

# Notes

## **Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes**

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Las Vegas businessman Raul Bey agreed in February 1995 to spend one year in a Florida prison, pay a \$2000 fine, and reimburse the state for \$10,000 in investigative costs. The crime to which he pled no contest: failing to register as a sports agent.<sup>1</sup> At the time, Florida law made being or attempting to become the representative of a student athlete without first registering with the state a third-degree felony punishable by a \$5000 fine and five years in jail.<sup>2</sup> According to the statute's preamble, criminalizing sports agent conduct serves to "protect the interests of student athletes and academic institutions by regulating the activities of athlete agents."<sup>3</sup> The events leading to Bey's arrest, however, suggest the law has a considerably less noble purpose and less far-reaching effect.

Hoping to secure product endorsements and representation agreements from college athletes, Bey had teamed up with Nate Cebrun, a man in the business of referring athletes to sports agents for a commission.<sup>4</sup> Bankrolled by Bey, Cebrun traveled to Florida State University (FSU) in Tallahassee in October 1993, lavishing cash on FSU players and promising them decadent trips to Las Vegas.<sup>5</sup> Having captured the attention of some of the Seminoles, Cebrun returned to Las Vegas, leaving Paul Williams, a former Tallahassee high school football coach acquainted with some FSU players, to distribute

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1. "Agent" Pleads No Contest, ST. PETERSBURG TIMES, Feb. 11, 1995, at 2C. Bey also faced federal charges in Las Vegas for allegedly dealing in stolen computer parts. *Id.*

2. See FLA. STAT. ANN. §§ 468.453, 775.082, 775.083 (Harrison 1994).

3. *Id.* § 468.451. This preamble was preserved when the Florida legislature amended the statute in 1995. See FLA. STAT. ANN. § 468.451 (West 1996).

4. Sonja Steptoe & E.M. Swift, *Anatomy of a Scandal*, SPORTS ILLUSTRATED, May 16, 1994, at 18, 20.

5. *Id.* at 24-25.

more money among those who had expressed an interest in Cebrun's overtures.<sup>6</sup>

Cebrun returned to Florida State with Bey in November to make grander gestures and promises. On one such trip, they passed out hundred-dollar bills and promised a regular allowance to those who would agree to accept their agent referrals.<sup>7</sup> Another incident—one that remains infamous—captured headlines and turned the pair's recruitment campaign into a national scandal. Apparently at Cebrun's behest, he and Bey took a group of FSU players to a Foot Locker store just as the store was to close. With only Bey, Cebrun, and the players behind the locked doors, the players grabbed shoes, hats, jackets, shirts, and anything else they wanted—\$6000 worth of merchandise in all. Bey footed the bill and later treated some of the athletes to a \$600 dinner.<sup>8</sup> Shortly thereafter, Bey and Cebrun had a falling-out, and the players lost all interest. Bey was left with nothing to show for the \$60,000 he claims to have spent on the recruitment effort.<sup>9</sup>

To someone unfamiliar with the mores of American college sports, Bey's plan might seem to be a sensible business strategy, though perhaps one lacking in taste. Among followers of National Collegiate Athletic Association (NCAA) sports, however, such actions carry a serious stigma. Universities and colleges that belong to the NCAA must disqualify student athletes who accept gifts or sign representation contracts with sports agents.<sup>10</sup> The "Foot Locker scandal" was trumpeted by the national media as representative of the corruption of college football and the greed of agents and players.<sup>11</sup> FSU athletic director Bob Goin cast the athletes and the university as victims of "the sleazebags who filter onto our campus."<sup>12</sup> Head coach Bobby Bowden, emphasizing his staff's impotence to prevent gifts to players, added, "If your daddy's running around on his wife, she's the last one to find out. What do you expect us to do?"<sup>13</sup> Prompted by the sensational attention being paid the incident, rival University of Florida coach Steve Spurrier quipped that FSU "is now known as Free Shoes University."<sup>14</sup>

As Bey and other would-be sports agents have learned, attempting to recruit student athletes not only generates bad publicity, it is also illegal in twenty-one states. This Note argues that state laws criminalizing contact

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6. *Id.* at 20, 21, 22, 25.

7. *Id.* at 28.

8. *Id.* at 19–20, 26.

9. *Id.* at 20.

10. See *infra* note 25 and accompanying text.

11. See, e.g., Brian Hewitt, *Florida St. Still Shopping; Seminoles Seek a Clean Image This Season*, CHI. SUN-TIMES, Nov. 11, 1994, at 141; Johnette Howard, *FSU's Dirt Shouldn't Sully Bowden*, WASH. POST, May 15, 1994, at D4; S.L. Price, *Victory, But Not Success*, SPORTS ILLUSTRATED, May 16, 1994, at 84.

12. Steptoe & Swift, *supra* note 4, at 21.

13. *Id.*

14. Peter Kerasotis, *Fla. State Troubles No Surprise to Spurrier*, USA TODAY, June 10, 1994, at 3C.

between student athletes and sports agents are invalid under the Sherman Antitrust Act and undermine the professed goals of the NCAA. Part I describes the structure and policies of the NCAA. Part II illustrates the prevalence and the consequences of violations of the NCAA rule against student athletes dealing with sport agents. Part III reviews the various state laws punishing sports agents for trying to recruit student athletes and questions the laws' underlying rationale. Part IV traces the interaction between federal antitrust law and state law and examines two independent grounds on which the state laws restricting contact between athletes and agents can be invalidated. This Note does not argue that under the Sherman Act states lack the power to regulate sports agents. It argues only that states may not legally criminalize the acts of consenting adults seeking to execute mutually beneficial representation agreements simply because they violate the rules of the NCAA.

## I. THE NCAA

Like most universities competing in intercollegiate athletics, Florida State is a member of the NCAA, which is responsible for overseeing athletic competitions among its member institutions. As of December 1994, the NCAA had 1152 members, 246 of which were conferences and 906 of which were universities and colleges (member institutions).<sup>15</sup> The members are grouped into three divisions according to the number of athletes a university fields, the number of sports it sponsors, the number of games it plays, and the financial aid it awards athletes.<sup>16</sup> Of the member institutions, 302 (33%) were classified as Division I; 247 (27%) comprised Division II; and 357 (39%) were in Division III.<sup>17</sup> Division I schools, such as Florida State, typically field the most competitive teams.

The self-proclaimed "basic purpose" of the NCAA 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."<sup>18</sup> Accordingly, it promulgates rules governing virtually all aspects of competition among its members. The NCAA Constitution and Bylaws delineate with great specificity the qualifications student athletes must meet to remain eligible to compete and the requirements member institutions must fulfill to remain in good standing. The NCAA can enforce its rules only against member institutions. When it determines an athlete is ineligible for competition, it

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15. Telephone Interview with Shawna Hutchins, NCAA Legislative Assistant (Feb. 13, 1995) [hereinafter Hutchins].

16. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1995-96 NCAA MANUAL § 20.9-20.11, at 361-77 (1995) [hereinafter NCAA MANUAL] (Operating Bylaws).

17. Hutchins, *supra* note 15.

18. NCAA MANUAL, *supra* note 16, § 1.3.1, at 1 (Constitution).

directs the athlete's school to suspend him from play. Member institutions that violate NCAA rules or directives can be fined, forced to forfeit past victories, or have their recruiting activities curtailed.<sup>19</sup> In cases of flagrant or repeated violations, a university is subject to several stricter penalties, including a two-year ban from competing in a sport altogether<sup>20</sup>—the so-called “death penalty.”

The NCAA rules governing student athletes are meant to ensure that only those who meet the NCAA definition of “student athlete” compete: “An amateur student athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation.”<sup>21</sup> Student athletes must be enrolled full-time in a curriculum leading to a degree and must make regular progress toward that degree.<sup>22</sup> They may not receive money or aid in excess of the total cost of tuition, fees, books, room, and board from virtually any source—including, in the case of Division I players, off-campus employment.<sup>23</sup> An NCAA football player who joins the National Football League (NFL) draft irrevocably loses his amateur status and thus becomes ineligible to compete in NCAA football, whether or not he is drafted.<sup>24</sup> The “no-agent rule” prohibits players from accepting money or gifts from sports agents and from entering into representation agreements.<sup>25</sup>

Despite these rules and the NCAA's repeated assertions, several commentators have questioned whether the revenue-producing college sports—particularly football—are in any sense amateur or educational.<sup>26</sup> NCAA sports have undeniable commercial aspects and appeal. Division I sports alone enjoyed well over \$1.5 billion in revenue during the 1992–93

19. *Id.* § 19.6.1, at 346–47 (Operating Bylaws).

20. *Id.* § 19.6.2, at 347–50 (Operating Bylaws).

21. *Id.* § 12.02.1, at 69 (Operating Bylaws).

22. *Id.* § 14.1.6.2, at 134, § 14.4.3.2, at 153–54 (Operating Bylaws).

23. *Id.* § 15.1.1, at 184, § 15.2, at 185–91 (Operating Bylaws).

24. *Id.* § 12.2.4.2, at 74 (Operating Bylaws). A basketball player, however, may participate in the National Basketball Association draft and return to college competition within 30 days. *Id.* § 12.2.4.2.1, at 74 (Operating Bylaws).

25. *Id.* § 12.3.1, at 74 (Operating Bylaws).

26. See, e.g., *Banks v. NCAA*, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part); *Page v. Regents of Univ. Sys.*, 93 F.2d 887, 895–97 (5th Cir. 1937) (Hutcheson, J., dissenting), *rev'd sub nom. Allen v. Regents of Univ. Sys.*, 304 U.S. 439 (1938); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213 (1993); Thomas R. Kobin, Comment, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483 (1994); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299 (1992) [hereinafter *Sherman Act Invalidation*].

Football is the most lucrative of the college sports and, although the NCAA does not keep statistics on violations of the no-agent rule, media coverage implies that such violations most frequently occur in that sport. Also, college baseball and basketball players are subject to a considerably more lenient no-draft rule that allows them to ascertain their market potential in the professional arena without losing college eligibility. See NCAA MANUAL, *supra* note 16, § 12.2.4.2, at 74 (Operating Bylaws).

fiscal year.<sup>27</sup> The total revenues for all three divisions were more than \$2 billion.<sup>28</sup> Among the 106 member institutions with the most competitive athletic programs—those in Division I-A—football accounted on average for 67% of the revenue from men's sports.<sup>29</sup> "Glorified men at arms, they go abroad, the fighting men of their universities, bringing to it, if they have been well scouted, garnered and trained, fame, honor, and money galore. If they have not been, no fame, no honor, and a much smaller portion of the gate receipts."<sup>30</sup>

Not only is NCAA football a prosperous industry, but it provides the only practical forum for a football player hoping to play professionally to showcase and develop his talent. Only two of the 1279 players on NFL team rosters at the start of the 1994 season did not play for an NCAA institution.<sup>31</sup> Most of the other players attended Division I schools, whose athletes (not surprisingly) commit most violations of the no-agent rule.<sup>32</sup> One would expect, then, that at least some athletes play NCAA football in the hope that doing so will lead to a professional contract.

The NCAA professes that this is not, or should not be, so: "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."<sup>33</sup> The NCAA's emphasis on the education of student athletes protects its amateurism and eligibility rules from legal challenges, such as federal antitrust claims, that might otherwise result in their nullification.<sup>34</sup> It is curious, then, that the three NCAA divisions utilize disparate methods for gauging their athletes' scholastic ambitions. Divisions I and II have established lax minimum academic requirements for prospective and current student athletes.<sup>35</sup> Rather than ensuring that athletes competing in these divisions have an interest in education, the requirements allow each

27. DANIEL L. FULKS, REVENUES AND EXPENSES OF INTERCOLLEGIATE ATHLETIC PROGRAMS 11 (1994).

28. *Id.*

29. *Id.* at 15.

30. *Regents of Univ. Sys.*, 93 F.2d at 895 (Hutcheson, J., dissenting).

