1995

Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA

David A. Skeel Jr.

University of Pennsylvania Law School, dskeel@law.upenn.edu

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship

Part of the Business Administration, Management, and Operations Commons, Business Law, Public Responsibility, and Ethics Commons, Corporation and Enterprise Law Commons, Higher Education Commons, Higher Education Administration Commons, Law and Economics Commons, Legal History, Theory and Process Commons, Nonprofit Administration and Management Commons, Organizations Commons, and the Securities Law Commons

Recommended Citation

http://scholarship.law.upenn.edu/faculty_scholarship/1331

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
SOME CORPORATE AND SECURITIES LAW PERSPECTIVES ON STUDENT-ATHLETES AND THE NCAA

DAVID A. SKEEL, JR.*

Since its inception in 1905 as a response to the growing violence in college football, the National Collegiate Athletic Association (NCAA) has expanded its oversight to nearly every sport at nearly every college and university. In keeping with its stated goal of protecting amateur athletics at the university level, the NCAA prescribes and enforces regulations on issues ranging from recruitment and compensation of college athletes to the format for championship tournaments.1

The NCAA’s vast authority over college athletics raises obvious questions of accountability. Who, we might ask, is responsible for overseeing the way that the NCAA and its member institutions oversee college athletics, and for ensuring that the regulatory apparatus is fair and effective for the various constituencies who participate in or are affected by college sports? The answer is far from clear. Student-athletes and universities with grievances most frequently challenge the NCAA on constitutional and related grounds, often arguing that the NCAA imposed penalties on them without adequate due process. These suits do not seem particularly promising, however, as courts have tended to show broad deference to NCAA procedures.2

* Associate Professor of Law, Temple University. I would like to thank Sue Ehrmann, Will Anzenberger, and the Wisconsin Law Review for inviting me to participate in this symposium; Jane Baron, Peter Carstensen, Deborah DeMott, JoAnne Epps, Nancy Knauer, Paul Olszowka, Robert Reinstein, Joel Seligman, Max Stearns and participants at the conference held in connection with this symposium and at a faculty colloquium at Temple University School of Law for helpful comments on earlier drafts; and Christine Taran for excellent research assistance.


2. For instance, in a high-profile Supreme Court decision involving Jerry Tarkanian, the former men’s basketball coach at the University of Nevada-Las Vegas, the Supreme Court rejected Tarkanian’s due process challenge to the NCAA’s disciplinary actions against him and his program. NCAA v. Tarkanian, 488 U.S. 454 (1988). The one prominent suit the NCAA did lose was an antitrust challenge to its regulation of college football television rights. NCAA v. Board of Regents, 462 U.S. 1311 (1983).
The goal of this Article is to look in a very different direction—corporate and securities law—and consider whether any of the accountability devices used in that context might provide an effective means of policing intercollegiate athletics. In keeping with the theme of this symposium, I will focus in particular on student-athletes. Thus, the question I ask throughout the Article is whether one or more corporate or securities law strategies might give student-athletes a greater say in, or more effective protection with respect to, NCAA decisionmaking.3

Many of the most frequent criticisms of the NCAA and its member institutions relate to their treatment of student-athletes who participate in the most prominent revenue sports, Division I-A football and men’s Division I basketball. Despite the vast amount of income these sports bring in, the NCAA prohibits a university from paying its student-athletes, and strictly regulates student-athletes’ ability to transfer or to hire an agent during their college careers. Critics of these regulations point out that the member universities that run the NCAA have perverse incentives when it comes to considering the effect the regulations have on student-athletes, since the universities themselves derive a direct financial benefit from limiting student-athlete compensation and restricting mobility. In their preoccupation with developing successful football and basketball programs, NCAA member institutions may also fail to pay sufficient attention to whether student-athletes receive an adequate education during their college careers.

This brief description might seem to suggest that student-athletes have a discrete set of interests that may be subverted by the NCAA decisionmaking process. Yet even within the limited context of revenue-producing sports, student-athlete interests are far from uniform. While the limits on compensation seem to penalize the very best football and basketball players, for instance, other athletes may actually benefit if restrictions on marketable players leave more money for granting scholarships and related support to those who are not among the very best athletes. The NCAA’s obligation to promote education as a key element of amateurism raises equally difficult issues. Who is to say whether an aspiring football player’s belief that raising the NCAA’s minimum academic standards would jeopardize his prospects for a pro career, or

3. Since the symposium’s focus is on student-athletes, my analysis of NCAA decisionmaking considers the student-athlete’s relationship with her university as well. In fact, several of the papers presented at the conference argue that for meaningful change to occur, much of it must take place at the university level. See John R. Allison, Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures and Process Promote Educational Primacy for the Student-Athlete?, 44 KAN. L. REV. (forthcoming 1995); Timothy Davis, A Model of Institutional Governance for Intercollegiate Athletics, 1995 Wis. L. REV. 599.
NCAA decisionmakers’ parentalistic desire to force high school athletes to focus on academics, should be seen as the appropriate student-athlete “interest” to consider? The multiplicity of student-athlete perspectives becomes still more striking when we take into account gender equity issues, or the differences between student-athletes at Division I schools and those at smaller institutions.4

However problematic it is to speak of student-athletes as if their interests were consistent and well-defined, one thing is clear. NCAA and member institution decisionmakers have traditionally been the only actors with authority to determine what is best for everyone involved in intercollegiate athletics, including student-athletes. The NCAA has taken a few steps to give student-athletes more of a voice, such as providing for student advisory committees.5 Yet the steps are extremely tentative thus far. It may therefore be an opportune time to consider whether another perspective, such as corporate law, might provide new insight on the relationship between student-athletes and the NCAA.

Corporate and securities law can be seen as offering two distinct approaches that one might employ on behalf of student-athletes. The first focuses on what I will describe as “internal” corporate governance, and includes governance devices such as board representation and litigation to enforce fiduciary duties. According to this view, adding student-athlete representatives to the NCAA’s primary decisionmaking bodies might enable student-athletes to voice their concerns directly. In the alternative, if NCAA and member institution decisionmakers’ fiduciary duties included a duty to student-athletes, student-athletes could sue to enforce this duty, and the prospect of such suits might force the decisionmakers to articulate more clearly their own views on the NCAA and member institutions’ obligations to student-athletes.

The arguments that student-athletes should be given direct representation, and that the NCAA and its member universities owe a duty to student-athletes, bear a close resemblance to a longstanding debate in the for-profit context over corporate directors’ accountability.6

4. The distinction between Division I and other schools is significantly dramatic to support a strong argument for bifurcating their regulation completely. For a discussion of the incomplete distinctions made in the current decisionmaking framework, see Allison, supra note 3.

5. At the 1995 Convention in January, the NCAA membership passed a measure adding student-athlete advisors to five NCAA committees. See Jack L. Copeland, Student-Athlete Welfare Principles Overwhelmingly Adopted, NCAA News, Jan. 11, 1995, at 7. I discuss this and related measures in Part II.

6. The debate is usually traced back to an exchange between Adolph Berle, who argued that directors should focus on shareholders’ interests, and Merrick Dodd, who argued that the directors should also consider interests of employees and other constituencies. See generally Adolph Berle, Corporate Powers as Powers Held in Trust,
Although corporate law has traditionally held that directors are responsible solely to shareholders, and that directors should work to maximize the value of shareholders’ stock, a chorus of dissenting voices has consistently called for a fiduciary duty to, or board representation of, other constituencies such as employees, consumers and local communities.\(^7\)

Just as for-profit directors have traditionally managed with their shareholders in mind, the NCAA is run by and for its member institutions rather than for student-athletes. From this perspective, student-athlete representation would entail an expansion of the NCAA’s focus quite similar to adding employee or consumer representatives to a for-profit corporation board. Yet the case for student-athlete representation in the NCAA is in many respects far more compelling than the arguments for adding nonshareholder representatives to the boards of for-profit corporations. Moreover, whereas most for-profits do not include multiple constituencies on the board, nonprofit corporations such as nonprofit hospitals, charities and some universities do include representatives of designated interests. As in other for-profit and nonprofit contexts, both direct representation and fiduciary duty litigation suffer from significant shortcomings as sources of NCAA accountability. Yet both offer some promise, and the fiduciary duty approach in particular may improve on what currently exists.

The second general approach to NCAA accountability would be to establish a framework for external review. The antitrust laws already serve as one source of external review of NCAA decisionmaking. I focus in this Article on another possible model, a framework drawn from the Securities and Exchange Commission’s (SEC’s) regulation of the stock exchanges.\(^8\) The heart of this framework is a system of dual regulation: the exchange registers as a “self-regulatory organization” and ordinarily governs itself in the first instance, but the SEC retains broad authority to work with or unilaterally regulate the exchange in appropriate circumstances. Although at first glance the NCAA seems to have little

\(^4\) HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932); Adolph Berle, For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365 (1932).

\(^7\) Somewhat similar questions respecting the appropriate constituencies arise in the nonprofit context.

\(^8\) The regulatory scheme described in this paragraph is not limited to exchanges, and currently governs related entities such as the National Association of Securities Dealers. The framework is described in more detail in Part IV. To my knowledge, Peter Carstensen was the first to suggest the analogy between the NCAA and securities law regulation of the exchanges. Thus, my discussion develops his insight, no doubt taking it at times in directions he would not have intended.
in common with a stock exchange, the analogy proves on inspection to be surprisingly close. My analysis suggests that SEC-style regulation would give a regulator the flexibility to take advantage of the NCAA’s expertise, yet also the authority to intervene when appropriate. Securities-style regulation is in some respects the most attractive of the corporate law accountability mechanisms. Its chief limitations are the practical barriers to its implementation, and the uncertainty about whether such an extensive reform is necessary.

In the Part that follows, I briefly discuss the significance of the NCAA’s organizational structure. Parts II and III consider the efficacy of internal corporate governance mechanisms as a means of enhancing NCAA accountability to student-athletes, and Part IV turns to securities-style external review.

I. THE NCAA AS AN UNINCORPORATED ASSOCIATION

Perhaps the first surprise about the NCAA from a corporate governance perspective is its organizational form. Rather than being structured as a nonprofit corporation, as one might expect, the NCAA is organized as an unincorporated association located in Kansas. The NCAA is at least nominally run by and for its roughly 1000 member colleges and universities. Under the NCAA’s constitution, each member is entitled to vote on the proposed rule changes and additions considered at the annual convention, where much of the NCAA’s major business is conducted. The members elect committees to carry on NCAA business between the conventions.

While the NCAA is structured as an unincorporated association, most of its members are themselves nonprofit corporations. Moreover, the NCAA has incorporated several aspects of its business. The Association has incorporated for-profit corporations both to hold title to the land and buildings that it owns and to market the NCAA logo. The Association

---

9. See, e.g., NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993) (explaining NCAA history and organizational form).

10. See 1994-95 NCAA MANUAL art. 4.1.4 (Council members elected at annual convention); id. art. 4.4.4 (Administrative Committee elected at convention); id. art. 4.5.4 (Presidents Commission elected by chief executive officers of member institutions); id. art. 5.1 (regulations governing convention); id. art. 5.3 (amendments made at convention). The Executive Committee is the one central committee whose members are not directly elected by the NCAA’s membership. The Council rather than the membership as a whole chooses the Executive Committee. id. art. 4.2.4.

Although I will analogize the NCAA to a corporation, its decisionmaking structure resembles a private legislature in many respects, as this discussion suggests.

