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Hell Hath No Fury Like a Fan Scorned: State Regulation of Sports Agents

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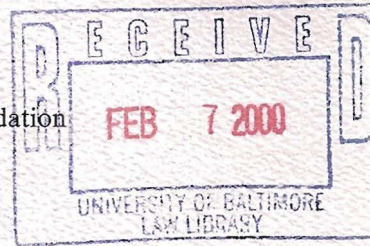
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THIRTIETH ANNIVERSARY ISSUE

An Irreverent and Idiosyncratic Review of the Historical Foundation
of the University of Toledo Law Review

Gerald P. Moran



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HELL HATH NO FURY LIKE A FAN SCORNED· STATE REGULATION OF SPORTS AGENTS

Phillip J. Closus

INTRODUCTION

INTERCOLLEGIATE athletics has evolved from local, student organized games in the early twentieth century into a national, multi-billion dollar industry in the twenty-first century.¹ This development has occurred in a context of dynamic tension between amateurism and student ideals on the one hand and professionalism, competitiveness, and financial gain on the other. The National Collegiate Athletic Association (NCAA), the major regulatory association for such intercollegiate competitions for most of this period, has publicly nurtured the ideal of the “amateur student-athlete” and has maintained stringent and detailed rules and regulations prohibiting the collegiate athlete from receiving any benefit of any kind based on athletic talent while he or she retains amateur eligibility.² In contrast to this NCAA sponsored image, reports of payments to and preferential treatment for collegiate athletes have been equally prevalent from the beginning of the twentieth century.³ The uneasy co-existence between the public perception of “amateur student-athlete” and the private reality of payments and preferences grew more tense as DIVISION I athletics, particularly football and basketball, began to attract national media attention and to generate millions of dollars in income.⁴ As the rewards for winning increased,

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1. See Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 368 (1997).

2. See NCAA CONST. art. 1, § 1.3.1 in NATIONAL COLLEGIATE ATHLETIC ASSOCIATION MANUAL 1998-1999, at 1 [hereinafter NCAA MANUAL]. See also Jan Stiglitz, *NCAA Based Agent Regulation: Who Are We Protecting?* 67 N.D. L. REV. 215, 217 (1991).

3. Some commentators have noted special benefits and payments to athletes appearing in ancient Greece. See W Jack Grosse & Eric Warren, *The Regulation, Control, and Protection of Athlete Agents*, 19 N. KY. L. REV. 49, 49 (1991). Preferential admission standards, professors who give athletes unearned high grades, summer jobs with no work involved, cash payments, free meals and clothing are only some of the “illegal” benefits widely portrayed in the media as being given to collegiate athletes. See Mike McGraw et al., *Money Games: Inside the NCAA*, KAN. CITY STAR, Oct. 5, 1997, at A1 (six-part series).

4. See Ricardo J. Bascuas, *Note: Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603, 1606-07 (1996).

the pressure to gain a recruiting edge or keep talented athletes academically eligible encouraged universities to ignore the "principles of amateurism."⁵ At the same time, the NCAA reinforced its commitment to the model of the "student-athlete" and strengthened the severity of sanctions that it may impose on an offending institution, including, but not limited to, forfeiture of games played by compromised athletes, return of revenue generated by "taunted" games, and limitations on the institution's ability to recruit future athletes.⁶

Prior to the 1970s, the battle for amateurism was waged mainly between the NCAA and a university's "institutional representatives"—coaches and boosters or alumni.⁷ In the late 1960s, the occupation of "sports agent" emerged and individuals of all kinds suddenly appeared on campus offering a variety of inducements to athletes in exchange for the execution of a representation agreement.⁸ The introduction of the agent disrupted the uneasy equilibrium which had been maintained for decades between the public image and the private reality of Division I athletics. The "principles of amateurism" were now being flaunted by agents—individuals not under the "institutional control" of any university. NCAA sanctions were imposed on universities when no institutional personnel had been involved in the violation of NCAA rules. The century old balance between the illusion of the "student-athlete" and the reality of payments and preferences, which had allowed intercollegiate football and basketball to flourish, was being threatened by the "uncontrolled" activities of the agents.⁹

The business practices of Norby Walters and Lloyd Bloom in the early 1980s brought the new reality of intercollegiate sports to a head. Walters and Bloom were talent agents in the recording industry who decided to represent athletes. In 1986, they signed a large number of college football players, most of whom were early draft picks, to representation contracts.¹⁰ The immediate success of the duo engendered rumors of extravagant payments to players and the signing of post-dated contracts before the expiration of an athlete's eligibility.¹¹ Allegations of Walters' and Bloom's ties to organized crime and their reported physical threats to the lives and well-being of rival agents and dissatisfied players brought a new level of criminality to Division I athletics.¹² In the course of numerous lawsuits regarding these two

5. NCAA MANUAL, *supra* note 2, art. 12 (Operating Bylaws).

6. *See id.* § 19.6, at 346-50 (Operating Bylaws). The NCAA can now also impose the so-called "death penalty" (ineligibility to field a team) for multiple violators. These varied sanctions cost the institution financially and embarrass it nationally.

7. *See* NCAA MANUAL, *supra* note 2, § 6.42 (Operating Bylaws).

8. *See* Lionel S. Sobel, *The Regulation of Player Agents and Lawyers*, in *A LAW OF PROFESSIONAL AND AMATEUR SPORTS* § 1.01 at 13-15 (Gary A. Uberstine ed., 1988); Philip N. Fluhr, Jr., *The Regulation of Sports Agents and the Quest for Uniformity*, 6 SPORTS LAW. J. 1, 2 (1999).

9. *See* Jeffrey P. Crandall, Note, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFF. L. REV. 815, 824-25 (1981). *See also* David L. Dunn, Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation*, 39 HAST. L.J. 1031, 1037-38 (1988) (discussing reported incidents of agent misconduct in the early 1980s).

10. *See* Grosse & Warren, *supra* note 3, at 65.

11. *See* Dunn, *supra* note 9, at 1032.

12. *See* Bascuas, *supra* note 4, at 1611-12. *See also* Grosse & Warren, *supra* note 3, at 66 (discussing the prosecution of Walters and Bloom for violations of RICO).

agents, the extent of intercollegiate corruption was publicly revealed. In a federal criminal prosecution of the duo, approximately fifty football players were subpoenaed by the government to testify against Bloom and Walters.¹³ All of the players had received money and other valuable consideration in exchange for signing post-dated representation contracts before the beginning of their senior season. The athletes were from every corner of the country and every type of college and university, including traditionally "clean" programs.¹⁴ These activities finally culminated in the conviction and sentencing of Bloom and Walters on five counts of racketeering and mail fraud.¹⁵

The breadth of the corruption and the easy availability of the athletes to the agents shocked the country. In response to the public outcry following these revelations, states began to pass legislation criminalizing conduct by sports agents that jeopardized a student athlete's eligibility under NCAA rules.¹⁶ This legislative trend is not directed at helping the student-athlete, especially with graduation rates below 40% at many programs and athletes who do procure degrees frequently receive them in meaningless majors.¹⁷ By restricting an athlete's ability to discover information about his/her market value, these statutes have been perceived as part of the monopolistic structure that depresses player compensation and rights in an industry which grosses billions of dollars from player's efforts.¹⁸ The states are therefore using their legislative and judicial processes to promote the narrowest provincial goals possible—the competitive advantage of intercollegiate football and basketball teams within the state and the granting of preferences and payments to athletes only by institutional representatives.

