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# EARLY SCHOLARSHIP OFFERS AND THE NCAA

ALFRED C. YEN\*

**Abstract:** Over the last few years, many NCAA Division I universities have begun offering athletic scholarships to progressively younger student-athletes. Both student-athletes and institutions have much to gain from early informal athletic scholarships. This Article argues, however, that the costs of these early scholarships outweigh the benefits for both student-athletes and institutions. Although the NCAA has laudably begun the process of curbing informal scholarship deals with underclassmen, this Article argues that existing practices are unlikely to change unless the NCAA adopts regulatory strategies fundamentally different from simple prohibitions of the sort recently considered and rejected. Real reform will be difficult to achieve unless institutions bear real costs for pursuing underclassmen and the value of early scholarship deals is diminished. This Article makes a proposal to accomplish real reform by actually allowing these early informal commitments. Although this may seem counterintuitive at first glance, the Article shows that this proposal will discourage institutions from making early scholarship offers and therefore constitutes real reform. Granted, no proposal is perfect. Nevertheless, the one made here hopefully will advance the dialog that takes place as the NCAA evaluates a new framework to deal with the difficulties of early recruitment.

## INTRODUCTION

Over the last few years, many NCAA Division I universities have begun offering athletic scholarships to progressively younger student-athletes. Today, it is increasingly common for high school sophomores to receive such offers,<sup>1</sup> and a few institutions have pursued and even

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\* © 2011, Alfred C. Yen, Professor of Law, Law School Fund Scholar, and Director, Emerging Enterprises and Business Law Program, Boston College Law School. The author would like to thank the *Boston College Law Review* for hosting this symposium. Thanks are also owed to Giselle Rivers, Amanda Perkins, Tokufumi Noda, and Matthew Lauring for their research assistance.

<sup>1</sup> See, e.g., Brad Allis, *Marana Sophomore Getting Pac-10 Offers*, WILDCAT SPORTS REP., May 10, 2010, <http://tucsoncitizen.com/wildcatsportsreport/2010/05/10/marana-sophomore-getting-pac-10-offers/> (describing how one sophomore “already has a host of scholarship offers including most of the Pac-10”); Pat Forde, *It’s a Scary Thought, but Middle Schoolers Are Now Recruitible Players*, ESPN (July 11, 2007), <http://sports.espn.go.com/espn/columns/>

received commitments from seventh and eighth graders.<sup>2</sup> These young recruits are, of course, very highly regarded athletes with special talent to offer universities. Given the competitive pressures of college sports, it comes as no surprise that coaches rush to identify and recruit the most talented players. And from the student-athlete's perspective, there is much to gain from taking a school's offer. If a child has grown up dreaming of playing football for the University of Southern California or basketball for the University of Kentucky, why not accept the dream when a coach offers it?<sup>3</sup> Indeed, if the recruit decides not to accept the offer right away, it may not be there when he or she is a senior.

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story?columnist=forde\_pat&id=2930720&sportCat=ncb (describing early scholarship offers to eighth-grade basketball players and noting that ten rising sophomores had apparently already committed to colleges); J.P. Giglio & Ken Tysiac, *Tokoto Gets Lots of Attention*, NEWS & OBSERVER (Raleigh, N.C.), June 18, 2010, <http://www.newsobserver.com/2010/06/18/538857/tokoto-gets-lots-of-attention.html> (reporting an offer of a scholarship to a high school sophomore); *How Does a College Coach Offer a Sophomore or Freshman During the Football Recruiting Process?*, RECRUITING-101.COM (June 17, 2009), <http://recruiting-101.com/how-does-a-college-coach-offer-a-sophomore-or-freshman-during-the-football-recruiting-process/> (describing the existence of scholarship offers to high school freshmen and sophomores and describing how offers are made despite NCAA rules).

<sup>2</sup> See, e.g., Jeff Drummond, *Avery Youngest Player to Commit to Cats*, RIVALS.COM (May 1, 2008), <http://rivalshoops.rivals.com/content.asp?SID=910&CID=803673> (reporting the commitment of eighth-grader Michael Avery to play basketball at the University of Kentucky); Jeff Eisenberg, *How Early Is Too Early for a Coach to Offer a Scholarship?*, RIVALS.COM (May 11, 2010, 5:49 PM), [http://rivals.yahoo.com/ncaa/basketball/blog/the\\_dagger/post/How-early-is-too-early-for-a-coach-to-offer-a-scholarship?urn=ncaa,240334](http://rivals.yahoo.com/ncaa/basketball/blog/the_dagger/post/How-early-is-too-early-for-a-coach-to-offer-a-scholarship?urn=ncaa,240334) (describing offers of college athletic scholarships to eighth-grade girls); Gary Klein, *Trojans Get Their First Commitment . . . for 2015*, L.A. TIMES, Feb. 5, 2010, <http://www.latimes.com/sports/college/usc/la-spw-usc-football-sills5-2010feb05,0,456634.story> (reporting that thirteen-year-old quarterback David Sills received and accepted a scholarship offer from the University of Southern California); *8th Grade Female Player Offered Scholarship to Michigan*, WINNING HOOPS (May 11, 2010), <http://www.winninghoops.com/pages/Breaking-News-8th-Grade-Female-Player-Offered-Scholarship-To-Michigan.php> (last visited Nov. 16, 2010) (reporting the University of Michigan's offer to an eighth-grade female); *USC Gets Commitment from 13-Year-Old QB*, CBS SPORTS (Feb. 5, 2010), <http://www.cbssports.com/collegefootball/story/12888171/report-usc-gets-commitment-from-13-year-old-qb> (reporting on David Sills's acceptance of an offer from the University of Southern California as a seventh-grader).