31. National Football League, NFL Rosters by College (Sept. 29, 1994) (on file with author).

32. "[A sports-agent violation] typically would involve those student athletes who have some prospect of competing in the professional sports and probably a majority of those would come from a Division I school." Telephone Interview with Lisa Dehon, NCAA Eligibility Representative (Feb. 13, 1995).

33. NCAA MANUAL, *supra* note 16, § 2.8, at 4 (Constitution).

34. *See, e.g.*, *Banks v. NCAA*, 977 F.2d 1081, 1089–90 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1343–45 (5th Cir. 1988); *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1495, 1496 (W.D. Wash. 1995). This issue is briefly addressed in Section IV.A.

35. To be eligible to compete, student athletes must have scored 700 out of a possible 1600 points on the Scholastic Aptitude Test (SAT) or 17 out of a possible 35 on the American College Test (ACT), and have achieved a 2.0 grade point average (GPA) on a 4.0 scale for 13 high school courses. NCAA MANUAL, *supra* note 16, § 14.3.1.1, at 142–43, § 14.3.1.2, at 144–45 (Operating Bylaws). Beginning in the 1996–97 academic year, the test-score and GPA requirements for Division I freshmen will be determined on a sliding scale. Students attaining only the minimum 700 SAT or 17 ACT score must have a 2.5 GPA, while students scoring at least 900 on the SAT or 21 on the ACT will be eligible with a 2.0 GPA. *Id.* § 14.3.1.1, at 144 (Operating Bylaws).

member institution to field athletes who are not in good academic standing under the institution's own criteria. For example, Division I athletes may continue to play sports even if their grade point averages are below that required by their colleges for graduation.<sup>36</sup> Student athletes competing in Divisions I and II must complete only 25% of their degree requirements after two years of enrollment, 50% after three years, and 75% after four years.<sup>37</sup> (It must be merely figuratively, then, that the *NCAA Manual* distinguishes only between two-year and four-year colleges.<sup>38</sup>) Division III, in contrast, does not impose academic requirements on its athletes. Instead, these athletes are subject to the same academic requirements as other students attending their respective colleges. Similarly, while Division I and II members award scholarships based solely on athletic talent,<sup>39</sup> Division III members do not award any financial aid for athletic ability absent a showing of need.<sup>40</sup>

These differing approaches indicate that Division I and II members are less concerned than Division III institutions about their student athletes' motivations for attending college. While Division III may have divined the best way "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body,"<sup>41</sup> Division I institutions have created a very high-profile, billion-dollar enterprise operating under a different set of rules than the institutions' academic programs. As a result, colleges that subordinate athletics to academics are viewed as exceptions to the norm by the mass media. One report, for example, described the New England Small College Athletic Conference (NESCAC), an NCAA Division III conference comprising small liberal arts colleges like Amherst, Dartmouth, and Middlebury, as playing "pure" college sports and being "above the fray" for putting "things academic ahead of things athletic."<sup>42</sup> The price paid by Division I institutions that operate their athletic and academic programs as separate enterprises has been NCAA penalties and public reprobation when athletes they recruit are caught violating NCAA rules.

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36. Division I athletes must attain 90% of the GPA required for graduation by the third year of enrollment and 95% of the average by the fourth year. *Id.* § 14.4.3.3.1, at 154-55 (Operating Bylaws). Division II athletes are required to have a 1.6 cumulative GPA after the first season of play, a 1.8 after the next, and a 2.0 thereafter. *Id.* § 14.4.3.3.2, at 155 (Operating Bylaws).

37. *Id.* § 14.4.3.2.2, at 154 (Operating Bylaws). The rule applies to students entering college after July 1992.

38. *See, e.g., id.* § 3.02.3, at 7, § 3.2.1.1, at 8 (Constitution).

39. This was not always so. From 1947 to 1952, the NCAA's "Sanity Code" allowed athletic scholarships only to students with financial need. "The goal of the code was to stop the unbridled spending by member institutions to recruit and retain student athletes." KENNETH L. SHROPSHIRE, *AGENTS OF OPPORTUNITY: SPORTS AGENTS AND CORRUPTION IN COLLEGIATE SPORTS* 61 (1990).

40. *NCAA MANUAL*, *supra* note 16, § 20.11.2, at 374 (Operating Bylaws).

41. *Id.* § 1.3.1, at 1 (Constitution).

42. Douglas S. Looney, *Pure and Simple*, *SPORTS ILLUSTRATED*, Oct. 31, 1994, at 68, 74, 77.

## II. VIOLATIONS OF THE NO-AGENT RULE

Anticipating NCAA action once the Foot Locker scandal erupted, Florida State suspended five athletes from play<sup>43</sup> and hired the law firm Bond, Schoeneck & King to investigate the alleged violations.<sup>44</sup> Less than one month later, allegations surfaced that sports agent Doug Andreus arranged for \$23,000 in loans to wide receiver Tamarick Vanover's mother.<sup>45</sup> Bond, Schoeneck & King's investigation, which cost FSU nearly \$400,000,<sup>46</sup> confirmed all the alleged violations and uncovered a new one: Three days before FSU defeated the University of Nebraska in the Orange Bowl to win the national championship, cornerback Corey Sawyer, apparently not satisfied with the pocket money and sportswear he received from Bey, purchased a \$29,000 automobile with money provided by another agent.<sup>47</sup>

The firm's report, which was given to the NCAA, found that FSU coaches and officials had no reason to know about the violations that occurred, but that they should be more vigilant in the future.<sup>48</sup> This finding is significant because if any coaches or officials had known or should have known of the violations, the NCAA could impose harsher penalties.<sup>49</sup> Failure to detect obvious infractions or failure to act on known infractions would indicate a lack of institutional control over a university's athletic program, a serious violation of NCAA principles.<sup>50</sup> As it turned out, the university might have spared

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43. Guard Patrick McNeil was suspended for three games; tailback Tiger McMillon and All-American linebacker Derrick Brooks were each suspended for two games; tackle Forrest Conoly was suspended "indefinitely" pending his cooperation with investigators. Franz Lidz & Richard O'Brien, *Seminole Justice*, SPORTS ILLUSTRATED, Aug. 8, 1994, at 10. Conoly ultimately missed four games. Alan Schmadtke, *NCAA to "Double-check" FSU*, ORLANDO SENTINEL, Feb. 25, 1995, at B1. Guard Marcus Long was also suspended for two games. Jack McCallum & Kelli Anderson, *With Fans Like This . . .*, SPORTS ILLUSTRATED, Sept. 5, 1994, at 11.

44. Mike Fish, *FSU Probe Finds Several Agent Violations*, ATLANTA J.-CONST., Dec. 10, 1994, at B-10. The NCAA's own investigation was delayed by a Florida law requiring the NCAA to observe specific procedural requirements in conducting the investigation. The Collegiate Athletic Association Compliance Enforcement Procedures Act, FLA. STAT. ANN. § 240.5339-.5349 (Harrison 1994), was ruled unconstitutional. *See NCAA v. Roberts*, No. 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994).

45. Douglas S. Looney & John Walters, *Seminole Shame*, SPORTS ILLUSTRATED, June 6, 1994, at 34, 35. Under NCAA rules, student athletes lose their eligibility if they, their family, or their friends accept money or other benefits not generally available to nonathletes and their family and friends. *See NCAA MANUAL*, *supra* note 16, § 16.12.1, at 224 (Operating Bylaws).

46. Fish, *supra* note 44, at B-10.

47. *What Was Reported and Found*, ST. PETERSBURG TIMES, Dec. 10, 1994, at 4C. Sawyer, who was drafted by the Cincinnati Bengals in 1994, was later charged with perjury for lying to a state attorney investigating the scandal. Prosecutors said the charges might be reduced if Sawyer testified against his agent. Ray Martinez, *Ex-Seminole Sawyer Charged With Perjury*, MIAMI HERALD, Apr. 7, 1995, at 2D.

48. "FSU's coaches and athletics administrators must learn from this case and must make themselves even more sensitive than they were to even the most remote signs or vague rumors of agent activity in and around their program." Phil Willon & Kevin Metz, *Law Firm Clears FSU Officials*, TAMPA TRIB., Dec. 10, 1994, Sports, at 1 (quoting Bond, Schoeneck & King's report to FSU).

49. *See NCAA MANUAL*, *supra* note 16, § 19.01.5, at 343 (Operating Bylaws).

50. *Id.* § 6.01.1, at 45 (Constitution).

itself the expense of investigating; rather than accepting the law firm's findings, the NCAA announced it would conduct its own investigation.<sup>51</sup>

Despite the national attention it drew, the Foot Locker scandal at Florida State is hardly an isolated incident. While estimates of the prevalence of violations of the no-agent rule vary significantly,<sup>52</sup> it cannot be said that they are uncommon. Former University of Miami player Benny Blades, for example, divulged in 1993 that, while playing for Miami's 1987 national championship team, he accepted between \$30,000 and \$40,000, some of which he used to buy a new sports car, from agent Mel Levine.<sup>53</sup> The NCAA learned in August 1995 that an agent gave \$1200 to University of Southern California (USC) wide receiver Keyshawn Johnson.<sup>54</sup> Two months later, California attorney and aspiring agent Robert Troy Caron agreed to pay \$50,000 to USC and was enjoined from contact with the university's athletes for attempting to recruit running back Shawn Walters.<sup>55</sup> Caron, who had allegedly hired Walters's roommates to assist him in recruiting Walters, accepted the penalties in a settlement agreement with USC.<sup>56</sup> Walters was temporarily suspended from play.<sup>57</sup>

Later that year, the NCAA placed the University of Alabama on two years' probation, barred the university from postseason bowl game competition, reduced the number of athletic scholarships the university could offer, and forced the Alabama Crimson Tide to forfeit their 1993 victories.<sup>58</sup> Such severe punishment was imposed because the university failed to investigate indications that All-American cornerback Antonio Langham had signed with an agent, signaling to the NCAA a lack of institutional control over athletics.<sup>59</sup> Langham had contracted with an agent following Alabama's championship victory over the University of Miami Hurricanes in the 1993 Sugar Bowl, yet played all eleven games the following season before Alabama

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51. Schmadtke, *supra* note 43, at B1.

52. See Landis Cox, *Targeting Sports Agents with the Mail Fraud Statute: United States v. Norby Walters & Lloyd Bloom*, 41 DUKE L.J. 1157, 1169 n.60 (1992); McCann Gar, *The Phone Calls from Sports Agents to Dave*, NEWS & REC. (Greensboro, N.C.), June 14, 1995, at C1 (estimating that 90% of football players picked in first round of NFL draft have broken no-agent rule); Robert McG. Thomas, *Illicit Pay in Wide Use, Study Contends*, N.Y. TIMES, Nov. 17, 1989, at A34.

53. Randall Mell, *Blades: 'Canes Paid by Agent*, ORLANDO SENTINEL, Aug. 28, 1993, at C1.

54. Danny Robbins, *Tape Links Sports Agent, USC's Johnson*, AUSTIN AM.-STATESMAN, Aug. 4, 1995, at D3.

55. Mark Asher, *Identifying Secret Agents: NCAA, Colleges Begin to Crack Down on Payments*, WASH. POST, Oct. 21, 1995, at B1.