These statutes have the effect of giving NCAA regulations the full force of law. This in essence criminalizes rules made by a private association to benefit its own members. Although the use of state law to further the goals of a private entity would predictably have deleterious effects, the obvious disadvantages are considerably increased when the private entity is the NCAA and the arena is intercollegiate Division I athletics.¹⁹ NCAA rules are incredibly detailed and, on their face, prohibit the conferral of any student "benefit" because of his or her athletic ability.²⁰ Many experts have trouble understanding the tangled maze of NCAA bylaws and interpretations.²¹ Inadvertent violations occur with some frequency. To avoid this tangled web, many state statutes are triggered by any contact, even mere speech, between the agent and a student-athlete.²² In addition, the culture of intercollegiate

13. See *United States v. Walters*, 913 F.2d 388, 390 (7th Cir. 1990).

14. See *Grosse & Warren*, *supra* note 3, at 66.

15. See *Walters*, 913 F.2d at 390.

16. See *Grosse & Warren*, *supra* note 3, at 56-64. See also *Dunn*, *supra* note 9, at 1063 (noting only California, Oklahoma and Texas had statutes in July, 1988).

17. See *Stiglitz*, *supra* note 2, at 222; *Fluhr*, *supra* note 8, at 25. See also *McGraw*, *supra* note 3, *Failing the Grade* (pt. 6) (listing graduation rates).

18. See *Fluhr*, *supra* note 8, at 22-23. See also *Bascuas*, *supra* note 4, at 1628-29 (citing Judge Easterbrook as stating prosecutors use criminal laws and contract-restricting statutes "to suppress the competitive process").

19. See *Fluhr*, *supra* note 8, at 24.

20. See *NCAA MANUAL*, *supra* note 2, § 12.1.1.1.4 (Operating Bylaws).

21. See *Grosse & Warren*, *supra* note 3, at 51-52.

22. See *CAL. BUS. & PROF. CODE ANN.* § 18897.63 (West Supp. 1999); *FLA. STAT. ANN.*

athletics is to disregard NCAA rules to a certain extent, either because strict compliance is impossible or because gross violations provide a competitive recruiting advantage. In this atmosphere, the state's law is likely to be ignored by agents and athletes for similar reasons.²³ This reality enforces the belief rampant in collegiate sports that violating NCAA rules is not a problem, but getting caught is. The only people likely to be prosecuted in such an environment are those whose violations are publicized by a different entity such as the media or an ancillary legal proceeding. In these instances, the violation catches the attention of state officials.²⁴

No existing or proposed state statute regulates or criminalizes the activities of college or university coaches, booster, or alumni. This omission would appear to be glaringly inconsistent with the state's professed goals of preserving student eligibility and preventing penalties or disqualifications from affecting in-state universities and colleges. Payments and other benefits given by coaches or institutional representatives are as clear a violation of NCAA rules as inducements given by agents to players.²⁵ If violations by coaches and boosters are more likely to result in NCAA sanctions, the omission of such groups from the sweep of state legislation only confirms that NCAA rules are widely ignored, the statutes are woefully underinclusive regarding their purposes, and the states are incredibly provincial in the creation and enforcement of these statutes.

This article first describes the existing system of state statutes regulating sports agents, including the proposed Model Uniform Athlete Agents Act. The article then examines the validity of these statutes in the context of jurisdictional limitations and dormant Commerce Clause principles. Lastly federal regulation and the rules of professional sports unions are considered as alternatives to state legislative activity

I. STATE STATUTES

State regulation of the sports agent business began in the early 1980s in California.²⁶ The few statutes in existence prior to the Norby Walters revelations essentially followed the California model and analogized sports agencies to employment agencies.²⁷ These statutes typically required registration with a state agency and the disclosure of certain information to the state, usually a standard form representation agreement and fee disclosure, if an individual desired to do business within the jurisdiction.²⁸ In the 1990s, a new wave of more detailed legislation has occurred. To date, twenty-seven states have enacted statutes which regulate sports

§ 468.453 (West Supp. 1999); IOWA CODE ANN. § 9A.8(3) (West 1995); MD. CODE ANN., BUS. REG. § 4-402 (1998); MICH. COMP. LAWS ANN. § 750.411e(1) (West 1998); TEXAS BUS. & COM. CODE ANN. § 8871(6)(b)(3) (Supp. 1999).

23. See Dunn, *supra* note 9, at 1051, Fluhr, *supra* note 8, at 23.

24. See Bascuas, *supra* note 4, at 1610-14.

25. See NCAA MANUAL, *supra* note 2, § 12.1.1.1.4 (Operating Bylaws).

26. See CAL. LAB. CODE § 1500 (West 1972). This statute was replaced by CAL. BUS. & PROF. CODE § 18895 (West Supp. 1999).

27. See generally Zinn v. Parrish, 461 F. Supp. 11 (N.D. Ill. 1977), *rev. d.*, 644 F.2d 360 (7th Cir. 1981).

28. See CAL. LAB. CODE §§ 1510, 1511 (West 1972).

agent activity²⁹ Of the twenty-three states without such statutes, sixteen have never enacted a sports agent statute and have no bills pending,³⁰ six have bills pending³¹ and one has recently repealed its statute with no bills pending to replace it.³² Although consistent in their intent to "protect" in-state collegiate athletes from the influence of sports agents, the statutes vary regarding their jurisdictional reach, registration requirements, substantive prohibitions, and imposed sanctions.

The jurisdictional scope of these statutes is centered in the definition of "student-athlete." The majority of the states define a student-athlete as a resident of the state or a student at an educational institution located within the state who participates or is eligible to participate in athletics.³³ A more aggressive expansion of these regulations is found in a second type of statute. These statutes contain the same definition of student-athlete delineated in the first group, but additionally include anyone who has indicated an intent, usually in writing, to participate in athletics at an in-state institution.³⁴ This modern trend extends the requirements of the statute to include contacts with prospective students who may live in another state and have only been in the state a few times. Although every other state defines "athletics" broadly, Texas specifically limits its statute to include only students participating in football and basketball.³⁵