11. id. art. 31.9.1 (National Collegiate Realty Corporation); id. art. 31.9.2 (NCAA Marketing Corporation).
has also structured its charitable foundation as a nonprofit corporation.  
Thus, the NCAA can be seen as an unincorporated association comprised of nonprofit corporation members, and which has established for-profit and nonprofit corporations to carry on various aspects of its business.

Why might the member universities continue to run the NCAA as an unincorporated association rather than as a nonprofit or even a for-profit corporation? Entities such as labor unions have traditionally operated as incorporated associations at least in part to avoid some of the consequences of corporate "personhood," such as the capacity to be sued in the corporate name. Many states now authorize suit against an association, so this distinction has lost some of its force. But similar concerns continue to explain much of the attractiveness of unincorporated status. An association still cannot sue or be sued (or hold property) in association name unless state law explicitly or implicitly authorizes suit. The association form may also diminish the likelihood that the NCAA will qualify as a state actor, thus helping to insulate its policies from certain constitutional challenges. In short, an obvious advantage of organizing as an unincorporated association is that it minimizes the likelihood of regulatory interference with NCAA policies and actions.

To appreciate the significance of the NCAA’s choice of form from a corporate governance perspective, consider first the distinctions between for-profit and nonprofit corporations. Nonprofits differ from for-profit corporations in two ways: state law ordinarily prohibits a nonprofit from making dividends or other distributions to its constituents, and nonprofits do not have shareholders in the same sense as for-profits. In a pair of

12. Id. art. 31.9.3 (NCAA Foundation).
13. It is possible, of course, that the NCAA’s unincorporated status is simply the perpetuation of a historical accident. This seems unlikely, however, and the discussion that follows suggests several possible motivations for remaining unincorporated.
16. See, e.g., Murray v. Sevier, 156 F.R.D. 235 (D. Kan. 1994); Kansas Private Club Ass'n v. Londerholm, 408 P.2d 891 (Kan. 1965). Associations are subject to suit under federal law, however. Federal Rule of Civil Procedure 17(b) provides that regardless of its status under state law, any association may sue or be sued in its common name for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States.
17. Prior to the reforms set in motion by the Securities Exchange Act of 1934, the New York Stock Exchange had long eschewed incorporation for precisely the same reasons. See Richard W. Jennings, Self Regulation in the Securities Industry: The Role of the SEC, 29 LAW & CONTEMP. PROBS. 663, 667-68 (1964).
classic articles on nonprofits, Henry Hansmann contended that the relationship between these attributes is not accidental.\textsuperscript{19} He argued that the nonprofit form addresses a contractual breakdown problem. The nondistribution rule compensates for the fact that a nonprofit's constituents are often poorly situated to monitor management by strictly limiting managers' ability to divert assets to themselves.\textsuperscript{20} This protection comes at a price, however. Because they cannot sell stock and do not have stockholders to encourage managers to emphasize financial return, nonprofits often have difficulty obtaining financing from lenders and similar sources.\textsuperscript{21}

It is immediately apparent that the NCAA is similar in some respects, but not in others, to this generalized account of nonprofit corporations. Like a nonprofit corporation, the NCAA's association form may affect its ability to obtain financing. This, together with tax concerns and lingering uncertainties about an association's capacity to hold property in association name, may explain the NCAA's decision to set up for-profit corporations for its marketing efforts and to hold its property.\textsuperscript{22} Although the NCAA lacks a shareholder constituency as a result of its association form, its members are actively involved in NCAA governance and well-positioned to monitor its management.\textsuperscript{23} From this perspective, the NCAA resembles mutual nonprofits, which are run by and for their members\textsuperscript{24} to a much greater extent than donor nonprofits such as charities.

By eschewing the for-profit form, despite the obvious profit motives that enter into many of the NCAA's activities, member institutions assure themselves complete control over NCAA operations. To the extent that members' interests do not conflict with those of student-athletes, the association form serves both quite effectively. This may not always be the case, however, especially given the obstacles to accountability an association poses. The following Parts explore whether corporate

\begin{itemize}
\item \textsuperscript{20} See, e.g., Hansmann, The Role of Nonprofit, supra note 19, at 843-45.
\item \textsuperscript{21} Id. at 877.
\item \textsuperscript{22} The most obvious tax concern is that the for-profit activities would jeopardize the NCAA's nonprofit status.
\item \textsuperscript{23} The nondistribution constraint (which does not by its terms apply to an unincorporated association) is thus less important for the NCAA than for charitable nonprofits. Moreover, the NCAA's ability to make distributions is limited by Internal Revenue Code restrictions on nonprofit organizations.
\item \textsuperscript{24} See, e.g., Hansmann, The Role of Nonprofit, supra note 19, at 892-94 (describing certain mutual nonprofits, such as social clubs, as an exception to the contract failure explanation for the nonprofit form).
\end{itemize}
governance devices might offer more input and/or protections to student-athletes, and what adjustments may be required in order to tailor these devices to the NCAA’s association form.  

II. INTERNAL CORPORATE GOVERNANCE: PUTTING STUDENT-ATHLETE REPRESENTATIVES ON NCAA (AND MEMBER INSTITUTION) COMMITTEES

The interests of shareholders are represented in two general ways in the for-profit corporation context. First, shareholders are represented directly, in that they are entitled to choose directors who will pursue their interests. Corporate law fiduciary duty standards reinforce directors’ obligations to shareholders. In addition to selecting directors, shareholders may sue directors who have violated any of their fiduciary duties.

The next two Parts examine these protections’ effectiveness for student-athletes. This Part considers the efficacy of direct student-athlete representation; Part III turns to fiduciary duty.

As noted above, the NCAA conducts much of its business at its annual convention, where member institutions vote on proposed legislative action. The forty-four member Council, together with the Presidents Commission, wields much of the NCAA’s decisionmaking authority between conventions. While member institutions correspond roughly to shareholders, and the governing councils to the board of a for-profit corporation, members play a much more active (and managerial) role in NCAA decisionmaking, since they vote directly on much of the NCAA’s business at the annual convention.

---

25. As noted at the outset, while my initial focus is on NCAA-level decisionmaking, I also consider the applicability of several of these protections at the member institution level.


27. See, e.g., 1994-95 NCAA MANUAL art. 4.1.3 (Council’s powers between conventions); id. art. 4.5.3 (powers of Presidents Commission). Since its establishment in 1984, and contrary to early suspicion that it would play only a superficial role, the Presidents Commission has become increasingly powerful in NCAA affairs. The Presidents Commission currently has substantial control over the convention agenda, for instance, and has veto power over the selection of the NCAA Executive Director. Id. art. 4.5.3(b) (responsibility for “placing any matter of concern on the agenda”); id. art. 4.5.3(h) (power to “approve the appointment of an executive director of the Association”). For a description of the origins and rise of the Presidents Commission, see Smith, supra note 1, at 998-1005.

28. The NCAA thus functions somewhat like a hybrid between a publicly held corporation, whose shareholders play only a minimal role, and a closely held corporation,
One way to enhance student-athletes' voice would be to give them representation either at the annual convention or on the principal NCAA committees, or both. For followers of for-profit corporation law, this suggestion will have a strikingly familiar ring. A call to add an additional constituency—here, student-athletes—to the NCAA's decisionmaking process parallels in many ways the periodic movements to place employee representatives on the boards of for-profit corporations or to implement cumulative voting to maximize the likelihood that minority interests will elect at least one director. In both contexts, inclusion is justified as a means of ensuring that decisionmakers will pay closer attention to the constituency in question.

Interestingly, while a call for student-athlete representation mirrors efforts to implement employee co-representation in many respects, the case for student-athlete representation may actually be appreciably stronger. Because the traditional view of corporate law holds that directors' primary responsibility is to maximize profits for shareholders, observers have long criticized direct employee representation as undermining directors' focus on shareholder interests. Moreover, employees arguably do not need a governance mechanism like voting, since in theory they can use contractual arrangements to protect themselves against exploitation far more effectively than shareholders.

whose shareholders serve both as shareholders and as managers of the firm. See also supra note 10 (NCAA in some respects more like a private legislature than a corporation).

29. Giving student-athletes direct representation at the university level would offer similar benefits, and suffer from similar limitations, as I discuss in somewhat more detail below.

30. The movement to place representatives on corporate boards, often described as "co-representation," was particularly prominent in the 1960s and 1970s, and was inspired by the use of co-representation in Germany and other European countries. See, e.g., Clyde W. Summers, Worker Participation in the U.S. and West Germany: A Comparative Study from a U.S. Perspective, 28 AM. J. COMP. L. 367 (1980).

31. For a recent discussion of cumulative voting, and an argument that institutional shareholders should look to it as a means of enhancing their ability to monitor for-profit boards, see Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 COLUM. L. REV. 124 (1994).


33. Oliver Williamson, Corporate Governance, 93 YALE L.J. 1197 (1984). Williamson argues that contractual safeguards are a means of curbing opportunism that might otherwise occur in contexts where the parties have invested in transaction-specific assets; that is, where the parties have committed resources to a contract that could not be fully recouped elsewhere if the contract were to fall through. Although employees make such an investment when they acquire firm-specific skills, Williamson argues that employees can bargain for termination fees and other devices in order to protect themselves. Id. at 1207-09. For an argument that employees may nevertheless benefit
Both arguments lose much of their force in the NCAA context. However commercial the NCAA may be, maximizing profits for its members is not, or at least should not be, the NCAA's sole goal. The NCAA's constitution, for instance, defines the "physical and educational welfare of student-athletes" as a fundamental principle of intercollegiate athletics. 34 At least, student-athletes should be seen as third party beneficiaries of the agreements entered into by member institutions and the NCAA. Unlike employee representation on a for-profit board, then, student-athlete representation would reinforce rather than distract the NCAA from its primary objectives.

Student-athletes are also less able to secure contractual safeguards than employees. As noted above, employees theoretically can protect their interests in their existing jobs by negotiating for contractual safeguards such as the right to a termination fee if fired. Consequently, they may not need or benefit from the additional protection of representation on the employer's board of directors. 35 Student-athletes are particularly vulnerable, since their eligibility is limited to a brief period of a few years; yet they have almost no means of protecting their interests by contract. 36 This is especially true of those athletes who hope to move on to a professional career, since college athletics is the most important (and for many, the only) opportunity they have to develop and demonstrate their talents. 37 Given the absence of other protections, one

---

34. 1994-95 NCAA MANUAL art. 2.2.
35. Whether employees do in fact have access to adequate contractual protections is, of course, debatable, even if one considers not only explicit contractual provisions but also the effect that external market pressures have on wages and working conditions. For present purposes, my principal point is that whatever one's view of employees' need for representation, student-athletes seem to have a significantly greater claim.
36. Professor Remington makes an interesting argument that student-athletes should in fact seek, and NCAA member institutions should give, explicit contractual protections such as a commitment to continue the student's scholarship after her eligibility expires. Frank J. Remington, Universities and Student-Athletes: Keeping Promises and Fulfilling a Mission, 1995 Wis. L. Rev. 765. While these kinds of provisions would provide many student-athletes with substantially more protection than voting rights, the parties' current failure to agree to such provisions underscores the need for other sources of protection, such as voting rights. The bargaining asymmetry between the parties and the difficulty of spelling out the university's responsibilities in complete detail may also reinforce the possible value of a fiduciary duty approach in the absence of, or in addition to, explicit contract terms, as I discuss in Part III.
37. The brevity of a college athlete's career makes unionizing less likely in the NCAA than in the professional sports context. The strict limitations on compensation and transfer reinforce student-athletes' vulnerability. See 1994-95 NCAA MANUAL art. 15.1
perspectives on student-athletes

Can make a strong argument that student-athletes are precisely the kind of constituency for whom direct representation makes sense.34 A comparison to the nonprofit sector reinforces the case for student-athlete representation. Unlike for-profits, which generally do not provide for multiple constituency representation, many nonprofits include representatives of specific interests on their boards. This is particularly true of charitable nonprofits such as universities, hospitals and organizations such as the YMCA that do not have a single, well-defined constituency.