<sup>3</sup> See Sean Gregory, *Courting Eighth-Graders*, TIME, Oct. 8, 2007, at 58 (describing early recruitment and reporting on the statement of Tanesha Boatright, whose eighth grade son received a scholarship offer from the University of Southern California: "So many people are getting loans and are in great debt just to pay for college. To get a free ride, as a single mother with four kids, that's all you can ask for."); Drummond, *supra* note 2. Howard Avery, father of eighth-grader Michael Avery, who received a scholarship offer from the University of Kentucky, stated:

It's a dream school for any kid who grows up wanting to play basketball. There's [*sic*] only a few of them out there: Kentucky, North Carolina, Duke, Indiana back east; UCLA out here. If you've got an opportunity to play for one of those

These benefits may explain why universities and underclassmen make commitments to each other, but the deals also involve considerable risk to both sides.<sup>4</sup> Sixteen-year-old high school sophomores will physically and mentally change before enrolling as eighteen-year-old college freshmen. They probably do not know much about the differences between schools. Even if students learn about the particulars of the university that offers them an athletic scholarship, their decision to accept involves considerable guesswork about the kind of college experience they will desire. Granted, recruits may care most about playing their chosen sport for a top college team, but even here there are no guarantees. If recruits do not develop to their full athletic potential, they may not play regularly, and the university will have prematurely squandered precious scholarship money on players who do not truly contribute to the school's athletic program.

These risks indicate that universities and student-athletes alike would be better off if they waited until a recruit's senior year to make commitments to each other. Universities would know more about the student's athletic and academic ability, and students would have the benefit of greater maturity and knowledge about their interests. This seemingly common sense result does not occur, however, because universities consider athletic success serious business—both literally and figuratively. Michigan surely wants to beat Ohio State for bragging rights, but more importantly Michigan wants its football and basketball teams to win because those victories hold the key to lucrative post-season competition. A school whose teams participate in a major post-season football game and the NCAA basketball tournament can collect as much as \$120 million in gross revenue.<sup>5</sup> Such success would be highly unlikely

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schools and get a great education, why not? We don't need a hundred offers; we just need one great program and one great coach.

Drummond, *supra* note 2.

<sup>4</sup> This Article uses the term "underclassmen" to refer to any student who has not yet reached his or her senior year of high school.

<sup>5</sup> See Josh Robins, *How Much Revenue Did Your Favorite Football Bowl Subdivision School Take in in 2007–08? This Chart Will Tell You*, ORLANDO SENTINEL (July 28, 2009, 11:50 AM), [http://blogs.orlandosentinel.com/sports\\_college/2009/07/how-much-revenue-did-your-favorite-fbs-school-take-in-in-200708-this-chart-will-tell-you.html](http://blogs.orlandosentinel.com/sports_college/2009/07/how-much-revenue-did-your-favorite-fbs-school-take-in-in-200708-this-chart-will-tell-you.html) (last visited Feb. 4, 2011) (listing total revenues of major athletic programs as reported to the U.S. Department of Education's Office of Postsecondary Education). In 2007–2008, the University of Texas reported over \$120 million in gross athletic revenue. *Id.* Whether major football or basketball programs actually turn a profit is subject to debate. A recent CNNMoney.com story noted that some basketball programs reported significant profits to the Department of Education (with the University of North Carolina at Chapel Hill reporting over \$12 million) and other programs reported losses. Chris Isidore, *Nothing but Net, Basketball Dollars by*

unless a school enrolls a sufficient number of skilled athletes to compete on its behalf. Schools therefore pursue the most valued recruits briskly, hoping to identify them and lock them up before the competition gets there.<sup>6</sup> This in turn pressures student-athletes to find and accept scholarship offers because they understand that opportunities will grow progressively scarce as more and more early commitments are made.<sup>7</sup>

Offers of athletic scholarships to underclassmen violate the NCAA's core values. The NCAA Constitution clearly states,

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>8</sup>

Early recruitment—particularly early commitment—violates this provision because it elevates athletics over education. Few underclassmen are ready to choose a college, and many have not even taken the necessary standardized testing that most colleges require. Nevertheless, institutions use scholarships to pressure recruits into rushing their college decisions.<sup>9</sup>

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*School*, CNNMONEY.COM (Mar. 18, 2010), [http://money.cnn.com/2010/03/18/news/companies/basketball\\_profits/index.htm?postversion=2010031807](http://money.cnn.com/2010/03/18/news/companies/basketball_profits/index.htm?postversion=2010031807). The accounting practices of universities are not uniform, however, particularly in how they attribute various indirect costs to athletic programs. This renders reported profit and loss figures highly unreliable. See Victor Matheson, *NCAA Basketball Tournament Teams Don't Generate Profits*, CHRISTIAN SCI. MONITOR (Mar. 19, 2010), <http://www.csmonitor.com/Business/The-Sports-Economist/2010/0319/NCAA-basketball-tournament-teams-don-t-generate-profits>.