29. See ALA. CODE §§ 8-26-1 to -41 (Supp. 1998); ARK. CODE ANN. §§ 17-16-101 to -203 (1992); CAL. BUS. & PROF. CODE §§ 18897.1-97 (West Supp. 1999); COLO. REV. STAT. ANN. §§ 23-16-101 to -108 (West Supp. 1999); CONN. GEN. STAT. ANN. §§ 20-553 to 558 (West Supp. 1999); FLA. STAT. ANN. §§ 468.451-4571 (West Supp. 1999); GA. CODE ANN. §§ 43-4A-1 to -19 (1994); IND. CODE ANN. §§ 35-46-4-1 to -4 (West 1998); IOWA CODE ANN. §§ 9A.1-.12 (West 1995); KAN. STAT. ANN. §§ 44-1501 to -1515 (1999); KY. REV. STAT. ANN. §§ 164.680-689 (Banks-Baldwin Supp. 1998); LA. REV. STAT. ANN. §§ 4:421-430 (1987 & Supp. 1999); MD. CODE ANN., BUS. REG. §§ 4-401 to -426 (Supp. 1999); MICH. COMP. LAWS ANN. § 750.411e (West 1991); MINN. STAT. ANN. § 325E.33 (West 1995); MISS. CODE ANN. §§ 73-41-1 to -23 (1995 & Supp. 1998); MO. ANN. STAT. §§ 436.200-209 (West Supp. 1999); NEV. REV. STAT. ANN. §§ 398.005-255 (West 1996); N.C. GEN. STAT. §§ 78C-71 to -81 (1990); N.D. CENT. CODE §§ 9-15-01 to -05 (Supp. 1997); OHIO REV. CODE ANN. §§ 4771.01-.99 (Banks-Baldwin 1999); OKLA. STAT. ANN. tit. 70, §§ 821.61-.71 (West Supp. 1999); 5 PA. CONS. STAT. §§ 3301-12 (Supp. 1999); S.C. CODE ANN. §§ 59-102-10 to 50 (Law. Coop. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2121 (1996 & Supp. 1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1999); WASH. REV. CODE ANN. §§ 18.175.010-.080 (West Supp. 1999).

30. Alaska, Delaware, D.C., Hawaii, Idaho, Illinois, Maine, Massachusetts, New Mexico, New Hampshire, Oregon, South Dakota, Utah, Vermont, Wisconsin and Wyoming have neither a statute nor a bill under consideration.

31. Nebraska, West Virginia, Arizona, Rhode Island, New York, and New Jersey have bills pending.

32. Virginia has recently repealed its statute and has no new bill under consideration.

33. See KAN. STAT. ANN. § 44-1502 (1998); MICH. COMP. LAWS. § 750.411e (1998); N.D. CENT. CODE §§ 9-15-01 to -02 (1998); WASH. REV. CODE ANN. §§ 18.175.030-.070 (West Supp. 1998).

34. See ALA. CODE §§ 8-26-24 to -41 (1998); CAL. BUS. & PROF. CODE §§ 18895.2-.93 (West Supp. 1998); COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); FLA. STAT. ANN. § 468.452 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); IND. CODE ANN. § 4-5.1 (West Supp. 1998); IOWA CODE ANN. § 91.8(1) (West Supp. 1998); MINN. STAT. ANN. § 325E.33 (West Supp. 1998); MISS. CODE ANN. §§ 71-41-01 to -99 (1998); OKLA. STAT. ANN. tit. 821, § 61 (West Supp. 1998); PA. CONS. STAT. ANN. § 7107 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998).

35. See TEXAS BUS. & COM. CODE ANN. § 8871(C) (West Supp. 1998). Despite broader applicability, the other state regulations are really only concerned with football and men's basketball. See Stiglitz, *supra* note 2, at 216.

Registration requirements reveal a more disparate pattern of regulation. A number of states do not require registration with the state or a posting of a surety bond prior to the contacting of or contracting with a student-athlete.³⁶ Other states require state registration but do not mandate the posting of a surety bond.³⁷ Finally, a third group requires central registration and the posting of a surety bond, with the required bond amounts ranging from \$10,000 to \$100,000.³⁸ The majority of the states that require registration specify that the information be filed with the Secretary of State.³⁹ The other states delineate a different state official to be in charge of registration, most typically a Commissioner of Consumer Protection or a special Agent Regulatory Commission.⁴⁰ A recent trend is to test prospective agents on various sports law topics in addition to requiring an application, background check, and fee.⁴¹ Many states exempt members of the state's bar from the registration requirements.⁴²

The substantive provisions of the statutes usually center on contact with the student-athlete and/or contracting with the student-athlete. A number of states do not regulate contact at all, but merely focus on the event of contract execution.⁴³ For those that do regulate contact, a small number of states impose an outright ban on contact between an agent and a student-athlete.⁴⁴ The others mandate that no contact

36. See IND. CODE ANN. § 4-5.1 (West Supp. 1998); MICH. COMP. LAWS. § 750.411e (1998); MINN. STAT. ANN. § 325E.33 (West Supp. 1998); NEV. REV. STAT. ANN. §§ 398.015-398.065 (Michie 1998); N.D. CENT. CODE §§ 9-15-01 to -02 (1998); OHIO REV. CODE ANN. §§ 4771.01-4771.99 (Banks-Baldwin 1998).

37. See CONN. GEN. STAT. ANN. §§ 20-555 to -558 (West Supp. 1998); LA. REV. STAT. ANN. § 4-421 (West Supp. 1998); MO. ANN. STAT. § 436.200 (West Supp. 1998); OKLA. STAT. ANN. tit. 821, § 61 (West Supp. 1998); S.C. CODE ANN. § 59-102 (Law Co-op. 1998); WASH. REV. CODE ANN. §§ 18.175.030-18.175.070 (West Supp. 1998).

38. See ALA. CODE §§ 8-26-24 to -41 (1998); ARK. CODE ANN. § 17-16-01 (Michie 1998); CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); FLA. STAT. ANN. § 468.453 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); IOWA CODE ANN. § 91.8(1) (West Supp. 1998); KAN. STAT. ANN. § 44-1502 (1998); KY. REV. STAT. ANN. §§ 518.010-518.080 (Banks-Baldwin 1998); MD. CODE ANN. BUS. OCC. & PROF. § 4-402 (1998); MISS. CODE ANN. §§ 71-41-01 to -99 (1998); N.C. GEN. STAT. §§ 78C 71 to 78 (1998); PA. CONS. STAT. ANN. § 7107 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998); TEXAS BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

39. See ARK. CODE ANN. § 17-16-01 (Michie 1998); CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); IOWA CODE ANN. § 91.8(1) (West Supp. 1998); KAN. STAT. ANN. § 44-1502 (1998); KY. REV. STAT. ANN. §§ 518.010-518.080 (Banks-Baldwin 1998); LA. REV. STAT. ANN. § 4-421 (West Supp. 1998); MD. CODE ANN. BUS. OCC. & PROF. § 4-402 (1998); MISS. CODE ANN. §§ 71-41-01 to -99 (1998); MO. ANN. STAT. § 436.200 (West Supp. 1998); N.C. GEN. STAT. §§ 78C 71 to 78 (1998); OKLA. STAT. ANN. tit. 821, § 61 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

40. See ALA. CODE §§ 8-26-24 to -41 (1998); CONN. GEN. STAT. ANN. §§ 20-555 to -558 (West Supp. 1998); FLA. STAT. ANN. § 468.453 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); PA. CONS. STAT. ANN. § 7107 (West Supp. 1998); S.C. CODE ANN. § 59-102 (Law Co-op. 1998); WASH. REV. CODE ANN. §§ 18.175.030-18.175.070 (West Supp. 1998).

