³⁸ The commission proposed a larger role for college presidents but not for university faculties. The structure places the principal responsibility for the education of student-athletes on the athletes themselves, and lodges institutional accountability in the athletic department rather than the faculty. The Knight Commission recently reconvened to assess the impact of its reforms.¹³⁹

Thus far, all major calls for reform recognize the existence of the exploitation of student-athletes and the necessity of its minimization. In fact, the NCAA even makes minimization a major principle.¹⁴⁰ However, reformers frequently assume that if exploitation occurs, it is because there is something wrong with the student-athlete, rather than the university.¹⁴¹ These informers believe that the solution is to regulate the university's ability to exploit by enforcing stricter academic standards. Thus, the NCAA in several controversial conventions has submitted to the external pressures for reform and has amended its constitution and bylaws as noted above in or-

tion's standards. In fact, many NCAA member institutions follow this normative proposition but within certain limits. The purpose of uniform standards is to prevent other institutions with lower standards or those that are willing to undertake greater risk from using athletes than institutions with higher standards or those that are more risk adverse.

137. See Yasser, *supra* note 12, at 136 (discussing author's blueprint for restructuring of intercollegiate athletics); see also Smith, *supra* note 12, at 567 (discussing need to make intercollegiate athletic programs part of accreditation process and desirability of requiring filing of academic impact statements in conjunction with each legislative proposal considered by NCAA).

138. See COMM'N ON INTERCOLLEGIATE ATHLETICS, KNIGHT FOUND. REPORT: KEEPING FAITH WITH THE STUDENT-ATHLETE - A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS (1991).

139. Gary T. Brown, *NCAA Leaders Testify Before New Edition of Knight Commission*, NCAA NEWS, Sept. 11, 2000, at 1.

140. See NCAA MANUAL, *supra* note 18, § 2.11.

141. See e.g., Davis, *supra* note 117, at 212; Yasser, *supra* note 12, at 136.

der to implement these changes.¹⁴² Although academic eligibility has been redefined to limit those athletes who are more likely to derive value from their educational opportunity, these reforms do not eliminate the suppression of value.¹⁴³ Unfortunately, the end result is that none of the proposals calls for the regulation of compensation other than in stricter eligibility requirements. Therefore, an athlete is ineligible unless he can benefit from the education.

C. Impact on African-American Student-Athletes

No student-athlete has prevailed against NCAA amateurism rules on antitrust grounds because such rules have been analyzed under the "rule of reason," which weighs justifications for these rules against their adverse economic effects. Although student-athletes have challenged initial eligibility rules, none have been on antitrust grounds. Additionally, there are no reported cases in which a student-athlete has challenged continuing eligibility rules. In light of dicta in cases such as *Board of Regents of the University of Oklahoma v. NCAA*,¹⁴⁴ such rules are unlikely to be invalidated under existing law.¹⁴⁵ The educational foundations of these rules will almost always outweigh any harm to student-athletes and it is the author's contention that these harms include the suppression of educational value to student-athletes.¹⁴⁶

One of the principal justifications now ventured by the NCAA for its academic eligibility rules is the prevention of exploitation of African-American student-athletes where the eligibility paradox is also present.¹⁴⁷ On one hand, universities have exploited African-

142. For a history of NCAA academic reform, see Shropshire, *supra* note 73, at 143-45 (discussing generally purpose of initial eligibility rules and changes to them over time).

143. *See id.*

144. 468 U.S. 85 (1984).

145. *See* Klein & Briggs, *supra* note 122, at 308.

146. *See* Davis, *supra* note 7, at 269 (1994).

147. *See* Cureton v. NCAA, 37 F. Supp. 2d 687, 699 (E.D. Pa. 1999) (noting that suppression is more pernicious in the case of African-American student-athletes - an effect that is visible in the differential in graduation rates). The graduation rates of African-American student-athletes in sports such as basketball and football indicate that the actual value delivered by universities to them is less than that received by other ethnic groups. *See id.* For the freshman class entering in 1990, the graduation rates for African-American males in basketball was 39%; in football, 45%. *See id.* The graduation rates for Caucasian male student-athletes during that period in those sports were 58% and 61% respectively. *See id.* I do not offer the observation here to "point a finger" and blame universities. To the extent that systemic forces have suppressed value of the educational opportunity, it has been done so for all athletes, but the suppression is greater for African-American student-athletes.