56. *Id.*

57. Elliott Almond, *Trojans' Walters Gets Reprieve From NCAA*, L.A. TIMES, Dec. 16, 1995, at C1.

58. Jere Longman, *The NCAA Eases Penalties for Alabama's Football Team*, N.Y. TIMES, Dec. 1, 1995, at B17.

59. J.C. Clemons, *Bama Still Reluctant to Face Up to Misdeeds*, ATLANTA J.-CONST., Aug. 6, 1995, at F1. In addition, the university made misleading reports to the NCAA. Ivan Maisel, *Alabama's Probation Serves as Warning to All*, SPORTING NEWS, Aug. 14, 1995, at 51. Another player, Gary Jelks, had also received loans from an agent. *Alabama Admits to Violations*, TAMPA TRIB., Nov. 23, 1994, Sports, at 1.



suspended him.<sup>60</sup> (For their assistance with the investigation, Bond, Schoeneck & King billed Alabama \$500,000.<sup>61</sup>)

While published accounts relating violations of the no-agent rule abound,<sup>62</sup> the story of Norby Walters and Lloyd Bloom remains the most notorious sports agent scandal involving NCAA athletes. Walters, formerly a booking agent for such entertainers as Janet Jackson, Kool and the Gang, and Patti LaBelle,<sup>63</sup> formed World Sports & Entertainment, Inc. (WSE) with Bloom in 1984 to sign as many future NFL draft picks as possible.<sup>64</sup> A prospective client was typically offered a lump sum ranging from \$2500 to \$4000 and a \$250 monthly allowance.<sup>65</sup> Other perks included airline and concert tickets, clothing, and even automobiles.<sup>66</sup> An estimated \$800,000 later,<sup>67</sup> fifty-eight student athletes had signed postdated contracts with Walters and Bloom.<sup>68</sup> Partly because of the pair's rumored ties to organized crime,<sup>69</sup> all but two of these players signed with other agents before beginning professional careers and refused to reimburse Walters and Bloom.<sup>70</sup>

Walters sued some of his former clients for breaching their agreements and began revealing his dealings with the players to the media.<sup>71</sup> As details of Walters and Bloom's methods came to light, the pair's self-defeating antics captured the attention of law enforcement officials. The violent slashing and beating of sports agent Kathe Clements, who worked for an agency that signed three of WSE's former clients, prompted an FBI investigation.<sup>72</sup> Walters and Bloom allegedly had threatened Clements prior to the assault and also had

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60. See Mike Fish, *Bama, NCAA to Work Out Penalty*, ATLANTA J.-CONST., Nov. 23, 1994, at E1; Longman, *supra* note 58, at B18.

61. Clemons, *supra* note 59, at F1.

62. In addition to the accounts related in this part, see, e.g., Vahe Gregorian, *Report Says Middleman Sent Cash to MU's Crudup*, ST. LOUIS POST-DISPATCH, Nov. 8, 1994, at 1C (involving University of Missouri's Jevon Crudup); Bruce Hooley, *OSU's Galloway Suspended*, PLAIN DEALER (Cleveland), Sept. 8, 1994, at 1D (involving Ohio State University's Joey Galloway); *Huskies Investigate Loan of Car to Bryant*, L.A. TIMES, Dec. 19, 1992, at C6 (involving University of Washington's Beno Bryant); Eric Olson, *Phillips' Report Is Completed*, OMAHA WORLD-HERALD, Aug. 11, 1995, Sports, at 27 (involving University of Nebraska's Lawrence Phillips); Bruce Pascoe, *Cavagnaro Decides Stewart Won't Play*, LAS VEGAS REV.-J., June 21, 1995, at 1E (involving University of Nevada at Las Vegas's Kebu Stewart); Ann-Eve Pedersen, *UA Denies Gifts Violated Rules on Agents*, Mar. 16, 1995, ARIZ. DAILY STAR, at 1A (involving plane ticket bought for father of University of Arizona's Damon Stoudamire); John Romano, *Agents Sentenced; They Still May Be Liable to UF*, ST. PETERSBURG TIMES, May 12, 1990, at 1C (involving several University of Florida athletes); *Shackleford Admits Taking Money at N.C. State*, WASH. POST, Feb. 26, 1990, at B2 (involving North Carolina State University's Charles Shackleford).

63. Craig Neff, *Agents of Turmoil*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 34, 36.

64. Cox, *supra* note 52, at 1162.

65. *Id.* at 1164.

66. *Id.*

67. Neff, *supra* note 63, at 34.

68. *United States v. Walters*, 997 F.2d 1219, 1221 (7th Cir. 1993).

69. Cox, *supra* note 52, at 1166.

70. *Walters*, 997 F.2d at 1221.

71. Neff, *supra* note 63, at 34.

72. Cox, *supra* note 52, at 1167 n.55.

threatened to break the knees and hands of players who breached their contracts.<sup>73</sup>

The Department of Justice charged Walters and Bloom with conspiracy, racketeering, and mail fraud.<sup>74</sup> A jury convicted the agents, but the court of appeals reversed the judgment<sup>75</sup> and ordered that Walters and Bloom be retried separately.<sup>76</sup> After entering into a conditional plea agreement with the government, Walters faced only the mail fraud charge, of which he was eventually acquitted by the Seventh Circuit Court of Appeals.<sup>77</sup> The prosecution had proceeded on the theory that, by signing college athletes to representation contracts, Walters had caused their universities to mail fraudulent forms verifying the athletes' eligibility to a college football conference.<sup>78</sup> The court refused to hold that "all frauds involving big organizations necessarily are mail frauds, because big organizations habitually mail things."<sup>79</sup> Bloom was shot to death in his Malibu home on August 26, 1993.<sup>80</sup>

Some of the beneficiaries of Walters's flamboyant recruiting methods, like University of Tennessee wide receiver Tim McGee, who said he took \$3500 from Walters, had been hard-pressed for cash: "I had to take money from Norby. There were bills to be paid. My mom ain't working. I have no dad. I have two nieces and two sisters to support. Norby took me from rags to riches in one day."<sup>81</sup> Others simply used the money to live in grand style. Clemson University running back Ronnie Harmon admitted he accepted over \$54,000 from Walters, including a \$25,000 down payment on a leased Mercedes-Benz: "That's not so much money. What's that, \$27,000 a year? I had living expenses—an apartment and a car."<sup>82</sup> None, however, expressed any misgivings about his decision to take the money. "We all know that you take money from these guys but you don't have to go with them in the end," said University of Texas tight end William Harris, who took \$6000 from Walters. "Take all the money he's going to offer and just quit him when there's no more.' . . . 'Older players will tell you: Take money from agents, alumni, anybody who will give it to you; take all the money they'll give you.'"<sup>83</sup>

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73. Neff, *supra* note 63, at 34–35.

74. For a detailed account of the trial, see Cox, *supra* note 52, at 1160–90.

75. See *United States v. Walters*, 913 F.2d 388, 391–92 (7th Cir. 1990).

76. See *id.* at 393.

77. See *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) ("Walters is by all accounts a nasty and untrustworthy fellow, but the prosecutor did not prove that his efforts to circumvent the NCAA's rules amounted to mail fraud.").

78. *Id.* at 1221.

79. *Id.* at 1223.

80. *Ex-Agent Lloyd Bloom Found Dead in Malibu*, L.A. TIMES, Aug. 27, 1993, at C14.

81. Neff, *supra* note 63, at 39–40.

82. *Id.* at 36.

83. *Id.* at 42.

The FSU players involved in the Foot Locker scandal echoed this lack of remorse, making clear that the Florida statute prohibiting Bey's conduct protects anything but their interests. "I got a few baseball caps, some shirts, socks, shoes and two jackets. I saw the other guys grabbing things, and I said to myself, hey, I might as well go ahead and pick up a few things, too," FSU offensive tackle Marvin Ferrell said. "I knew it was illegal. I can't say why I did it."<sup>84</sup> Corey Sawyer added, "At Florida State you work so hard to give to that program and get nothing out of it. The most you can get out of it is a trip to the NFL. I felt I was entitled to money or clothing. Why couldn't I have it?"<sup>85</sup>

### III. THE RESPONSE OF STATE LEGISLATURES

Violations of the no-agent rule and the attendant penalties and scandals have provoked action by state legislatures, including Florida's. Six people were arrested and charged with violations of Florida's sports agent law as a result of the Foot Locker scandal.<sup>86</sup> Bey's agreement to pay \$12,000 and spend one year in jail represents the stiffest criminal penalty ever imposed for so-called sports agent "misconduct" in any state. Cebrun and Williams each pleaded no contest, paid a fine, and served less than thirty days' jail time.<sup>87</sup> Andreus was fined and placed on probation.<sup>88</sup>

Following the scandal, the Florida legislature amended its sports agent law. Florida is now the only state to test prospective agents' knowledge of the law and to impose continuing-education requirements.<sup>89</sup> Twenty-one other states—Alabama, Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, and Washington—also have legislation regulating sports agents. Most require agents to be registered with or licensed by the state.<sup>90</sup> Failure to do so can render any representation contract made with a student athlete in that state

84. Steptoe & Swift, *supra* note 4, at 26.

85. *Id.* at 21–22.

86. Jim Henry, *Foot Locker Issues Continue for FSU*, TAMPA TRIB., June 27, 1995, Sports, at 3; Alan Schmadtke, *Arrest Surfaces in Probe of FSU*, ORLANDO SENTINEL, Sept. 8, 1995, at C7.

87. *Bey Charged in FSU Probe*, ORLANDO SENTINEL, Jan. 7, 1995, at B2.

88. Schmadtke, *supra* note 43, at B1.

89. See FLA. STAT. ANN. §§ 468.453(2)(c), 468.4563 (West 1996). Members of the Florida bar are exempt from the examination requirement. *Id.* § 468.453(3).

90. See ALA. CODE § 8-26-4 (1993); ARK. CODE ANN. § 17-48-201(a) (Michie 1992); CAL. LAB. CODE § 1510 (West 1994); FLA. STAT. ANN. § 468.453 (West 1996); GA. CODE ANN. § 43-4A-4 (1994); IOWA CODE ANN. § 9A.3.1 (West 1995); LA. REV. STAT. ANN. § 4:422.A (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-407 (1992); MISS. CODE ANN. § 73-41-3 (1995); N.C. GEN. STAT. § 78C-72(b)(5) (1995); OKLA. STAT. ANN. tit. 70, § 821.62.C (West 1989); S.C. CODE ANN. § 59-102-20(A) (Law. Co-op. Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 8871, § 2(a) (West Supp. 1996); WASH. REV. CODE ANN. § 18.175.020 (West Supp. 1995).

void<sup>91</sup> or result in a forfeiture of the right to repayment for any loans made to a prospective client.<sup>92</sup> Maximum civil penalties range from \$1000 to \$100,000, and six states provide for maximum jail terms ranging from one to five years.<sup>93</sup>

Registration or licensure is, of course, a prerequisite for engaging in any number of professions, from practicing medicine to cutting hair, and while the expense and trouble incident to registering have been criticized,<sup>94</sup> the requirement cannot be said to be exceptional. Unlike doctors and stylists who are free to practice their professions on whoever will submit to their treatment, properly registered sports agents can face criminal penalties in each of the states with sports agent laws, save Arkansas, for dealing with student athletes. The statutes (hereinafter described as contact-restricting) of these twenty-one states vary in their exigency. Indiana's requires only that an agent, after entering into a contract with a student athlete, notify the athlete's university.<sup>95</sup> Kentucky's and Michigan's laws prohibit agents only from offering student athletes anything of value to induce them to enter into a contract and from paying university employees for client referrals.<sup>96</sup> Fourteen other states also forbid giving student athletes inducements to sign contracts,<sup>97</sup> and fifteen other states have outlawed compensating university employees for referring clients.<sup>98</sup> California goes one step further by also prohibiting students from

91. See ALA. CODE § 8-26-40 (1993); ARK. CODE ANN. § 17-48-102(b) (Michie 1992); CAL. LAB. CODE § 1546 (West 1994); FLA. STAT. ANN. § 468.454(7) (West 1996); GA. CODE ANN. § 43-4A-11(b) (1994); IOWA CODE ANN. § 9A.10 (West 1995); LA. REV. STAT. ANN. § 4:426.B (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-404 (1992); MISS. CODE ANN. § 73-41-15(3) (1995); N.C. GEN. STAT. § 78C-78(b) (1995); OKLA. STAT. ANN. tit. 70, § 821.66.B (West 1989); TEX. REV. CIV. STAT. ANN. art. 8871, § 8(b) (West Supp. 1996).