The NCAA has in fact begun to increase student-athletes' influence in NCAA decisionmaking. In addition to requiring each member institution to establish a student-athlete advisory committee, the membership voted at the most recent convention to add student-athlete advisors to five NCAA committees.39 The obvious limitation of these reforms is that each restricts student-athletes to an informal role, rather than giving them direct decisionmaking authority.40 The question, then, is whether student-athletes deserve actual voting power at the NCAA or member institution level.

One possible concern with direct representation involves another objection frequently directed at co-representation proposals in the for-profit context: that adding student representatives would create a problem economists describe as "cycling."41 The concern is that, however laudable the objectives may be, ensuring representation on the Council or

(student-athlete ineligible if receives more than a full grant-in-aid); id. art. 14.5.1 (student-athlete must sit out one year after transfer). Notice that the transfer rule, while undermining a student-athlete's position, acts as a safeguard for the athlete's university, since it reduces the risk that a student-athlete will defect to another school.

38. An alternative approach might be to relax the restrictions on student-athletes' ability to contract. Commentators and at least one activist have long advocated this step, arguing in particular that college athletes should be paid. See, e.g., Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 NOTRE DAME L. REV. 206 (1990); Mike Jensen, Play-for-Pay Advocate Goes 1-on-1 with NCAA, PHILA. INQUIRER, Nov. 18, 1994, at A1 (describing Dick DeVenzio's 12-year campaign to alter NCAA compensation restrictions).

39. See Jack L. Copeland, Student-Athlete Welfare Principles Overwhelmingly Adopted, NCAA NEWS, Jan. 11, 1995, at 7. Student-athletes are also members of some universities' delegations to the Convention. See Allison, supra note 3 (questioning efficacy of student-athletes' input in a delegation or on the Advisory Committee).

40. The NCAA does give (limited) direct representation to women and, to a lesser extent, minorities. See 1994-95 NCAA MANUAL art. 4.1.1 (requiring at least 12 women on the 44-member Council); id. art. 4.2.1 (at least three women on 14-member Executive Committee); id. art. 4.5.1 (at least three women on 44-member Executive Committee). Some conferences give student-athletes a direct role in conference decisionmaking.

other committees to groups with particular perspectives (such as athletes', women's, or minorities' interests) could seriously undermine these bodies' ability to speak with a coherent, unified voice. As a result, the committee (or the membership as a whole, in the context of the annual convention) might enact a series of inconsistent rules as various coalitions formed and then shifted, or it might have difficulty enacting anything in the first instance.\footnote{42}

The NCAA does differ from a for-profit corporation in at least one way with respect to cycling. Whereas for-profit directors arguably focus on the single, well-defined goal of ensuring a profit for shareholders in the absence of multiple constituency representation, NCAA decisionmaking already includes a variety of perspectives and goals, both within its membership and among its various constituencies. As a result, NCAA decisionmaking in some instances resembles a legislature more than a corporation.\footnote{43} Stated differently, the potential for cycling already

\begin{itemize}
\item Member University: A, B, C
\item Women: B, C, A
\item Student-Athlete: C, A, B
\end{itemize}

Given these preferences, if the representatives vote in accordance with their preferences, none of the three outcomes can consistently defeat the other two in pairwise voting. Thus, Member University's first choice of A would defeat B (since Member University and Student-Athlete both prefer A over B), but both Women and Student-Athlete prefer C to A; yet B defeats C, and so on. One way to ensure a winning choice even where, as here, the parties' preferences are multi-peaked, is to adopt a procedural rule that prohibits the decisionmakers from reconsidering an alternative they have previously rejected. Thus, if A is matched first against B, then against C, C will emerge as the winning choice. Yet the outcome is arbitrary, since both Member University and Women prefer B to C, and the decisionmakers might easily reverse this choice at their next meeting. The choice also is subject to manipulation if one of the parties has agenda control. For an extensive discussion of these issues, see Maxwell L. Stearns, \textit{The Misguided Renaissance of Social Choice}, 103 \textit{Yale L.J.} 1219 (1994); Saul Levmore, \textit{Parliamentary Law, Majority Decisionmaking, and the Voting Paradox}, 75 \textit{Va. L. Rev.} 971 (1989).

\footnote{43} This is particularly true given that the NCAA's member institutions vote on much of its business at the annual convention. On the other hand, the Presidents Commission and the Council act somewhat like a board of directors, since the Presidents Commission determines the order in which proposals are voted on, see 1994-95 NCAA MANUAL art. 4.5.3(c), the Council appoints many of the association's operating committees, \textit{id.} art. 4.1.3(b), and both are within the limited group of decisionmakers who have authority to initiate legislation. \textit{See, e.g., id.} art. 5.3.2.1 (only Presidents Commission, Council, Division Steering Committee, group of eight or more members, or a member conference may sponsor an amendment).
exists, and it is not clear how much student-athlete representation would exacerbate the problem. 44

Cycling is not the only concern, however. NCAA decisionmakers might also agree to student-athlete representation but then effectively marginalize the role of the representatives. 45 If the NCAA gave student-athletes a prescribed number of votes at the convention, for instance, these votes would lose value if the association shifted much of its decision-making authority to the committees that conduct NCAA business between conventions. 46

To the extent direct representation remains attractive despite these concerns, additional questions remain as to who student-athletes’ representatives might be and how they should be selected. The NCAA’s current approach to women’s representation is simply to set aside a specified minimum number of slots for representatives who are women, without otherwise altering the selection process. This strategy would not work for student-athletes, given that student-athletes do not hold the kinds

44. In the legislative context, the risk of cycling often is countered by vote trading, or “logrolling.” That is, constituencies agree to vote for a measure they may not support in return for votes in favor of a subsequent measure about which they feel strongly. Thus, to return to the example in note 42, Student-Athlete might agree to support B in return for Women’s promise to back a proposal of particular interest to Student-Athlete. See, e.g., Stearns, supra note 42, at 1278-79 nn.223-25 (discussing logrolling). The large amount of discussion among members prior to and in connection with the annual convention strongly suggests that NCAA members engage in logrolling. Whether logrolling is desirable is debatable, of course, but it does reduce cycling. Cycling also is less likely if some member institutions have disproportionate influence. Members of high revenue conferences such as the Big Ten and Pacific Ten are widely viewed as having particular influence due to the fear that they will simply secede from the NCAA if they conclude that its regulations are excessive.

45. This appears to have occurred during the attempts to reform the New York Stock Exchange during the New Deal era. During William Douglas’ term as chairman of the SEC, the SEC pressured the New York Stock Exchange to alter its governing structure in order to reduce the traditional dominance of floor traders. Although the exchange agreed to include a substantial minority of non-floor trader members and non-members on the governing board, floor traders subsequently reasserted control by arranging the delegation of important decisions to committees they controlled. See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 166, 178, 324 (1982). Notice that behavior of this sort can be seen as a particularly malignant exercise of agenda control.

46. The possibility of a shift in authority in the NCAA is not at all hypothetical. As noted earlier, the Presidents Commission did not even exist until the 1980s and was initially seen as largely powerless. It has subsequently become a major force in NCAA decisionmaking. See supra note 27. If student-athletes were represented on other committees, but not on the Presidents Commission, they could easily lose much of their leverage. Even if committees that lacked student-athlete participation did not arrogate additional authority, student-athletes’ inability to initiate legislation would significantly limit their influence.
of positions from which NCAA representatives currently are chosen.\textsuperscript{47} Should the NCAA decide to give student-athletes representation, it thus would face the difficult issue of deciding who should be eligible to vote: all students; all student-athletes; athletes at particular universities; student body presidents; or some other defined group.

As noted earlier, some conferences already provide for student input in conference decisionmaking. Big Ten universities generally select their representatives through a campus-wide vote. This approach illustrates some of the difficulties in assuring that student-athletes have meaningful input. If the student chosen to represent the university is not herself a student-athlete, for instance, there is some question as to how effectively she can speak for student-athletes; and, as discussed earlier, even student-athletes have very different perspectives. The brevity of student-athletes' presence further undermines the continuity of their input.\textsuperscript{48}

Nevertheless, there is something to be said for giving students the opportunity to speak for themselves about what they see as student-athletes' "interests." Simply having student-athletes present, as recent reforms allow, may increase member institutions' incentive to focus on student-athletes, but it significantly dilutes any benefits actual voting authority might offer.

III. INTERNAL CORPORATE GOVERNANCE: STUDENT-ATHLETES AND FIDUCIARY DUTY LITIGATION

The approach discussed above, direct representation, can be seen as an ex ante, or before-the-fact, strategy since it would assure student-athletes a say in the development and application of NCAA rules. This Part considers whether the traditional ex post corporate law remedy, suing the managers of an entity \textit{after} they fail to live up to their fiduciary duties, might be a means of enhancing student-athletes' influence in NCAA decisionmaking.

The fiduciary duty approach can only come into play if NCAA and university decisionmakers do in fact owe a fiduciary duty to student-

\textsuperscript{47} For instance, the \textit{NCAA Manual} defines "faculty athletics representative" as "a member of an institution's faculty or administrative staff who is designated by the institution's chief executive officer . . . to represent the institution." 1994-95 \textit{NCAA Manual} art. 4.02.1 Student-athletes ordinarily do not meet this definition.

\textsuperscript{48} An obvious alternative would be to use ex-athletes or professional representatives. For a somewhat analogous proposal in the corporate literature, see Ronald J. Gilson & Reinier Kraakman, \textit{Reinventing the Outside Director: An Agenda for Institutional Investors}, 43 \textit{Stan. L. Rev.} 863 (1991). The chief limitations of this approach would be the cost of engaging professionals and the possibility that outside representatives of this sort would only imperfectly share student-athletes' perspectives.
athletes. Therefore begin this Part by discussing the appropriate scope of managers’ fiduciary duties in the NCAA context. Then ask whether student-athletes would have standing to enforce these duties; discuss the procedural hurdles such a suit might face and whether the litigation would prove effective; compare the fiduciary duty approach with a somewhat analogous contract-based argument that a university owes its student-athletes an implied duty of good faith; and, finally, address the practical obstacles to this approach.

A. Fiduciary Duty Standards in NCAA and University Decisionmaking

The initial issue considered in much of the literature on fiduciary duties to nonprofits is how closely nonprofit duties should mirror for-profit standards. Because of the traditional perception of nonprofits as noncommercial and even charitable in nature, states at times have applied different fiduciary standards to nonprofits. Nonprofit directors may be held to a more lenient standard of care as a result. On the other hand, states have sometimes construed the duty of loyalty very strictly, prohibiting any transaction between a director and the nonprofit on the basis that it is particularly important to remove any hint of impropriety in the nonprofit context. As several commentators have recently noted, each of these deviations poses problems. Relaxing the duty of care diminishes directorial accountability, and the heightened duty of loyalty may chill even desirable transactions between a director and the nonprofit. A better approach, and one that the Revised Model Nonprofit Corporation Act has largely adopted, is to apply similar standards to for-profit and nonprofit directors.