American athletes by tendering an educational opportunity with little, if any value, to a large number of student-athletes.¹⁴⁸ On the other hand, the reform of NCAA academic rules has attempted to solve the problem by making it more difficult for a disproportionate number of African-Americans to obtain an educational opportunity. This racially discriminatory impact of initial eligibility rules has been well addressed in legal scholarship. Professor Linda Greene was the first legal scholar to explore challenges to initial eligibility rules using legal theories under antidiscrimination law.¹⁴⁹ Additionally, Professor Yasser has also written on the subject, and Professors Shropshire and Davis have revisited this issue in recent scholarship.¹⁵⁰ Currently, these legal theories are being tested in *Cureton*.¹⁵¹ Although initial eligibility rules should theoretically increase the value of the educational opportunity available to those student-athletes who are permitted to participate, a person who is excluded does not gain that value.

The suppression of the actual value of the educational opportunity by uniform initial eligibility rules to student-athletes, including African-Americans, appears to be limited.¹⁵² Professor Shropshire, however, has argued that the initial eligibility standards have the unintended effect of decreasing the value of the educational opportunity because the rules enhance the social stigmatization of African-American student-athletes.¹⁵³ Yet the suppression of value by continuing eligibility standards may be substantial. Although the graduation rates for African-Americans are lower than those for Caucasians, that differential alone is not sufficient enough to conclude that the degree of suppression is greater for African-Americans. Even though graduation rates for all student-athletes,

148. See Davis, *supra* note 105, at 664-65.

149. See Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101 (1984).

150. See Davis, *supra* note 117, at 208-12; Davis, *supra* note 105, at 660-78; Shropshire, *supra* note 73, at 141-47; Ray Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983).

151. See Adam S. Taylor & M. Darren Traub, *Cureton v. NCAA: Scrutinizing Proposition 16 and Its Disparate Impact on Prospective Minority Student-Athletes*, 7 SPORTS L.J. 59 (2000).

152. Indeed, proponents of uniform rules argue that after the implementation of Proposition 48 higher graduation rates have yielded higher value. However, such claims must be balanced against changes in the number of graduates. Graduation rates may be higher, but one must question whether more African-Americans are graduating. The jury must await a study of the application of the commutative property of multiplication. Moreover, study also needs to be made of the degrees those graduates are obtaining and whether they are getting optimum educational value.

153. See Shropshire, *supra* note 73, at 144-45.

including African-Americans, have increased since the promulgation of Proposition 48, that increase fails to show that the continuing eligibility framework does not suppress value. Thus, there is evidentiary proof that the suppression of value is less than it was prior to the passage of Proposition 48.

There is, however, at least one circumstance where a larger magnitude of suppression of value for African-American student-athletes may occur. The incentives for universities to invest in the maintenance of eligibility rather than academic achievement may be greater due to stereotypes. Universities with athletic and academic officials who possess stereotypical views of the academic capabilities of African-American student-athletes may encourage them to pursue eligibility retention instead of maximizing academic achievement. Such students may graduate without undertaking the most rigorous coursework despite their capabilities.¹⁵⁴ Some universities may cheat and spare African-American student-athletes of the work required to obtain a degree.¹⁵⁵ The end result is that the value of the educational opportunity to African-American student-athletes has been suppressed.

The initial eligibility and continuing eligibility standards do have a significant adverse effect on the perceived value of an educational opportunity. As noted by Professor Davis, critics of the NCAA educational regime often explicitly presume that many African-American athletes are unprepared and undeserving of an op-

154. See Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 36 n.4 (1987) (depicting fictional Yale student-athlete who was described as having "a body like Tarzan's and a head like Einstein's"); see also Michael Schinner, *Touchdowns and Taxes: Are Athletic Scholarships Merely Disguised Compensation*, 8 AM. J. TAX POL'Y 127, 144 (1989) (stating that 75% of African-American student-athletes who graduate receive physical education degrees).