92. See ARK. CODE ANN. § 17-48-102(a) (Michie 1992); IOWA CODE ANN. § 9A.10 (West 1995); LA. REV. STAT. ANN. § 4:426.B (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-424(2) (1992); MISS. CODE ANN. § 73-41-15(2)(a) (1995); N.C. GEN. STAT. § 78C-78(a)(1) (1995); OKLA. STAT. ANN. tit. 70, § 821.66.A.2 (West 1989); TEX. REV. CIV. STAT. ANN. art. 8871, § 8(a)(2) (West Supp. 1996).

93. See FLA. STAT. ANN. § 468.4561 (West 1996); FLA. STAT. ANN. §§ 775.082-083 (West 1995); GA. CODE ANN. § 43-4A-11(a) (1994); IOWA CODE ANN. § 9A.11 (West 1995); MD. CODE ANN., BUS. REG. § 4-425 (1992); MISS. CODE ANN. § 73-41-15(1)(e) (1995); N.C. GEN. STAT. §§ 78C-78(c), 15A-1340.17 (1995); OKLA. STAT. ANN. tit. 70, § 821.66.C (West 1989); S.C. CODE ANN. § 59-102-20(C) (Law. Co-op. Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 8871, § 8(c) (West Supp. 1996); TEX. PENAL CODE ANN. § 12.21 (West 1993).

94. See, e.g., David L. Dunn, Note, *Regulation of Sports Agents: Since At First It Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1066 (1988).

95. IND. CODE ANN. § 35-46-4-4 (West 1994).

96. KY. REV. STAT. ANN. § 518.080 (Michie/Bobbs-Merrill 1994); MICH. COMP. LAWS ANN. § 750.411e(1) (West 1995).

97. See CAL. EDUC. CODE § 67360 (West 1989); FLA. STAT. ANN. § 468.456(1)(f) (West 1996); GA. CODE ANN. § 43-4A-16(b) (1994); IOWA CODE ANN. § 9A.8.3 (West 1995); LA. REV. STAT. ANN. § 4:424.A(7), (8) (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-421 (1992); MISS. CODE ANN. § 73-41-11(g) (1995); NEV. REV. STAT. ANN. § 597.920.1(d) (Michie 1994); N.C. GEN. STAT. § 78C-76(b)(4) (1995); OKLA. STAT. ANN. tit. 70, § 821.64.7 (West 1989); 18 PA. CONS. STAT. ANN. § 7107(a)(2) (Supp. 1995); S.C. CODE ANN. § 59-102-40(4) (Law. Co-op. Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(4) (West Supp. 1996); WASH. REV. CODE ANN. § 18.175.070(2) (West Supp. 1995).

98. See ALA. CODE § 8-26-34 (1993); CAL. LAB. CODE § 1539 (West 1989); FLA. STAT. ANN. § 468.456(1)(e) (West 1996); IOWA CODE ANN. § 9A.8.5 (West 1995); LA. REV. STAT. ANN. § 4:424.A(6) (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-419 (1992); MINN. STAT. ANN. § 325E.33.4 (West

accepting gifts from agents.<sup>99</sup> Two states make it illegal for agents to enter into representation agreements with student athletes,<sup>100</sup> and six others simply forbid agents to have any contact whatsoever (other than that permitted by the NCAA<sup>101</sup>) with students who are eligible to play intercollegiate sports.<sup>102</sup> If a student athlete does manage to sign a sports agent contract despite the above-mentioned prohibitions, ten states in addition to Indiana require the agent (and in some cases the student athlete as well) to send notice of the contract to the state or to the student's university.<sup>103</sup>

Though there are variations in the methods employed, the aim of each contact-restricting statute is the same: to remove any incentive for a sports agent to deal with a student athlete by criminalizing such behavior. Maximum civil penalties for violating a contact-restricting statute range from \$10,000 to the greater of \$100,000 or three times the amount offered or promised to an athlete, and jail sentences can be as long as five years.<sup>104</sup> Furthermore, universities in eight states can sue an agent for revenue lost as a result of being forced to declare a student ineligible or of being penalized for a violation of the no-agent rule by the NCAA; in three states, the student athlete can be sued

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1995); MISS. CODE ANN. § 73-41-11(f) (1995); NEV. REV. STAT. ANN. § 597.920.1(c) (Michie 1994); N.C. GEN. STAT. § 78C-76(b)(3) (1995); OKLA. STAT. ANN. tit. 70, § 821.64.6 (West 1989); 18 PA. CONS. STAT. ANN. § 7107(a)(3) (Supp. 1995); S.C. CODE ANN. § 59-102-40(2), (3) (Law. Co-op. Supp. 1993); TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(3) (West Supp. 1996); WASH. REV. CODE ANN. § 18.175.070(1)(b) (West Supp. 1995).

99. See CAL. EDUC. CODE § 67361(a) (West 1989). The maximum penalty is the greater of a \$1000 fine or a fine equal to the value of the gift accepted. CAL. EDUC. CODE § 67361(c) (West 1994).

100. See MISS. CODE ANN. § 73-41-11(g) (1995); 18 PA. CONS. STAT. ANN. § 7107(a)(1) (Supp. 1995).

101. NCAA member institutions can organize a "sports counseling panel" comprising only full-time university employees. The panel may interview prospective agents with student athletes and advise the students on career decisions. NCAA MANUAL, *supra* note 16, § 12.3.4, at 75.

102. See FLA. STAT. ANN. § 468.456(1)(I) (West 1996); LA. REV. STAT. ANN. § 4:424.A(9) (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-423 (1992); N.C. GEN. STAT. § 78C-76(b)(5) (1995); OKLA. STAT. ANN. tit. 70, §§ 821.62.A, 821.64.8 (West 1989); TEX. REV. CIV. STAT. ANN. art. 8871, § 6(b)(5) (West Supp. 1996).

103. See FLA. STAT. ANN. § 468.454(1) (West 1996); GA. CODE ANN. § 43-4A-16(a)(2) (1994); IND. CODE ANN. § 35-46-4-4(2) (West 1994); LA. REV. STAT. ANN. § 4:423.E (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-415(a)(1) (1992); NEV. REV. STAT. ANN. § 398.095.3 (Michie 1991); N.C. GEN. STAT. § 78C-75(c) (1995); OHIO REV. CODE ANN. § 4771.02(B) (Anderson 1994); S.C. CODE ANN. § 59-102-30(A), (B) (Law. Co-op. Supp. 1993); TENN. CODE ANN. § 49-7-2104(b)(4) (1990); TEX. REV. CIV. STAT. ANN. art. 8871, § 5(c) (West Supp. 1996). A twelfth state allows a student athlete to void any agent contract made prior to his sending a "waiver of eligibility" form to the state or to his university's athletic director. See MINN. STAT. ANN. § 325E.33.2 (West 1995).

104. See CAL. EDUC. CODE § 67360(d) (West 1989); FLA. STAT. ANN. § 468.454(1) (West 1996); IND. CODE ANN. § 35-46-4-4(2) (West 1994); IOWA CODE ANN. § 9A.11 (West 1995); KY. REV. STAT. ANN. § 518.080(2) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 4:426.C (West Supp. 1995); MD. CODE ANN., BUS. REG. § 4-425 (1992); MICH. COMP. LAWS ANN. § 750.411e(2) (West 1995); MINN. STAT. ANN. §§ 325E.33.3(2), 325E.33.4(2) (West 1995); MISS. CODE ANN. § 73-41-15(1)(e) (1995); NEV. REV. STAT. ANN. § 597.920.2 (Michie 1994); N.C. GEN. STAT. §§ 78C-78(c), 78C-79(a) (1995); OHIO REV. CODE ANN. § 4771.05(B) (Anderson 1994); OKLA. STAT. ANN. tit. 70, § 821.66.C (West 1989); 18 PA. CONS. STAT. ANN. § 7107(b) (Supp. 1995); S.C. CODE ANN. § 59-102-30(B) (Law. Co-op. Supp. 1994); TEX. REV. CIV. STAT. ANN. art. 8871, §§ 8(a)(1), 9(b) (West Supp. 1996); WASH. REV. CODE ANN. § 18.175.070 (West Supp. 1995).

for damages as well.<sup>105</sup> Such damages can easily run into the millions of dollars when broadcast revenues are considered. The deliberately intended and desired effect of the laws is to remove any opportunity for a student athlete to violate the NCAA no-agent rule.

These laws proceed from two popular misconceptions regarding sports agent dealings with student athletes. The first, that student athletes are somehow tricked into signing representation agreements by shady agents, is directly contradicted by the statements of players who have broken the no-agent rule.<sup>106</sup> While the agents involved may in fact have been shady, if not something worse, there is no question that these athletes understood the ramifications of their actions and that at least some of them intended to exploit the perception that they are victims by double-crossing the agents. (It was exactly this behavior that provoked Norby Walters to sue his former clients and to reveal his scheme to the press.)

Because general contract law principles protect against agreements induced by fraud or coercion, the view of athletes as victims of agents more likely stems from the premise that athletes do not know any better than to go along with what agents tell them. If that is the case, universities have a duty to prepare their athletes for professional sports dealings. Some universities, such as Duke and Temple, have established career-counseling programs that go beyond the NCAA's suggestion of a counseling panel.<sup>107</sup> They extensively educate athletes on how to deal with sports agents, how to negotiate favorable terms, what actions constitute violations of NCAA rules, and how best to launch successful athletic careers. Dr. Michael Jackson, the director of Temple's program, also maintains a database of agents with whom he has dealt and assists players ready to become professional athletes in their contract negotiations. The programs are solely for the protection of the athletes. "We don't want them to get ripped off," said Dr. Jackson. "It's probably the best way of deterring the exploitation of players."<sup>108</sup>

The second misconception underlying the statutes is that universities, besieged by sports agents who seduce their student athletes, are helpless to do anything about the problem. Because NCAA members have complete control collectively over intercollegiate sports and individually over their own admissions decisions, it is illogical to view them as victims of sports agents. They are always free either to change the rules or to deny admission to athletes primarily interested in professional sports. Furthermore, criminalizing the acts

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105. See FLA. STAT. ANN. §§ 468.456(6), 468.4562 (West 1996); GA. CODE ANN. § 43-4A-16(c) (1994); IOWA CODE ANN. § 9A.6.1 (West 1995); MISS. CODE ANN. § 73-41-23 (1995); NEV. REV. STAT. ANN. § 398.085 (Michie 1991); S.C. CODE ANN. § 59-102-30(F) (Law. Co-op. Supp. 1994); TENN. CODE ANN. §§ 49-7-2103, 49-7-2106, 49-7-2107 (1990); TEX. REV. CIV. STAT. ANN. art. 8871, § 8A(a) (West Supp. 1996).

106. See *supra* notes 81-85 and accompanying text.

107. See *supra* note 101.

108. Telephone Interview with Dr. Michael Jackson, Temple Univ. (Feb. 13, 1995).

of sports agents is antagonistic to the NCAA's philosophy and rules. NCAA rules exist not to prevent student athletes or sports agents from doing whatever they believe to be in their best interest, but to prevent universities from recruiting and retaining athletes who have no interest in a college education. The only deterrent to member institutions' recruiting such athletes is the likelihood that those athletes will break the rules and thereby expose the members to the threat of NCAA penalties. Eliminating agents from the picture with criminal penalties minimizes the possibility that athletes will be able to cheat. The statutes thus serve only to encourage NCAA members to recruit those athletes who make their teams most competitive without regard for their duties as NCAA members.

As Division III members demonstrate, truly amateur intercollegiate competition among student athletes can be achieved without resort to criminal prosecutions. While the popularity and revenues of NCAA Division I football would likely be diminished if it adopted policies similar to Division III's, that is no argument against the attainability of the NCAA's "basic purpose." It is safe to assume that, were all of college football truly amateur, the NFL would not be long in replacing its de facto minor league with a truly professional minor league. The interests of those players who have indicated their dissatisfaction with the present arrangement by cheating on the rules would be better served by the opportunity to play in such a league.

