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# University Price Competition for Elite Students and Athletes: Illusions and Realities

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# UNIVERSITY PRICE COMPETITION FOR ELITE STUDENTS AND ATHLETES: ILLUSIONS AND REALITIES

MATTHEW J. MITTEN\*

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## I. INTRODUCTION

The life blood of any institution of higher education is a talented student body, which must be continually replenished as students graduate. Similarly, a university's athletic program needs a steady supply of talented athletes to be successful. Hence, throughout higher education, universities vigorously compete among themselves in many respects to attract the best students and athletes to their educational and athletic programs.

In some instances, universities have agreed to eliminate price competition among themselves for highly sought-after, elite students and athletes. For example, the 1,152 member institutions of the National Collegiate Athletic Association (NCAA)<sup>1</sup> have agreed not to provide athletically-related financial aid in excess of the authorized cost of education at the student's chosen institution. Even further in this direction, member institutions of the so-called Ivy Overlap Group, which included twenty-two northeastern uni-

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\* Professor, South Texas College of Law. The author gratefully acknowledges the insightful critique of an earlier draft of this article by his colleague, Bruce W. Burton, the research assistance of Lisa M. Tilton-McCarthy, and the secretarial assistance of Helen Flores.

1. *NCAA Membership Hits All-Time High of 1,152*, NCAA News, Aug. 31, 1994, at 16.

versities and the Massachusetts Institute of Technology (MIT), agreed not to award merit-based aid and to collectively determine the amount of need-based financial assistance to be awarded to commonly admitted individual students.<sup>2</sup>

An elite athlete may singlehandedly enable a university to generate increased revenues by playing a sport for the school. For example, while Bo Jackson played football at Auburn University, season ticket sales substantially increased each year, thereby enabling the university to increase revenues.<sup>3</sup> Auburn officials believe that at least some of the increase in season ticket sales was directly attributable to Jackson's participation.<sup>4</sup> It is estimated that Patrick Ewing accounted for approximately twelve million dollars in increased revenues while playing basketball for Georgetown University.<sup>5</sup>

In addition to direct revenue benefits, universities may derive indirect financial benefits from the efforts of their intercollegiate athletes. The quantity and quality of students who apply to schools with successful athletic programs may increase.<sup>6</sup> Alumni and booster contributions to the university may expand. A university's reputation and prestige may also be enhanced by favorable publicity and television appearances generated by a winning athletic team.

Universities also derive substantial economic benefits from the enrollment of talented students. Attracting the best and brightest students will enhance the quality of a university's student body, thereby enhancing the school's prestige and enabling it to attract other desirable students and faculty.<sup>7</sup> This will have a cyclical effect, providing a university with an enhanced opportunity to attract research grants and public and private contributions and funding. Talented students who become successful graduates are likely to contribute money to their alma mater and will further enhance their university's prestige by achieving significant stature in public or private employment.<sup>8</sup> Truly exceptional alumni may provide extraordinary economic benefits to their schools in the form of extensive publicity by winning significant awards such as a Nobel Prize or generating millions of dollars in financial support because of their association with the university.<sup>9</sup>

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2. See *infra* notes 38–39 and accompanying text.

3. ARTHUR A. FLEISHER, III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION—A STUDY IN CARTEL BEHAVIOR* 45–46 n.4 (1992).

4. *Id.*

5. *Id.* at 92–93.

6. *Id.* at 101.

7. Donald R. Carlson & George B. Shepherd, *Cartel on Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 OR. L. REV. 563, 571 (1992).

8. *Id.*

9. *Id.* at 572.

The thesis of this Article is that universities, although legally non-profit in nature, are nevertheless *de facto* engaged in commercial activity when recruiting students or athletes. Universities derive substantial short and long-term economic benefits from the academic and athletic endeavors of their best students. Each university has a strong economic incentive to offer significant financial inducements to desired students for enrollment in its undergraduate program or participation in its intercollegiate athletic program. Ordinary market forces, rather than collusion among economically self-interested universities, should determine the optimal allocation of academically or athletically talented students among universities and the financial incentives offered for their enrollment and athletic participation.

This Article argues: that (1) NCAA restrictions on compensation to athletes, (2) collective elimination of merit scholarships, and (3) joint determination of need-based financial aid are price fixing mechanisms that impede the free market. In effect, students with superlative academic credentials or athletic skills are rewarded equally, although their individual talents and abilities, and current or future economic value to a university, differ. Thus, the antitrust laws should be applied to these joint arrangements in the same manner as agreements among competitors engaged in commercial activity and must, therefore, be supported by a pro-competitive economic justification to survive antitrust scrutiny. Courts have incorrectly applied the antitrust laws in a manner that permits social welfare concerns such as amateurism and socio-economic diversity to be accepted as legitimate justifications for price fixing by universities.<sup>10</sup> Non-economic social welfare concerns do not justify agreements by universities to eliminate price competition for students and athletes under the appropriate antitrust analysis. If furtherance of these objectives justifies anti-competitive conduct, universities should collectively petition Congress for an exemption from the antitrust laws.

My primary concern is the *process* by which the relative importance of anti-competitive effects and noneconomic social welfare concerns are prioritized rather than the ultimate *result* of any balancing of such factors. In my view, the operation of independent free market forces or Congressional action, not collusion among universities, should determine the appropriate level of price competition for elite students or athletes and allocation of their talents among universities.

## II. NCAA RESTRICTIONS ON ATHLETE COMPENSATION

The NCAA's constitution and by-laws expressly prohibit member

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10. See *infra* notes 22-35, 66-68 and accompanying text.

schools from awarding financial aid to a student-athlete that exceeds the cost of attendance normally incurred by students enrolled in a comparable program at the subject school.<sup>11</sup> An athlete generally may receive a maximum financial aid package that includes the value of tuition and fees, room and board, and books to attend his or her chosen school.<sup>12</sup> If an institution provides financial aid other than that permitted by NCAA regulations, the school is subject to disciplinary sanctions,<sup>13</sup> and the athlete is not eligible to participate in intercollegiate athletics.<sup>14</sup> Representing the product of an agreement among its more than 1,150 members, NCAA restrictions on athlete compensation clearly satisfy the concerted action requirement of section 1 of the Sherman Act.<sup>15</sup>

In *NCAA v. Board of Regents of University of Oklahoma*,<sup>16</sup> the Supreme Court observed that college sports are "an industry in which horizontal restraints on competition are essential if the product is to be available at all."<sup>17</sup> The Court viewed college and professional sports as distinct products, and stated, in dicta, that college athletes must not be paid to preserve the unique character and quality of college sports.<sup>18</sup> The Court suggested that NCAA rules maintaining the amateur status of college athletes are pro-competitive because they widen the range of spectator sports available for viewing by consumers.<sup>19</sup> The Court also recognized that preserving competitive balance among amateur teams<sup>20</sup> and the student-athlete's place in higher education<sup>21</sup> are legitimate objectives of NCAA rules for antitrust purposes.

To date, no court has held that the NCAA's maximum limits on the

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11. NCAA MANUAL, art. 2, § 2.12 (const.) (1994-95) (permitting financial aid to student athletes as long as "the amount does not exceed the cost of education"); *id.* art. 15, bylaw 15.01.7 (prohibiting a financial aid award "that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution").