155. See *Hall v. University of Minn.*, 530 F. Supp. 104 (D. Minn. 1982) (discussing question concerning academic standing and athletic eligibility of University of Minnesota basketball player). The perverse incentive structure is also reflected in the current academic fraud scandal at the University of Minnesota. A tutor for the basketball program has admitted that she wrote papers for members of the team to keep them eligible. See Brian Bakst, *Judge Rejects Gophers' Tutor Plea*, ASSOCIATED PRESS, Sept. 25, 2000, 2000 WL 27211207. The university is suing the former coach to recover a \$1.5 million severance payment and federal prosecutors are investigating. *Id.* Moreover, the NCAA has placed the university on probation for four years and taken away five scholarships. See Joe Drape, *N.C.A.A., Citing Serious Violations, Puts Minnesota Men's Program on Probation*, N.Y. TIMES, Oct. 25, 2000, at C27. A similar issue arose out of the University of Tennessee which has restructured its academic advisement program for athletes as a result. See Welch Snuggs, *Tennessee Restructures Tutoring Program*, CHRON. OF HIGHER EDUC., June 23, 2000, at A53.

portunity for a college education.¹⁵⁶ He further points out that it is the educational opportunity that a large number of these presumably uneducable African-American athletes seek.¹⁵⁷ By raising the minimum initial standards, it is more difficult for them to attain scholarships. As one's chances of obtaining a scholarship are reduced, the perceived value of the scholarship to a prospective college student is lessened.

Professor Davis has provided an elaborate demonstration of how initial eligibility rules intensify the exploitation of African-American student-athletes by universities.¹⁵⁸ His primary thesis is that the conjunction of suppression of compensation by amateurism rules and initial eligibility rules distorts the perceived value of an educational opportunity offered by universities in exchange for African-American athletic participation.¹⁵⁹ He further argues that the NCAA, as well as many reformers, has underestimated the magnitude of the distortion for African-American student-athletes.¹⁶⁰

Proposition 48, for example, was promulgated to address the perceived widespread use of African-American athletes who were unlikely to graduate. At the same time, however, African-American student-athletes were graduating at higher rates than other African-American students.¹⁶¹ The athletic route thus offered African-Americans a better chance to obtain a college degree than the traditional academic route. Thus, a rational African-American would have been encouraged to invest time in athletics that might have been spent sharpening academic skills instead of athletic pursuits. Many African-Americans who made this choice found themselves excluded by Proposition 48. Ironically, many student-athletes who chose to spend more time on academic pursuits found themselves excluded by the stricter standards of Proposition 16.¹⁶² Moreover, as the plaintiffs in *Cureton* were able to show, the NCAA

156. See Davis, *supra* note 105, at 648-49; see also Shropshire, *supra* note 73, at 145.

157. See Davis, *supra* note 105, at 648-49.

158. See Davis, *supra* note 117, at 218-20.

159. See *id.* at 218-19.

160. See *id.*

161. See *id.* at 220.

162. See *Cureton v. NCAA*, 37 F. Supp. 2d 687, 689 (E.D. Pa. 1999) (discussing *Cureton* as another aspect of distortion). The plaintiffs' academic performance in school indicates that they sought to maximize the academic route, perhaps, at the expense of athletic development. See *id.* They were both "A" students who did not score high enough on the SAT to meet initial eligibility standards. See *id.* Tai Kwan Cureton saw a drop-off in recruitment efforts by Division I universities when he failed to obtain the requisite score. See *id.* His allegiance to educational primacy thus cost him a college education at the type of institution he desired. See *id.*

had no particular basis for drawing the narrow pathways at the points it did.¹⁶³

The technical application of the cumbersome, complex NCAA rules also creates havoc with the perceived value of the educational opportunity. High school students must balance the time they invest in academic and athletic pursuits to qualify for eligibility. Finding the appropriate balance requires them to understand precisely what the requisite academic standards are. High school students and their parents are expected to comprehend the specific requirements that a student-athlete must satisfy in order to qualify for athletic-based financial aid and participation. Some African-American student-athletes who rely on high school counselors and others to inform them accurately of the required courses end up in litigation like Thomas and Phillip.¹⁶⁴ To many African-American children, those cases demonstrate that it does not matter how hard they try to pursue NCAA academic standards, because doing so will not matter. Rational African-American student-athletes, therefore, can justify the amount of time they invest in athletic pursuits, so long as there are universities willing to cheat in order to maintain their athletic eligibility.