41. See FLA. STAT. ANN. § 468.453 (West Supp. 1998).

42. See KY. REV. STAT. ANN. § 518.010(3)(b); LA. REV. STAT. ANN. § 40422(A); TEX. BUS. & COM. CODE ANN. § 49-7-2112(5) (1998).

43. See MICH. COMP. LAWS. § 750.411e (1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998).

44. See CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); MD. CODE ANN.

occur until the registration process has been completed and approved.⁴⁵ An exception usually exists for student initiated contact, with the agent required to begin the registration process a set number of days from the contact.⁴⁶ The statute may also require the agent to notify the educational institution before contacting the student-athlete.⁴⁷ These statutes do not provide guidance for agents if the institution tells an agent that he or she does not have permission to contact the athlete. Some statutes require, and a number of educational institutions host on their own, an official agent interview panel.⁴⁸ Any contact which violates NCAA rules violates the statute.

The statutes usually mandate that a representation contract contain certain specified clauses. A boldface warning to the athlete that execution of the contract will result in his or her loss of eligibility is the most commonly imposed term.⁴⁹ A few states require notice to the educational institution before any representation contract is executed,⁵⁰ but most states require a copy of the contract to be filed with the educational institution within some designated period after execution, typically seventy-two hours or before the athlete's next scheduled game or event, whichever is sooner.⁵¹ Such statutes stipulate that the student-athlete may rescind the contract within a specified period of the date of execution.⁵² A few states include an outright ban on any representation contract between an agent and a student-athlete with remaining eligibility.⁵³ Any contract or contractual inducement that violates NCAA rules violates the statute.⁵⁴

The existing statutes impose harsh penalties for violations. A representation contract that does not comply with statutory requirements is void and cannot be enforced.⁵⁵ A violation of the statute is a misdemeanor⁵⁶ or a felony,⁵⁷ with

BUS. OCC. & PROF. § 4-402 (1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

45. See FLA. STAT. ANN. § 468.454 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998).

46. See CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

47. CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); FLA. STAT. ANN. § 468.454 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

48. See CAL. BUS. & PROF. CODE § 18897.63(e); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998); S.B. 6719 § 424(6)(2), 221st Leg. (N.Y. 1997); S.B. 2642 § 5-73-6, 1997-98 Leg. Sess. (R.I. 1997); H.B. 825 § 4771.16(E), 122nd General Assembly (Ohio 1997-98).

49. See KY. REV. STAT. ANN. § 518.015(3); OHIO REV. CODE ANN. § 4771.01(3); TENN. CODE ANN. § 49-7-2113(2).

50. See GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998).

51. See CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); FLA. STAT. ANN. § 468.454 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998).

52. See CAL. BUS. & PROF. CODE §§ 18895.2-18897.93 (West Supp. 1998); FLA. STAT. ANN. § 468.454 (West Supp. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998).

53. See MD. CODE ANN. BUS. OCC. & PROF. § 4-402 (1998); MICH. COMP. LAWS. § 750.411e (1998).

54. See ALA. CODE § 8-26-14(g) (1998); KY. REV. STAT. ANN. § 518.050(5) (Banks-Baldwin 1998); L.B. 766 § 7(5), 95th Leg., 1st Sess. (Neb. 1997) (adjourned during the 1998 Regular Session without being carried over).

55. See ARK. CODE ANN. § 17-16-01 (Michie 1998); COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); IOWA CODE ANN. § 91.8(1) (West Supp. 1998); KAN. STAT. ANN. § 44-1502 (1998); MINN. STAT. ANN. § 325E.33 (West Supp. 1998); NEV. REV. STAT. ANN. §§ 398.015-398.065 (Michie 1998); N.C. GEN. STAT. §§ 78C 71

appropriate sentences indicated. In addition to incarceration, a fine of varying amounts can be imposed on the agent, including formulations where the fine is a multiple of any benefits conferred on the athlete in violation of NCAA rules.⁵⁸ In the modern trend of aggressive statutes, an educational institution is allowed to sue the agent for any damage that the institution has suffered, including loss of revenue from NCAA-mandated forfeitures or sanctions.⁵⁹ Some jurisdictions allow the institution to recover punitive damages.⁶⁰ This panoply of sanctions can expose a non-complying agent to significant civil and criminal liability. Although defined in terms of the student-athlete, no current state statute punishes an educational institution, its coaches or boosters or alumni for violating NCAA rules; only a few subject the student athlete to liability.⁶¹ The burdens of compliance and all civil and criminal liability are almost solely on the sports agent.⁶²

Although legislative history varies throughout the states, the typical stated purpose of the legislation is "to register athlete agents and to regulate their practices for the purposes of avoiding the negative impacts that may result from improper activity or inadequate performance by athlete agents."⁶³ These "negative impacts" are typically listed as: (1) student ineligibility resulting in a loss of an athletic grant-in-aid and the athlete's withdrawal from the college or university prior to completion of his or her education; (2) penalties, forfeitures, or disqualifications of colleges and universities which hinders their participation in intercollegiate athletics; (3) harmful consequences for professional sports; and (4) general detrimental effect on the people of

to -78 (1998); OHIO REV. CODE ANN. §§ 4771.01-4771.99 (Banks-Baldwin 1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

56. See CAL. BUS. & PROF. CODE ANN. §§ 18895.2-93 (West Supp. 1998); CONN. GEN. STAT. ANN. §§ 20-555 to 558 (West Supp. 1998); IOWA CODE ANN. § 91.8(1) (West Supp. 1998); MICH. COMP. LAWS § 750.411e (1998); LA. REV. STAT. ANN. § 4-421 (West Supp. 1998); MD. CODE ANN. BUS. OCC. & PROF. § 4-402 (1998); MO. ANN. STAT. § 436.200 (West Supp. 1998); N.D. CENT. CODE §§ 9-15-01 to -02 (1998); OHIO REV. CODE ANN. §§ 4771.01 to .99 (Banks-Baldwin 1998); OKLA. STAT. ANN. tit. 821, § 61 (West Supp. 1998); TEX. BUS. & COM. CODE ANN. § 8871 (West Supp. 1998); WASH. REV. CODE ANN. §§ 18.175.030 to .070 (West Supp. 1998).

57. See ALA. CODE §§ 8-26-24 to -41 (1998); FLA. STAT. ANN. § 468.4561 (West Supp. 1998); GA. CODE ANN. §§ 43-4A-2 to -16 (West Supp. 1998); IND. CODE ANN. § 4-5.1 (West Supp. 1998); KY. REV. STAT. ANN. §§ 518.010 to .080 (Banks-Baldwin 1998); MISS. CODE ANN. §§ 71-41-01 to -99 (1998); S.C. CODE ANN. § 59-102 (Law. Co-op. 1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998).