12. *Id.* art. 15, bylaw 15.2. "An NCAA institution in Division III [intercollegiate sports competition] shall not award financial aid to any student-athlete except upon a showing of financial need by the recipient." *Id.* art. 15, bylaw 15.4.1.

13. *Id.* art. 19, bylaw 19.01; *see also id.* art. 19, bylaw 19.6 (listing possible penalties for violation of NCAA rules).

14. *Id.* art. 12, bylaw 12.1.2 (providing that an individual loses amateur status through receipt of "educational expenses not permitted by the governing legislation of the NCAA"); *id.* art. 15, bylaw 15.01.2 (declaring ineligible "[a]ny student-athlete who receives financial aid other than that permitted" by the NCAA).

15. *Hennessey v. NCAA*, 564 F.2d 1136, 1147 (5th Cir. 1977) ("[C]onceptually the adoption and execution of the NCAA Bylaw can be seen as the agreement and concert of action of the various members of the association.").

16. 468 U.S. 85 (1984).

17. *Id.* at 101.

18. *Id.* at 102.

19. *Id.*

20. *Id.* at 117.

21. *Id.* at 120.

compensation an athlete may receive for playing an intercollegiate sport on behalf of a university violates the antitrust laws. In *McCormack v. NCAA*,<sup>22</sup> a Southern Methodist University (SMU) alumnus claimed that the NCAA's suspension of SMU's football program for exceeding restrictions on compensation for student-athletes violated the antitrust laws.<sup>23</sup> The Fifth Circuit held that the NCAA's compensation rules did not unreasonably restrain trade.<sup>24</sup> The court reasoned that these regulations are a legitimate means of fostering amateur athletic competition that have the pro-competitive effect of enhancing public interest in intercollegiate athletics.<sup>25</sup>

Courts have also upheld NCAA rules rendering an athlete ineligible to participate in a sport if he previously had been paid for playing the sport. In *Jones v. NCAA*,<sup>26</sup> the court held that a student was ineligible to play intercollegiate ice hockey because he was paid money to play hockey before he enrolled at Northeastern University. The court rejected the plaintiff's claim that NCAA regulations declaring him ineligible to play college hockey violated the antitrust laws. The challenged regulations were found to be a legitimate means of implementing the NCAA's basic principles of amateurism.<sup>27</sup>

In *Justice v. NCAA*,<sup>28</sup> four University of Arizona football players asserted that the university's two-year exclusion from post-season bowl games and television appearances for providing extra compensation to players violated the antitrust laws. The court held that the NCAA's enforcement of rules to preserve amateurism and enhance fair competition for players by its members was permissible under the antitrust laws. The court found that restrictions on student-athlete competition are not "an agreement with business competitors in the traditional sense" and that the NCAA sanctions reflect no anti-competitive purpose and are reasonably related to the NCAA's legitimate objectives.<sup>29</sup>

Consistent with the Supreme Court's admonition that the NCAA should be given "ample latitude"<sup>30</sup> in maintaining amateurism in college sports, several lower courts have upheld NCAA amateur eligibility rules. In

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22. 845 F.2d 1338 (5th Cir. 1988).

23. *Id.* at 1340. Specifically, McCormack argued that the restrictions on compensation to football players amounted to illegal price fixing and that SMU's suspension constituted a group boycott by other NCAA members. *Id.*

24. *Id.* at 1343.

25. *Id.* at 1344.

26. 392 F. Supp. 295 (D. Mass. 1975).

27. *Id.* at 304.

28. 577 F. Supp. 356 (D. Ariz. 1983).

29. *Id.* at 379 (citing *Gunter Harz Sports v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1116 (D. Neb. 1981)).

30. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

*Banks v. NCAA*,<sup>31</sup> the Seventh Circuit held that the NCAA's "no draft" and "no agent" rules withstood antitrust challenge. These regulations provided that athletes lose their amateur status if they declare their eligibility for a professional league player draft or agree to allow an agent to represent them.<sup>32</sup> Violation of these rules caused Braxton Banks to lose his final year of college football eligibility and his athletic scholarship.<sup>33</sup> He unsuccessfully sought to resume playing football for Notre Dame University after failing to be selected in the National Football League (NFL) draft.

The *Banks* court found that the challenged rules did not restrain trade in the college football labor market because "[t]he NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."<sup>34</sup> The court reasoned that these rules helped to "preserve the bright line of demarcation between college and 'play for pay' football."<sup>35</sup>

These courts appear to focus almost exclusively on the public demand-generated commercial success of intercollegiate sports that has resulted in the creation of a billion dollar industry. Although both generate enormous revenues for their sponsors, intercollegiate sports are considered sufficiently distinct from professional sports to be treated differently for antitrust purposes. Courts view restraints on price competition for inputs such as players to be acceptable for intercollegiate sports,<sup>36</sup> but not professional sports,<sup>37</sup> even absent a pro-competitive economic justification.

### III. JOINT RESTRICTIONS ON STUDENT TUITION DISCOUNTS

Since the 1950s, a group of twenty-three elite and mid-level colleges and universities meet regularly to establish common policies on student financial aid and to fix financial aid levels.<sup>38</sup> They agreed to provide only

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31. 977 F.2d 1081 (7th Cir. 1992).

32. *Id.* at 1083-84 (referring to NCAA Bylaws 12.2.4.2 and 12.3.1).

33. *Id.* NCAA regulations currently permit college athletes to request information about their market value in a professional sport without losing their amateur status. NCAA MANUAL, art. 12, bylaw 12.2.4.1 (1994-95). Subject to compliance with certain conditions, a college basketball player may enter a professional league's draft once without losing his amateur status. *Id.* art. 12, bylaw 12.2.4.2.1.

34. *Banks*, 977 F.2d at 1089-90.

35. *Id.* at 1090; *see also* *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (holding that the "no draft" and "no agent" rules do not violate antitrust laws).

36. *See supra* notes 16-35 and accompanying text.

37. *See, e.g., Brown v. Pro Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,747 (D.D.C. Mar. 10, 1992).

38. The participants included the Massachusetts Institute of Technology (MIT) and the following Ivy League schools: Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, University of Pennsylvania, and

need-based financial aid to undergraduate students and to jointly determine a single amount that all of the institutions would offer commonly admitted students.<sup>39</sup> The effect of this agreement was to eliminate price competition among Ivy Overlap Group schools for undergraduate students.

On May 22, 1991, after a two-year Justice Department investigation of the financial aid programs of various colleges and universities, the United States filed an antitrust suit against MIT and eight Ivy League schools.<sup>40</sup> Concurrently with the filing of the complaint, the United States and eight Ivy League schools filed a Consent Decree, which was entered and approved by the court on September 20, 1991.<sup>41</sup> MIT refused to agree to the terms of the Consent Decree and elected to defend itself against the government's allegation that collectively determining the amount of financial aid awarded to admitted students violates the antitrust laws.