Although the NCAA is an unincorporated nonprofit, similar reasoning suggests, at least as a normative matter, that NCAA decisionmakers should also be held to for-profit standards in conducting


50. REVISED MODEL NONPROFIT CORP. ACT § 8.30 (1981); Developments, supra note 18, at 1601-04. While the general for-profit fiduciary duty standards are also appropriate for nonprofits, for-profit standards arguably should not be imported wholesale in all circumstances. See, e.g., Deborah A. DeMott, Self-Dealing Transactions in Nonprofit Corporations, 59 BROOK. L. REV. 131 (1993) (arguing that proponents of a self-dealing transaction involving charitable nonprofits should be required to prove affirmatively the transaction’s fairness).
business for or with the NCAA. This conclusion speaks only to the relative stringency of courts' scrutiny, however, and leaves several crucial issues unresolved. First, what would be the nature of NCAA decisionmakers' duty? The NCAA's articulated mission is to preserve and promote amateur athletics, as well as education. NCAA decisionmakers' duty must therefore include an obligation to pursue these objectives in a reasonably prudent manner.

A second, and, from a student-athlete's perspective, particularly important question, is whether NCAA decisionmakers owe a duty directly to student-athletes, rather than solely to the member institutions that comprise the NCAA's primary constituency. Like the analogy between co-representation and student-athlete representation, the argument that NCAA decisionmakers owe a duty directly to student-athletes closely parallels the arguments in the for-profit context for "other constituency" provisions, which require directors to consider the interests of nonshareholder constituencies. Just as "other constituency" statutes require (or invite) directors to deviate from their traditional charge to focus exclusively on shareholders, holding NCAA decisionmakers accountable not just to their members but also to student-athletes could be seen as an expansion of their existing duties.

51. Given that many universities are nonprofit corporations, the nonprofit analysis in the preceding text applies directly to university decisionmakers. While my initial focus is on a duty owed by NCAA decisionmakers to student-athletes, I argue below that a member university should also have a duty to its student-athletes.

52. Which NCAA decisionmaking bodies should be subject to the duty, and whether the duty should vary among decisionmaking bodies, are additional issues to consider. For instance, it seems clear that members of the Presidents Council should be subject to a duty, but attributing a duty to each member represented at the annual convention is more problematic as a conceptual matter.

An additional question is whether NCAA decisionmakers' fiduciary duties also should apply to operating level actions such as a decision by the Infractions Committee to impose sanctions on a member institution or its athletes. For the duty to be fully effective, it would need to apply to individual infractions decisions as well as to the decision whether to implement a particular rule.

53. The call for holding directors responsible to a broad array of constituencies, rather than solely to shareholders, dates back at least to Dodd's debate with Berle. See supra note 6. The argument has gained particular force in recent years in the wake of the takeover wave of the 1980s, as a response to the damaging effect takeovers are thought to have on nonshareholder constituencies. Twenty-eight states have now adopted statutes that either permit or require for-profit directors to take stakeholders' (that is, constituencies other than shareholders') interests into account. Lawrence E. Mitchell, A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes, 70 Tex. L. Rev. 579 (1992) (defending the statutes). For a criticism of these statutes, see Carney, supra note 41.
Despite the fact that student-athletes do not on initial inspection appear to be the NCAA's principal constituency, the case for a duty to student-athletes is particularly attractive. Whereas for-profit corporations have traditionally owed fealty, at least in theory, solely to their shareholders, the NCAA's mission as protector of amateur athletics already extends beyond its members' parochial concerns to encompass the interests of student-athletes, as discussed earlier.  

As with the duty of care in the for-profit context, the most intractable limitation on looking to NCAA decisionmakers' fiduciary duties as a source of protection for student-athletes is that courts are poorly situated to second-guess NCAA decisionmaking. Courts are not any more expert in evaluating the effects of a given NCAA rule on student-athletes and amateur athletics than they are with respect to more traditional business decisions. In consequence, the broad deference extended to directors' decisionmaking pursuant to the business judgment rule in the for-profit context seems, at least at first glance, to be similarly appropriate for NCAA decisionmaking.

Given the need to defer to NCAA expertise, and the uncertainty as to what student-athletes' interests are, the fiduciary duty approach is subject to appreciable limitations. But a strong case can be made that NCAA decisionmakers should and do in fact owe such a duty to their student-athletes. I will return to the question whether fiduciary duty is likely to be an effective protection for student-athletes below, but first I consider several procedural issues.

B. Would Student-Athletes Have Standing to Sue?

Just as important as the issue of what an NCAA or member institution decisionmaker's fiduciary duty would entail is the related question whether student-athletes would have standing to enforce the duty. In addressing this issue, it is useful to begin by focusing on fiduciary duty claims student-athletes might make against NCAA decisionmakers, and

54. See supra note 34 and accompanying text. Student-athletes' relative inability to protect themselves by contract further reinforces the case for fiduciary duty protection. The argument that university decisionmakers owe their student-athletes a fiduciary duty is potentially even stronger, since students are a principal constituency of their universities. See infra part III.B.

55. In a case involving the closely related issue of requirements for participating in the Olympics, Judge Posner wrote a separate concurrence solely to underscore courts' lack of expertise in making decisions about amateur athletics. Michels v. United States Olympic Comm., 741 F.2d 155, 158 (7th Cir. 1984) (Posner, J., concurring).

56. For a classic example of courts' deference under the business judgment rule, see Shlensky v. Wrigley, 237 N.E.3d 776 (Ill. 1968) (rejecting challenge to directors' decision not to hold night games at Wrigley Field baseball park).
then to turn to the suits a student-athlete might bring against her own university.

For many nonprofit corporations, the issue of standing has proven particularly troublesome due to the absence of shareholders or an analogous constituency that is directly harmed by directorial breach. The states' usual response has been to vest standing in the state attorney general, but this is at most a second-best solution due to resource constraints and other limitations on attorney generals' effectiveness. 57

The standing issue is less problematic as a conceptual matter for a member-run organization like the NCAA. Much like the shareholders of a for-profit corporation, the members of the NCAA benefit or suffer most directly from NCAA decisions; as a result, they are the obvious choice to bring suit in the event of a breach. 58 Thus, as a general matter, it appears that the NCAA's members rather than anyone else should have standing to enforce any breach of NCAA decisionmakers' duties of care and loyalty. 59

Whether vesting standing in the member institutions also makes sense when the alleged breach relates to student-athletes is a more difficult question, however. Members often have very different incentives from a student-athlete. If a student-athlete wished to challenge the NCAA's limits on compensation, for instance, her university would have little incentive to defend her cause, because an increase in compensation would mean higher costs for the university. Moreover, even if the university were sympathetic to an athlete's grievance, it might refuse to pursue the

57. See, e.g., DeMott, supra note 30, at 145; Developments, supra note 18, at 1605-06.
58. Consistent with this notion, some states give members of a nonprofit corporation derivative standing either by statute or by common law. N.Y. NOT-FOR-PROFIT CORP. LAW § 623 (Consol. 1990 & Supp. 1995); TENN. CODE ANN. § 48-56-401 (1994); Developments, supra note 18, at 1605.
59. The derivative provision in the NCAA's home state of Kansas explicitly contemplates the possibility of suit by the members of an unincorporated association, see KAN. STAT. ANN. § 60-223a (1994), suggesting that the NCAA's members do in fact have standing to sue. The issue of standing becomes somewhat less clear on inspection, however, at least for suits that are derivative rather than direct, as discussed in more detail below. See infra note 83 and accompanying text.

In addition to its explicit inclusion of members of an unincorporated association, the Kansas provision also is significant in that, unlike many provisions applicable to nonprofit corporations, it does not impose the additional prerequisite that a minimum percentage of members join any derivative suit. See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 623 (Consol. 1990 & Supp. 1995) (minimum of five percent of members). Because each member institution has a significant stake in the NCAA's actions, despite comprising much less than one percent of NCAA membership, and given the reluctance many institutions will have to join a challenge to NCAA decisionmaking, members should be entitled to initiate fiduciary duty litigation individually.
claim for fear that challenging NCAA authority would invite retaliation.60

An obvious alternative to member-initiated litigation is allowing student-athletes to file suit if NCAA decisionmakers appear to have neglected their interests. Whether courts would in fact recognize student-athlete standing is unclear, however. Courts have often been extraordinarily reluctant to permit additional constituencies to enforce directorial duties on behalf of both for-profit and nonprofit corporations. Yet the arguments for student-athlete standing are quite powerful.62 Moreover, if the student-athlete's claim is against her

60. The NCAA has in fact shown a willingness to retaliate. When a group of prominent schools challenged the NCAA hegemony over college football television rights, the NCAA made clear that it would discipline any member school that recognized their television contract. The rebelling schools proved successful only when the Supreme Court held that the NCAA's actions violated the antitrust laws. NCAA v. Board of Regents, 468 U.S. 85, 95, 120 (1984).

The conflicts of interest between a student-athlete and her university are analogous in interesting respects to those arising in connection with for-profit directors' general duty to act lawfully. Although for-profit directors are subject to a fiduciary duty suit if they cause the corporation to break a law, shareholders may be better off looking the other way, since the improper behavior may actually benefit the corporation financially and, even if it does not, calling attention to the problem could prove costly for the firm. See, e.g., Patrick J. Ryan, Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance, 66 WASH. L. REV. 413 (1991).

61. See, e.g., O'Donnell v. Sardegna, 646 A.2d 398 (Md. 1994) (subscribers to health services insurance plans denied standing to sue former officers and directors); DeMott, supra note 50, at 145 (noting that standing with respect to charitable nonprofits often is limited to state attorneys general and the corporation). In the for-profit context, courts' general unwillingness to expand standing is reflected by their hostility towards bondholders' efforts to sue on fiduciary duty grounds. See, e.g., Simons v. Cogan, 549 A.2d 300 (Del. 1988) (no fiduciary duty owed to holders of convertible debentures); see also Laura Lin, Shift of Fiduciary Duty upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors, 46 VAND. L. REV. 1485 (1993) (arguing that, while directors are said to owe a fiduciary duty to creditors when a corporation becomes insolvent, most of the cases involve fraudulent conveyances or preferences rather than true fiduciary duty issues). One of the striking characteristics of the new "other constituency" statutes that purport to expand directors' duties is that they almost never authorize noshareholder constituencies to sue. See, e.g., 15 PA. CONS. STAT. ANN. § 1717 (Purdon 1990 & Supp. 1993).

62. One case involving an antitrust challenge to the NCAA's imposition of sanctions on a college football program offers a tantalizing glimpse at the issue. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988). In McCormack, the Fifth Circuit rejected the plaintiffs' attempt to characterize their suit as a derivative action brought against the NCAA on behalf of their university, due to the plaintiffs' failure to show that they had complied with the procedural prerequisites to derivative litigation. Id. at 1341. The court seems to have left open the possibility that student-athletes who do jump through the appropriate hoops could sue derivatively, although the court expressed doubts
university rather than against NCAA decisionmakers, the argument for
vesting standing in the student-athlete is even stronger. Although the
relationship between student-athletes and a university is not as direct as
that of shareholders to a for-profit firm, or members to a mutual benefit,
students have the kind of discrete financial stake in a university that
justifies giving them standing to enforce university decisionmakers'
fiduciary duties. Some courts have based student standing to sue
universities on this theory.63

Even more than in other contexts, courts' treatment of the standing
issue seems likely to turn on their conclusion as to whether NCAA and
university decisionmakers owe a fiduciary duty to student-athletes.
Because student-athletes' grievances tend to involve mistreatment specific
to student-athletes rather than claims of general mismanagement, courts
that recognize a duty to student-athletes would probably also grant
student-athletes standing to enforce it.