<sup>6</sup> See Andy Staples, *The Trend of Players Choosing a College Before a High School*, SI.COM (May 6, 2008), [http://sportsillustrated.cnn.com/2008/writers/andy\\_staples/05/06/kentucky.0506/index.html](http://sportsillustrated.cnn.com/2008/writers/andy_staples/05/06/kentucky.0506/index.html) ("Remember, coaches are the ultimate adopters. If one coach enjoys even a modicum of success after locking down middle schoolers, other coaches will start offering kids who still watch *Spongebob Squarepants* after practice.").

<sup>7</sup> NCAA ACADEMIC & MEMBERSHIP AFFAIRS STAFF, DIVISION I MANUAL art. 15.5 (2010) [hereinafter DIVISION I MANUAL] (establishing limits on scholarships available in NCAA Division I sports).

<sup>8</sup> *Id.* art. 2.9.

<sup>9</sup> See Bill Pennington, *Recruits Clamor for More from Coaches with Less*, N.Y. TIMES, Mar. 11, 2008, at D1 (describing how one women's lacrosse coach played recruits against each other to create such pressure). The coach explained:

For example, if she is looking for a goalie, she might bring to campus each of her top three potential recruits at the position in the space of a few days. She said she would tell them that there were three players, that all three had been on campus recently and that they had a week to decide whether to attend

To its credit, the NCAA recognizes the undesirability of early commitment and has taken steps to discourage the practice and curb its worst effects. The NCAA Division I Manual contains numerous provisions designed to prevent universities from asking prospective student-athletes for commitments until their senior year,<sup>10</sup> thereby relieving pressure to make premature decisions about college before academic and social preferences are fully formed. In particular, universities generally may not write or call prospective recruits until their junior year,<sup>11</sup> and student-athletes cannot formally accept scholarships until specific dates in their senior year, as prescribed by the National Letter of Intent program.<sup>12</sup>

This regulation of early scholarship offers is only partially successful, at best. It does give recruits the ability to postpone binding decisions about college until their senior year, but it does not effectively relieve the pressure associated with early scholarship commitments. The rules contain loopholes that allow institutions and recruits to make non-binding verbal commitments about scholarships.<sup>13</sup> In theory, these early informal commitments are not as problematic as formally binding ones. Recruits who want to avoid the pressure of early recruiting should be able to ignore early offers because no one can make binding decisions until the senior year.

In practice, however, a recruiting process that permits only early informal commitment is actually worse for recruits than one allowing early binding commitment. As an initial matter, early informal commitments make early recruiting more attractive to institutions by removing the risks associated with the practice. If a school discovers that a recruit is not as good as initially thought or that a scholarship might be better used on someone else, the school can withdraw its commitment and

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Delaware. The first player to commit gets the scholarship money. The others do not.

*Id.*

<sup>10</sup> See, e.g., DIVISION I MANUAL, *supra* note 7, arts. 13.1.1, 13.1.3.1, 13.4.1, 13.9.2 (limiting the contact universities can have with recruits prior to the recruits' senior year in high school). For a discussion of these rules individually, see *infra* notes 70–74 and accompanying text.

<sup>11</sup> See *id.* arts. 13.1.3.1, 13.4.1.

<sup>12</sup> See *About the National Letter of Intent (NLI)*, NCAA, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/About+the+NLI/> (last visited Feb. 4, 2011). For a discussion of the NLI program, see *infra* notes 64–70 and accompanying text.

<sup>13</sup> See Klein, *supra* note 2 (describing how a coach asked an intermediary to give a recruit the coach's phone number so that he could extend an early scholarship offer); *How Does a College Coach Offer a Sophomore or Freshman During the Football Recruiting Process?*, *supra* note 1 (describing various ways coaches extend early scholarship offers to underclassmen).

avoid having to live with its “mistake.”<sup>14</sup> Even worse, a recruit who understands the risk of withdrawn commitment finds him- or herself in a quandary. If he or she makes contingency plans by talking to other schools, the school to which he or she is verbally committed may question his or her loyalty and recruit other players to take his or her place.<sup>15</sup> Of course, if the recruit does nothing, he or she risks having no scholarship should his or her original school change its mind. In short, early informal commitments are actually worse for recruits than early formal commitments because early informal commitments force recruits to experience the stress of making premature decisions about college without receiving any certainty that supposedly done deals will be honored.<sup>16</sup>

Because of these problems, the NCAA has begun to reconsider how it regulates early recruitment. In June 2010, the Division I Recruiting and Athletics Personnel Issues Cabinet (“DI Cabinet”) proposed new legislation designed to slow down the pace of early recruiting and