The Consent Decree prohibited the consenting defendants from agreeing whether or not to offer merit-based aid as a general policy or to particular students, and agreeing on the amount of financial aid to be awarded to any student.<sup>42</sup> Each defendant was permitted to independently choose to adopt a financial aid program based wholly or partially on the economic needs of admitted students.<sup>43</sup> The Consent Decree, however, expressly permitted defendants to continue their jointly determined policy of granting financial aid to intercollegiate athletes "on the sole basis of economic need," which is consistent with NCAA regulations.<sup>44</sup> The Consent Decree will expire ten years after its date of entry.<sup>45</sup>

On July 23, 1992, Congress passed legislation expressly permitting institutions of higher education to agree to award financial aid to students

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Yale University, as well as Amherst College, Barnard College, Bowdoin College, Bryn Mawr College, Colby College, Middlebury College, Mount Holyoke College, Smith College, Trinity College, Tufts University, Vassar College, Wellesley College, Wesleyan University, and Williams College. Theodore J. Stachtaris, Note, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1746 nn.6 & 13 (1994).

39. Carlson & Shepherd, *supra* note 7, at 563.

40. Verified Complaint, *United States v. Brown Univ.*, No. 91-CV 3274 (E.D. Pa., May 22, 1991).

41. *United States v. Brown Univ.*, 1993-2 Trade Cas. (CCH) ¶ 70,391 (E.D. Pa. Sept. 20, 1991) [hereinafter *Brown Univ. I.*]. Although the other fourteen Overlap members were not named as defendants in the government's suit, they agreed to comply with the terms of the Consent Decree. Carlson & Shepherd, *supra* note 7, at 564-65. The government's lawsuit gave rise to the filing of a private antitrust suit by a student against members of the Overlap Group. See *Kingssepp v. Wesleyan Univ.*, 763 F. Supp. 22 (S.D. N.Y. 1991).

42. *Brown Univ. I.*, 1993-2 Trade Cas. (CCH) at ¶ 71,039.

43. *Id.* at ¶ 71,041.

44. *Id.*; see also NCAA MANUAL, art. 20, bylaw 20.11.2 (1994-95) (prohibiting Division III institutions, which would include members of the Ivy Overlap Group, from offering athletic scholarships "except upon a showing of financial need by the recipient").

45. *Brown Univ. I.*, 1993-2 Trade Cas. (CCH) at ¶ 71,041.



only on the basis of demonstrated financial need.<sup>46</sup> The statute prohibits schools from agreeing on the financial aid award for any commonly admitted student. The legislation expired on September 30, 1994.<sup>47</sup>

In *United States v. Brown University II*,<sup>48</sup> a federal district court held that an agreement to eliminate merit scholarships and to establish a uniform expected family contribution for educational expenses violated section 1 of the Sherman Act.<sup>49</sup> Although it rejected MIT's claim that universities' allocation of financial aid is exempt from antitrust scrutiny, and characterized the challenged conduct as "price fixing," the court held that this agreement is not per se illegal.<sup>50</sup>

The court found that the agreement between Ivy Overlap Group members, which are horizontal competitors, had both the purpose and effect of eliminating price competition for students. The court found that the "Ivy Overlap agreements are plainly anticompetitive" by effectively depriving students of the opportunity to consider competing offers of financial assistance in selecting a college education.<sup>51</sup>

The court stated that the Rule of Reason<sup>52</sup> placed upon MIT "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."<sup>53</sup> MIT asserted that the objective of Ivy Overlap Group was "to enroll the most qualified student body possible" and that coordinated financial aid distribution by member schools is necessary to accomplish this objective.<sup>54</sup> MIT expressed concern that "a bidding war for the 'best of the brightest' " would reduce available money for need-based financial aid and reduce educational opportunities for relatively poor students.<sup>55</sup>

The court held that MIT's non-economic social welfare defenses did not justify the elimination of university price competition for students.<sup>56</sup>

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46. Need-Based Aid Act of 1992, Pub. L. No. 102-325, § 1544, 106 Stat. 609 (1992).

47. *Id.*

48. 805 F. Supp. 288 (E.D. Pa. 1992) [hereinafter *Brown Univ. II*].

49. *Id.* at 301-07. Section one of the Sherman Act, as judicially construed, prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Literally, § 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . ." 15 U.S.C. § 1 (1988 & Supp. V 1993).

50. *Brown Univ. II*, 805 F. Supp. at 301 n.7.

51. *Id.* at 304.

52. For a general discussion of the application of the Rule of Reason, see *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993) [hereinafter *Brown Univ. III*].

53. *Brown Univ. II*, 805 F. Supp. at 304 (quoting *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984)).

54. *Id.*

55. *Id.* at 304-05.

56. *Id.* at 305.

The court found no plausible pro-competitive economic defenses to justify the Ivy Overlap. Applying a truncated rule of reason, the court found that the Ivy Overlap Group agreements unreasonably restrained trade without the need to balance their anti-competitive effects with MIT's improper justifications.<sup>57</sup>

There was no evidence that invalidation of Ivy Overlap on antitrust grounds would cause the elimination of need-blind admissions or need-based financial aid. The court observed that "[e]very institution, with or without Overlap, is free to embrace independently any admission and financial aid policy it wishes, and most do."<sup>58</sup>

The district court entered a broad permanent injunction prohibiting MIT from participating in any agreement having "the effect, or tendency to affect, the determination of the price, or any adjustment thereof," of a university education for any student.<sup>59</sup> The injunction prohibited MIT from agreeing with other universities to establish a uniform expected family contribution for educational expenses and not award merit scholarships.

On appeal, the Third Circuit agreed that providing financial assistance to students is part of the process of setting tuition and constitutes a commercial transaction subject to the coverage of the antitrust laws.<sup>60</sup> The court, however, reversed the district court's determination that the Ivy Overlap Group agreement violated the Sherman Act. The court found that agreeing to award only need-based financial aid and collectively determining the amount of financial aid for commonly admitted students was "price fixing in 'a literal sense.'"<sup>61</sup> This conduct was not considered per se illegal because it was engaged in by bona fide nonprofit institutions with a public interest motive.<sup>62</sup>

The Third Circuit agreed with the lower court's finding that the Ivy Overlap Group's purpose was "to eliminate price competition for talented students among member institutions" and that its effect was "to restrain 'competitive bidding' and deprive prospective students of 'the ability to utilize and compare prices' in selecting among schools."<sup>63</sup> The court observed that the "'hallmark' consequences of price fixing," such as a higher price for an MIT education or lower student enrollment, was missing in this

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57. *Id.*; see also *Brown Univ. III*, 5 F.3d at 669 (providing a general discussion of the truncated or "quick look" rule of reason).

58. *Brown Univ. II*, 805 F. Supp. at 305.

59. *Brown Univ. III*, 5 F.3d at 665.

60. *Id.* at 665-68.

61. *Id.* at 670.

62. *Id.* at 672.