#### IV. APPLICATION OF FEDERAL ANTITRUST LAW

While several commentators have suggested that the NCAA eligibility rules violate the Sherman Act because they impede athletes in marketing their skills outside of the NCAA,<sup>109</sup> the invalidity of the contact-restricting statutes under the Act has been overlooked. Those commenting on laws regulating sports agents have proposed other problematic ways to reduce violations of the no-agent rule through criminal penalties, such as the enactment of uniform contact-restricting laws in every state<sup>110</sup> and the enactment of a federal contact-restricting statute.<sup>111</sup> Federal legislation in this area would be the worst possible result, however, because it would create an enduring anticompetitive structure extremely disadvantageous to those aspiring to careers as professional athletes. Such a statute could only be attacked on constitutional grounds or through the political process. Universities tempted to recruit athletes who are not quite students could not ask for better protection from NCAA

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109. See, e.g., Chin, *supra* note 26; Kobin, *supra* note 26; *Sherman Act Invalidation*, *supra* note 26. But see Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655 (1978).

110. See, e.g., T. Andrew Dow, Comment, *Out of Bounds: Time to Revamp Texas Sports Agent Legislation*, 43 SW. L.J. 1091, 1104-14 (1990); Curtis D. Rympa, Note, *Sports Agents Representing Athletes: The Need for Comprehensive State Legislation*, 24 VAL. U. L. REV. 481, 510-19 (1990).

111. See, e.g., Dow, *supra* note 110, at 1114-18; Dunn, *supra* note 94, at 1064-78.

penalties. As this part demonstrates, the existing contact-restricting statutes are susceptible to Sherman Act invalidation. Section A of this part briefly explains why, despite arguments to the contrary, the NCAA amateurism and eligibility rules have rightly withstood federal antitrust challenges. Section B traces the development of the state action immunity doctrine, which shields certain state legislation from antitrust attack, and shows that the contact-restricting statutes are an unlawful exercise of the states' power in light of the relevant case law.

### A. *Antitrust Challenges to NCAA Rules*

The Sherman Act outlaws all combinations that unreasonably restrain interstate trade or commerce<sup>112</sup> as well as all attempts to monopolize an interstate commodity.<sup>113</sup> Passed pursuant to Congress's constitutional power to regulate interstate commerce,<sup>114</sup> the Act reflects a congressional determination that, as a matter of public policy, competition is the favored means for distributing goods in the national economy. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."<sup>115</sup> It is well settled that the Act expresses the full measure of Congress's power under the Commerce Clause<sup>116</sup> and that the scope of the Act conforms to changing judicial interpretations of that power.<sup>117</sup> Certain business practices, such as price fixing among competitors,<sup>118</sup> territorial divisions of markets among competitors,<sup>119</sup> and group boycotts,<sup>120</sup> are deemed unlawful *per se* under the Act. Other practices

112. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1 (1994); *see also* *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-43 (1982); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

113. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (1994).

114. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cls. 1, 3.

115. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

116. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944); *Atlantic Cleaners & Dyers Inc. v. United States*, 286 U.S. 427, 435 (1932).

117. *See Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976).

118. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

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

120. *See Fashion Originators' Guild of Am. v. Federal Trade Comm'n*, 312 U.S. 457 (1941).



are evaluated according to the “Rule of Reason” approach, which entails examining market conditions and weighing the anticompetitive and procompetitive effects of the challenged practice to determine whether it unreasonably restricts competition.<sup>121</sup>

No one contends that the NCAA is not a cartel that restrains interstate commerce. To be sure, the Supreme Court has held that it is.<sup>122</sup> Federal courts considering the legality of NCAA rules under the Sherman Act, however, have consistently held that the rules do not violate the Act because they do not *unreasonably* restrain commerce. Most of these courts have undertaken a Rule of Reason analysis and concluded that the NCAA rules are, on balance, procompetitive because without them, intercollegiate athletics would not exist.<sup>123</sup> The Supreme Court lent support to this rationale in dicta:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.<sup>124</sup>

In fact, the NCAA’s power to enforce its rules has survived attacks brought under a panoply of legal arguments by virtually every party with any conceivable stake in intercollegiate sports. Plaintiffs have included NCAA members,<sup>125</sup> student athletes,<sup>126</sup> coaches,<sup>127</sup> team managers,<sup>128</sup> university

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121. See, e.g., *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 24 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977).

122. See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 99, 117 (1984); see also *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988) (characterizing NCAA as “private monopolist”).

123. See, e.g., *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1344–45 (5th Cir. 1988); *Gaines v. NCAA*, 746 F. Supp. 738, 746 (M.D. Tenn. 1990); *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983).

124. *Board of Regents of Univ. of Okla.*, 468 U.S. at 101–02 (footnote omitted).

125. See *Colorado Seminary (Univ. of Denver) v. NCAA*, 570 F.2d 320 (10th Cir. 1978) (per curiam); *Regents of Univ. of Minn. v. NCAA*, 560 F.2d 352 (8th Cir. 1977).

126. See *Banks*, 977 F.2d 1081; *McCormack*, 845 F.2d 1338; *Jones v. Wichita State Univ.*, 698 F.2d 1082 (10th Cir. 1983); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Hairston v. Pacific-10 Conference*, 833 F. Supp. 1495 (W.D. Wash. 1995); *Collier v. NCAA*, 783 F. Supp. 1576 (D.R.I. 1992); *Gaines*, 746

alumni,<sup>129</sup> players' parents,<sup>130</sup> and even cheerleaders.<sup>131</sup> They have come to court claiming the NCAA has violated §§ 1<sup>132</sup> and 2<sup>133</sup> of the Sherman Act; impinged on constitutional guarantees to due process<sup>134</sup> and equal protection;<sup>135</sup> prevented the exercise of First Amendment rights to freedom of expression<sup>136</sup> and freedom of association;<sup>137</sup> breached or interfered with contractual obligations;<sup>138</sup> infringed the right to be free from punishment absent personal guilt<sup>139</sup> and the right of a parent to rear his child;<sup>140</sup> and broken state law.<sup>141</sup> And they have all lost. The NCAA rules and their enforcement appear to be entirely legal. Indeed, the Tenth Circuit, evidently weary of hearing such cases, has stated: "[T]his court has consistently found that, unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with high school athletic associations or NCAA rules do not present substantial federal questions."<sup>142</sup>

Those who claim the NCAA rules restrain the ability of athletes to market their skills criticize the federal court decisions upholding NCAA rules in Sherman Act cases and have gone so far as to accuse the federal bench of ignorant if not obsequious deference to the NCAA.<sup>143</sup> These commentators, however, focus only on the apparent inequities the rules impose on student athletes of potentially professional caliber while ignoring the benefits the rules

F. Supp. 738; *Hawkins v. NCAA*, 652 F. Supp. 602 (C.D. Ill. 1987); *Justice*, 577 F. Supp. 356; *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).

127. See *Tarkanian*, 488 U.S. 179.

128. See *Hawkins*, 652 F. Supp. 602.

129. See *McCormack*, 845 F.2d 1338.

130. See *Karmanos v. Baker*, 816 F.2d 258 (6th Cir. 1987).

131. See *McCormack*, 845 F.2d 1338.

132. See *Banks*, 977 F.2d 1081; *McCormack*, 845 F.2d 1338; *Hairston*, 833 F. Supp. 1495; *Justice*, 577 F. Supp. 356; *Jones*, 392 F. Supp. 295.

133. See *Gaines*, 746 F. Supp. 738; *Jones*, 392 F. Supp. 295.

134. See *Tarkanian*, 488 U.S. 179; *McCormack*, 845 F.2d 1338; *Colorado Seminary*, 570 F.2d 320; *Regents of Univ. of Minn.*, 560 F.2d 352; *Parish*, 506 F.2d 1028; *Collier*, 783 F. Supp. 1576; *Hawkins*, 652 F. Supp. 602; *Justice*, 577 F. Supp. 356; *Jones*, 392 F. Supp. 295.

135. See *Wichita State Univ.*, 698 F.2d 1082; *Colorado Seminary*, 570 F.2d 320; *Parish*, 506 F.2d 1028; *Hawkins*, 652 F. Supp. 602; *Jones*, 392 F. Supp. 295.

136. See *Justice*, 577 F. Supp. 356.

137. See *McCormack*, 845 F.2d 1338; *Karmanos*, 816 F.2d 258.

138. See *Collier*, 783 F. Supp. 1576; *Hawkins*, 652 F. Supp. 602.

139. See *Justice*, 577 F. Supp. 356.

140. See *Karmanos*, 816 F.2d 258.

141. See *Hawkins*, 652 F. Supp. 602.

142. See *Wichita State Univ.*, 698 F.2d at 1085 (quoting *Wiley v. NCAA*, 612 F.2d 473, 477 (10th Cir. 1979), cert. denied, 446 U.S. 943 (1980)).

143. See, e.g., *Chin*, *supra* note 26, at 1230 ("[W]hile courts have applied antitrust laws to the NCAA's regulations, they have traditionally been very lenient . . . . The modern trend in antitrust litigation is that while courts recognize the NCAA's actions in commercial markets, they still defer to the stated goal of intercollegiate athletics as a part of the educational system."); *Kobin*, *supra* note 26, at 523 ("In order to protect its rules from antitrust attack, the NCAA claims the rules preserve amateurism rather [than] generate profit. While courts generally agree with this argument, they are obviously closing their eyes to reality. . . . Any objective observation without deference to the NCAA would reach a different conclusion." (footnote omitted)); *Sherman Act Invalidation*, *supra* note 26, at 1304 ("[C]ourts have failed to acknowledge the distinction between the ideal of amateurism and the reality of college athletics.").

provide the vast majority of NCAA athletes.<sup>144</sup> When all three divisions are taken into account, it is reasonable to conclude that even most college football players are truly amateur student athletes, to say nothing of the men and women involved in other NCAA sports. During the 1991–92 season, 45,579 student athletes played NCAA football at 530 member institutions.<sup>145</sup> Last year, NFL teams drafted a total of 249 players.<sup>146</sup> Because the NCAA provides an intercollegiate forum for amateur athletic competition that would not otherwise exist, courts have correctly decided that the NCAA rules do not unreasonably restrain trade.

The numerous violations of the no-agent rule, the various lawsuits filed against the NCAA, and the remorselessness of the players who break the rules imply only that some member institutions are ignoring their obligations to the NCAA by fielding “student athletes” who, despite arguably fulfilling every other requirement of amateurism and eligibility detailed in the NCAA Bylaws, fail to meet the definition of the term. Presumably universities do this because they expect winning games will generate goodwill and other benefits.<sup>147</sup> That some members engage in such conduct does not by itself turn the NCAA into a cartel unreasonably restraining commerce. As one court has observed, “That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”<sup>148</sup>

#### B. *Invalidating State Enforcement of the No-Agent Rule*

While § 1 of the Sherman Act says nothing about what states can or cannot do, under the Supremacy Clause and the judicial doctrine of preemption, states may not pass laws that are inconsistent with the Act’s

144. Sports agents are necessarily interested in only those players who will turn professional. *See supra* note 32.

145. NATIONAL COLLEGIATE ATHLETIC ASS’N, *THE SPORTS AND RECREATIONAL PROGRAMS OF THE NATION’S UNIVERSITIES AND COLLEGES* 7 (July 1994).

146. Gordon Forbes, *Selection Pattern Shows Many Teams Face Time of Need*, USA TODAY, Apr. 25, 1995, at 11C.

147. There is some controversy over whether a successful athletic program benefits a university. *See, e.g.*, John Dorschner, *Hip-Hip-Hypocrisy!*, MIAMI HERALD, July 16, 1989, Tropic Magazine, at 8. The debate is not new:

[T]here is no difference of informed, academic, as opposed to legalistic opinion anywhere, upon the proposition that intercollegiate games in themselves are not part of higher education, and that it is only by dint of the greatest struggles and precautions, on the part of the various conferences which govern these football games, directed toward maintaining scholastic standing and preventing professionalism in too aggravated a form, that they are conducted without great injury to the cause of higher education. But we know, too, that it is thought by many that, so managed and conducted, the money and athletic prestige gained for particular colleges by outstanding teams make the games worth the candle.