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<sup>14</sup> See, e.g., Jeff Fedotin, *High School Junior’s College Future Is Uncertain After Eighth-Grade Commitment to Kentucky Fizzles*, THEPOSTGAME (Feb. 26, 2011), <http://www.thepostgame.com/blog/throwback/201102/high-school-juniors-college-future-uncertain-after-eighth-grade-commitment-ken#>; Forde, *supra* note 1 (reporting that the University of Maryland rescinded its offer to Tamir Goodman because Goodman did not live up to his athletic potential); Andy Staples, *For Elite Recruits, Commitments Aren’t What They Used to Be*, SI.COM (July 8, 2010) [hereinafter Staples, *Elite Recruits*], [http://sportsillustrated.cnn.com/2010/writers/andy\\_staples/07/07/committed-players/index.html](http://sportsillustrated.cnn.com/2010/writers/andy_staples/07/07/committed-players/index.html) (“College coaches often whine about the lack of actual commitment by their verbal commitments, but their complaints ring hollow when they yank scholarship offers because another player became interested in their school or when they hand out 200 scholarship offers for a 25-man class. It’s easy to blame the 17-year-olds for failing to honor their word, but the 45-year-olds are equally at fault in this case.”); Andy Staples, *Going to Court over Commitment*, SI.COM (Feb. 29, 2008), [http://sportsillustrated.cnn.com/2008/writers/andy\\_staples/02/29/hawaii.recruit/index.html](http://sportsillustrated.cnn.com/2008/writers/andy_staples/02/29/hawaii.recruit/index.html) (reporting a lawsuit over an informal scholarship allegedly withdrawn by the University of Hawaii); Andy Staples, *Oregon Pulls Written Offer, an Unsavory Move That’s Common*, SI.COM (June 23, 2008) [hereinafter Staples, *Oregon Pulls Offer*], [http://sportsillustrated.cnn.com/2008/writers/andy\\_staples/06/20/notebook.0620/](http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/20/notebook.0620/) (reporting that the University of Oregon rescinded a scholarship offer to a recruit).

<sup>15</sup> See *infra* note 100 and accompanying text. Recruits also sometimes change their minds about commitments, especially if they are highly sought-after players with many options. See Staples, *Elite Recruits*, *supra* note 14 (reporting the statement of a highly recruited player that “[i]t’s a verbal commitment . . . I’m still open to every other school. I just like Ole Miss better right now.”). Although this does pose a risk for institutions that make early commitments, the consequences of broken deals are less severe for institutions than for recruits, primarily because institutions have the ability to diversify risk over multiple recruits, existing players, and multiple years of recruiting. See *infra* notes 100–103 and accompanying text.

<sup>16</sup> See *infra* notes 84–86 and accompanying text.

link it more closely to academics.<sup>17</sup> First, the proposed rules would prohibit verbal offers of scholarships until after July 1 of a recruit's junior year.<sup>18</sup> Second, institutions would need to have on file a high school transcript showing five completed semesters or seven completed quarters before extending a scholarship offer.<sup>19</sup> This would effectively postpone most offers until the second half of the junior year. Although the NCAA ultimately rejected this proposal,<sup>20</sup> the proposal exemplifies the regulatory approach the NCAA plans to use in dealing with early recruitment.

This Article studies and critiques the regulatory scheme that allows early informal commitments and the NCAA's new efforts at reform. It agrees with the NCAA that existing regulations do not adequately control early recruiting, unfairly pressuring prospective student-athletes to make premature decisions that place sports over academics. This does not necessarily mean, however, that the recent proposed legislation would have effectively dealt with the problem. Although the effort to restrict early recruiting and re-emphasize academics is praiseworthy, the NCAA would have had extreme difficulty enforcing its proposed ban on early informal offers. Schools and recruits occasionally make public announcements about their intentions, and the proposed rules would

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<sup>17</sup> See Michelle Brutlag Hosick, *Cabinet Proposes End to Early Verbal Offers of Aid*, NCAA (June 24, 2010), [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/NCAA+News/NCAA+News+Online/2010/Division+I/Cabinet+proposes+end+to+early+verbal+offers+of+aid\\_06\\_24\\_10\\_NCAA\\_News](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/NCAA+News/NCAA+News+Online/2010/Division+I/Cabinet+proposes+end+to+early+verbal+offers+of+aid_06_24_10_NCAA_News).

<sup>18</sup> See NCAA, DIVISION I PROPOSAL NO. 2010-42 (2010) [hereinafter DIVISION I PROPOSAL 2010-42] available at <https://web1.ncaa.org/LSDBi/exec/homepage> (follow "Search" hyperlink; then follow "Division I Proposals" hyperlink; then type "2010-42" in "Proposal Number" text box). This proposal would have amended NCAA Bylaw 13.9 by inserting a new provision as Bylaw 13.9.1. See *id.* Proposed Bylaw 13.9.1 reads as follows:

13.9 LETTER-OF-INTENT PROGRAMS, FINANCIAL AID AGREEMENTS,  
OFFERS OF FINANCIAL AID

13.9.1 Requirements for Verbal Offer of Athletically Related Financial Aid. An institution may make a verbal offer of athletically related financial aid to an individual, subject to the following requirements:

- (a) Such an offer shall not be made to the individual, directly or indirectly, before July 1 following the individual's junior year in high school; and
- (b) The institution must have a copy of the individual's high school transcript (official or unofficial) on file that includes the results of the individual's first five semesters or seven quarters of high school enrollment.

*Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The proposal was rejected by the Division I Legislative Council, in large part due to concerns about its enforceability. See David Moltz, *NCAA President Answers Critics*, INSIDE HIGHER ED (Jan. 14, 2011), [http://www.insidehighered.com/news/2011/01/14/ncaa\\_president\\_s\\_speech\\_and\\_updates\\_from\\_convention](http://www.insidehighered.com/news/2011/01/14/ncaa_president_s_speech_and_updates_from_convention).



have stopped that. The DI Cabinet chair admitted, however, that those determined to make early informal deals would probably do so without detection.<sup>21</sup> Given the strong incentives that favor early recruiting and the extent to which institutions have traditionally flouted NCAA rules,<sup>22</sup> it is fair to worry that these rules would simply have driven early recruiting further underground, placing even more unfair pressure on recruits by forcing them to participate in a clandestine market with no mechanism to enforce deals that are made.

This Article responds to this problem by suggesting that the NCAA take a radically different approach to regulating early recruiting.<sup>23</sup> Instead of making largely futile efforts to prevent institutions and recruits from making early informal scholarship deals, the NCAA should allow them to make formal binding ones. There would, however, be strings attached. For every year before a recruit's senior year in which an institution offers a binding commitment, the institution must guarantee the scholarship for an additional year. Thus, a senior would get a one-year scholarship (the present practice), a junior a two-year scholarship, a sophomore three, and a freshman four. These scholarships would be guaranteed, regardless of whether the student plays the sport for the university, and they would further count against the scholarship limitations for the sport in question.

This proposal may seem strange to those familiar with the NCAA's traditional "prohibit and punish" approach to regulation. After all, why permit the very thing (early scholarship commitments) that causes harm to students? The answer to this question lies in the observation that it is frequently more effective to permit and regulate certain behaviors than to ban them.<sup>24</sup> For example, legal but regulated access to alcohol probably works better than a complete ban. Society has learned that although drinking may be undesirable, it is practically impossible to stop people from imbibing.<sup>25</sup> When society tried to ban alcohol

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<sup>21</sup> See Hosick, *supra* note 17.

<sup>22</sup> See *infra* notes 40–57 and accompanying text for examples of universities' historical attempts to flout NCAA rules.

<sup>23</sup> See *infra* notes 122–137 and accompanying text.

<sup>24</sup> See Harry G. Levine & Craig Reinerman, *Alcohol Prohibition and Drug Prohibition: Lessons from Alcohol Policy for Drug Policy*, in *DRUGS AND SOCIETY* 43, 48 (Jefferson M. Fish ed., 2006) ("It has frequently been observed that drug prohibition tends to drive out the weaker and milder forms of drugs and to increase the availability and use of stronger and more dangerous drugs.").

<sup>25</sup> See *id.* at 50 (giving examples of alcohol regulations used in other countries and noting that these regulations more successfully eliminated social problems related to alcohol than the total prohibition tried in the United States).

completely, illegal markets flourished, along with harmful side effects like fraud and violence.<sup>26</sup> Permitting the vice, though perhaps a second-best option, ameliorated the side effects without exposing society to intolerable levels of drinking.<sup>27</sup>

A similar approach to early recruitment is probably wise. As with alcohol or gambling, it is probably impossible for the NCAA to wipe out early recruiting, and unregulated early recruiting clearly has side effects harmful to student-athletes. It therefore makes sense to regulate early recruiting with rules that make it less harmful to students and less attractive to institutions. This Article's proposal does this in three ways.<sup>28</sup> First, allowing early commitments will make institutions less eager to pursue younger recruits by making early recruitment riskier for the institutions.<sup>29</sup> Second, allowing early commitments will give those who participate in early recruiting clear signals about what they are getting.<sup>30</sup> Those who sign genuine commitments will get security. Those who do not get those offers will know that the schools involved are merely prospecting. Recruits will no longer be misled—deliberately or mistakenly—about the intentions of universities. Third, the extra scholarship guarantees associated with making early binding offers will discourage universities from pursuing younger recruits, making the problems associated with early recruitment less common.<sup>31</sup>

This Article proceeds in four parts. Part I provides background about the history of NCAA regulation.<sup>32</sup> Part II lays out the framework of modern NCAA sports recruiting, including the basic incentives that affect institutions and prospective student-athletes.<sup>33</sup> Part III describes the recently rejected proposal from the NCAA on the problem of early recruitment and explains why the proposed response or similar efforts would probably have done little to improve the problems associated

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<sup>26</sup> See *id.* at 45–46 (noting that after the prohibition of alcohol in the United States, “[n]ew institutions and cultural practices appeared: bootleggers and speakeasies, hip flasks and bathtub gin, rum runners smuggling in liquor and prohibition agents . . . smashing down doors”).