In his paper for this conference, Professor Remington argues that
student-athletes should negotiate explicit contractual protections during the
recruiting process, and that universities should in turn offer express
contractual protections to their recruits. For instance, a university might
promise to extend the student-athlete's scholarship in the event her athletic
eligibility expires, or to finance attendance of summer school.64 One
effect of focusing on the contractual nature of the student-athlete's
relationship with her university is that it underscores both the role of
fiduciary duty and the arguments I have just made for giving student-
athletes standing.

The issue of student-athletes' ability to contract with a university
raises two related concerns. First, even when the parties have equal
bargaining power, if the relationship is complex, they often will fail to
specify all the terms of their contract. One can easily imagine student-
athletes failing to insist that summer school tuition be included in their
scholarships, for instance. Second, all except the most highly sought after
student-athletes are at a significant bargaining disadvantage as compared
to a university.

63. See, e.g., Jones v. Grant, 344 So. 2d 1210 (Ala. 1977) (students and faculty
have standing to bring class action against trustees); Monclair Nat'l Bank & Trust Co.
standing to sue); see also Developments, supra note 18, at 1606. The most important
obstacle to standing in many of these cases is state statutory law suggesting that only the
attorney general has authority to bring suit against the trustees of a charitable
organization. By allowing student-athletes to sue, the courts would effectively expand the
standing provision.

64. Remington, supra note 36, at 768.
Fiduciary duty is a classic response to each of these problems. According to one view of fiduciary duty, its principal role in the corporate law context is to fill in terms that the parties have omitted from their contract. A very different view suggests that fiduciary duties should be imposed when the parties have unequal bargaining power or lack an arm's length relationship.

Characterizing fiduciary duty in this way strongly reinforces the case for recognizing student-athletes' standing. Whether one sees fiduciary duty as a mechanism for filling gaps in the student-athlete's contract, or as an obligation university or NCAA decisionmakers owe based on the nature of their relationship with student-athletes, the duty runs directly to student-athletes and can be seen as quasi-contractual in character. From this perspective, student-athletes are precisely the parties who should have standing to enforce such a duty.

C. The Procedural Prerequisites for Bringing Fiduciary Duty Litigation

Having suggested that NCAA and university decisionmakers may owe a fiduciary duty that student-athletes should have standing to enforce, I now consider the procedural requirements a student-athlete must satisfy in order to enforce the duty. The key threshold issue is whether the suit is derivative or direct. Corporate law defines a shareholder's suit as derivative if the harm in question runs to the corporation as a whole, as occurs when the directors of a firm mismanage its assets. If the suit is derivative, the shareholder must first demand that the corporation bring the suit, or allege that demand is excused, since technically it is the corporation that has been harmed. A shareholder who is harmed directly, on the other hand, can sue without first clearing these procedural hurdles.

66. Lawrence Mitchell has argued, based on this perspective, that managers should owe a fiduciary duty to bondholders in the for-profit context, in part because bondholders are not represented in the negotiation process. Lawrence E. Mitchell, The Fairness Rights of Corporate Bondholders, 65 N.Y.U. L. REV. 1165, 1177-86 (1990).
67. Harm to the corporation obviously impacts its shareholders, but a shareholder's injury is derivative, or indirect, to the extent that it principally stems from her proportionate interest in the corporation's loss in value due to directorial mismanagement or related problems. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 360, at 1047-53 (3d ed. 1983).
68. Some states impose additional prerequisites to derivative litigation, such as requiring plaintiffs to post security for expenses. See, e.g., N.Y. Bus. CORP. LAW § 627 (McKinney 1986).
A student-athlete who wishes to enforce a fiduciary duty might often be able to characterize her suit as direct and thus avoid the procedural obstacles to suing derivatively. A student-athlete whose eligibility has been restricted by the NCAA or whose university refuses to finance summer school, for instance, has suffered an injury that is direct rather than common to all student-athletes. Articulating the claim in quasi-contractual terms—as arising out of the student-athlete's contract with the NCAA or her university—reinforces the argument that the student has suffered an injury specific to herself. In fact, one could argue that nearly every claim involving NCAA or university decisionmakers' treatment of a student-athlete would be direct; only if the student-athlete sought to allege general mismanagement of NCAA or university assets would her claim qualify as derivative.

However, some student-athlete challenges to NCAA action might be at least partially derivative in nature. The NCAA's prohibition on compensating student-athletes is a good example. This restriction arguably affects all (or at least a wide range of) student-athletes, so that a challenge to the restriction as violating the NCAA's duty to student-athletes may be characterized as derivative.

In the corporate context, derivative litigation raises a problem that would prove similarly vexing if a student-athlete's suit against NCAA or university decisionmakers were found to be derivative: the directors of a corporation are the actors who will respond to a shareholder's demand, and thus will decide whether to pursue or terminate the suit; yet their motives are questionable given that they usually are the subjects of the suit. Even if the board of directors delegates the decision to a special litigation committee limited to directors who are not implicated in the suit, the committee is likely to be sympathetic to the defendant directors. As a result, the directors may not only weed out frivolous suits, but also

69. This contention is arguably consistent with the distinctions courts draw in the for-profit context. While it is difficult to generalize about the cases, courts generally characterize allegations that the behavior in question has impaired a shareholder's voting or dividend rights as direct rather than derivative, even if all shareholders suffer a similar injury. HENN & ALEXANDER, supra note 67, § 360, at 1048-49. One can argue, by analogy, that each student-athlete suffers a direct injury to her status as a student-athlete when the NCAA imposes regulations that adversely affect a wide range of student-athletes.

70. The literature on this and other derivative issues discussed below is extensive. John Coffee was the first to explore many of the issues in a series of classic articles. See, e.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669 (1986); John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, LAW & CONTEMP. PROBS., Summer 1985, at 5.
terminate potentially meritorious claims. One suspects that NCAA or university decisionmakers would be similarly unsympathetic to litigation brought by a student-athlete.71

As an alternative to special committees made up of "independent" directors (i.e., directors not named as defendants), commentators have suggested that a better approach in the for-profit context might be to authorize either court-appointed experts or a group of substantial shareholders to determine whether a corporation should pursue litigation.72 Of the two approaches, using court-appointed experts seems more attractive for derivative litigation involving the NCAA, and may in fact offer real promise in this context.73 As noted above, commentators have criticized court-appointed experts as being insufficiently focused on shareholders' interest in maximizing profits given that the experts are not themselves shareholders. In litigation involving student-athletes and the NCAA, by contrast, a committee with an incentive to focus solely on the NCAA's bottom line would be misplaced. Given the NCAA's explicit commitment to student-athletes,74 and the multiplicity of its other objectives, outside experts (such as former student-athletes) might be at least as capable of evaluating a complaint as representatives of member institutions or NCAA decisionmakers, yet not so hampered by conflicting incentives.

71. Another problem that would arise if a suit against NCAA decisionmakers were characterized as derivative is the uncertainty of whether the NCAA, because it is an unincorporated association, could be sued derivatively under Kansas law. See supra note 16; infra note 83. This uncertainty reinforces the value of suing directly rather than in a derivative capacity.

72. Both would ensure a less interested decisionmaker, but each also has significant downsides. The problem with shareholders' committees is that a firm's largest shareholders may be unwilling to serve due to inconvenience and the effect committee membership would have on their ability to buy and sell the firm's stock. Court-appointed experts are more willing to serve but, because they lack a financial interest in the firm, may not be as effective in advocating shareholders' best interests as would someone who shares those interests. For a thoughtful discussion of both approaches, and a tentative suggestion that shareholders' committees might improve on the existing regime, see Edward B. Rock, The Logic and (Uncertain) Significance of Institutional Shareholder Activism, 79 GEO. L. REV. 445 (1991); see also Franklin A. Gevurtz, Who Represents the Corporation: In Search of a Better Method for Determining the Corporate Interest in Derivative Suits, 46 U. PIT. L. REV. 365, 321-25 (1985) (arguing for court-appointed litigation panel).

73. The most obvious analogue to a shareholders' committee for suits involving the NCAA would be a committee comprised of representatives of seven member institutions. Such a committee raises concerns about its members' incentives, which may include a competitive interest in the punishment of another member or, on the other hand, the fear of future NCAA scrutiny of their own athletics department.

74. See supra note 34 and accompanying text.
This approach would obviously add to the cost of the derivative strategy, but it would give student-athletes the benefit of a disinterested decisionmaker in the event their suits were defined as derivative.

**D. Fiduciary Duty in Action: Its Promise and Limitations**

I have argued that none of the most immediate obstacles to a fiduciary duty approach is insuperable. An important question that still remains, and to which I now return, is whether this approach would effectively protect student-athletes.

I have already noted an important limitation on fiduciary duty litigation: because courts are poorly situated to second-guess NCAA decisionmaking, they almost certainly would defer in many situations to NCAA and university decisionmakers' substantive decisions, much as they do in duty-of-care corporate law cases. Yet the likely extent of judicial deference should not be overstated. First, even in duty-of-care cases, courts can provide meaningful scrutiny of the decisionmaking process and may strike down a decision if the procedures that led to it were flawed. Second, many and perhaps most of the suits brought by student-athletes would resemble duty of loyalty rather than duty-of-care suits, given the conflicts of interest created by NCAA and university decisionmakers' financial interest in limiting student-athlete compensation and mobility. Courts' willingness to play an active role in cases involving a conflict of interest suggests that fiduciary duty theories could offer meaningful protection for some student-athletes.

To appreciate how the fiduciary duty approach might work, consider an illustration. Suppose that a men's football player who has completed

---

75. Courts already have afforded broad deference to schools and other educational organizations sued on educational malpractice and related grounds. See, e.g., Ross v. Creighton Univ., 957 F.2d 410, 414-15 (7th Cir. 1992) (describing reasons for deference and citing cases). It is important to keep in mind, however, that the relationship between a student-athlete and a university is very different from the relationship between a non-athlete student and the university, given the university's close control over student-athletes' lives and the financial benefits some student-athletes bring to the university. See University of Colo. v. Derdeyn, 863 P.2d 629 (Colo. 1993) (describing extent of university regulation of student-athletes' lives).

76. For prominent recent examples in the for-profit context, see CEDE & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993) (directors exercised inadequate care in approving merger); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (same).

77. Delaware courts have applied enhanced scrutiny of for-profit corporation takeovers when directors have a conflict of interest but have not engaged in classic self-dealing. See, e.g., Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994). A somewhat similar level of review—one which at a minimum entails a searching scrutiny of the decisionmaking process—would be appropriate in the NCAA and member institution context.
his athletic eligibility needs one more year to complete his degree, but his university refuses to extend his scholarship for the final year. Using a fiduciary duty approach, the student-athlete might allege that the university’s refusal to extend his scholarship constitutes a breach of duty, and ask that the court issue injunctive relief requiring the university to finance his final year. In making his case, the student might point out that the NCAA constitution emphasizes NCAA (and by implication, member institution) decisionmakers’ obligation to further educational objectives; that the university insists on its recruits that it takes its educational responsibilities seriously (and perhaps made an explicit promise to that effect); and that refusing to extend the scholarship is wholly inconsistent with the educational mission of intercollegiate athletics. In view of the university’s obvious conflict of interest—saving costs by terminating the scholarship a year earlier—a court might well agree that the university decisionmakers breached their duty.