Page v. Regents of Univ. Sys., 93 F.2d 887, 896 (5th Cir. 1937) (Hutcheson, J., dissenting), *rev’d sub nom.* Allen v. Regents of Univ. Sys., 304 U.S. 439 (1938).

148. McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988).

proscription of combinations in restraint of interstate commerce.<sup>149</sup> Unilateral commercial regulation undertaken by a state, such as the licensing of professionals, poses no conflict with the Act because the requisite element of a contract, combination, or conspiracy under § 1 or of an attempt to monopolize under § 2 is lacking.<sup>150</sup> If, however, a state regulation restrains trade by approving or enforcing private action, an inquiry must be made to determine whether the regulation is within the powers reserved to the states by the Constitution or the regulation is preempted by the Act.

### 1. *State Action Immunity Doctrine*

The judicial doctrine acknowledging the power of the states to regulate their economies through anticompetitive measures despite federal antitrust legislation is sometimes called the “state action exemption.”<sup>151</sup> This is a misnomer: Exemptions from federal antitrust laws can only be granted by congressional legislation.<sup>152</sup> What the Supreme Court has decided is that the Sherman Act simply does not apply to the states’ regulation of commerce within their borders pursuant to their sovereign authority. This basic tenet of federalism was recognized by the Court in *Parker v. Brown*.<sup>153</sup> The *Parker*

149. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

150. See *Olsen v. Smith*, 195 U.S. 332, 344–45 (1904).

151. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 337 (1987); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36 (1985); *Bates v. State Bar*, 433 U.S. 350, 357 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780 (1975).

152. For example, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (1994), was passed in 1945 to exempt the business of insurance from federal antitrust laws.

153. 317 U.S. 341 (1943). Although the doctrine is most often associated with *Parker*, *Olsen v. Smith*, 195 U.S. 332 (1904), was actually the first Supreme Court case to recognize state action immunity. At issue was the legality of a Texas law requiring marine pilots to be licensed by the state and establishing the maximum rates they could charge. *Smith* and several other pilots sued to enjoin *Olsen*, who did not have a license, from continuing to offer his services. In his defense, *Olsen* claimed that under the Commerce Clause, Texas was without power to regulate pilotage, that every competent pilot had a Fourteenth Amendment right to pursue that career, and that the statute conferred a monopoly on licensed pilots in violation of the Sherman Act. The Court first reiterated the long-settled rule that states were free to regulate pilotage until Congress exercised its authority to do so. *Id.* at 341. Given the state’s power to regulate the profession, there could logically be no right to pursue pilotage despite the Texas statute. *Id.* at 344. Finally, the Court held:

[I]f the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.

*Id.* at 345.

The first state action immunity case in the lower federal courts was *Lowenstein v. Evans*, 69 F. 908 (C.C.D.S.C. 1895), which held that a statute giving South Carolina an exclusive monopoly over the sale and distribution of liquor within the state did not violate the Sherman Act: “[B]y this act the state makes no contract, enters into no combination or conspiracy. She declares and asserts in herself the monopoly in the purchase and sale of liquors.” *Id.* at 911.

*Parker* cites both *Olsen* and *Lowenstein*. See 317 U.S. at 352.

case concerned a challenge to the California Agricultural Prorate Act, a law passed to stabilize the prices of crops and produce in California by restricting competition among producers and distributors. A raisin grower sued to enjoin enforcement of the state's raisin-marketing program, alleging it was invalid under the Sherman Act. The Court held that it was not: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."<sup>154</sup> Because the Act was not intended to reach state action, the doctrine is more precisely referred to as "state action immunity" or "*Parker* immunity."<sup>155</sup>

Resolving the semantic issue is not mere trifling: "Exemption" implies someone is letting the states off the hook while "immunity" indicates no one was fishing for them in the first place. *Parker* does not say that states are at liberty to pass whatever laws they desire without any consideration for the preservation of competition in the national economy. It simply says that some state action, while anticompetitive in its effect, does not implicate the Sherman Act. Crucial to the holding in *Parker* was the fact that California had acted unilaterally in imposing the marketing restraints: "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."<sup>156</sup> The Court explicitly noted that states cannot immunize private action that would otherwise violate the antitrust laws and left undecided the question of whether states may participate in a conspiracy among private actors:

[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, *cf. Union Pacific R. Co. v. United States*.<sup>157</sup>

This passage and the cases cited in it illuminate two analytical avenues for testing the validity of state laws under the Sherman Act, each leading to the conclusion that laws restricting sports agent contact with student athletes are invalid.

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154. *Parker*, 317 U.S. at 350–51.

155. "The word 'exemption' is commonly used by courts as a shorthand expression for *Parker's* holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n.8 (1978); *see also* *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06 (1980); *Capital Tel. Co. v. New York Tel. Co.*, 750 F.2d 1154, 1157–58 (2d Cir. 1984).

156. 317 U.S. at 352 (citing *Olsen v. Smith*, 195 U.S. 332, 344–45 (1904)).

157. *Id.* at 351–52 (citations omitted).

The first route is to apply the current Supreme Court test as developed by *Parker's* progeny for determining whether a particular regulation satisfies the state action immunity criteria or is instead an attempt to protect illegal private conduct. *Northern Securities Co. v. United States*<sup>158</sup> illustrates why making this determination is imperative to enforcing the antitrust laws. The Northern Securities Company was a holding company organized in New Jersey by James J. Hill and J.P. Morgan to merge their competing railroads. The United States alleged a violation of § 1 of the Sherman Act and sued to dissolve the merger. The defendants argued inter alia that, because the Northern Securities Company's conduct, though arguably anticompetitive, was not inconsistent with its New Jersey charter, enforcing the Sherman Act against it would be "an unauthorized interference by the national government" with intrastate commerce.<sup>159</sup> To this the Court replied, "This suggestion does not at all impress us."<sup>160</sup> Justice Harlan's elaboration on this terse remark explains the interaction between the Sherman Act and the states' power over their economies:

The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can . . . interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. . . . We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress.<sup>161</sup>

From this it is clear that, were all state action immune to Sherman Act challenge, the states could effectively render federal antitrust law a nullity. State laws that aim merely to shield illegal private conduct are therefore subject to preemption by the Act.

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158. 193 U.S. 197 (1904).

159. *Id.* at 332.

160. *Id.*

161. *Id.* at 349-50.

The alternative approach to invalidating state regulation of agent contact with student athletes involves finding that the states, in passing contact-restricting statutes, are not acting in their sovereign capacities as required by *Parker*, but instead are acting as participants in a combination to restrain interstate commerce. The *Parker* Court's citation of *Union Pacific Railroad Co. v. United States*<sup>162</sup> provides an example by way of analogy. Union Pacific Railroad Company persuaded Kansas City, Kansas, officials to construct a new railroad terminal on its line so that it could enjoy an advantage over its competitors worth "several hundred thousand dollars annually."<sup>163</sup> The idea was to divert traffic from the terminal in Kansas City, Missouri, to Kansas City, Kansas, and thus to Union Pacific. The plan contemplated the city's ownership of the terminal, as this made possible certain tax advantages as well as a federal grant for construction. To persuade prospective tenants to relocate from Missouri, the city offered concessions and free rents in excess of the cost of moving. The Supreme Court held the city's action violated the Elkins Act,<sup>164</sup> which prohibited rebates, concessions, and discrimination in the rates charged for transporting goods by rail.<sup>165</sup> Like the Sherman Act, the Elkins Act was a congressional regulation of interstate commerce, and the Court held the city could not violate it for profit.<sup>166</sup> The *Parker* Court's reference to *Union Pacific* therefore indicates that if a state participates in a conspiracy to restrain interstate commerce so as to enhance its treasury, it might not be entitled to assert its immunity from federal antitrust legislation.

## 2. States as Enforcers of Private Anticompetitive Action

The first step in a "state action immunity" analysis is identifying the character of the restraint at issue. While *Parker* indicates that states cannot bestow antitrust immunity upon the anticompetitive schemes of private parties, it does not offer any guidance in determining whether a combination or agreement represents illegal private action or permissible state action. The distinction is not as obvious as it might seem for the simple reason that every state regulation displacing free-market competition will necessarily benefit some private actors at the expense of others. The defendants in *Olsen*, for example, had the pilot fees they could charge their customers fixed by the Texas legislature and were assured that unlicensed individuals could not

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162. 313 U.S. 450 (1941).

163. *Id.* at 461.

164. Elkins Act, ch. 708, 32 Stat. 847 (1903) (codified as amended at 49 U.S.C. §§ 11703, 11902-11903, 11915-11916 (1988)).

165. *Union Pacific*, 313 U.S. at 464-74.

166. *Id.* In a later Supreme Court opinion considering *Union Pacific* in the context of state action immunity, Justice Brennan wrote: "It is significant that the cities' [sic] argument was rejected in the context of the antirebate provisions of the Elkins Act, a statute which essentially is an antitrust provision . . ." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 401-02 n.19 (1978).

compete for the business. Similarly, California's Agricultural Prorate Commission sought to prevent the appellee in *Parker* from fulfilling contracts he had made to sell his raisins at a price different from that fixed by the state. This obviously benefited Parker's competitors.

The case of *Schwegmann Bros. v. Calvert Distillers Corp.*<sup>167</sup> gave the Court its first occasion to indicate the limits of state action immunity. The controversy centered on the validity of a Louisiana statute that forbade any retailer to sell liquor below the price established by any fair-trade contract (an agreement establishing a minimum resale price) of which the retailer was aware even if it was not a party to the agreement. The respondents, gin and whiskey distributors, sued Schwegmann Brothers, a New Orleans retailer that refused to sign a fair-trade contract, to prevent it from selling below the prices fixed by contracts with other retailers. Reasoning that states could not compel adherence to privately set prices, the Court held that Louisiana had overstepped the bounds of state action immunity and invalidated the statute: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids."<sup>168</sup>

More recent Supreme Court jurisprudence has engendered a simple test that further clarifies the matter. The roots of the test are found in *Bates v. State Bar*,<sup>169</sup> a case arising from a challenge to the Arizona Supreme Court's prohibition on attorney advertising, which it adopted from the American Bar Association's Code of Professional Responsibility. The Court held that the advertising ban was immune from antitrust challenge because the policy was "the affirmative command of the Arizona Supreme Court."<sup>170</sup> In other words, the determinative factor was that, rather than having agreed not to advertise, the lawyers had been told by the state that they could not. That the same harmful effects flowed from the state's directive as would from a conspiracy among lawyers to restrict competition was irrelevant. The question of immunity is one of the state's power, not the wisdom of its policies.<sup>171</sup> The *Bates* Court noted, "[W]e deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active."<sup>172</sup>

Following a three-year gestation period, the decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*<sup>173</sup> pronounced those two significant considerations—a clearly expressed policy and active state supervision—the standards by which to determine whether state action

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167. 341 U.S. 384 (1951).

168. *Id.* at 389 (citing *Parker v. Brown*, 317 U.S. 341, 350 (1943)).

169. 433 U.S. 350 (1977).

170. *Id.* at 360. The Court struck down the advertising ban on First Amendment grounds. *Id.* at 384.

171. "[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreements."

Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 421-22 (1990).

172. 433 U.S. at 362.