<sup>27</sup> See *id.* at 59 (“Legalizing alcohol, then regulating it, had accomplished what most temperance and prohibition supporters claimed was impossible: alcohol moved from being a scandal, crisis, and constant front-page news story to something routine and manageable . . .”).

<sup>28</sup> See *infra* notes 122–137 and accompanying text.

<sup>29</sup> See *infra* notes 124–128 and accompanying text.

<sup>30</sup> See *infra* notes 129–130 and accompanying text.

<sup>31</sup> See *infra* note 131 and accompanying text.

<sup>32</sup> See *infra* notes 36–59 and accompanying text.

<sup>33</sup> See *infra* notes 60–108 and accompanying text.

with early recruitment, and may have made them worse.<sup>34</sup> Part IV offers an alternate response to the problem of early recruitment.<sup>35</sup>

### I. HISTORY OF NCAA REGULATION

According to the NCAA Constitution, collegiate sports are amateur recreational activities contained within an educational program devoted to the welfare of the student.<sup>36</sup> Of particular note, the NCAA's regulation of student-athlete recruiting should "shield them from undue pressures that may interfere with the scholastic or athletics interests of the prospective student-athletes or their educational institutions."<sup>37</sup>

These statements of principle are appropriately lofty. Unfortunately, the NCAA has found it rather difficult to govern in a manner fully consistent with these statements. Indeed, one can fairly describe the NCAA's regulation of sport as a somewhat futile attempt to shield

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<sup>34</sup> See *infra* notes 109–121 and accompanying text.

<sup>35</sup> See *infra* notes 122–137 and accompanying text.

<sup>36</sup> See DIVISION I MANUAL, *supra* note 7, art. 2.9.

<sup>37</sup> *Id.* art. 2.11. Other representative sections from the NCAA's Constitution include the following:

Article 1.3.1:

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

...

Article 2.2:

Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.

...

Article 2.5:

Intercollegiate athletics programs shall be maintained as a vital component of the educational program, and student-athletes shall be an integral part of the student body. The admission, academic standing and academic progress of student-athletes shall be consistent with the policies and standards adopted by the institution for the student body in general.

...

Article 2.9:

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

*Id.* arts. 1.3.1, 2.2, 2.5, 2.9.

college sports from the corrupting influences of professionalization and money.<sup>38</sup> For most of its history, the NCAA has tried to preserve college sports as recreation within an educational setting, but member institutions continually flout, or find loopholes in, the relevant rules because they cannot resist the urge to gain competitive advantages any way they can.<sup>39</sup>

In the late nineteenth century, no less an institution than the University of Chicago instructed its first football coach (the famous Amos Alonzo Stagg) to “develop teams which we can send around the country and knock out all the colleges. We will give them a palace car and a vacation too.”<sup>40</sup> The University of Chicago did not act alone. By the twentieth century, many colleges and universities eagerly pursued talented athletes and offered them money to attend school and play football with little regard for their academic abilities.<sup>41</sup>

Not surprisingly, calls for reform arose, and in 1905 the Intercollegiate Athletic Association of the United States (IAAUS) was founded.<sup>42</sup> Five years later, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA).<sup>43</sup> From its inception, the NCAA regulated both on-field competition (most immediately the growing risk of injury associated with football) and off-field matters of recruiting and money. The new organization’s rule on amateurism was clear. Universities could not offer scholarships or other money based on athletic ability.<sup>44</sup>

Unfortunately, the NCAA had no teeth behind its regulations. Universities were on their honor to live up to the principles set forth by the NCAA, and many failed to do so.<sup>45</sup> Scholarships, under-the-table payments, and special jobs with alumni made it clear that universities and coaches valued athletic victory and its associated benefits more

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<sup>38</sup> See ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE* 11 (1998).

<sup>39</sup> See *id.* at 19–26. See generally WALTER BYERS, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* (1995) (detailing historic examples of rules violations and the NCAA’s lack of adequate response to them).

<sup>40</sup> SACK & STAUROWSKY, *supra* note 38, at 21.

<sup>41</sup> *Id.* at 22–24.

<sup>42</sup> *About the NCAA: History*, NCAA, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last updated Nov. 8, 2010).

<sup>43</sup> *Id.*

<sup>44</sup> SACK & STAUROWSKY, *supra* note 38, at 33.

<sup>45</sup> JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 15 (Digital ed. 2006), available at <http://ncaapublications.com/DownloadPublication.aspx?download-IN-ARENA06.pdf> (describing the NCAA’s early effort to control recruiting and noting that universities themselves, and not the NCAA, were responsible for enforcing rules).

than any obligation to live up to the ideals of amateur sport.<sup>46</sup> Something more was clearly needed.