Uniform continuing eligibility rules also contribute to the distorted view of an educational opportunity by African-American student-athletes. Minimum academic standards in excess of those necessary to determine bona fide student status increase the probability that eligibility, and concomitantly, the right to receive value of any kind in exchange for athletic participation from a university, may be terminated. The probability of termination increases especially in cases where student-athletes have relatively weak academic qualifications. Because the incremental increase in the probability of termination is expected to be greater in the cases involving African-Americans, such student-athletes will be expected to have a higher loss of eligibility rate. A higher loss of eligibility rate means a greater suppression of actual value. The incremental increase in the probability that eligibility may be lost reduces the perceived value of the educational opportunity. Accordingly, African-Americans may be less persistent in their efforts in obtaining educational value because of the direct correlation between the in-

Leatrice Shaw also saw a drop in recruitment but attended a Division I school and received institutional aid. *See id.*

163. *See id.*

164. For a discussion of this litigation, see *supra* notes 60-67 and accompanying text.

crease in the probability of eligibility loss and their perceived value of the educational opportunity. The magnitude of the effect on perceived value may be exacerbated in cases of African-American student-athletes due to the impact of racial discrimination.¹⁶⁵

The perceived value of the educational opportunity to many African-American student-athletes may be affected by the existence of professional opportunities.¹⁶⁶ DeBrock, Hendricks and Koenker demonstrate the interrelationship of the perceived values of the educational opportunity with professional opportunity and the impact of those relative perceptions on human capital. It may be deduced from their work that there is a direct relationship between the effort the student-athlete will expend to attain the value of an educational opportunity and its magnitude relative to the value of the professional opportunity. While DeBrock, Hendricks and Koenker focus on the lack of responsibility by universities for past scandals, their work implicitly demonstrates the significance of enhanced efforts on the part of universities to increase the value of an educational opportunity. Student-athletes must allocate their efforts between educational and athletic pursuits – which is true regardless of a professional opportunity – because of contractual commitment. Student-athletes will allocate more effort in athletic pursuits, whenever the perceived value of an educational opportunity is relatively less than that of the athletic pursuit – this condition will frequently occur when a professional opportunity surfaces. Thus, universities can affect the relative perception that these student-athletes possess by emphasizing the value of an educational opportunity.

The latter point is even more significant when market effects are taken into account. NCAA members compete against each other for the pool of athletes who have the athletic skills to compete at the collegiate level, and NCAA bylaws devote a full chapter to the regulation of this competition.¹⁶⁷ But NCAA members do not compete merely against each other. Many of the athletes in the pool have athletic skills that professional teams may also be willing to acquire. Professional teams may also compete for student-ath-

165. See Alex M. Johnson, *Hoop Dreams: Rational Behavior, Meritocratic Standards and Affirmative Action: Why Shaquille Chooses to Play Basketball or Tell Jokes Instead of Going to Law School* (1996) (unpublished paper) (on file with author). But see Jason W. Osborne, *Race and Academic Disidentification*, 89 J. EDUC. PSYCHOL. 1 (1997) (arguing that poor academic performance of African-American males is due to academic disidentification).