173. 445 U.S. 97 (1980).



immunity insulates a challenged regulation from antitrust attack.<sup>174</sup> *Midcal* Aluminum sued to enjoin enforcement of California's wine-pricing program. The program required wineries to file executed fair-trade contracts with the state. Wholesalers had to file price schedules for wines whose prices were not fixed by fair-trade contracts. A distributor selling wine below the filed prices could be fined or have its license suspended or revoked. The program thus enabled distributors or producers to fix prices for all wines, regardless of their origin or destination, with the state acting as enforcer of their determinations. Finding that the state legislature had clearly articulated a policy of allowing resale price maintenance in the wine trade, the Court turned its attention to examining the state's supervision over the program:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."<sup>175</sup>

A unanimous Court thus sounded the death knell for California's wine-pricing program and announced the birth of a two-prong judicial test: State action immunity obtains only when a state (1) expresses clearly and affirmatively an intention to supplant competition with regulation in some sector of the economy and (2) actively supervises the regulated sector. The *Midcal* test, which was affirmed on similar facts in *324 Liquor Corp. v. Duffy*<sup>176</sup> and later cases, continues to be the measure of whether regulations providing for state enforcement of private marketing decisions enjoy *Parker* immunity. The national policy favoring competition requires that the test be strictly administered: "For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control."<sup>177</sup>

There can be little doubt that the contact-restricting statutes restrain interstate commerce by enforcing private agreements and thus come within the

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174. *Id.* at 105.

175. *Id.* at 105-06 (footnote omitted).

176. 479 U.S. 335 (1987). The Court invalidated a New York statute requiring liquor retailers to charge at least 112% of the bottle prices filed by wholesalers with the State Liquor Authority. Justice O'Connor and Chief Justice Rehnquist dissented on Twenty-First Amendment grounds. All of the Justices apparently agreed that "the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior." *Id.* at 346 n.8.

177. *Federal Trade Comm'n v. Tico Title Ins. Co.*, 504 U.S. 621, 636 (1992).

ambit of the Sherman Act. Intercollegiate sports are in interstate commerce,<sup>178</sup> and the NCAA is a combination of competitors whose eligibility rules, one of which is enforced by the statutes, restrain interstate commerce, though not unreasonably. By passing these laws, the states have lent their police power to the purpose of enforcing an NCAA rule against parties over whom the NCAA has no authority. Indeed, while all twenty-one contact-restricting statutes have this effect, several of them explicitly state that causing a student athlete to violate an NCAA rule is a crime.<sup>179</sup>

One might wonder, though, how these statutes can offend the Act if the NCAA no-agent rule that they enforce does not. Judge Easterbrook answered this question in *United States v. Walters*.<sup>180</sup> Rejecting the charge that Norby Walters's recruitment of athletes constituted mail fraud, Easterbrook wrote:

The NCAA depresses athletes' income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes' services for less than the competitive market price. . . . For current purposes *it matters not whether the NCAA actually monopsonizes the market for players*; the point of this discussion is that the prosecutor's theory makes criminals of those who consciously cheat on the rules of a private organization, even if that organization is a cartel. We pursue this point because *any theory that makes criminals of cheaters raises a red flag*.

Cheaters are not self-conscious champions of the public weal. They are in it for profit, as rapacious and mendacious as those who hope to collect monopoly rents. Maybe more; often members of cartels believe that monopoly serves the public interest, and they take their stand on the platform of business ethics, while cheaters' glasses have been washed with cynical acid. Only Adam Smith's invisible hand turns their self-seeking activities to public benefit. It is cause for regret if prosecutors, assuming that persons with low regard for honesty must be villains, use the criminal laws to suppress the competitive process that undermines cartels.<sup>181</sup>

This reasoning applies with equal force to the contact-restricting statutes.<sup>182</sup> Because the statutes outlaw economic activity that gives athletes

178. See, e.g., *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), cert. denied, 114 S. Ct. 1543 (1994); *NCAA v. Roberts*, No. 94-40413-WS, 1994 WL 750585 (N.D. Fla. Nov. 8, 1994).

179. See, e.g., ALA. CODE § 8-26-7 (1993); FLA. STAT. ANN. § 468.4562(2) (West 1996); IOWA CODE ANN. § 9A.8 (West 1995); MISS. CODE ANN. § 73-41-7(c) (1995); NEV. REV. STAT. ANN. § 398.085 (Michie 1991); TENN. CODE ANN. § 49-7-2103 (1994); TEX. REV. CIV. STAT. ANN. art. 8871, § 7(d) (West Supp. 1996).

180. 997 F.2d 1219 (7th Cir. 1993).

181. *Id.* at 1225 (emphases added) (citation omitted).

182. Judge Easterbrook's argument is particularly compelling considering that he not only is a recognized authority on antitrust law, but also argued the NCAA's case in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

hoping to play professional football an alternative to the NCAA's offer of tuition, room, and board, they raise a "red flag" signaling possible conflict with the Sherman Act. The legality of the NCAA rules themselves is entirely beside the point. It is also worth noting that the contact-restricting statutes do not enjoy the procompetitive justifications that have saved the NCAA rules from Sherman Act invalidation. They are neither necessary for conducting intercollegiate sports nor tailored to further the primacy of educational pursuits among student athletes. In fact, the statutes undermine these NCAA goals by protecting universities that admit students based solely on athletic ability from the likely consequences of such decisions. The *Midcal* test therefore must be applied to determine whether the statutes are protected from invalidation under the Act by state action immunity.

Failure of either prong of the *Midcal* test is sufficient to invalidate a challenged statute.<sup>183</sup> The first prong of the test requires that a challenged regulation be made pursuant to an affirmatively expressed state policy "to displace competition with regulation or monopoly public service."<sup>184</sup> As *Bates* and *Midcal* indicate, the requirement of this first prong is easily met. Its only purpose is to ascertain a deliberate legislative intent to replace competition with regulation.<sup>185</sup>

Motivating the contact-restricting statutes is the perceived need to eliminate competition from sports agents for commitments from student athletes.<sup>186</sup> Because there is nothing inherently unethical or unprofessional about student athlete contact with sports agents—only the NCAA's no-agent rule that casts such business relations in an unfavorable light—the true policy underlying the statutes must be one of avoiding or mitigating the penalties the NCAA imposes on universities. While the wisdom of dedicating public resources to the attainment of this end is questionable, it is sufficient for the *Midcal* test that a government policy be identified, not that it be soundly reasoned. Like the advertising prohibition challenged in *Bates* and the wine-pricing policy invalidated in *Midcal*, the contact-restricting statutes satisfy the first requirement for state action immunity. They "reflect a clear articulation of the State's policy with regard to professional behavior."<sup>187</sup>

The contact-restricting statutes, however, fail the second prong of the *Midcal* test. "[T]he [state supervision] analysis asks whether the State has played a substantial role in determining the specifics of the economic policy."<sup>188</sup> It might be argued that giving legal effect to the NCAA's no-

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183. See *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

184. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978).

185. See *id.* at 393–94.

186. See *infra* notes 216–17 and accompanying text.

187. *Bates v. State Bar*, 433 U.S. 350, 362 (1977).

188. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

agent rule is no different than the Arizona Supreme Court's giving legal effect to the American Bar Association's ban on advertising in *Bates*, but this analogy is fallacious. The no-agent rule is not a proscription against sports agent conduct or even student athlete conduct. Its purpose is to ensure that member universities recruit only amateur student athletes who, because they are primarily interested in a college education, have little incentive to contract with an agent before graduating. A violation of the no-agent rule, or of any amateurism or eligibility rule, is evidence that the institution involved is not meeting its responsibilities as an NCAA member. While the Arizona Supreme Court enforced the advertising ban just as the ABA intended, the contact-restricting statutes turn the NCAA's rule on its head and make sports agents and student athletes the scapegoats for the universities.

Moreover, the *Bates* Court noted that the advertising restriction "was subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings."<sup>189</sup> In other words, the Arizona court could supervise the economic effects of its rule on a case-by-case basis. The contact-restricting statutes, however, do not provide for any examination of the economic consequences of limiting the money student athletes can legally receive and of reducing the competitive incentives for sports agents. The statutes simply foreclose an area of competition for the marketing of athletic skill that can be reopened only by subsequent acts of the legislatures,<sup>190</sup> and, in fact, afford no state supervision whatsoever.

Like the regulations in *Midcal* and *Schwegmann*, these statutes contemplate private economic control backed by the power of state enforcement. They merely punish those who violate privately made rules. By removing incentives for athletes to violate the no-agent rule, the contact-restricting laws benefit only those NCAA member institutions that choose not to honor the spirit of the NCAA amateurism rules in their admissions decisions. The economic consequences of this are precisely those Judge Easterbrook cautioned against in *Walters*: The statutes allow a private cartel to fix the benefits offered first-rate athletes for their services while making it illegal for anyone to cheat on

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189. 433 U.S. at 362.

190. That a restraint on trade can be removed through recourse to the political process does not provide the requisite state supervision necessary for state action immunity:

[T]hat argument cuts far too broadly; the same argument may be made regarding anticompetitive activity in which any corporation engages. Mulcted consumers and unfairly displaced competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," *without regard to the amount of influence it might have with local or state legislatures.*

*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 406–07 (1978) (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972)) (emphasis added) (footnotes omitted).

the arrangement.<sup>191</sup> The ability of the nation's most skilled young football players to market their talents in the manner most advantageous to them is thus sacrificed to the interests of the universities, which is to say that interstate commerce is unreasonably restrained. The Sherman Act prevents states from coercing adherence to a privately created price fix in this manner.

The parallel between this situation and that presented by *Schwegmann* cannot be overly emphasized. In that case, liquor producers were free to make fair-trade contracts with willing retailers. Similarly, NCAA member institutions are free to field students willing to attend their universities and colleges. The Supreme Court ruled in *Schwegmann* that the state could not use its power to force the liquor producers' prices on retailers who preferred to set their own. In the same way, the states cannot force athletes who find it advantageous to violate NCAA rules to settle for what the universities agree to offer (the opportunity to display their talents and arguably the chance to earn a degree) or to prevent agents from making competing offers. The contact-restricting statutes restrict competition, undermine the enforcement of NCAA rules by protecting members that do not properly screen prospective student athletes, and, most importantly, inflict harsh penalties on people guilty of nothing other than aggressively pursuing their livelihood. The Sherman Act guarantees every economic actor in the nation the chance to do just that.<sup>192</sup> It follows that these statutes are not protected by state action immunity and are invalid under the Sherman Act.

### 3. *States as Participants in Conspiracies to Restrain Trade*

The alternate ground for invalidating the contact-restricting statutes under the Sherman Act derives from the question left unanswered in *Parker*: whether state action immunity applies when a state participates in a private combination to restrain trade. That issue was visited by the Court in *Goldfarb v. Virginia State Bar*.<sup>193</sup> The controversy in that case centered on a schedule of minimum fees to be charged for legal services published by the Fairfax County Bar Association, a private organization. The Virginia State Bar, an agency of the Virginia Supreme Court, enforced the fee schedule by threatening disciplinary action against attorneys charging less than the established fees. Unable to find an attorney willing to charge less than the published fees, petitioners alleged a violation of § 1 of the Sherman Act against both organizations. The state bar claimed its enforcement was protected by *Parker* immunity. The county bar association claimed that because it was "prompted" to publish the schedule by the state agency, it too was immune.

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191. See also *Banks v. NCAA*, 977 F.2d 1081, 1096 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part).

192. See *Topco Assocs.*, 405 U.S. at 610.

193. 421 U.S. 773 (1975).

The Court held that neither organization's conduct was protected by state action immunity and invalidated the price schedules and their enforcement. Because the Virginia Supreme Court had not even arguably directed its state bar to enforce a minimum fee schedule, the bar's members had exceeded the authority delegated to them by the state. The Court proceeded to explain in dicta that state action immunity does not apply to regulations made by a state when it acts as a participant in interstate commerce:

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.<sup>194</sup>

Unlike *Bates* and *Midcal*, which both involved state-ordered and -enforced restrictions on competition, *Goldfarb* involved only state enforcement of prices fixed by a private organization of competitors.<sup>195</sup> While heightened state supervision could have saved California's wine-pricing program and did save Arizona's attorney-advertising ban from antitrust condemnation, *Union Pacific* and *Goldfarb* point to a different conclusion when the state teams up with private actors to make both the private actors and the state more profitable. Just as Kansas City, Kansas, participated in Union Pacific Railroad's plan to divert traffic from Missouri because the city would profit economically, the state bar association joined the price fix in *Goldfarb* because its members stood to benefit from the anticompetitive scheme. That the goal of the arrangement was to extract higher fees for attorneys did not go unnoticed by the Court: "The reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in respondent State Bar's 1962 Minimum Fee Schedule Report states: 'The lawyers have slowly, but surely, been committing economic suicide as a profession.'"<sup>196</sup> Thus, *Goldfarb* amounts to a case of a state agency enforcing rules promulgated by a private cartel for the sole purpose of increasing the wealth of the state or, more accurately, that of state

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194. *Id.* at 791–92 (citations and footnotes omitted).