Reform arrived in 1948 with the enactment of the so-called "Sanity Code" that gave the NCAA power to expel member schools for violations.<sup>47</sup> The Sanity Code did not, however, prove successful. The Code permitted limited athletic scholarships and off-campus recruiting, but the NCAA's member institutions refused to enforce the very code they had adopted.<sup>48</sup> In 1950, the NCAA membership considered the cases of the so-called "Seven Sinners," seven institutions who voluntarily admitted to breaking the rules.<sup>49</sup> In defense, one of the Seven Sinners, the University of Virginia, argued that the scholarship limitations of the Sanity Code were unreasonable because athletes could not play football, work at a job, and keep up with school.<sup>50</sup> The NCAA membership responded by refusing to expel the Seven Sinners, in part because many institutions felt it unfair to punish those who publicly admitted breaking the rules while many others continued to break the rules secretly.<sup>51</sup> This led in turn to the 1951 repeal of the Sanity Code.<sup>52</sup>

The history of the NCAA's first attempt to regulate amateurism and recruiting illustrates a basic problem that persists to this day. No matter how hard it tries, the NCAA cannot force its member institutions to commit fully to the ideals of amateur sport incidental to education. The NCAA tried to prohibit athletic scholarships, but universities would not go along. Then, when the NCAA accepted limited scholarships but tried to enforce its rules, the membership again rebelled, in part because violations of the rules were sufficiently widespread that it seemed unfair to punish those who voluntarily admitted their behavior.

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<sup>46</sup> SACK & STAUROWSKY, *supra* note 38, at 35–40 (describing widespread violation of rules that the NCAA did not have power to enforce).

<sup>47</sup> See Gary T. Brown, *NCAA Answers Call to Reform*, NCAA (Nov. 22, 1999), [http://web1.ncaa.org/web\\_files/NCAANewsArchive/1999/19991122/active/3624n24.html](http://web1.ncaa.org/web_files/NCAANewsArchive/1999/19991122/active/3624n24.html) (describing adoption of Sanity Code and its problems).

<sup>48</sup> See BYERS, *supra* note 39, at 53–55 (describing the unwillingness of universities to punish confessed violators of rules while others who did not confess continued to violate them); SACK & STAUROWSKY, *supra* note 38, at 45–46 (describing same); *Sport: What Price Football?*, TIME, Jan. 23, 1950, at 46 available at <http://www.time.com/time/magazine/article/0,9171,858594,00.html> (describing the Sanity Code and universities refusing to vote to enforce its provisions); Brown, *supra* note 47 (explaining that many institutions considered the penalty of expulsion too harsh).

<sup>49</sup> See BYERS, *supra* note 39, at 53–54; *Sport: What Price Football?*, *supra* note 48, at 46.

<sup>50</sup> See BYERS, *supra* note 39, at 54.

<sup>51</sup> See *id.*

<sup>52</sup> See Brown, *supra* note 47.

Even today, NCAA institutions frequently break well-known rules against improper payments to players and the use of academically ineligible players. In 2009, the NCAA sanctioned Florida State University because the school's University Athletic Support Services helped more than sixty athletes in ten different sports cheat on exams.<sup>53</sup> This assistance included the provision of answers to exams.<sup>54</sup> In 2010, the NCAA penalized the University of Arizona for, among other things, a scheme in which the men's basketball program circumvented recruiting restrictions by helping an ostensibly unaffiliated promoter run a basketball tournament.<sup>55</sup> The Arizona Cactus Classic took place in the university's facilities with the knowledge and assistance of the basketball coach and boosters.<sup>56</sup> Also in 2010, the NCAA punished the University of Southern California for improper benefits received from an agent by star running back Reggie Bush.<sup>57</sup>

Each of these violations involved deliberate flouting of NCAA rules. It seems highly unlikely that any of them could have occurred without the knowledge and complicity of people bearing primary responsibility for compliance with those rules. Indeed, the frequency of violations such as these strongly suggests that far too many NCAA member institutions are perfectly willing to break rules when doing so provides a competitive advantage in sports. A cynic could easily argue that NCAA rules generally fail to stop cheating, but instead drive it underground where ever more unsavory characters and practices can get involved.

The NCAA's regulation of early recruitment is no different. It is abundantly clear that the NCAA wants its members to avoid serious athletic scholarship commitments until a recruit's senior year, yet member institutions routinely pursue commitments from the very underclass-

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<sup>53</sup> See Press Release, NCAA, Division I Committee on Infractions Issues Decision on Florida State University (Mar. 6, 2009), available at [http://web1.ncaa.org/web\\_files/PressArchive/2009/Infractions/20090306\\_d1\\_coi\\_fsu\\_rls.html](http://web1.ncaa.org/web_files/PressArchive/2009/Infractions/20090306_d1_coi_fsu_rls.html). For more on eligibility requirements for NCAA student-athletes, see Kelly M. Trainor, Note, *The NCAA's Initial Eligibility Requirements and the Americans with Disabilities Act in the Post-PGA Tour, Inc. v. Martin Era: An Argument in Favor of Deference to the NCAA*, 46 B.C. L. REV. 423, 434–36 (2005).

<sup>54</sup> See *id.*

<sup>55</sup> See Stacy Osburn, *University of Arizona Men's Basketball Program Penalized*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/july+latest+news/university+of+arizona+basketball+program+penalized>.