One caveat is in order: the parameters of the fiduciary duty necessarily would vary depending on the student-athlete and sport in question. Significantly different expectations are created in different contexts—the most obvious disparity in expectations appearing between revenue-producing sports and other sports. These differences highlight the intriguing parallels between a fiduciary duty theory and a student-athlete’s contract-based arguments that the university owes her an implied duty of good faith. In a much-cited recent case involving a Creighton University basketball player, the Seventh Circuit suggested that a university did in fact owe such a duty, at least to the extent it had made express promises to the student-athlete. In the example discussed above, this approach might, like fiduciary duty, be a basis for liability if

78. At the university level, courts have held that the letter of intent and related documents create a contractual relationship between the student-athlete and the university. Ross, 957 F.2d at 410; Colorado Seminary v. NCAA, 570 F.2d 330 (10th Cir. 1978); see Michael J. Cozzillio, The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name, 35 Wayne L. Rev. 1275 (1989).

79. Ross, 957 F.2d at 417 (rejecting negligence claims such as educational malpractice, but concluding that Illinois would recognize a claim based on express promise). Tim Davis has explored and argued for the implied contract duty approach in several recent articles. Timothy Davis, Student-Athlete Prospective Economic Interests: Contractual Dimensions, 19 T. Marshall L. Rev. 585 (1994); Timothy Davis, Intercollegiate Athletics: Competing Models and Conflicting Realities, 25 Rutgers L.J. 269 (1994) [hereafter Davis, Intercollegiate Athletics]; see also Harold B. Hilborn, Comment, Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics, 39 NW. L. Rev. 741 (1995) (arguing for contractual duty or, in the alternative, that student-athletes be given full employment benefits).
the university had made express promises to the football player concerning its financial commitment to his education.

In fact, the contract-based duty of good faith and fiduciary duty seem likely to lead to similar analyses in a wide range of cases. There are, however, several important differences between them. One advantage of implied contract is that it would entail fewer procedural uncertainties, such as the standing issues discussed earlier. On the other hand, fiduciary duty does not require the university to have made an express promise, and it can be used to scrutinize the university's decisionmaking process, rather than just the substance of its actions.

The fiduciary duty approach also seems far more promising if the student-athlete's grievance is against NCAA decisionmakers rather than her university, given that the NCAA does not have a direct contractual relationship with student-athletes. To appreciate how the fiduciary duty example might play out with respect to the NCAA, consider another example. Suppose the Presidents Commission drafted and sponsored legislation prohibiting universities from paying student-athletes a stipend to encourage them to attend summer school, and the legislation was passed at the annual convention. A student-athlete could attempt to show flaws in the decisionmaking process, such as the Commission's failure to consider evidence suggesting that revenue sports athletes cannot realistically graduate unless they attend summer school and that the graduation rate for these athletes is far lower than for other students (and perhaps student-athletes). The student-athlete might also focus on any obvious conflicts of interest that might have skewed the Presidents Commission's decisionmaking process, and argue that the process was flawed as a result.

In contrast to negative forms of scrutiny such as antitrust review, fiduciary duty litigation might even help to create and clarify the affirmative obligations universities and the NCAA owe to student-athletes. For instance, even if many of the suits proved unsuccessful

---

80. The same is true in the for-profit context. Bondholders whose contracts fail to protect them against adverse developments have attempted to advance both fiduciary duty and implied contractual duty arguments. See Marcel Kahan, The Qualified Case Against Mandatory Terms in Bonds, 89 Nw. U. L. Rev. 565, 587 (1995) (citing cases).

81. Peter Carstensem and Paul Olszowka argue that NCAA regulation should take place at the national level due to the "home court advantage" concerns that can undermine state decisionmaking. Peter C. Carstensem & Paul Olszowka, Antitrust Law, Student-Athletes and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation, 1995 Wis. L. Rev. 545, 560. These concerns are far less serious with respect to judicial review of fiduciary duty claims than in other contexts. Under ordinary conflict-of-law principles, or by analogy to the internal affairs doctrine in for-profit corporate law, courts would apply Kansas law in cases involving NCAA decisionmakers given that the NCAA is located in Kansas. Litigation against university decisionmakers would be decided by
on the merits, fiduciary duty challenges might force NCAA and university decisionmakers to articulate more clearly how they view their educational and athletic responsibilities to student-athletes.

It is important not to overstate the likely effectiveness of a fiduciary duty approach. As noted earlier, because courts are poorly situated to second-guess NCAA and university decisionmakers, they would often defer to NCAA and university expertise. Nevertheless, fiduciary duty suits could offer a significant additional protection to student-athletes.

E. Why Have We So Rarely Seen the Fiduciary Duty Approach in Action?

The suggestion that fiduciary duty litigation may improve on existing legal strategies for student-athletes, and thus that this corporate law perspective offers a welcome addition to student-athletes’ existing legal protections, raises an obvious question: why have litigants suing the NCAA so rarely invoked this device in the past? Why do they routinely look to constitutional law, antitrust, or their state legislatures instead?

One possibility is that, even in the absence of any practical obstacles to suing on fiduciary duty grounds, these suits would not be effective because of limitations such as courts’ likely deference to NCAA decisionmaking and the possibility courts would conclude that NCAA and university decisionmakers simply do not owe an enforceable duty to student-athletes. Yet, the concern over a relatively low probability of success seems an incomplete explanation of the dearth of fiduciary duty suits against the NCAA, and I have suggested several contexts where the approach might prove effective.\(^\text{82}\)

The NCAA’s unincorporated status creates additional uncertainties. As discussed in Part I, unincorporated associations are not legal entities. Because of this, and because derivative litigation involves state rather than federal law, the NCAA could not be sued derivatively unless a state courts in the university’s state, but both the student-athlete and the university would, in a sense, hail from that state. As a result, judges and juries would seem as likely to identify with even an out-of-state student-athlete as with university decisionmakers. Moreover, while state-by-state case law arguably could create problems such as a lack of uniformity, this has not been a major problem in other corporate contexts; and federal courts applying a federal law do not always provide uniform decisions, as the antitrust cases themselves make clear.

82. Because derivative plaintiffs are ordinarily required first to demand that a corporation (or in this case, association) pursue the litigation before pursuing it themselves, the possible time delay might be seen as a disincentive to suing derivatively. But plaintiffs have been able to sue immediately in the corporate context by alleging that demand is unnecessary because futile. Moreover, the problem arises only if the student-athlete cannot characterize her cause of action as direct rather than derivative.
Yet, as noted earlier, student-athletes could avoid this uncertainty by characterizing their suits as direct rather than derivative, and emphasizing the quasi-contractual nature of the claim.

Another possibility, of course, is that lawyers have not yet thought to focus on fiduciary duty. The one remaining obstacle is basic, but may also be particularly important: the fiduciary duty approach would function effectively only if student-athletes were able to obtain lawyers. Most student-athletes cannot afford to pay lawyers themselves. While the obvious alternative in such a situation is for attorneys to take promising cases on contingency as they do in the for-profit context, the contingency approach might not work for student-athletes' suits. In contrast to corporate derivative litigants, who frequently seek monetary damages, student-athletes would frequently be seeking injunctive relief and would often have extraordinary difficulty proving monetary damages.

Yet student-athletes' inability to obtain representation should not be overstated. First, some cases do involve or could be framed in terms of readily ascertainable dollar amounts, such as the cost of a final year of education that a university refuses to finance after an athlete's eligibility expires. Second, student-athletes could bring some suits as class actions (for instance, a challenge to an NCAA eligibility rule) and argue for attorneys fees in connection with a settlement or successful verdict. Finally, some student-athletes can afford representation, and other cases may be particularly good candidates for pro bono representation. The attorneys fees concern could be easily addressed through legislation requiring the NCAA and member institutions to pay successful plaintiffs' attorneys fees. But even in the absence of such a step, the fiduciary duty approach appears to offer promise.

83. Interestingly, Kansas, the NCAA's home state, appears to contemplate that derivative litigation may be brought against a Kansas association. Section 60-223a of the Kansas statutes, which sets forth the requirements for suing derivatively, refers to a "derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association." Kan. Stat. Ann. § 60-223a (1994) (emphasis added). Yet it is unclear whether the provision in question qualifies as an enabling statute affirmatively authorizing derivative litigation involving the NCAA. The Supreme Court of Kansas, for instance, construed Kan. Stat. Ann. § 60-223a quite narrowly in Kansas Private Club Ass'n v. Londerholm, 403 P.2d 891 (Kan. 1965), rejecting arguments that it gives an association the authority to sue on behalf of its members. See also Murray v. Sevier, 156 F.R.D. 235, 242 (D. Kan. 1994) (noting, in a case decided under Alabama law, that § 60-223 has been construed as not creating a right to sue or be sued in association name).
IV. EXTERNAL CORPORATE GOVERNANCE ISSUES: THE NCAA AS A SELF-REGULATING ORGANIZATION

The previous Parts considered whether internal corporate governance mechanisms might give student-athletes a greater voice in and protection with respect to NCAA and member institution decisionmaking. I shift in this Part from a discussion of internal governance to a consideration of the role that a more dramatic approach, external oversight, might play in addressing concerns of student-athletes.

The antitrust laws provide one possible source of external oversight. Students and universities have already used antitrust law in several high-profile cases against the NCAA, and Peter Carstensen and Paul Olszowka defend it in their article for this symposium as the most plausible mechanism for regulating NCAA activities. I will return to the role of antitrust later in this Part.

But antitrust is not the only possible source of external review of the NCAA. This Part examines the possibility of adopting a framework derived from the structure currently used to regulate the stock exchanges. This structure, which was first implemented pursuant to the Securities Exchange Act of 1934, grants the Securities Exchange Commission extensive authority to regulate the exchanges, but leaves much regulation to the exchanges themselves. Consistent with their largely autonomous role, the exchanges are registered as “Self Regulatory Organizations” under the 1934 Act.

I argue in this Part that a similar arrangement, coupling government regulation with a relatively hands-off approach to day-to-day governance, might also make sense for the NCAA. The analysis will suggest that securities-style regulation offers important advantages over both the internal corporate governance mechanisms previously discussed and the antitrust approach. The most obvious limitation of such an approach is the significant reform it would entail.

The Part begins by describing the regulatory framework used to oversee the exchanges, and details a few similarities between the NCAA and an exchange. I then consider how securities-style regulation might

85. Carstensen & Olszowka, supra note 81.
87. Securities Exchange Act of 1934, § 6, 15 U.S.C. § 78f. As noted earlier, Self Regulatory Organization status is not limited to exchanges. The National Association of Securities Dealers, for instance, is an association of securities professionals. For convenience, I will sometimes use “exchange” and “SRO” interchangeably, since the exchanges’ status most closely parallels the NCAA’s.
resolve controversial issues involving student-athletes, contrast the approach to external review under the antitrust laws, and briefly describe the practical barriers to adopting a system of securities-style regulation.

A. The Analogy Between the NCAA and the Exchanges

The Securities Exchange Act of 1934 gives the SEC authority to regulate each entity registered as an SRO. The SEC’s role, as defined in the Act, is to promote “fair competition” among the various constituencies of the exchanges, and to make sure that the exchanges take appropriate steps to monitor for and prevent fraudulent practices. The SEC’s charge also includes related, subsidiary goals, such as ensuring “fair representation” on the boards of the exchanges.