58. See MINN. STAT. ANN. § 325E.33(3).

59. See COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); FLA. STAT. ANN. § 468.4562 (West Supp. 1998); KAN. STAT. ANN. § 44-1502 (1998); KY. REV. STAT. ANN. §§ 518.010-518.080 (Banks-Baldwin 1998); MISS. CODE ANN. §§ 71-41-01 to -99 (1998); NEV. REV. STAT. ANN. §§ 398.015-398.065 (Michie 1998); N.D. CENT. CODE §§ 9-15-01 to -02 (1998); TENN. CODE ANN. §§ 49-7-2111 to -2113 (1998); TEXAS BUS. & COM. CODE ANN. § 8871 (West Supp. 1998).

60. See COLO. REV. STAT. ANN. §§ 23-16-102 to -105 (West Supp. 1998); FLA. STAT. ANN. § 468.4562 (West Supp. 1998); KAN. STAT. ANN. § 44-1502 (1998); KY. REV. STAT. ANN. §§ 518.010-518.080 (Banks-Baldwin 1998); TENN. CODE ANN. § 49-7-2113 (1998).

61. S.C. CODE ANN. §§ 59-102-30(A), (F) (Law. Co-op. 1998); TENN. CODE ANN. § 49-7-2113; 1998 Ala. Acts 98-132 (H.B. 197); 1998 Ky. Acts ch. 259 (H.B. 703).

62. See Bascuas, *supra* note 4, at 1609-14.

63. S. 6719, 221st Leg. (N.Y. 1997); S. 1237, 222d Leg. (N.Y. 1999).

the state.⁶⁴ The conclusion is inescapable that these statutes are designed to regulate or punish any contact or influence that individuals not associated with a college or university may have with an athlete. This ban is clearly designed to allow the institution to control the revenues that its program generates.⁶⁵

The reach of the most aggressive statutes is quite broad, especially those statutes that include prospective students within the definition of "student-athlete." For example, if a high school senior living in Chicago signs a letter of intent to play football at Florida State, a resident of Chicago who talks to that senior about professional representation must register with the state of Florida before talking with the high school student or face civil and criminal penalties in Florida. If a sophomore football player at the University of Maryland who lives in Los Angeles, California is home for spring break and contacts a Los Angeles agent to talk about his market value, the California agent cannot talk to the player by phone or in the player's home without first registering in Maryland. If a woman who is a junior plays basketball for the University of Texas and is from Milwaukee, Wisconsin, an agent from Milwaukee cannot talk to the girl's father in Milwaukee without violating the Texas statute. In each of these examples, the agent is subject to a state's sports legislation even though the agent does not and will not have any direct contact with the state.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has a draft "Uniform Athlete Agents Act" before it for consideration.⁶⁶ The Model Act, which follows the modern trend, adopts the jurisdictional reach and substantive provisions of the broadest current statutes. The general provisions contained within the Act's Article One define an "agent" as anyone who contracts with a student-athlete or solicits, contacts, or recruits a student-athlete to sign a representation contract.⁶⁷ An "educational institution" is described as a "public or private junior high school, high school, junior college, college, or university that the student-athlete attends, last attended, or to which the student-athlete has expressed written intention to attend."⁶⁸ Finally, a "student-athlete means an individual who engages in, is eligible to engage in, or may be eligible presently, or in the future, to engage in any intercollegiate sporting event, contest, exhibition, or program."⁶⁹ The Act expands its reach by including a contact ban on any student-athlete who expresses a written intent to attend an in-state institution.⁷⁰ The registration requirements in the Act's Article Two prevent an agent from contacting or contracting with any student-athlete prior to registration with the state and notification of the athletic director at the educational institution.⁷¹ If the student-athlete or someone on his or her behalf initiates the contact with the agent, the agent must file an application for registration and notify the athletic director within seven days of the contact.⁷² The Model Act

64. S. 6719, 221st Leg. (N.Y. 1997).

65. See Bascuas, *supra* note 4, at 1629-30; Fluhr, *supra* note 8, at 22.

66. See UNIF. ATHLETE AGENTS ACT (Proposed Official Draft Sept. 1998). For a description of the procedures that govern the NCCUSL's creation of uniform laws, see Fluhr, *supra* note 8, at 9-12.

67. See *id.* § 102(1).

68. *Id.* § 102(5).

69. *Id.* § 102(11).

70. See *id.* § 102(5).

71. See *id.* § 201(a).

72. See *id.* § 202(a).

exempts an agent from many of the registration details if the agent proves to the state that he or she has registered previously in another state with similar requirements.⁷³ If a student-athlete executes a contract with an agent, the contract must contain certain clauses described in Article Three of the Model Act, including a boldface notice regarding loss of collegiate eligibility and encouragement of the student-athlete to talk to his or her coach before signing.⁷⁴ Within seventy-two hours of the execution of the contract, or prior to the student-athlete's next athletic event, whichever comes first, the agent and the student-athlete must notify the athletic director of the educational institution.⁷⁵ The Model Act also contains a detailed registration process (including specified fees, an application form and proof of liability insurance in a minimum amount of \$100,000), a student-athlete's right to cancel a contract within seven days of execution, recordkeeping requirements and prescribed sanctions (including civil remedies for the educational institution, administrative penalties and criminal punishment).⁷⁶

The Model Act therefore embodies most of the principles of the "aggressive" sports legislation already in existence. The Model Act would sanction all of the examples previously discussed. By including junior high school students within its scope, the Model Act potentially criminalizes a conversation between an uncle and his eighth grade nephew, if the uncle states that he will represent the nephew if he ever plays in the NFL. Before having that conversation, the uncle would be required to notify the junior high school athletic director and register with the state. As also noted earlier, a local merchant can give the senior football star of the area high school a \$40,000 car to induce him to attend the state university. The payment on behalf of the educational institution does not come within the proscription of the Model Act. Similarly, a coach for a summer Amateur Athletic Union (AAU) basketball team can offer a high school basketball star financial inducements to play for his summer team and not be within the purview of the Model Act. Finally, if a football player at the University of Georgia returns home to Seattle, Washington, after the fall semester of his junior year with the intent of turning professional and not returning to Georgia, an agent based wholly in Seattle would be subject to Georgia law and would need to register with the state of Georgia and notify the Georgia athletic director before the Seattle agent could contact the player in his Seattle home.⁷⁷

II. VALIDITY OF STATE STATUTES

The widespread passage of sports agent legislation by the states raises two significant issues concerning the statutes' validity: legislative jurisdiction and the dormant Commerce Clause. Principles of legislative jurisdiction limit the ability of a state's legislature to impose a rule of substantive law, civil or criminal, on an individual or entity not within its borders or affecting the state. Legislative

73. See *id.* § 201(c).

74. See *id.* § 301(c).

75. See *id.* § 302(a).

76. See *id.* § 201. For a summary of the Model Act and anticipated comments, see Fluhr, *supra* note 8, at 12-21.

77. For a summary of agent actions prohibited by Article Four of the Model Act, see Fluhr, *supra* note 8, at 18-19.

jurisdiction therefore involves principles of territoriality and sovereignty which restrict the power of one state to bind the nation.⁷⁸ The principles of the dormant Commerce Clause limit any state's ability to interfere with the national economy and the free flow of goods and services in interstate commerce.⁷⁹ As such, the Constitution's grant of power to the federal government to control the national economy dictates that no state may favor in-state economic interests to the detriment of out-of-state business or excessively burden "traffic" in interstate commerce.⁸⁰ Each of these doctrines poses significant questions regarding the validity of state regulation of sports agents.