195. *See id.* at 776. *Midcal* did not raise the issue of horizontal price fixing (where direct competitors agree on the price to be charged) except to observe that the wine-pricing program "frequently resulted" in such agreements. *See Midcal*, 445 U.S. at 101. The controversy centered instead on the vertical price fixing (where producers, wholesalers, or distributors force their buyers to resell the product at a fixed price) aspect of the program. That petitioner California Retail Liquor Dealers Association, an intervenor in the case, brought the appeal does not indicate a cartel among retailers. The retailers had no power to set prices under the program but were intended to be its chief beneficiaries—one of the program's aims was to protect small retailers from competition with larger ones. *Id.* at 112–13.

196. *Goldfarb*, 421 U.S. at 786 n.16 (citation omitted).

officials.<sup>197</sup> “*Goldfarb* therefore made it clear that, for the purposes of the *Parker* doctrine not every act of a state agency is that of the State as sovereign.”<sup>198</sup>

*Jefferson County Pharmaceutical Ass’n v. Abbott Laboratories* also involved the application of a federal antitrust statute, the Robinson-Patman Act,<sup>199</sup> to state action. The Robinson-Patman Act makes it illegal to sell or purchase anything in interstate commerce at prices not available to other buyers “where the effect . . . may be substantially to lessen competition or tend to create a monopoly.”<sup>200</sup> The University of Alabama, a public university operating two pharmacies at an affiliated hospital, obtained prescription drugs at prices available only to government agencies and resold them in competition with private pharmacies. Assuming that Congress did not intend the Robinson-Patman Act to apply to purchases made for use by governments, the Court nonetheless held that it did apply when states compete with private retailers:<sup>201</sup> “It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities.”<sup>202</sup>

Two years later, the Court in *Garcia v. San Antonio Metropolitan Transit Authority* abandoned the distinction between sovereign and proprietary government actions in Commerce Clause cases.<sup>203</sup> Despite this holding, the “market participant exception” persists in Commerce Clause jurisprudence.<sup>204</sup> As a matter of logic, because federal antitrust laws are promulgated under Congress’s Commerce Clause power, the market participant exception must

197. It is useful here to clarify a slight conceptual ambiguity. All the members of the county bar were also members of the state bar, so the same people who were setting prices were also enforcing the cartel. Rather than picturing the attorneys as wearing two hats—a “private actor” hat and an “officer of the court” hat—it is perhaps simpler to imagine the two organizations as having no overlap in membership. Alternatively, one can suppose that some other state agency (such as the income tax collector) was enforcing the arrangement (expecting to reap higher taxes from attorneys earning higher fees). The point is the same: The state participated in the price-fixing scheme, and its officials stood to benefit from it.

198. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

199. 15 U.S.C. §§ 13–13b, 21a (1994).

200. *Id.* § 13(a), 13(f).

201. 460 U.S. 150, 154 (1983).

202. *Id.* at 154 n.6.

203. 469 U.S. 528, 546–47 (1985). The Court held:

[N]either the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. . . . We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular government function is “integral” or “traditional.”

*Id.* at 545–47.

The same distinction had previously been abandoned in cases concerning state immunity from federal taxation. *See New York v. United States*, 326 U.S. 572, 583–84 (1946).

204. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 459 (1992); *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988); *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 289 (1986).

remain viable in the antitrust field as well. *City of Columbia v. Omni Outdoor Advertising, Inc.*<sup>205</sup> indicates as much:

The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. . . . [T]his immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market. That is evident from the citation of *Union Pacific R. Co. v. United States*, which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities.<sup>206</sup>

Not surprisingly, confusion persists among the lower courts over whether the market participant exception has a role in antitrust law. In a case decided between *Garcia* and *Omni*, a Tenth Circuit panel stated: "It appears to us that the distinction between proprietary and governmental functions has not been pursued in recent Supreme Court opinions."<sup>207</sup> Relying on the Court's noncommittal approach to the market participant exception in *Omni*,<sup>208</sup> the Eighth Circuit concluded: "As yet, . . . the market participant exception is merely a suggestion and is not a rule of law."<sup>209</sup> Taking its cue from these courts, the Southern District of Indiana also rejected the market participant exception. In a case involving antitrust claims arising from patent misuse allegations against the University of California, a public university, that court stated: "[E]ven were we inclined to apply a market participant exception to *Parker* immunity, the facts of this particular case would not warrant its application. We, however, join the Eighth and Tenth Circuits in their refusal to recognize any such exception."<sup>210</sup> In an appeal arising from the same litigation, however, the Federal Circuit acknowledged the viability of the market participant exception.<sup>211</sup>

There is no sound legal basis for a federal court to refuse to apply the market participant exception in *Parker* immunity cases. *Garcia* has not

205. 499 U.S. 365 (1991).

206. *Id.* at 374–75 (citation omitted).

207. *Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1510 n.11 (10th Cir. 1991).

208. The court relied on the passage quoted in the text accompanying note 206 and on this passage: "We reiterate that, with the possible market participant exception, any action that qualifies as state action is 'ipso facto . . . exempt from the operation of the antitrust laws.' This does not mean, of course, that the States may exempt private action from the scope of the Sherman Act . . ." *Omni*, 499 U.S. at 379 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984)) (citation omitted).

209. *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1312–13 (8th Cir. 1991).

210. *In re Recombinant DNA Technology Patent & Contract Litig.*, 874 F. Supp. 904, 912 (S.D. Ind. 1994).

211. *See Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948–49 (Fed. Cir. 1993).



prevented its continued use even in Commerce Clause cases,<sup>212</sup> so there is no reason why the exception should be disregarded in antitrust cases. *Omni* negates any contrary contention, and *Jefferson County* and *Union Pacific* show that the exception is in fact law and not “merely a suggestion.”

The twenty-one states with contact-restricting statutes participate in the market for college sports and consequently in the market for student athletes.<sup>213</sup> Each of these states operates universities involved in NCAA Division I sports (including football)<sup>214</sup> and stands to benefit economically from laws designed “to squeeze out of their players one or two more years of service.”<sup>215</sup> Sports agents do not compete with NCAA member institutions in the same way that the University of Alabama pharmacies competed with private pharmacies in *Jefferson County*. Rather than competing directly, agents compete by offering an alternative to the NCAA’s standardized compensation. By agreeing to give athletes no more than tuition, room, and board and to disqualify athletes who accept additional benefits from any source, NCAA members are vulnerable to agents offering student athletes an “advance” against income they expect the athletes to earn professionally.

The contact-restricting statutes are nothing more than a means to prevent this competition from decreasing the revenue generated by public university football teams. That this is the true motivation behind the laws appears to be less than a secret. Asked why it is necessary to incarcerate agents who sign student athletes, Florida legislator James King, the sponsor of Florida’s revamped sports agents statute, said, “Because they’re criminals! If their action results in an institution being punished by the NCAA or in an athlete’s ineligibility, that’s really stealing from the coffers of the state of Florida.”<sup>216</sup> The year after Alabama passed its contact-restricting statute, Alabama Assistant Attorney General Don Valeska expressed the same concern: “Anytime you have sports agents costing universities a quarter of a million dollars, just by waving cash under the face of a kid, you don’t have a political problem,

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212. See *supra* text accompanying note 204.

213. See *Banks v. NCAA*, 977 F.2d 1081, 1095–96 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (“NCAA member colleges are the purchasers of labor in this market, and the players are the suppliers. The players agree to compete in football games sponsored by the colleges, games that typically garner the colleges a profit, in exchange for tuition, room, board, and other benefits.”); see also *United States v. Walters*, 997 F.2d 1219, 1225 (7th Cir. 1993) (“The NCAA depresses athletes’ income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth.”).

214. Examples of Division I public universities in these states include: University of Alabama, University of Southern California, Florida State University, University of Georgia, University of Indiana, University of Iowa, University of Kentucky, Louisiana State University, University of Maryland, University of Michigan, University of Minnesota, Mississippi State University, University of Nevada, North Carolina State University, Ohio State University, University of Oklahoma, Pennsylvania State University, University of South Carolina, University of Tennessee, Texas A&M University, and University of Washington.

215. *Banks*, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part).

216. Telephone Interview with Representative James King, Florida House of Representatives (Feb. 14, 1995).

you've got a criminal problem."<sup>217</sup> So, because competing with sports agents for the loyalty of student athletes would entail either dropping all pretenses at amateurism or recruiting only true "student athletes"—either of which would almost certainly make college football less interesting to fans and consequently less profitable for state universities<sup>218</sup>—these states and nineteen others have simply outlawed the competition.

Viewed in light of the market participant exception, the ruthless behavior leading to the contact-restricting statutes becomes clear: State U., a public university and NCAA member university on a quest to achieve enhanced prominence, prestige, and revenue by winning football games, recruits players for whom sport is more than an avocation. Some of these athletes, who may never have gone to college if there were any other way into professional football, are caught violating the no-agent rule. University administrators feign shock and outrage before the media, seeming totally at a loss as to how such corruption arrived on their campus, just as those from Florida State did after *Sports Illustrated* uncovered the Foot Locker scandal. The NCAA slaps State U. with penalties for fielding ineligible athletes. Fans are disappointed all across the state over State U.'s consequent diminished ability to recruit the best athletes and win games. In the capital, legislators disappointed with State U.'s diminished ability to fill stadium seats and collect proceeds from television appearances, including postseason tournament competition, crack down on those sports agents who rained on State U.'s bowl-game victory parade. Sports agents are declared outlaws for "corrupting" State U.'s cheap labor. Because the NCAA is a private actor,<sup>219</sup> this is undoubtedly a case of "a state . . . becoming a participant in a private agreement or combination by others for restraint of trade."<sup>220</sup>

## V. CONCLUSION

Outlawing legitimate business conduct because it lures away athletes worth a good deal of money to universities is not a manifestation of state action deemed immune from antitrust condemnation under the rule of *Parker v. Brown*. The contact-restricting statutes exist to insulate universities from the very penalties they have assented to accept as NCAA members and to help some NCAA member institutions maintain profitable control over the only forum leading to a professional football career. The laws provide for state enforcement of a privately made rule, but not for any review of or control over its economic consequences. Furthermore, as owners of public universities, the

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217. Fred Grimm, *Alabama Wants Errant Sports Agents Jailed*, MIAMI HERALD, Apr. 27, 1988, at 1A, 9A.

218. See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984).

219. See *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988).

220. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).

states enforcing the no-agent rule with criminal penalties enjoy a considerable pecuniary stake in preventing top athletes from losing their eligibility to compete in NCAA contests. The contact-restricting statutes thus fail to meet the requirements for *Parker* immunity and unreasonably restrain interstate commerce. They are therefore invalid under the Sherman Act.

In addition, they serve no end that the universities could not easily achieve without resort to incarceration. By recruiting athletes prone to breaking NCAA rules, state university officials evince the very profiteering that they condemn in agents and athletes. To say only that this is hypocritical is to ignore the larger issue:

Individuals employed by or associated with member institutions for the administration, the conduct or the coaching of intercollegiate athletics are, in the final analysis, teachers of young people. Their responsibility is an affirmative one, and they must do more than avoid improper conduct or questionable acts. Their own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example. Much more is expected of them than of the less critically placed citizen.<sup>221</sup>

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221. NCAA MANUAL, *supra* note 16, § 19.01.2, at 343.