63. *Id.* at 673.

case.<sup>64</sup> Nevertheless, the court required MIT to prove that the challenged price fixing is justified by "some procompetitive virtue, or with a showing of Overlap's reasonable necessity to its institutional purpose."<sup>65</sup>

The court held that enhancing the quality and accessibility of education at Ivy Overlap schools by ensuring that financial aid is available to needy students is a legitimate pro-competitive economic justification enhancing consumer choice.<sup>66</sup> The court rejected MIT's claim that eliminating price competition is a legitimate means of facilitating non-price competition for students.<sup>67</sup> Noting that Overlap's objectives are consistent with federal loan programs that distribute financial aid solely on the basis of need, the court held that promoting "equality of educational access and opportunity" was a legitimate social welfare justification to be considered under the rule of reason.<sup>68</sup>

Disagreeing with the lower court, the Third Circuit held that "a full rule of reason analysis" is necessary to determine the legality of Overlap.<sup>69</sup> The court suggested that if MIT proves that the Ivy Overlap Group agreement furthers the above "legitimate objectives," then the government must prove that these objectives could be satisfied through a substantially less restrictive alternative.<sup>70</sup> For example, the "free market coupled with MIT's institutional resolve"<sup>71</sup> or "other imaginable creative alternatives"<sup>72</sup> might be shown to further the policies of need-blind admissions and full need-based aid to promote the goals of achieving a diverse student body and increasing access to opportunities for an elite undergraduate education.

Before the case was considered on remand by the district court, MIT and the government entered into a settlement agreement resulting in its dismissal. Under the settlement agreement, MIT is allowed to agree with other universities to award financial aid solely on the basis of need and to exchange limited information about applicants' financial profiles.<sup>73</sup> However, MIT may not agree with other schools to establish a uniform expected family contribution for commonly admitted students.<sup>74</sup> The government agreed

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64. *Id.* at 674.

65. *Id.*

66. *Id.* at 674-75.

67. *Id.* at 675.

68. *Id.*

69. *Id.* at 678.

70. *Id.* at 678-79.

71. *Id.* at 679.

72. *Id.* at 677.

73. Stachtiaris, *supra* note 38, at 1745 n.2; Srikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity*, 46 STAN. L. REV. 919, 925 n.51 (1994); *MIT Resolves Division Concerns About "Overlap" in Financial Aid*, Antitrust & Trade Reg. Rep. (BNA) No. 66, at 11 (Jan. 13, 1994) [hereinafter *MIT Resolves*].

74. *MIT Resolves*, *supra* note 73, at 11-12.

to modify the 1991 Consent decree with the eight Ivy League schools to provide consistency with the MIT settlement agreement.<sup>75</sup> It appears that this settlement agreement is also consistent with the expired 1992 federal legislation.<sup>76</sup>

#### IV. COMMERCIAL NATURE OF UNIVERSITY RECRUITING OF STUDENTS AND ATHLETES

The federal antitrust laws apply only to concerted activities that restrain trade or commerce.<sup>77</sup> In a 1970 case, *Marjorie Webster Junior College Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*,<sup>78</sup> the Court of Appeals for the District of Columbia held that a non-profit educational corporation's accrediting activities are not subject to antitrust scrutiny.<sup>79</sup> The court observed that the Sherman Act "is aimed primarily at combinations having commercial objectives"<sup>80</sup> and found that "the process of accreditation is an activity distinct from the sphere of commerce."<sup>81</sup> This decision suggested that purely "educational matters" not having a "commercial motive" are exempt from the antitrust laws.<sup>82</sup>

Both the NCAA's<sup>83</sup> and the Ivy Overlap Group's<sup>84</sup> current restraints on price competition for students and athletes and enforcement mechanisms were established in the 1950s. Prior to 1975, when the Supreme Court held that the learned professions are not exempt from the antitrust laws,<sup>85</sup> institutions of higher education had little fear of antitrust liability for engaging in collective activities having anti-competitive effects.

In 1984, the Supreme Court held that the Sherman Act applies to commercial activity by institutions of higher education despite their non-profit status. In *NCAA v. Board of Regents of University of Oklahoma*,<sup>86</sup> the Court ruled that universities' collective sale of television rights to college football games were covered by the antitrust laws.<sup>87</sup> The Court noted that

75. *Id.* at 12.

76. *See supra* note 47 and accompanying text.

77. 15 U.S.C. § 1 (1988 & Supp. V 1993).

78. 432 F.2d 650 (D.C. Cir. 1970).

79. *Id.* at 654-55.

80. *Id.* at 654 (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

81. *Id.* at 655.

82. *Id.* at 654-55.

83. FLEISHER, *supra* note 3, at 49-50.

84. *United States v. Brown Univ. III*, 5 F.3d 658, 662-63 (3d Cir. 1993).

85. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-88 (1975).

86. 468 U.S. 85 (1984). *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 232.2 (Supp. 1993) (stating that non-profit status by itself confers no blanket exemption from antitrust laws).

87. *Board of Regents of Univ. of Okla.*, 468 U.S. at 98-99.

"the NCAA and its member institutions are in fact organized to maximize revenues"<sup>88</sup> and compete with each other for television revenues, fans, and athletes.<sup>89</sup> Thus, university income-generating activity is subject to antitrust scrutiny.

The Supreme Court has not yet considered whether collective restraints on price competition for elite students and athletes involve "trade or commerce" covered by the antitrust laws. In resolving this issue, lower courts appear to focus on whether joint limits on academic or athletic financial aid are a covered means of reducing economic competition for students and athletes, or are an exempt non-commercial aspect of higher education.

In *United States v. Brown University III*,<sup>90</sup> the Third Circuit held that a university's provision of financial assistance is an effective means of discounting tuition for desired students. Offering financial assistance in the form of loans, grants, or work study reduces a student's net education cost and provides an economic incentive to attend the university.<sup>91</sup> The court correctly found the offering of financial assistance to be "a commercial transaction" rather than the non-commercial distribution of university charitable funds.<sup>92</sup>

Courts have correctly determined that the NCAA's efforts to regulate competition for inputs necessary to produce intercollegiate athletics, such as limiting the size of coaching staffs, are not immune from the antitrust laws.<sup>93</sup> These courts appropriately recognize the inherent commercial nature of recruiting personnel involved in producing intercollegiate athletics. Like other businesses that provide a product for public consumption, universities must attract the human resources necessary to operate. This inevitably involves competing for desired resources with those offering a similar product.

On the other hand, some lower courts have suggested that the collective establishment of eligibility standards to preserve the amateur status of college athletes should be exempt from antitrust scrutiny.<sup>94</sup> These courts

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88. *Id.* at 101 n.22. *Accord College Football Association*, [1993-94 Transfer Binder] FTC Complaints and Orders (CCH) ¶ 23,631 at 23,358 (July 8, 1994) (finding that an organization of 66 major football playing universities "engages in large-scale, commercial activity from which it generates substantial revenue.").

89. *Board of Regents of Univ. of Okla.*, 468 U.S. at 99.

90. 5 F.3d 658 (3d Cir. 1993).

91. *Id.* at 666-68.

92. *Id.* at 668.

93. *See, e.g., Hennessey v. NCAA*, 564 F.2d 1136, 1151 (5th Cir. 1977) (holding that restricting the number of coaching positions impacts interstate commerce by reducing the movement of coaches between institutions located in different states); *Board of Regents of Univ. of Okla. v. NCAA*, 561 P.2d 499, 505 n.14 (Okla. 1977) (noting that the provision of coaching services to amateur athletics is commercial in nature).