A. *Legislative Jurisdiction*

The law delineating the legislative power of the states is not very clear or well-established. After many years of doctrinal turbulence, the United States Supreme Court has at least clarified a primal concept establishing the limits of legislative jurisdictional validity. The test created by the Court is similar to that enunciated for choice of law decisions by the judicial system: the "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."⁸¹ The Supreme Court has also indicated that the appropriate definition of jurisdictional limitations should not change depending on the Constitutional provision selected as the source of the limitation.⁸²

In general, states may not enact statutes that proscribe conduct outside their own borders.⁸³ Aside from this agreed upon statement of the general rule, courts and commentators have differed in their application of the Supreme Court concept mentioned above to states' efforts to expand their legislative reach. In the context of criminal law, some conduct or the result of some conduct must occur within a state for that state to prosecute a defendant.⁸⁴ Under the older theory of subjective territoriality, the state in which the defendant is located at the time the crime was committed has jurisdiction to sanction the offense.⁸⁵ The modern theory of objective territoriality, however, extends the situs of the crime to include the state where injury occurred regardless of the defendant's location.⁸⁶ The Supreme Court has treated this concept of objective territoriality as an exception to accepted jurisdictional notions and has therefore limited its application to acts that are intended to have, and actually

78. See WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 269 (2d ed. 1993).

79. See *Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

80. See *infra* notes 96-113 and accompanying text.

81. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

82. See RICHMAN & REYNOLDS, *supra* note 78, at 282. The Supreme Court applies the same test in defining state jurisdictional limits under either the Due Process Clause or the Full Faith and Credit Clause. See *id.*

83. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1, 3 (1971). See generally Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

84. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 133 (2d ed. 1986).

85. See *People v. Blume*, 505 N.W.2d 843, 845 (Mich. 1993).

86. See *id.* at 854-55 (Boyle, J., dissenting).

do have, a detrimental effect within the state.⁸⁷ Pursuant to this "intended effects" test, "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within [its] border which the state reprehends" but only if that conduct was intended to adversely affect the state and if it actually had such an effect.⁸⁸ Therefore, an individual standing in North Carolina who shoots across the border and kills someone standing in Virginia can be made subject to Virginia's criminal laws. Similarly, if an individual stabs someone in Michigan and the victim drives back into Ohio while bleeding and dies in Ohio, the stabber can be subjected to Ohio's criminal law. However, a person who shoots and kills someone in Arizona cannot be subjected to California's criminal law simply because the victim was a California citizen.⁸⁹

The tests for limiting legislative jurisdiction in the context of civil regulatory statutes is differently phrased. Courts in this setting tend to parallel more closely the choice of law language employed in conflicts of law.⁹⁰ If legislative jurisdiction is questioned in a contracts setting, the court will examine the relationship between the state and the contract. If a contract is neither performed nor executed within the state, legislative jurisdiction is usually lacking.⁹¹ If a state attempts to impose its antitrust statute on a defendant, the court will determine whether the defendant has the requisite minimum contacts with the state to justify the exercise of legislative jurisdiction. Such contacts can be few if those contacts, which actually exist, give rise to the application of the statute.⁹²

The above example of the junior Georgia football player who returns home to turn professional and is contacted at his Seattle home by a Seattle-based agent provides a basis for assessing the validity of the agent regulatory statutes in both their criminal and civil application. In this hypothetical, the agent does not register with the state of Georgia or inform the University of Georgia of any dealings with the player. The agent contacts the player in Seattle, meets him numerous times in Seattle and, one month after the initial contact, signs the player to a representation agreement in Seattle. Three months later, the player is drafted in the first round by the New York Giants and the agent negotiates a player contract with the Giants. The Giants play their fourth game of the season in Atlanta and the agent flies to Atlanta to watch the game. In his hotel the Saturday before the game, he is arrested by Atlanta police for failure to comply with Georgia's version of the Model Act regarding his contacting and signing the player.

87. See *Strassheim v. Daily*, 221 U.S. 280, 284-85 (1911); *Deur v. Newaygo Sheriff*, 362 N.W.2d 698, 702 (Mich. 1984).

88. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945). See, e.g., *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir. 1967).

89. See generally *Rivard*, 375 F.2d at 882; *People v. Blume*, 505 N.W.2d 843 (Mich. 1993); LAFAYE & SCOTT, *supra* note 84, at 135-36.

90. See Jonathan R. Macey & Geoffrey Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 33-37 (1993).

91. See *id.*

92. See Herbert Hovcnkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 381-82 (1982-83).

Since the agent was arrested within the state of Georgia, the state court would have judicial jurisdiction over the agent based on physical presence within the state.⁹³ In the ensuing trial, a preliminary question would be whether Georgia had legislative jurisdiction sufficient to justify making the Washington activities criminal in Georgia. If the agent regulation statute were seen as criminal, Georgia would not appear to have legislative jurisdiction over the agent. The player's loss or renunciation of his remaining collegiate eligibility would not satisfy the intended effects test applied in a criminal context. As noted above, a mere deleterious effect on a citizen or state entity is not enough to justify legislative jurisdiction.⁹⁴ If the statute was perceived as a civil regulation and the contacts test was employed, the state would still lack legislative jurisdiction since the agent had no contact with Georgia.⁹⁵ Therefore, the most far-reaching statutes, such as the Model Act, contain serious jurisdictional defects as applied to agents who have never entered the state. The states possess greater jurisdictional credibility regarding statutes which regulate agent activities which actually occur in the state. Therefore, if a representation contract was executed within the state, or the agent made a number of trips into the state to meet with the athlete, the test for civil legislative jurisdiction would appear to be satisfied. If an out-of-state agent, however, merely telephoned an athlete in-state and then met the player at away games and trips to the agent's out of state office, state civil jurisdiction would still be seriously questioned.

B. *Dormant Commerce Clause*

In the absence of federal legislation, the Constitution's mandate that the federal government shall regulate interstate commerce has been construed as limiting the ability of the states to control economic matters.⁹⁶ The Supreme Court has declared that this "dormant" Commerce Clause doctrine can be violated by a state in any one of three ways: (1) a state favoring the economic interests of its residents over those of out-of-state entities seeking to do business within the state (protectionism); (2) regulation by a state or states creating the impermissible risk of inconsistent regulation by different states of the same economic entity or creating a cumulative burden which stifles the economic activity; or (3) a state placing a burden on the free flow of goods and services in interstate commerce which outweighs the local benefits the state is attempting to advance.⁹⁷

93. See *People v. Blume*, 505 N.W.2d 843, 855 (Mich. 1993) (Boyle, J., dissenting). See also RICHMAN & REYNOLDS, *supra* note 78, at 14-15 (explaining the historical roots of judicial jurisdiction based on the physical control of the defendant).