Although the SEC’s power to achieve its antifraud and pro-competition objectives was originally more constrained, the Commission now has pervasive regulatory power. In addition to being able to respond to rules proposed by an exchange, for instance, the SEC can directly alter an existing rule or promulgate an SEC rule with respect to a given issue. If the Commission views exchange regulation as inadequate, it can force an exchange to enact a new rule. The SEC’s response to the rise of the options market is perhaps the best example of this last power. As the options market dramatically expanded in the 1970s, many observers feared that the absence of regulation created the potential for widespread fraud. The SEC responded to the exchanges’ failure to develop safeguards by imposing a moratorium on new options until the exchanges proposed a framework for overseeing this market.

Despite its wide-ranging authority, the SEC has traditionally permitted the exchanges to retain a large measure of autonomy, intervening relatively infrequently. Although commentators have often


91. Lipton, supra note 89, at 550-54.

92. See, e.g., Timothy S. Hardy, Note, Informal Bargaining Process: An Analysis of the SEC’s Regulation of the New York Stock Exchange, 80 YALE L.J. 811 (1971) (suggesting that the SEC is generally prompted to act by scandals or the threat of antitrust scrutiny of the exchanges, and criticizing the informal processes the SEC and the New York Stock Exchange often employ).
called for a more active SEC role, most acknowledge that collaboration between the exchanges and the SEC offers, at least in theory, important advantages over exclusive regulation by the SEC. Not only would direct SEC regulation seriously tax the SEC’s administrative resources, but self regulation has the advantage of tapping into the expertise of the market professionals who comprise an exchange.93

A discussion of self regulation in the securities industry is not likely to immediately bring the NCAA to mind. Yet even a brief comparison reveals striking parallels. The NCAA currently acts very much like a self regulatory organization: it establishes rules for its members, regulates NCAA athletic competition, and disciplines members that fail to adhere to NCAA standards. If Congress were to assert some form of regulatory control over the NCAA, modeling the framework on the dual system used in securities law would offer the same kinds of benefits as exchange regulation. Most importantly, treating the NCAA as a self regulatory organization would leave the business of running college athletics to those with the requisite expertise, yet would enable regulators to step in to correct perceived inadequacies of NCAA oversight.

In addition to the theoretical attractions of treating the NCAA like a self-regulating exchange, this approach also draws support from a consideration of the remarkable historical and practical similarities between these superficially dissimilar organizations. Both the NCAA and the exchanges were originally set up and run as unincorporated associations, and appear to have foregone incorporation at least in part to minimize the likelihood of judicial interference with their internal affairs.94 By the time lawmakers established federal authority to regulate market operations during the New Deal, the New York Stock Exchange (and to a lesser extent the other exchanges) was so well-entrenched that displacing its regulatory role altogether would have been nearly impossible as a practical matter.95

The NCAA seems quite similar in this respect. Like the New York Stock Exchange, the NCAA has overseen college athletics for so long that recognizing its continuing role may be a prerequisite for any effort to provide for external regulatory review over intercollegiate athletics.96

---

94. Jennings, supra note 16, at 663 n.2. For a more complete discussion of the NCAA’s use of the association form, see supra part 1.
95. SELIGMAN, supra note 45; Jennings, supra note 16, at 669-70.
96. As noted at the outset of this Article, the NCAA was established in 1905, and has long regulated nearly all of collegiate athletics. See supra note 1 and accompanying text.
External regulation of the NCAA would obviously have a somewhat different focus than SEC regulation of the exchanges, yet one can easily imagine what its general mission would be. In addition to an SEC-like antifraud objective of making sure that the NCAA adequately polices member institutions' compliance with NCAA rules, regulators would also scrutinize NCAA decisionmaking (as well as the actions of its member universities) from both economic and educational perspectives. Regulators would address economic issues such as the question whether NCAA regulations bear an appropriate relationship to the NCAA's stated objective of "preserving amateurism." From an educational standpoint, regulators would ensure that the NCAA takes appropriate steps to integrate educational goals into intercollegiate athletics. In each of these areas, regulators would pay particular attention to the role and perspectives of student-athletes.

As in the exchange context, even an effective securities-style framework for NCAA regulation would face inevitable limitations. If regulators defer too much to SRO expertise, they may fail to correct any deficiencies in SRO regulation. Commentators have frequently criticized the SEC's regulation of the exchanges along these lines, pointing out that the SEC tends to exercise active and visible oversight only in the face of a public scandal or other crisis. On the other hand, aggressive regulators run the risk of overly burdening the organization they are charged with overseeing. Yet despite these limitations, one can easily imagine an important role for dual regulation in the NCAA context, as I discuss in detail below.


98. Market forces counteract some of the regulatory deficiencies in the stock exchange context. The New York Stock Exchange faces intense competition from both the other exchanges and market substitutes that have emerged in recent years. See Jonathan Macey & Hideki Kanda, The Stock Exchange as a Firm: The Emergence of Close Substitutes for the New York and Tokyo Stock Exchanges, 75 CORNELL L. REV. 1007 (1990). These market forces give the New York Stock Exchange an incentive to regulate efficiently, even if the SEC seems to have dropped the ball. Similarly, the NCAA may be constrained to a certain extent by the professional sports leagues. In theory at least, fans may turn to other sports if NCAA decisionmakers mismanage intercollegiate athletics. Yet the market constraints on the NCAA seem significantly less forceful. The NCAA (and the television networks) schedule the most visible NCAA sports so as not to compete directly with professional sports, for instance. Moreover, whatever constraints do exist may not benefit many student-athletes. In fact, the professional sports leagues may even exacerbate student-athletes' relative powerlessness with respect to some issues, since pro sports indirectly benefit from limits on compensation and other restrictions imposed on student-athletes at the collegiate level.
B. The Role That External Oversight Might Play in the NCAA

Having described external oversight in general terms, it is useful to examine in more detail what external regulation of the NCAA might look like. This section considers how securities-style regulation might influence NCAA decisionmaking with respect to several of the most prominent issues affecting (in often conflicting ways) student-athletes.

One of the most controversial issues in recent years has been the question of student-athlete compensation. While the NCAA has long defended its stringent limitations on compensation as crucial to preserving “amateurism” at the collegiate level, critics have repeatedly pointed out the irony that these unpaid athletes generate huge revenues for the NCAA and its member institutions, as well as the hardships the NCAA’s restrictions impose on poor student-athletes in particular. Yet these complaints have largely fallen on deaf ears.

One can easily imagine how securities-style regulators might deal with this issue. While regulators could unilaterally alter the NCAA’s restrictions if they had roughly the same powers as the SEC, they would presumably first pressure the NCAA to implement new rules. By analogy to the SEC’s approach in the options context, regulators might threaten to remove all restrictions on compensation unless the NCAA devised a new approach to compensation—one that provided more flexibility on issues such as pocket money and summer jobs, for instance, but preserved the distinctions between intercollegiate and pro sports. The obvious advantage of this approach is that it would enable the regulator to defer to NCAA decisionmakers’ expertise rather than attempting to substitute its own judgment, yet force the NCAA to address compensation issues much more quickly than it is likely to do in the absence of external pressure.99

Other issues are sufficiently disconnected from the NCAA’s expertise and stated purpose that regulators need not defer to NCAA decisionmaking. Consider, for example, the NCAA’s rule terminating a football player’s college eligibility if he makes himself available for the

99. The informal nature of much SEC regulation is not attractive to all observers. For an extensive criticism of this aspect of the self-regulation framework, see Hardy, supra note 92. As the analysis in the text suggests, I am significantly more optimistic about the efficacy of informal regulation. In my view, formalizing the regulatory process, as Hardy proposes, would undermine incremental change and would inevitably invite more resistance from the entity being regulated.

I do not mean to suggest by the examples I discuss in this section, however, that regulators invariably would address and help solve the problems in question (though I suspect they often would, at least in high-profile situations). My aim is merely to show the role regulators could play.
pro draft, regardless of whether a pro team actually selects him.\textsuperscript{100} As Carstensen and Olszowka point out in their antitrust analysis, this rule bears no obvious relationship to the NCAA's interest in preserving amateurism.\textsuperscript{101} By terminating eligibility as of the moment the athlete puts his name forward, the regulation simply tightens the NCAA's reins on its labor supply without providing any offsetting benefit, since many athletes would forgo the draft rather than risk losing their remaining eligibility. An external regulator could either invalidate anticompetitive regulations such as this one, or compel the NCAA to do so itself.

A third issue, gender equity and Title IX, implicates a much broader cross-section of student-athletes than compensation and draft issues, which primarily concern student-athletes who participate in Division I-A football and Division I men's basketball. Title IX has made clear that the NCAA's member institutions must provide equal opportunities for both men and women student-athletes.\textsuperscript{102} The NCAA's member institutions have tended to respond to the Title IX mandate in notably piecemeal fashion. Many have appeared to make only as many changes as are necessary to forestall Title IX litigation, rather than genuinely to address gender equity issues. Only when faced with or as a result of actual litigation have some schools made sweeping changes.\textsuperscript{103}

Equitable treatment of men and women student-athletes is an issue that NCAA decisionmakers should be ideally situated to address.

\textsuperscript{100} 1994-95 NCAA Manual art. 12.2.4.2; see also Ethan Lock, \textit{NCAA Eligibility Rules Send Braxston Banks Truckin'}, 20 CAP. U. L. REV. 643, 649 (1991) (criticizing draft rule as designed to benefit universities by discouraging student-athletes from making themselves available for draft).

\textsuperscript{101} Carstensen & Olszowka, supra note 81, at 590. As my discussion of the draft issue suggests, securities-style regulation would parallel antitrust review on many issues—particularly those entailing a consideration of the competitive effect of NCAA rules. For a more detailed comparison (and contrast), see infra part IV.C.

\textsuperscript{102} Notice that gender equity is an issue with respect to which student-athletes may have dramatically different interests. Equalizing men's and women's scholarships benefits student-athletes who participate in historically underfunded women's sports. Other student-athletes, on the other hand, generally those who play non-revenue men's sports, may view this equalization as a threat to their sport. \textit{See, e.g.}, Mike Jensen, \textit{In Sports, Equity Still Is an Issue}, PHILA. INQUIRER, Oct. 28, 1994, at A1 (comparing expenditures on men's and women's sports at six Philadelphia universities and describing effects of efforts to equalize them).

Universities' reluctance to make dramatic changes unilaterally—particularly if the changes reduce funding of revenue sports such as football and men's basketball—stems at least in part from a classic collective action problem. Even if an individual university wished to shift scholarships from men's football to women's sports, for instance, it might hesitate to take such a step for fear that it would put the university at a competitive disadvantage vis-à-vis other universities that failed to take similar steps.\(^\text{104}\) NCAA decisionmakers could theoretically address this problem by imposing a uniform obligation on all schools. The NCAA might also experiment with other ways of promoting gender equity, such as basing NCAA championships in some sports on the combined performance of the men's and women's teams.\(^\text{105}\)

In contrast to this theoretical promise, the NCAA's general response to the recent wave of Title IX and other discrimination suits against member institutions has been to articulate a general policy that members comply with these laws, but otherwise to leave members largely to their own devices.\(^\text{106}\) An external regulator might be a valuable antidote to NCAA decisionmakers' current failure to take more aggressive action. As with compensation, a regulator could use its leverage to counteract the current resistance to developing a meaningful approach at the NCAA level.

Notice that, in addition to replacing member institutions' existing ad hoc responses with a more consistent one, external regulation might also provide for better decisionmaking with respect to gender issues. Under existing law, courts have become the principal decisionmakers of gender equity disputes. Yet gender equity issues are quite complex, and rather than benefitting from a retroactive focus, require a forward-looking focus that courts are not particularly well-situated to provide. The advantage of external regulation is that it would force decisionmakers who have more expertise than courts on issues of importance to student-athletes to

\(^{104}\) For a classic account of collective action concerns of this sort, which uses an illustration from competitive sports as a central metaphor, see Thomas C. Schelling, Hockey Helmets, Concealed Weapons, and Daylight Saving: A Study of Binary Choices with Externalities, 17 J. CONFLICT RESOL. 381 (1973).