166. See Davis, *supra* note 105, at 647-49.

167. NCAA CONST. art. 13.

letes who develop their skills to professional caliber while participating in intercollegiate athletics. The NCAA and its members have become more and more concerned over the number of athletes who have bypassed intercollegiate athletics, or those who have bypassed their eligibility for the professional ranks. This behavior is predictable in light of the limited investment on the part of universities in academic achievement and increased suppression of value by academic reforms. In order to compete against other buyers for the skills of these elite student-athletes, universities will have no choice but to increase the amount of compensation they spend on student-athletes. This measure would take the form of additional investments in the enhancement of the value of the educational opportunity or monetary compensation to student-athletes.

There is some evidence to suggest that the suppression regarding the value of the educational opportunity is not as problematic for women student-athletes.¹⁶⁸ Graduation rates for women student-athletes, for example, tend to surpass those of men.¹⁶⁹ That proposition also appears to hold for African-American women student-athletes in comparison to African-American men. For example, in the sport of basketball, African-American women in the 1990 entering class had a 58% graduation rate, whereas the graduation rate for African-American men in that class was 39%.¹⁷⁰ This situation was also reflected by Caucasian student-athletes as well, where Caucasian females had a 74% graduation rate compared to 58% for Caucasian males.¹⁷¹

It is unclear why the gender disparity in graduation rates occurs. Socio-economic factors may play a role, and each of the assertions made below runs the risk of over-generalization. Women student-athletes, as a group, may come from relatively more affluent backgrounds than men. Several commentators have recognized that Title IX has led to the establishment of athletic programs, where resources for such developments generally exist in

168. See Rodney K. Smith, *When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 334 (1996) (noting that one commentator argues that women are shortchanged on educational value derived through participation in intercollegiate athletics).

169. See *Female Athletes Lead List: Women Graduate at Higher Rate*, SEATTLE TIMES, June 30, 1995, at D5 [hereinafter *Female Athletes*] (noting that relevance of graduation rates to suppression of educational value should not be over emphasized). A student-athlete may graduate without having fulfilled her potential as a student. See *id.* To the extent the NCAA framework impedes that fulfillment, female athletes are adversely affected even with higher graduation rates. See *id.*

170. See NCAA, 1997 NCAA DIVISION I GRADUATION-RATES SUMMARY (1997).

171. See *id.*

suburban communities.¹⁷² This explanation may account for some of the gender disparity among African-Americans but cannot account for all of it. The majority of African-American women in intercollegiate athletics primarily participate in basketball and track.¹⁷³ The majority of African-American men participate in basketball and football.¹⁷⁴ In both instances, the sports in which African-American female and male athletes tend to participate are cultivated in urban and inner-city communities. If African-American men and women student-athletes come from the same communities, then other factors must account for the difference.

Perhaps the most significant factor has been the absence of professional opportunities for women. DeBrock, Hendricks and Koenker analyzed graduation rate data and attempted to provide empirical support for the assertion that the existence of professional sports opportunities affects the academic efforts of student-athletes in general, male and female, African-American, Caucasian or other ethnicity.¹⁷⁵ According to them, the absence of professional sports opportunities results in an increase in the perceived value of the educational opportunity and greater effort on the part of individual athletes.¹⁷⁶ These academic scholars did not analyze the differences in persistence along racial lines. The data does show lower graduation rates for African-American women than Caucasian women in the sport of basketball.¹⁷⁷ The relationship between the availability of professional opportunities and perceived value of the educational opportunity by African-American women appeared in literature before the empirical work by DeBrock, Hendricks and Koenker.¹⁷⁸

IV. ELIGIBILITY RECONSIDERED

Student-athletes should have to meet collegiate academic standards, but uniform standards generated by an athletics organization suppress the perceived and actual educational value. NCAA eligi-

172. See Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 251 (1996) (discussing generally what gender equity means in relation to athletics).

173. See *id.* at 257.

174. See Norman R. Yetman & D. Stanley Eitzen, *Racial Dynamics in American Sport: Continuity and Change*, in *SPORT IN CONTEMP. SOC'Y* 325-32 (1984).