94. *See, e.g., Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (exempting eligi-

view intercollegiate athletics and the recruiting of athletes as part of the process of higher education, implicitly adopting "the Principle of Amateurism" set forth in the NCAA's constitution, which states that:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>95</sup>

In *Gaines v. NCAA*,<sup>96</sup> a federal district court held that the NCAA's "no draft" and "no agent" rules are not subject to antitrust analysis. The court accepted the NCAA's argument that these rules "are not designed to generate profits in a commercial activity but to preserve amateurism by assuring that the recruitment of student athletes does not become a commercial activity."<sup>97</sup>

Similarly, in *Jones v. NCAA*,<sup>98</sup> the court held that NCAA rules rendering an athlete ineligible if he has received "pay" to play a particular sport are "particularly inappropriate for application of the Sherman Act."<sup>99</sup> The court found that these eligibility guidelines do not have "any nexus to commercial or business activities."<sup>100</sup>

In its recruiting efforts, a university acts as a "seller" of educational services to students; whereas, a university functions as a "buyer" of the services of athletes. In both instances, a university competes with certain other schools for talented students and athletes.<sup>101</sup> As evidenced by "under-the-table" payments to athletes by university representatives<sup>102</sup> and bidding

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bility standards from antitrust scrutiny because their overriding purpose is to "preserve the unique atmosphere of competition between 'student-athletes,' " not to provide a competitive advantage to the NCAA); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that the Sherman Act does not reach actions of NCAA members in setting eligibility requirements); *College Athletic Placement Serv., Inc. v. NCAA*, 1975 Trade Cas. (CCH) ¶ 60,117, 65,266-67 (D.N.J. Aug. 22, 1974) (holding that an NCAA rule designed to promote amateurism in college sports as it relates to education "does not come within the purview of the Sherman Act").

95. NCAA MANUAL, art. 2, § 2.8 (const.) (1994-95).

96. 746 F. Supp. 738 (M.D. Tenn. 1990).

97. *Id.* at 743.

98. 392 F. Supp. 295 (D. Mass. 1975).

99. *Id.* at 303.

100. *Id.*

101. *United States v. Brown Univ.* III, 5 F.3d 658, 667 (3d Cir. 1993) (admitting that MIT competes with Ivy League schools for outstanding students); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 210 (1990) (discussing competition among NCAA member schools for athletes).

102. MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* 246-55 (1990) (discussing how athletic departments recruit athletes outside of the NCAA rules).

for sought-after students by discounting tuition,<sup>103</sup> universities have a strong independent economic motive to engage in price competition for desired students and athletes.

In deciding whether to provide financial incentives to a desired student or athlete, a rational university calculates whether the anticipated benefit to the school from the student's attendance or participation in sports exceeds the cost of the academic financial aid or an athletic scholarship. A university may reap substantial short- and long-term economic benefits from the enrollment of an elite student or athlete.<sup>104</sup> Top athletes may significantly enhance a university's athletic revenues and increase applications by prospective students desiring to attend a school with winning athletic teams. Talented students will enhance a university's quality, prestige, and ability to attract other desired students and faculty. Successful recruitment of elite students and athletes is a vital part of a university's efforts to enhance its reputation and attract needed financial resources.

University efforts to eliminate price competition for elite students or athletes are appropriately characterized as a commercial means of minimizing costs for collectively desired human resources.<sup>105</sup> Jointly determined maximum limits on the financial incentives universities may offer to students or athletes should be subject to antitrust scrutiny.<sup>106</sup> These restraints deprive talented students and athletes of the opportunity to receive offers of

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103. William Celis, *Colleges Caught in Middle as Parents Seek Best Deal*, N.Y. TIMES, July 6, 1994, at A1.

104. See *supra* notes 3-9 and accompanying text.

105. MIT acknowledged that the "purpose of Overlap is to eliminate price competition for talented students among member institutions." *United States v. Brown Univ.* III, 5 F.3d 658, 673 (3d Cir. 1993). Richard Schulz, former executive director of the NCAA, admitted that "financial concerns are the primary reason for rejecting proposals to pay college-athletes a stipend." Goldman, *supra* note 101, at 217; see also James V. Koch, *The Economic Realities of Amateur Sports Organizations*, 61 IND. L.J. 9, 11 (1985) (describing NCAA regulations designed to restrict competition among universities for student-athletes).

106. For discussions by law review commentators who generally argue that NCAA restrictions on payments to student-athletes are not exempt from the antitrust laws, see Steve Murphy & Jonathan Pace, *A Plan for Compensating Student-Athletes*, B.Y.U. EDUC. AND L.J. 167, 169-70 (1994); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305-07, 1314 n.84 (1992); Goldman, *supra* note 101, at 215-19.

Legal scholars have disagreed whether university agreements on the type and amount of financial aid to be offered to students should be immunized from antitrust scrutiny. Some authors argue that such agreements should be immune from antitrust, see Mark D. Selwyn, *Higher Education Under Fire: The New Threat of Antitrust*, 26 COLUM. J.L. & SOC. PROBS. 117 (1992); Stephen D. Browning, Note, *The Misguided Application of the Sherman Act to Colleges and Universities in the Context of Sharing Financial Aid Information*, 33 B.C. L. REV. 763 (1992); Srinivasan, *supra* note 73, at 947-49; Stachtiaris, *supra* note 38, at 1753-62. On the other hand, other authors believe that such agreements should not be immune from antitrust scrutiny, see Carlson & Shepherd, *supra* note 7, at 563; Richard Morrison, *Price Fixing Among Elite Colleges and Universities*, 59 U. CHI. L. REV. 807 (1992); Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271 (1991).

greater financial benefits from universities which have an independent economic incentive to do so absent an agreement with their competitors.

#### V. APPROPRIATE ANTITRUST ANALYSIS

Both the NCAA and Ivy Overlap Group have the indicia of a price fixing cartel. The classic elements of such a cartel are competitors who collectively possess market power, an agreement to prevent free market forces from determining prices, and a mechanism for enforcing and policing the agreement. The membership of these associations consists of universities that would actively engage in price competition for elite students and athletes absent an agreement to the contrary. The Supreme Court has recognized that the NCAA is an association of schools (now more than 1,150) which compete against each other for athletes and possess market power over those athletes.<sup>107</sup> Similarly, the district court in *Brown University II* found the Ivy Overlap Group members to be horizontal competitors which compete among themselves for students.<sup>108</sup> Commentators have suggested that the Ivy Overlap's member schools possess market power because their highly regarded reputations create a separate market for their educational services.<sup>109</sup>

The respective agreements among members of the NCAA and the Ivy Overlap Group are commercial in nature, economically self-interested, and enforced with sanctions. A member school that violates NCAA rules against paying athletes is subject to economic sanctions, such as a prohibition against television or bowl game appearances or temporary suspension of play in a sport—either of which may result in the loss of substantial revenues to a school's athletic program.<sup>110</sup> In *Brown University II*, the district court found that a school's failure to comply with the Ivy Overlap agreement could result in severe sanctions, making incidents of cheating

107. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 99, 111 (1984). "Market power is the ability to raise prices above those that would be charged in a competitive market." *Id.* at 109 n.38.

108. 805 F. Supp. 288, 301 (E.D. Pa. 1992).