\(^{105}\) See George, supra note 103, at 658 (discussing use of this approach in skiing championships as a means of avoiding zero sum perception that benefits to women's sports must come at the expense of men's sports).

\(^{106}\) Under its "Principle of Gender Equity," for instance, the NCAA states that "[i]t is the responsibility of each member institution to comply with Federal and state laws regarding gender equity." 1994-95 NCAA MANUAL art. 2.3.1. The NCAA Manual goes on to suggest that the NCAA "should adopt legislation to enhance member institutions' compliance with applicable gender-equity laws." Id. art. 2.3.2. In addition, the NCAA has recently imposed a certification requirement, which requires each institution to conduct a self-study to address various issues, including gender equity.
develop a plan in the first instance. One suspects that courts would tend to defer to the NCAA approach if an external regulator pressured NCAA decisionmakers to develop a meaningful response to gender equity concerns.

A final issue further illustrates how securities-style regulation might make the NCAA more responsive and effective in areas of concern to student-athletes. One of the most consistent criticisms of the NCAA and its member institutions is that they do not do enough to place educational objectives at the heart of intercollegiate athletics. Many commentators have argued that the emphasis on education must occur at the institutional level, with universities providing academic oversight of their athletics departments and offering scholarships only to student-athletes who can reasonably be expected to succeed academically.107

While unilateral, institutional level reform is crucial, securities-style external regulation could play an important role in addressing educational objectives, and in doing so help to counteract the risk that individual universities whose administrators are not committed to change will subvert its effectiveness. External regulators could require NCAA decisionmakers to articulate specific educational responsibilities that a university would have to its student-athletes. Universities might be required, at least for revenue sport student-athletes, to extend a scholarship to include summer school, as well as the period after the student has completed her athletic eligibility.108 The NCAA and its member institutions have already taken a few tentative steps to achieve educational objectives—some under congressional prodding—such as requiring athletic recruiters to disclose the university’s graduation rate for student-athletes and related information to potential recruits.109 An external regulator might speed this process, and force NCAA decisionmakers to focus much more explicitly on the educational concerns of student-athletes.

107. Professors Allison and Davis both make arguments of this sort in their papers for this conference. Allison, supra note 3; Davis, supra note 3.

108. For a discussion of universities’ refusal to give scholarship aid in these situations, see Remington, supra note 36. A regulator might also encourage the NCAA to play some role in defining the appropriate parameters of academic support services. For one possible model of academic support services, see Davis, supra note 3, at 618-19 (proposing that support services be overseen by an academic dean).

C. Securities-Style Regulation as Compared to Antitrust

As I noted at the outset of this Part, one important mechanism for external regulation of NCAA decisionmaking already exists: the antitrust laws. In this section I return to antitrust in order to compare this form of external review to a framework modeled on SEC oversight of the stock exchanges. The comparison is particularly important given the obstacles to implementing a securities-style framework, as the following section discusses.

In many respects, the focus of a securities-style framework for the NCAA would parallel that of the antitrust laws, much as it does in the stock exchange context. Like antitrust regulators, and as discussed earlier, an NCAA regulator would scrutinize NCAA decisionmaking to ensure that NCAA regulations bear an appropriate relationship to the NCAA's objective of providing a framework for amateur intercollegiate athletic competition. In areas where NCAA regulations arguably do not further this objective—such as its rules terminating the eligibility of student-athletes who make themselves available for the pro football draft—securities-style regulation and the antitrust laws both suggest that such unnecessarily anticompetitive regulations should be struck down.110 Yet securities-style regulation also offers several important advantages over antitrust review. First, antitrust scrutiny is primarily negative in nature; antitrust laws focus on whether coordination among private actors has an impermissibly anticompetitive effect, and strike down those actions that do.111 By contrast, securities-style regulation not only addresses these concerns, but it also can be used to develop affirmative obligations. Perhaps the most obvious illustration of an affirmative external regulatory strategy among the examples we have considered is the enforcement of the NCAA's and universities' educational obligation to student-athletes. Whereas antitrust regulation would not have much to say about this responsibility, securities-style regulators could, as we have discussed, devise (or prompt NCAA decisionmakers to devise) a framework for addressing educational issues of concern to student-athletes.

110. See, e.g., Carstensen & Olszowka, supra note 81, at 590.
111. Carstensen and Olszowka recognize this limitation in their defense of antitrust scrutiny as the best available mechanism for external regulation of the NCAA. Id. at 581. In fact, the limitations of antitrust seem even more significant than their relatively optimistic view of its likely efficacy would suggest, given courts' relative reluctance to interfere with NCAA actions on antitrust grounds except in fairly egregious cases. See, e.g., Davis, Intercolligate Athletics, supra note 79, at 306-08 (describing cases rejecting antitrust challenges to various NCAA regulations).
A second advantage of securities-style regulation is closely related. Even with respect to issues involving "negative" review, securities-style regulators arguably can employ a more nuanced approach. Consider the issue of compensating athletes. If a court concluded that the NCAA regulations constituted an impermissible restraint of trade under the antitrust laws, it ordinarily would simply invalidate the regulations, perhaps with instructions as to what kinds of restrictions might be more likely to withstand an antitrust challenge. Rather than simply striking down the regulations, securities-style regulators could work with the NCAA and tap NCAA decisionmakers' expertise in developing a more reasonable approach to compensation of student-athletes.112

This affirmative, collaborative facet of securities-style regulation also could play an important role in resolving issues not covered by antitrust law. Title IX issues involving student-athletes are illustrative in this respect. As discussed earlier, securities-style regulators could pressure NCAA decisionmakers to develop a coherent, overarching framework for addressing gender equity issues such as the question of what achieving equal opportunity for men's and women's athletics requires.

While this analysis suggests that securities-style regulation theoretically offers several advantages over antitrust, I do not mean to suggest that the antitrust laws would prove irrelevant. As occurs with SEC regulation of the stock exchanges, antitrust scrutiny still could play an important role in settling issues that regulators have not addressed.113 In addition, the SEC often does not act until a scandal or the threat of antitrust challenge focuses attention on an issue.114 Although some commentators see this as a flaw in SEC regulation, it also suggests that antitrust scrutiny is a desirable stimulant to regulatory intervention.

D. Practical Obstacles to Securities-Style Regulation

This Part began with a somewhat improbable analogy: the suggestion that the NCAA bears an intriguing resemblance to the New York Stock Exchange and the other exchanges. I have attempted to show that the same regulatory strategy used in the exchange context could prove

112. The SEC has played a similar role on occasion in the securities context. As discussed earlier, for instance, the SEC pressured the exchanges to develop regulations in response to concerns about misbehavior in the options markets. See supra note 91 and accompanying text.

113. See Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (insisting on an "analysis which reconciles the operation of both statutory schemes . . . rather than holding one completely ousted"); Smythe, supra note 97 (proposing a framework for integrating antitrust scrutiny with SEC regulation of the exchanges).

114. See supra note 92.
remarkably effective in addressing issues of particular concern to student-athletes, and that it offers advantages even over external review under the antitrust laws. Yet it is important to recognize both the costs and the potential obstacles to securities-style regulation.

The direct costs of securities-style regulation are the costs of hiring new regulators and running a new enforcement office. In addition, securities-style regulation is only as effective as its administrators. As noted earlier, some commentators view SEC regulation of the exchanges as insufficiently vigilant.

The more important issue, however, is the political question of whether Congress would implement such a framework. Two observations illustrate the resistance such a proposal would face. First, in exploring the analogy between the NCAA and the exchanges, I touched only briefly on the conditions that led to SEC oversight of the exchanges. The securities acts were passed in the wake of the massive market collapse that ushered in the Depression. Given that the market crash was an aspect and important symbol of the overall economic breakdown, politicians and the public strongly believed that something needed to be done to regulate the exchanges. In striking contrast, the problems of student-athletes and intercollegiate athletics, while significant, are not nearly so dire. Similarly, intercollegiate athletics involves large sums of money in absolute terms, but its economic significance pales in comparison with the New York Stock Exchange and the other exchanges.

Second, the current political climate would be particularly hostile to a call to create a new agency or expand an existing one in order to force more effective NCAA action on issues of concern to student-athletes. One obvious candidate for expansion to encompass securities-style regulation of the NCAA, for instance, is the Department of Education, given the concern that NCAA decisionmakers and universities place a greater premium on educational objectives. Yet the Department of Education is one of the agencies most frequently mentioned as a candidate for elimination in the effort to downsize the federal government.

Nevertheless, securities-style regulation cannot simply be dismissed. As we have seen, this approach offers striking benefits. Whereas the NCAA currently tends to make changes only in the face of adverse public opinion or congressional hearings, securities-style regulation would create

115. My thanks to Alice Abreu for emphasizing this point. See SELIGMAN, supra note 45, at ix, 75, 92. Passage was further smoothed by the Pecora hearings, which highlighted alleged abuses in the banking industry. Id. at 1-18.

116. From a slightly different perspective, these observations can be seen as aspects of a historical path dependence issue. Having left the primary regulation of NCAA athletics to the private sphere for so long, Congress is less likely to shift gears now, and to establish extensive governmental oversight of intercollegiate athletics.
a more systematic incentive to address concerns about NCAA regulation. An amateur athletics commission might play this role with respect to both the NCAA and other amateur athletics organizations. Such a step would be dramatic, but given the problems not only with the NCAA but with American sports generally, it is not unimaginable.

It is interesting to note in this regard that there is a recurring threat that one or more major conferences might secede from the NCAA rather than continue to subject their programs to its restrictions. And it is debatable how necessary the NCAA really is, given the widely divergent perspectives of its members and how far it has moved from its original purposes in the context of revenue-producing sports. In view of this, it is certainly possible that the NCAA’s member institutions will eventually agree to external review as the price of its continued existence, or that secession will prompt a call for at least limited securities-style regulation.

V. CONCLUSION

As a purely conceptual matter, securities-style regulation is in some respects the most attractive of the corporate and securities law approaches this Article has considered. Securities-style regulators could oversee the NCAA and its member institutions on an ongoing basis, and as a result both strike down unnecessarily anticompetitive NCAA rules, and force the NCAA to focus more closely on educational and other concerns of student-athletes. Because this approach would require a major shift in oversight, however, its implementation faces significant practical obstacles under current conditions.

By contrast, the internal corporate governance devices, direct representation of and fiduciary duty litigation by student-athletes, both would have a less dramatic effect. Yet each is quite plausible as a practical matter, and the NCAA already appears to be moving toward some form of direct representation. Of the two approaches, fiduciary duty claims seem particularly promising. While fiduciary duty litigation is subject to several possible limitations, and is not a cure-all for the concerns of student-athletes, it offers appreciable advantages over existing constitutional law approaches, as well as over somewhat similar causes of action such as contract-based arguments and antitrust scrutiny. Not only might it result in an articulation of NCAA and member institutions’ obligations to student-athletes, but it also could be used to scrutinize the process pursuant to which NCAA and member institution decisionmakers act. Student-athletes’ ability to obtain lawyers to pursue fiduciary duty claims would be significantly enhanced if Congress were to pass legislation giving attorneys fees to successful plaintiffs; but even in the absence of such legislation, a number of student-athletes could, and should, add this approach to their existing strategies.