94. See LAFAVE & SCOTT, *supra* note 84, at 135-36.

95. The student-athlete's attendance at a Georgia educational institution would not seem to be a sufficient contact to bind the agent. See *Dunn*, *supra* note 9, at 1065.

96. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

97. See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-89 (1987).

1. *Protectionism*

A state statute can exhibit traces of protectionism either on its face, in its purpose, or in its effect.⁹⁸ The sports agent legislation is clearly neutral on its face because all agents who contact or contract with defined athletes are subject to regulation, regardless of their residence. Therefore, in-state and out-of-state economic entities are treated similarly by the state. The purpose underlying these statutes is also neutral. A state desires to "protect" its athletes and NCAA institutions from all agents, in-state and out-of-state in origin. The effect of the statute does not impose burdens only upon out-of-state agents. Therefore, as currently drafted, the states' regulation of agents does not appear to violate the prohibition against protectionism.

2. *Impossibility or Cumulative Burden*

State statutes may also be invalidated under the dormant Commerce Clause because of the multiplicity of states who have or may enact differing statutes. In such a situation, compliance with all of the statutes needed to conduct an agent's national business may be impossible or, at the least, extremely difficult.⁹⁹ Dormant Commerce Clause jurisprudence would invalidate the statutes on either the real or hypothetical impossibility of compliance with all statutes, or the impermissible burden placed on a national business by the sheer volume of statutory requirements.¹⁰⁰

Many statutes require sports agents to submit a surety bond to the state treasurer in amounts ranging from \$10,000 to \$100,000 as one of the requirements for obtaining a sports agent license.¹⁰¹ This financial burden, multiplied by the number of states with such a requirement, may make compliance with each statute impossible. The statutes currently in existence, however, do not expressly make illegal in one state an action that is expressly legal or specifically mandated in another.¹⁰² Therefore, compliance with all statutes, while difficult, is, in fact, possible. The existent array of regulatory legislation would not appear to violate the impossibility of compliance branch of the dormant Commerce Clause doctrine.

The multiplicity of regulations hamper an industry that is unquestionably national in scope. The differing state regulations place a cumulative burden on interstate commerce which is unacceptable under dormant Commerce Clause theory.¹⁰³ The broad applicability of the most aggressive legislation makes it impossible for an agent to know, prior to contacting the athlete, what regulations may be applicable. In order to protect himself or herself from civil and criminal liability, an agent must comply

98. See *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

99. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527-28 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 781-82 (1945).

100. See *CTS Corp.*, 481 U.S. at 88-89.

101. See CAL. BUS. & PROF. CODE §§ 18896, 18897.87 (West Supp. 1998); FLA. STAT. ANN. § 468.453 (West Supp. 1998); GA. CODE ANN. § 43-4A-4 (West Supp. 1998).

102. See *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 583-84 (1985).

103. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). See also *Dunn*, *supra* note 9, at 1066.

with the regulation of every state, no matter how costly, on the off chance that a prospective client might have some distant tie to that state. This reality means, in effect, that the most restrictive legislation must be followed in order to avoid a violation. The sheer volume of compliance makes it difficult or impossible to maintain a national business. The dormant Commerce Clause prohibits such a result. In addition, such a "mandated" national compliance with the statutes of the most restrictive states violates the dormant Commerce Clause because those states are given authority well beyond their borders and are, in effect, exercising the power to regulate the national economy¹⁰⁴ Such control as stated in the Constitution is exclusively federal and, therefore, beyond the authority of any state or states.

3. *Balancing*

In addition to examining the burden multiple regulations impose on an industry, a related, but separate, dormant Commerce Clause analysis compares the burden on interstate commerce with the importance of local benefits derived from the state legislation.¹⁰⁵ The Supreme Court has enunciated several descriptions of the appropriate weighing and balancing of interests required by the Constitution. If the state statute advances an "important" state purpose, the burden on interstate commerce should probably be declared incidental unless a "special" need exists for national uniformity within the industry¹⁰⁶ A slightly different formulation of the balancing test states that the legislation will be upheld unless the burden on interstate commerce is excessive in relation to putative local benefits.¹⁰⁷ A court should also take into account the nature of the local interest and whether it can be promoted by other means which will have less impact on interstate activities.¹⁰⁸

As noted previously, most states assert four justifications for these statutes.¹⁰⁹ The state's concern for the athlete's education is tempered by the low graduation rates in most Division I football and basketball programs and a subordination of academic concerns to athletic interests while the athlete is actually attending the college or university¹¹⁰ Concern for the disqualification of the student and the institution should dictate that coaches and alumni or boosters who violate NCAA rules should also come within the purview of the act.¹¹¹ Any negative publicity directed towards professional sports is clearly temporary and not of any real concern to the state. The actual purpose of these statutes is to protect the competitiveness and profitability of

104. See *Forman Distillers*, 476 U.S. at 584-85; *Bibb*, 359 U.S. at 520-21.

105. Some Justices believe that balancing is not an appropriate function of the Supreme Court and therefore should not be a consideration in the dormant Commerce Clause analysis. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). This balancing may, in practical effect, be the same as assessing the burden placed on a national industry referenced in the prior section.

106. See *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 675 (1981).

107. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

108. See *id.*

109. See *supra* notes 61-62 and accompanying text.

110. See *supra* note 17 and accompanying text. See also *Bascuas*, *supra* note 4, at 1608 (stating that Division I athletes are required to complete only 25% of their degree requirements after two years, 50% after three years, and 75% after four years of enrollment).

111. See *supra* note 7 and accompanying text.

in-state teams in the big revenue sports of men's football and basketball.¹¹² Although probably critical to in-state fans and the local electorate, these purposes would not appear to be terribly important in the mandated balancing required by the Constitution. The burden of complying with these various state statutes significantly hampers an entire industry, which is clearly national in scope.¹¹³ The state purposes motivating the statute are trivial and provincial. In the balancing required by the Supreme Court, the burden on interstate commerce would, therefore, appear to outweigh any state's interest in keeping its collegiate athletes playing for the local school and avoiding NCAA sanctions.

III. NATIONAL REGULATION

To date, the federal government has not passed national legislation dealing with the sports agent industry. Congress, however, has recently considered two such proposals.¹¹⁴ In addition, the unions of all the major professional sports now regulate the conduct of certified agents in their sports. These union regulations proscribe many activities by sports agents as unethical, including many practices that are regulated by the state statutes.¹¹⁵

A. Congress

In 1996, Congress considered an amendment to Title 18 of the U.S. Code that would have prohibited sports agents from "influencing" college athletes to terminate their eligibility to participate in intercollegiate athletics.¹¹⁶ Rather than requiring registration and licensing for athlete agents, the bill, through its definition of the term "influence," essentially criminalized any contact between an agent and a college athlete.¹¹⁷ The bill defined "athlete agent" as anyone who solicits a college athlete to enter into a contract authorizing such person to represent the athlete in marketing his or her athletic ability.¹¹⁸ "College athlete" was defined as anyone enrolled in an undergraduate or graduate degree granting program who either participates in or has informed the school in writing of an intent to participate in intercollegiate athletics.¹¹⁹ This bill would have provided a single national rule for agents, but it would not have significantly clarified the field. The concept of "influencing" is vague unless it is enforced to the extreme of banning all contact between the agent and athlete. The bill also did not clearly pre-empt the registration and licensing requirements of the states.¹²⁰ Fortunately, this bill died in the 1997 Judiciary Committee.¹²¹

112. See Stiglitz, *supra* note 2, at 216-17.

113. See Dunn, *supra* note 9, at 1066; Fluhr, *supra* note 8, at 23-24.

114. See H.R. 3328, 104th Cong. (1996); H.R. 2171, 105th Cong. (1997). See also *infra* notes 115-127 and accompanying text.