109. Carlson & Shepherd, *supra* note 7, at 563–65; Morrison, *supra* note 106, at 811; Richmond, *supra* note 106, at 271. See generally DAVID A. GARVIN, *THE ECONOMICS OF UNIVERSITY BEHAVIOR* 7–16 (1980) (discussing the segmentation of the higher education market and noting the existence of a separate submarket for prestigious high quality institutions).

110. See, e.g., McCormack v. NCAA, 845 F.2d 1338, 1341–42 (5th Cir. 1988) (stating that the school's alumni, cheerleaders, and football players wrongly brought suit on behalf of the school after the school's football program had been suspended by the NCAA); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1985) (stating that the university's football program was prohibited from participating in post-season competition and from appearing on television according to an NCAA ruling). The NCAA is appropriately characterized as a "monopsonist" because its members have the collective ability to depress the offered price for college athletes' services as they jointly constitute a substantial segment of the demand for their services.



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University recruiting of elite students and athletes is a commercial activity motivated by economic concerns. Therefore, traditional antitrust analysis should be applied to restraints on price competition among schools desiring the talents of those students and athletes. The ultimate issue in the analysis becomes: What is "the competitive significance of the restraint"?<sup>112</sup> The Supreme Court has held that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."<sup>113</sup>

Collective restraints on price competition for mutually desired students and athletes have similar anti-competitive effects. First, exceptionally talented students and athletes are deprived of the opportunity to choose a school based on price considerations. The value of a particular student or athlete to a school may exceed the jointly established maximum financial aid or scholarship value. Limiting the amount of financial assistance that can be awarded prevents the free market from establishing the market value for a student's academic prowess or an athlete's physical skills and abilities.

Second, preventing price competition for sought-after athletes and students unfairly redistributes wealth from students to colleges and universities. Continuing to enroll a high quality student body is necessary to attract alumni contributions, thereby expanding university endowments. Outstanding students or athletes may generate more revenue for their respective schools than the cost to educate them or the cost to have them participate on their athletic teams. A superstar athlete, like Bo Jackson or Patrick Ewing, or the collective efforts of lesser talented athletes, may generate athletic revenues for a university that greatly exceed the individual or aggregate cost of their athletic scholarships.

Third, restraints on price competition are likely to cause inefficient non-price competition for students and athletes. Universities attempt to differentiate themselves by offering their students higher quality facilities and services, such as better professors, well manicured grounds, more ornate dormitories and classrooms, elaborate recreational opportunities, and extensive medical and counseling services.<sup>114</sup> Athletic departments entice athletes with highly regarded and well known coaches, modern stadiums and training facilities, promises of playing time, and media exposure to enhance the opportunities of a future professional career, as well as special dormito-

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111. *United States v. Brown Univ. II*, 805 F. Supp. 288, 296 (E.D. Pa. 1982).

112. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984) (quoting *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

113. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

114. *Carlson & Shepherd*, *supra* note 7, at 587-89.

ries, fancy food, and other amenities.<sup>115</sup> Students may prefer lower tuition prices, and athletes may desire higher compensation for playing, although unrestrained price competition may result in the provision of a lower level of amenities. Universities are able to subsidize unnecessary or undesired facilities and services with the cost savings from restrictions on price competition.

Fourth, a collective unwillingness to engage in price competition causes allocative inefficiency in matching students and athletes with universities, thereby preventing maximum benefits to both parties. A prohibition on price competition may prevent a university from offering greater financial aid and from luring a student away from a slightly higher ranked university whose attendance would enhance the former university's prestige. Similarly, Northwestern University may be unable to attract a top athlete away from Notre Dame unless it is able to offer a financial package that exceeds the value of an athletic scholarship. Ordinary free market forces that combine both price and non-price competition should result in the optimal allocation of human resources among universities in the recruiting of elite students and athletes.<sup>116</sup> Under free market conditions, a university would be willing to provide financial assistance up to the amount that the student or athlete will benefit the institution, and the student or athlete will choose the university that is perceived to offer the maximum net benefits.

To justify the anti-competitive effects of price fixing in connection with the recruiting of elite students and athletes, this restraint must promote a pro-competitive economic justification that cannot be achieved by a substantially less restrictive alternative.<sup>117</sup> In other words, price fixing by universities for desired human resources is legal only if it has a net pro-competitive effect that cannot be accomplished by other viable means. The remainder of this Article will discuss the primary justifications asserted by universities for agreeing not to engage in price competition for elite students and athletes.

## VI. PRESERVING COMPETITIVE BALANCE

The Supreme Court has held that jointly establishing a uniform price for a product or service that cannot be produced without collaboration

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115. SPERBER, *supra* note 102, at 229–31.

116. See Carlson & Shepherd, *supra* note 7, at 607, 605–08 (arguing that “student and institutional quality should match as well in a system with perfect price competition as in a system with no price competition”).

117. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 113–20 (1984). *Accord* National Soc’y of Prof. Eng’rs v. United States, 435 U.S. 679 (1978) (rejecting claimed non-economic justification for price fixing and noting existence of substantially less restrictive means for preventing deceptively low bids).

among competitors is legal absent a substantially less restrictive means of ensuring product or service availability.<sup>118</sup> Although maintaining the competitive balance among amateur athletic teams that regularly play games together is a legitimate objective necessitating some agreement on recruiting practices,<sup>119</sup> an NCAA-imposed and enforced national ban on all price competition for athletes is overbroad. Courts generally assume that all 1,152 NCAA member schools must agree on a uniform maximum "compensation" level for all athletes to preserve the integrity of intercollegiate sports and ensure balanced competition.<sup>120</sup> This apparent underlying assumption is incorrect. Not all NCAA member schools compete against each other in all sports. Rather, NCAA schools are grouped by division for purposes of applicable bylaw legislation and competition in NCAA championships.<sup>121</sup> For example, although Notre Dame regularly plays football against Big Ten Conference schools such as Michigan and Purdue, it generally does not play Division III schools such as Harvard and Yale.

There would be viable regional and national intercollegiate athletic competition absent NCAA-enforced nationwide restraints on price competition for athletes. Although some limits on price competition for athletes appear necessary to ensure balanced competition among members of the same league or conference, the NCAA's nationwide ban on price competition is overbroad and unnecessary.<sup>122</sup> On the other hand, it may be permissible for a smaller group of geographically-dispersed schools, such as Division III universities or the sixty-six members of the College Football Association, to agree on the maximum compensation for athletes if necessary to preserve the integrity of athletic competition among their members.

Invalidation of current NCAA restraints on price competition would allow universities to align themselves consistent with the economic potential of their athletic programs. Economic factors are already driving conference expansion and realignments by major football and basketball powers. A super conference of universities with big-time athletic programs may agree to permit its members to pay athletes a stipend in addition to educational costs to attract desired athletes. Doing so would enable these schools to acquire the best athletes, thereby enhancing the quality of their athletic teams and stimulating consumer interest in their "on-the-field" product.

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118. *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979).

119. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984).