175. See DeBrock et al., *supra* note 129, at 515.

176. See *id.*

177. See *Female Athletes*, *supra* note 169, at D5.

178. See Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 105-51 (1990) (discussing impact of Title IX on female student-athletes).

bility rules restrain price and non-price competition among its members. The amateurism rules amount to restraints on price competition. The academic standards component of athletic eligibility amounts to restraints on non-price competition. If the NCAA must have amateurism restraints, it should promote the non-price competition in educational value. Institutions subject to educational primacy should be policed to assume that they maximize the provision of educational value rather than merely maintain eligibility.

The new eligibility framework should be developed around five principles. First, colleges and universities should engage openly in competition with educational value subject to regulation by the NCAA as an athletic organization. Such competition would be healthy and would help regulate the abuses in the current and old systems. Regulation of that form of competition will correct the major legal flaw in those systems: the absence of a legal right to educational value for student-athletes, which the NCAA could monitor and regulate. On the other hand, universities that promise educational value but fail to deliver should be subject to some form of sanction.

Long time critics of NCAA academic policies will no doubt notice that the proposed solution appears to revert back to the "home rule" days. But, critics overlook the role that legal regime has played. The law does not require universities to provide any more value than NCAA rules mandate. Furthermore, courts have not required more mandates, due to the difficulty of articulating these standards over the promise of university admission to student-athletes. The NCAA should step into the breach and enforce the promises made by universities in recruiting student-athletes. Universities should be monitored to ascertain whether they are delivering academic value to student-athletes and should be subject to enhanced scrutiny and sanctions when they are not.

There have been proposals to modify the existing NCAA initial eligibility regime. Professor Shropshire, for example, has called for, among other things, the elimination of standardized tests and freshman eligibility.¹⁷⁹ These proposals address the flaws in the current system, but do not go far enough. Such measures could still be incorporated in the solution proposed by this Article. Universities should compete for student-athletes with, among other things, freshman eligibility. A university need not use standardized

179. See Shropshire, *supra* note 73, at 149-50.

tests for admission or initial eligibility. It may eliminate freshman ineligibility for all or just some freshmen, but there should be a quid pro quo for this discretion. As explained below, a university must be subject to scrutiny to assure that it is delivering academic value. Universities that are not providing adequate educational value should not be permitted to offer freshman eligibility in a sport.

Second, the NCAA should consciously regulate eligibility in furthering its athletic mission. The NCAA should continue to use its initial and continuing eligibility standards to measure the extent to which universities are providing academic value. Those standards, along with graduation rates and other factors, would be transformed into institutional performance standards. For example, an institution would be permitted to offer financial aid to student-athletes who did not meet the initial eligibility standards. It would not, however, be allowed to offer freshmen eligibility in a sport unless a specified high percentage of such student-athletes were in compliance with continuing eligibility standards or the university had a history of graduating a high percentage of such athletes. For example, a university would be ineligible for post-season competition in a sport unless a high percentage of its student-athletes in that particular sport met the continuing eligibility standards. As discussed below, a student-athlete who did not meet continuing eligibility standards may be subject to sanctions as well.

Third, eligibility for athletics participation and academic standards to promote academic achievement should be separated. The NCAA should convert provisions for academic standards into terms of performance rather than as conditions precedent and subsequent to the performance of member universities. The NCAA should promulgate narrow academic standards for athletic eligibility and enhanced standards for academic achievement. Member colleges and universities governed by the principle of educational primacy should promote the academic achievement of student-athletes in order to maximize the value of the educational opportunity provided to student-athletes in exchange for their athletic participation. A student-athlete would not lose athletic eligibility because of academic performance unless the student failed to maintain good academic standing at a university.

Fourth, universities and student-athletes should be provided with incentives to maximize the value of an educational opportunity. For example, NCAA rules prohibit universities from entering into scholarship agreements for a term in excess of one year. The

term for athletic scholarships should be structured similar to those of most academic scholarships. That is, a student-athlete would be guaranteed a scholarship for the full period of athletic eligibility on the condition that the athlete annually meets the enhanced academic standards.¹⁸⁰ If a student-athlete has met these enhanced standards, a university may renew the athletic scholarship; however, the NCAA could go far beyond this example. The NCAA could reform the amateur system by permitting additional scholarship amounts for meeting or exceeding the enhanced standards. Such reforms provide student-athletes with incentives to take the risks necessary for academic achievement.