115. See *infra* notes 132-135 and accompanying text.

116. See H.R. 3328, 104th Cong. § 226 (1996).

117. See *id.*

118. See *id.* § 226(b)(2).

119. See *id.* § 226(b)(3).

120. In order to provide the full benefits of national regulation, a federal statute should completely and explicitly pre-empt all state law on the subject. See *Pacific Gas & Elec. Co. v. State Energy*

A second attempt to enact a national sports agent statute was made in Congress in 1997. Rather than sanctioning agents for influencing student-athletes, this bill provides for the extensive regulation seen in most of the current state statutes.¹²² First, the bill prohibits contact between an agent and any student-athlete currently subject to the rules and regulations of the NCAA or the NJCAA.¹²³ Upon the first violation of the statute, an agent would be prohibited from representing any student-athlete who attends the college or university at which the offense occurred.¹²⁴ Any subsequent violation would subject the agent to conviction of a Class C felony and a fine.¹²⁵ The statute also regulates the contractual language in representation agreements between student-athletes and agents, specifically requiring notification in bold type that contracting with an agent will terminate the student-athlete's eligibility to participate in intercollegiate athletics.¹²⁶ The educational institution must be notified of the agreement within seventy-two hours of its creation and the athlete is granted a twenty-day rescission period.¹²⁷ Most importantly for notice purposes, the statute limits the definition of student-athlete to "any athlete who practices for or otherwise participates in intercollegiate athletics at any college or university."¹²⁸ This bill was referred to the Committee on Education and the Workforce on July 16, 1997 and is still pending.¹²⁹

A Congressional statute regulating sports agents would clearly be within Congress' power pursuant to the Commerce Clause.¹³⁰ The passage of a national regulation would seem to benefit all the parties concerned with intercollegiate athletics. The schools would receive protection for their financial and athletic interests. The agents would only have one registration and one set of regulations with which to comply. The serious questions regarding the validity of state statutes in connection with legislative jurisdiction and the dormant Commerce Clause would be eliminated. The inconsistencies in current state law could be eliminated by encompassing within a federal statute the activities of coaches, alumni, and boosters. Even federal legislation, however, does not seriously examine whether this type of statute is fair to the student-athlete. Although such a national statute would eliminate the technical, legal objections to state regulation of sports agents, the larger question of whether any legislation giving NCAA rules the force of law is a proper function of government would remain unasked and unanswered.¹³¹ The majority of Congress may in fact be implicitly indicating their opinion by their failure to take any meaningful action on the pending legislation. To date, no federal statute appears close to passage.

Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

121. See H.R. 3328, 104th Cong. (1996).

122. See H.R. 2171, 105th Cong. § 2 (1997).

123. See *id.* § 2(a). The NJCAA is the National Junior College Athletic Association.

124. See *id.* § 2(b)(1).

125. See *id.* § 2(b)(2).

126. See *id.* § 3(5).

127. See *id.* § 4.

128. *Id.* § 4(3).

129. See H.R. 2171, 105th Cong. (1997) (pending).

130. See generally *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

131. See *Bascuas*, *supra* note 4, at 1617-18 (arguing that even federal legislation is inappropriate).

B. Professional Sports Unions

The unions in each of the major professional team sports have the power to regulate the registration and conduct of sports agents pursuant to their role in collective bargaining.¹³² These labor groups have all exercised this power, providing for a full application and review process for becoming an agent, and a detailed code of conduct that delineates particular activities as unethical and indicates the appropriate sanction for proven violation.¹³³ These codes of conduct generally proscribe providing money or any other financial benefit to induce an athlete to sign with an agent.¹³⁴ These regulations control, in substantial effect, the same agent conduct made criminal by the state statutes without a reference to NCAA rules. Current union codes, however, only provide union-imposed remedies for aggrieved athletes or agents and sanctions, usually a fine or suspension, for unethical agents.¹³⁵ These regulations do not provide a mechanism for the colleges to reclaim lost revenue from the agents.

CONCLUSION

Current state statutes that regulate sports agents are of questionable validity because of concerns regarding legislative jurisdiction and the dormant Commerce Clause. If state regulation is to continue, statutes should clearly be limited to agents and athletes residing within the state or having contacts with the state. Federal legislation, which completely preempts state law, would be preferable to state regulation. National regulation would simplify the registration process and provide notice to agents of the one set of rules with which they must comply. Any legislation, including federal, regulating sports agents should be seriously questioned. No government should give the force of law to a portion of the rules of a private athletic association to benefit its collegiate sports fans. By criminalizing the NCAA rules, the state penal code is forced to adopt the hypocrisy and duality of Division I athletics. These statutes are on the books, but rarely enforced. They are ignored in the same manner that NCAA rules on amateurism are ignored. The net effect is that ethical agents will not recruit athletes in a state where they are not registered or will be burdened with multiple compliance just to talk to a student-athlete. Unscrupulous agents will simply ignore the requirements and continue to contact and sign players.

132. See *Collins v NLRB*, 850 F. Supp. 1468, 1475 (D. Colo. 1991).

133. The National Football League Players Association (NFLPA), the National Basketball Players Association (NBPA), the Major League Baseball Players Association (MLBPA), and the National Hockey League Players Association (NHLPA) all have regulations providing for the certification and regulation of agents in their sport. See Fluhr, *supra* note 8, at 7-8. Collective bargaining provisions in all of the sports also provide that member clubs will only deal with certified agents. See, e.g., NFL Collective Bargaining Agreement 1993-2000, art. VI, § 1 (stating teams will exclusively negotiate with union-certified agents).

134. See, e.g., NFLPA CODE OF CONDUCT FOR NFLPA MEMBER CONTRACT ADVISORS § 3(b) (1994).

135. See *id.* §§ 5-6.

The activities of college coaches and school boosters, which equally threaten loss of eligibility and revenue, will continue with no fear of legal sanction.

Athletics are best left to private, not public, regulation. The codes of conduct of professional sports unions are an example of private sector activity that can control at least the most flagrant abuses performed by sports agents. The NCAA should critically evaluate its existing rules and honestly discuss whether they make sense in the modern economic realities of Division I football and basketball. Governmental regulation of sports agents is inhibiting the effective working of the marketplace in athletics and delaying an effective resolution of deeper issues regarding amateurism and the proper role of educational institutions in a multi-billion dollar athletic and entertainment industry