120. See *supra* notes 16-35 and accompanying text.

121. NCAA MANUAL, art. 20 (1994-95).

122. It is arguable that the NCAA's ban on price competition actually inhibits competitive balance by enabling universities with more prestigious athletic programs to continue attracting top athletes and preventing schools with lesser athletic programs from fielding stronger teams by offering greater financial incentives to the best athletes.

Other schools may choose to limit athletic scholarships to the value of educational expenses or to not offer athletic scholarships at all, as currently done by NCAA Division III universities.<sup>123</sup> Thus, free market forces, considering the revenue-generating potential of individual athletic programs, and the association or league need for competitive balance would most effectively match athletes and universities by ensuring a fuller consideration of the potential economic benefits of a particular athlete's services and the corresponding costs of acquiring those services.

## VII. PRESERVING AMATEURISM

Courts also view the NCAA's ban on "paying" athletes as a pro-competitive means of preserving the unique character of amateur sports, which are considered distinct from professional sports.<sup>124</sup> The Supreme Court has stated that "to preserve the character and quality of the 'product' [college sports], athletes must not be paid."<sup>125</sup> The Court assumes that the primary distinguishing feature between college and professional sports is that only those athletes playing professionally are paid for their services. The non-payment of amateurs maintains the perceived purity of intercollegiate athletics, thereby accounting for their enormous popularity.

In many ways, college sports, particularly high-caliber football and basketball programs, are more similar to professional sports than amateur sports at the high school and youth levels. Like professional athletes, scholarship athletes have a contractual relationship with their universities.<sup>126</sup> In both instances, athletes receive a quid pro quo for playing. Professional athletes receive money and other benefits for playing; college athletes receive in-kind compensation comprised of tuition, room and board, and related educational expenses.

Elite college athletes often choose to attend a particular university due to the caliber and quality of its team in a particular sport. The university's academic reputation may only be a secondary consideration.<sup>127</sup> Many elite athletes attend college primarily to refine their athletic skills in anticipation of a future professional career or opportunity to participate in the Olympics, rather than to develop their academic potential.<sup>128</sup> For these athletes, participation in intercollegiate athletics is more than an "avocation" and is not primarily motivated by the educational, physical, mental, and social bene-

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123. NCAA MANUAL, art. 20, bylaw 20.11.2 (1994-95).

124. See *supra* notes 16-35 and accompanying text.

125. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

126. See, e.g., Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. App. 1972) (holding that an athletic scholarship is a contract between athlete and university).

127. SPERBER, *supra* note 102, at 8-9.

128. *Id.*

fits espoused in the NCAA's creed of amateurism.<sup>129</sup>

Intercollegiate sports, like professional sports, generate millions of dollars for their sponsoring entities. Both college and professional sports are shown extensively on television and have rabid followers. Over the last forty years, college sports have grown from a small business into a major industry grossing over one billion dollars in revenues per year.<sup>130</sup> Large NCAA member universities generate millions of dollars annually from the operation of their intercollegiate athletics programs.<sup>131</sup> Even smaller NCAA schools that do not participate in intercollegiate football generate significant revenues from their sports programs.<sup>132</sup> College athletics programs typically earn substantial revenues from ticket sales, guarantees for playing away games, payouts from participating in bowl games and tournaments, television appearances, as well as from sales of licensed merchandise bearing the university's name or logo and corporate sponsorships.<sup>133</sup> The success, popularity, and economic viability of college and professional teams is largely dependent on the athletic abilities and skills of their players.

It is unlikely that the tremendous popularity of intercollegiate sports is a result of the amateur status of college athletes. Other factors seem to be more significant in accounting for the strong national public interest in college sports. For example, alumni pride and loyalty, tradition, long-standing rivalries, national rankings, conference and national championship tournament competition, and exciting play probably contribute to the public obsession with college sports more than the "amateur" status of college athletes.

Allowing universities to engage in price competition for college athletes will not destroy any judicially perceived "unique character" of intercollegiate sports that distinguishes them from professional sports.<sup>134</sup> Although college athletes historically have not received a monetary stipend for playing a sport, allowing such a payment would not change the nature and quality of intercollegiate athletics. Academic eligibility requirements could continue to be used to preserve the athlete's status as a student.<sup>135</sup> Requiring that athletes be full-time students, while limiting college athletic

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129. See *supra* note 95 and accompanying text.

130. FLEISHER, *supra* note 3, at 4.

131. DANIEL L. FULLIS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS—1993 8 (1994).

132. *Id.*

133. SPERBER, *supra* note 102, at 30–91.

134. NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 100–02 (1984).

135. See also Deborah E. Klein & William B. Briggs, *Proposition 48 and the Business of Intercollegiate Athletics: Potential Antitrust Ramifications Under the Sherman Act*, 67 DENV. U. L. REV. 301 (1990) (discussing whether NCAA academic eligibility standards for student-athletes

eligibility to four years and other jointly determined requirements regarding team size, number of games, and practice seasons and times, should maintain the fundamental nature of college athletics and continue to distinguish them from professional sports.

A complete restriction on price competition for college athletes imposed by a national organization of economic competitors with disciplinary powers does not further a legitimate pro-competitive objective. Preserving the noneconomic social welfare goal of amateurism in college sports should not be accepted as a justification for horizontal price fixing. Continuing to recognize such a justification will prevent athletes from sharing in the economic benefits that their services allow university athletic departments to derive.

Some commentators assert that NCAA restrictions on price competition do not suppress the "compensation" that intercollegiate athletes receive for playing their respective sports below amounts that would otherwise result if competitive bidding were permissible.<sup>136</sup> Others argue that the direct, indirect, and intangible benefits of a college degree financed by an athletic scholarship exceed the fair market value of an athlete's services rendered to a university.<sup>137</sup> These arguments, however, do not legitimately justify price fixing. There is a strong national policy in favor of having the free market determine prices, and the asserted reasonableness of a price fixed by competitors is not an accepted justification.<sup>138</sup>

It is possible that permitting universities to engage in price competition for athletes will reduce available university-provided financial assistance to lesser-talented athletes or those participating in non-revenue-producing sports. Title IX of the Education Amendments of 1972,<sup>139</sup> which requires proportional athletic opportunities and financial assistance for both sexes,

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violate antitrust laws); see generally NCAA MANUAL, art. 14 (1994-95) (listing the academic requirements for student-athletes under NCAA bylaws);

136. Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes?—An Economics and Legal Reinterpretation*, ANTITRUST BULL., Summer 1987, at 373.

137. Vincent J. Dooley, *Compensation to Student-Athletes Already Exists Without Direct Payments*, ATHLON'S FOOTBALL 1994, at 53 (1994).

138. See, e.g., *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) ("The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act 'precludes inquiry into the question whether competition is good or bad.' . . . Respondents' argument, like that made by the petitioners in *Professional Engineers*, ultimately asks us to find that their boycott is permissible because the price it seeks to set is reasonable. But it was settled shortly after the Sherman Act was passed that it 'is no excuse that the prices fixed are themselves reasonable.' ") (citations omitted); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) ("[U]niform price fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon.").