Because these proposals are costly, universities may be reluctant to embrace them. But NCAA rules could be structured to add incentives for universities. For example, student-athletes who meet or exceed the enhanced continuing eligibility standards could be awarded another two year period of eligibility. Student-athletes who meet or exceed the enhanced standards for four consecutive years could be awarded a fifth year of athletic eligibility. Student-athletes who graduate in five years could be given a grubstake severance scholarship.

Fifth, the responsibility for assuring educational value within an institution should be placed on faculties. As matters now stand, athletic departments governed by athletic primacy are the principal institutional departments responsible for the value of the educational opportunity awarded to student-athletes. This responsibility rightly belongs to the faculty, which is responsible for the curricula and for determining the awarding of degrees. The faculty must be given, and must accept, a larger role in the academic program of student-athletes. The often-criticized "friendly faculty" are useful to this recommendation, as they are usually the most interested and most motivated in providing educational value and should not be removed from the equation merely because of their affinity for sports.¹⁸¹

It is also possible that the taboo against the establishment of academic programs for student-athletes may also fall. This possibility would not result in the implementation of a program used by

180. As late as the early 1970s, universities extended athletic scholarships to four-year terms. Under current NCAA rules, scholarships may not be offered for more than one year, although they are renewable for up to five years. The change in term may have occurred in response to Rev. Rul. 77-263, 1977-2 C.B. 47 (stating that athletic scholarships are excludable if extended for one year or less).

181. See Allison, *supra* note 21, at 19.

the University of Georgia in *Kemp v. Ervin*.¹⁸² The problems occurring in that program resulted largely because of the incentive structure of the current regime. Both the university and student-athletes were interested only in athletic eligibility. Programs designed by faculty in an academic achievement regime would differ in implementation and outcome. Many universities offer academic support programs for minority and other students in specific educational programs. Those students who participate in such programs enhance their academic performance, which is the purpose behind the programs. Such programs offered within the academic achievement framework suggested above ought to produce substantially better results than the University of Georgia program.

This Article does not call directly for the abolition of amateurism, although several suggestions contravene it. The solution proposed does have tremendous implications for the future of amateurism in intercollegiate athletics. Given the numerous complications that would arise from the direct payment of compensation to student-athletes for their athletic skill or permitting them to receive compensation from other sources, the prudent course is to begin the reform of the compensation system with the educational side.¹⁸³

V. CONCLUSION

Educational reforms in intercollegiate athletics have not gone in the right direction because of the refusal or inability to recognize the fundamental differences in missions of the NCAA and its member institutions. The NCAA is an organization devoted to and governed by the principle of athletics primacy. Member institutions are devoted to and governed by educational primacy. The current regime fuses these disparate missions into one and has produced an eligibility framework that inherently suppresses the value of the educational opportunity paid to student-athletes in exchange for their athletic participation. Separating the concept of academic eligibility from athletic eligibility and transforming the former into one of

182. 651 F. Supp. 495, 499 (N.D. Ga. 1986) (stating that University had Division of Development Studies for incoming freshmen who were not yet ready for college level work). A participant was "exited" into regular college program upon meeting requirements. *See id.* The coordinator was terminated after complaining about the exiting of student-athletes who had not met the requirements. *See id.*

183. *See* WEISTART & LOWELL, *supra* note 13, at 770-71 (noting specifically, monetary gifts to students and economic inducements and commercial pursuits as complications arising from student-athlete compensation).

compensation through academic achievement will best maximize the value of an educational opportunity.

This Article only advances the inquiry. It may well lead to development of modifications to amateur eligibility as well. NCAA member institutions compete against each other and professional teams for the athletic services of student-athletes. Increasing the compensation to athletes in educational currency may well lead to the permissibility of payments to student-athletes for the use of their names and images by universities, and perhaps, the signing of contracts with professional sports teams without losing athletic eligibility for intercollegiate athletics. It is time to adapt the dinosaur of intercollegiate athletics to modern realities.