139. 20 U.S.C. §§ 1681-88 (1988).

should adequately protect the interests of female intercollegiate athletes.<sup>140</sup> Male athletes, however, may receive reduced financial assistance for playing an intercollegiate sport, particularly if it does not provide net revenues to a university. While this would be an unfortunate consequence of price competition, it would flow from the operation of free market forces. A university may decide to subsidize an intercollegiate sport that loses money and continue to offer financial incentives to participating athletes if the university's benefits exceed those costs. Alternatively, a university could allow students to continue deriving the educational benefits of participation in certain sports by offering them as club or intramural sports.

#### VIII. ENHANCING ACCESSIBILITY AND QUALITY OF HIGHER EDUCATION

In *United States v. Brown University III*,<sup>141</sup> the Third Circuit held that ensuring that financial aid is available to needy students is a pro-competitive economic justification for the Ivy Overlap Group's elimination of price competition for talented students among member schools.<sup>142</sup> The alleged objective of this joint program was to increase access to higher education for needy students and to enhance socio-economic diversity within university student bodies.<sup>143</sup>

Contrary to the Third Circuit's holding, coordinating financial aid distribution policies to ensure the availability of money for need-based financial aid is not a pro-competitive economic justification. It does not increase the total amount of financial aid available to all students or the total number of students admitted to Ivy Overlap member institutions. It is unclear whether the Ivy Overlap Group agreement allowed member schools to increase their aggregate net tuition revenues. Absent the Ivy Overlap Group agreement, individual participating universities have an economic incentive to award increased financial aid to certain desired students,<sup>144</sup> reducing the net tuition costs of these students, which would result in an apparent decline in a university's aggregate net tuition revenues.

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140. Courts have applied Title IX to prevent universities from dropping women's intercollegiate athletic teams as a cost-cutting measure if doing so causes disproportionate athletic participation opportunities among the sexes. *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) (stating that an educational institution can violate Title IX by failing to accommodate students' athletic interests and abilities, even if it meets federal regulatory requirements of financial assistance and educational equivalents equality); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (holding that the university violated Title IX of the Education Amendments Act of 1972 when it discontinued the women's varsity fast pitch softball team, and issuing a permanent injunction reinstating program).

141. 5 F.3d 658 (3d Cir. 1993).

142. *Id.* at 674-75.

143. *Id.*

144. *See supra* notes 7-9 and accompanying text.

The Ivy Overlap Group agreement has the pro-competitive effect of decreasing the net tuition cost of an elite university education for talented, needy students. This goal, however, is accomplished by a forced cross subsidization of the educational costs of poor students by rich students.<sup>145</sup> The validity of such a redistribution of financial resources among students merely implicates social welfare concerns that should not be accepted as a justification for anti-competitive conduct. Moreover, price competition among universities seeking to enhance the socio-economic diversity of their respective student bodies may be the best means of maximizing available financial aid for needy students. It seems anomalous that universities would have a strong interest in student diversity without having a corresponding economic incentive to compete for students that will enable them to achieve this objective.

Assuming that the socio-economic diversity contributed by talented needy students enhances the overall quality of education provided to all students, the total elimination of price competition resulting from the Ivy Overlap Group's agreement remains unjustified.<sup>146</sup> The Supreme Court has recognized that competition is the preferred means of ensuring that the quality of available products and services is responsive to consumer demand.<sup>147</sup> To the extent that quality higher education is dependent upon a diverse student body, there is a marketplace incentive for each member of the Ivy Overlap Group to individually allocate its financial aid resources accordingly.

#### IX. PROBABLE EFFECTS OF PRICE COMPETITION

Applying traditional antitrust analysis, it is unlikely that agreements by the NCAA or the Ivy Overlap Group members to eliminate price competition for mutually desired talented students or athletes is legal under the Sherman Act. These agreements have clear anti-competitive effects that are not justified by pro-competitive economic objectives. Rather, price competition, driven by each member university's independent economic interests, probably would allow institutions of higher education to achieve their legitimate objectives, but at a higher cost to universities.

University price competition for students and athletes would likely in-

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145. Morrison, *supra* note 106, at 812-13, 822-23.

146. Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 422 (1990) (rejecting claimed quality enhancement defense because it is not a judicial "task to pass upon the social utility or political wisdom of price-fixing agreements").

147. *Id.* at 423; *see also* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (stating that the Sherman Act was designed to prevent "unreasonable restraints on competition," which would enable consumers to make price comparisons and other decisions related to the goods available).



crease the financial rewards, in the form of money or in-kind benefits, offered to exceptionally talented students and athletes. A school has a strong economic incentive to attract the best students and athletes to its campus. On the other hand, considerations of intra-institutional equality and morale may discourage a university from providing widely varying amounts of financial incentives to its athletes and students.<sup>148</sup> Developing a sense of team work and unity is particularly important in the context of athletics. Jealousy and ill-will among team members receiving differing financial incentives to play a sport may be divisive and counterproductive to the development of a successful team. These factors may significantly influence a university's independent decision regarding the nature and character of any price competition it is willing to engage in for students and athletes.

Price competition will enable students and athletes to weigh monetary considerations along with non-price factors in selecting a university. Sought-after students will have the opportunity to consider different financial incentives, as well as a university's academic quality and prestige, along with the opportunities provided by having a degree from the institution. Top-flight athletes will evaluate the amount of offered compensation for playing a sport, as well as the athletic and academic opportunities provided by a particular university. A highly desirable effect of price competition may be the elimination of inefficient non-price competition by universities for coveted students and athletes. University financial resources would be more effectively utilized to meet the mutual needs and interests of schools, students, and athletes.

Price competition may also have the adverse effects of reducing available financial aid for marginal students and scholarships for lesser talented athletes. Paying athletes would further erode the out-dated concept of amateurism in intercollegiate athletics. In addition, talented rich students may receive unneeded financial assistance to attend a university that equally talented poor students cannot afford to attend.

If the foregoing effects are deemed to be socially undesirable, or free market price competition adversely affects academic or athletic programs, Congressional corrective action may be necessary. Congress, representing broad political and societal perspectives, may establish the bounds of university cooperation required to achieve social welfare objectives that are not furthered by the operation of the free market. Under current law, universities may petition Congress jointly for a limited exemption from the antitrust laws for any concerted anti-competitive conduct that they believe is justified on noneconomic policy grounds.<sup>149</sup>

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148. Carlson & Shepherd, *supra* note 7, at 601-03.

149. The so-called Noerr-Pennington doctrine immunizes collective petitioning of a legisla-

Collective petitioning for antitrust immunity for the horizontal price fixing necessary to further social welfare objectives is preferable to price fixing by economically self-interested universities to further their own objectives. In this way, all affected parties, including students and athletes, as well as those representing the public interest, will have a voice in appropriately balancing the effects of eliminating university price competition for elite students and athletes.

#### X. CONCLUSION

University recruiting for elite students and athletes is a commercial activity that should be subject to traditional antitrust analysis. Agreements to eliminate price competition for talented students and athletes have clear anti-competitive effects. There are no legitimate pro-competitive economic justifications for associations of universities with market power to prohibit their members from independently determining the amount and nature of financial incentives to offer coveted students and athletes that cannot be achieved by substantially less restrictive means. If the normal operation of free market forces does not achieve or advance desired noneconomic social welfare objectives, Congress should determine whether university collaboration should displace price competition for students and athletes.

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tive body for an anti-competitive purpose. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