<sup>56</sup> See *id.*

<sup>57</sup> See Erick Smith, *NCAA Hammers Southern Cal's Football Program with Two-Year Postseason Ban*, USA TODAY, June 10, 2010, <http://content.usatoday.com/communities/campusrivalry/post/2010/06/ncaa-hammers-southern-cals-football-program-with-two-year-postseason-ban/1> (including link to NCAA report).

men who should be left alone.<sup>58</sup> The NCAA could respond by passing rules to stop this pursuit, but the rules would likely prove ineffective because institutions will secretly conduct business as usual in ways that exacerbate the problems of early recruitment.<sup>59</sup>

## II. THE MODERN RECRUITING FRAMEWORK

Existing NCAA regulations admirably try to curb the worst excesses of recruiting, but member institutions have vigorously exploited loopholes to do the very things the NCAA has tried to stop.<sup>60</sup> The result is a system that exacerbates the problems of early recruiting by pressuring student-athletes to make premature decisions about college without genuine assurance that their choices will be honored. This Part first describes the NCAA's recruiting rules and the loopholes that institutions have used to evade them.<sup>61</sup> It then explores the basic incentives for student-athletes and institutions to exploit the loopholes.<sup>62</sup> This Part concludes by discussing the risks and rewards associated with broken non-binding commitments and explaining that these broken commitments harm student-athletes more than institutions.<sup>63</sup>

### A. NCAA Recruiting Rules and Loopholes

NCAA rules and the National Letter of Intent Process govern the recruiting of Division I NCAA student-athletes. The National Letter of Intent (NLI) is a voluntary program for universities and student-athletes that specifies exactly when a student-athlete may sign a binding commitment to attend a university in exchange for an athletic scholarship.<sup>64</sup> These dates vary by sport, but they all fall within the student-athlete's senior year of high school.<sup>65</sup> Once a student-athlete signs a letter of intent, he or she becomes committed to attend the particular school and play the sport, and the school becomes obligated to give the student-athlete the specific scholarship mentioned in the letter of in-

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<sup>58</sup> See Allis, *supra* note 1; Forde, *supra* note 1; Giglio & Tysiac, *supra* note 1; *How Does a College Coach Offer a Sophomore or Freshman During the Football Recruiting Process?*, *supra* note 1.

<sup>59</sup> See *infra* notes 109–121 and accompanying text.

<sup>60</sup> See *infra* notes 64–79 and accompanying text.

<sup>61</sup> See *infra* notes 64–79 and accompanying text.

<sup>62</sup> See *infra* notes 80–87 and accompanying text.

<sup>63</sup> See *infra* notes 88–108 and accompanying text.

<sup>64</sup> See *About the National Letter of Intent (NLI)*, *supra* note 12.

<sup>65</sup> See *Signing Dates*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/Signing+Dates/> (last visited Mar. 29, 2011) (listing signing dates for students enrolling in 2011–2012).

tent.<sup>66</sup> This formal commitment has consequences beyond the quid pro quo of attendance and scholarship. Other schools must stop recruiting student-athletes who have signed letters of intent.<sup>67</sup> Additionally, student-athletes who decide to attend a school other than the one with which they signed the NLI must generally sit out a year and give up a year of eligibility in all sports.<sup>68</sup> Practically every Division I institution participates in the NLI program (the exceptions being the Ivy League schools, which do not offer athletic scholarships, and the Service Academies), making it effectively impossible for a student-athlete to make a formal, binding scholarship deal before his or her senior year.<sup>69</sup> NCAA rules support the NLI process by prohibiting formal acceptance of an athletic scholarship until the relevant NLI date has passed.<sup>70</sup>

NCAA rules further control early recruiting in four ways. First, the rules prohibit coaches from visiting or casually encountering recruits in situations where recruiting might occur until after a student-athlete's junior year in high school.<sup>71</sup> Second, the rules restrict telephone calls to the student's senior year and also limit the number of calls.<sup>72</sup> Third, universities cannot send letters or other written recruiting materials to

<sup>66</sup> See *About the National Letter of Intent (NLI)*, *supra* note 12.

<sup>67</sup> See *NLI Provisions: Recruiting Ban After Signing*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/Recruiting+Ban+After+Signing> (last visited Feb. 5, 2011) (establishing a recruiting ban after the signing of an NLI).

<sup>68</sup> See *NLI Provisions: Basic Penalty*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/NLI+Provisions/Basic+Penalty> (last visited Feb. 5, 2011).

<sup>69</sup> See *Frequently Asked Questions: If I Sign with an NCAA Division I Institution, May I Still Sign with a Division II Institution?*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/NLI/Frequently+Asked+Questions/> (follow "General" hyperlink; then follow ninth numbered hyperlink (last visited Feb. 25, 2011)).

<sup>70</sup> See DIVISION I MANUAL, *supra* note 7, art. 13.9.2.

<sup>71</sup> See *id.* art. 13.1.1 ("Off-campus recruiting contacts shall not be made with an individual (or his or her relatives or legal guardians) before July 1 following the completion of his or her junior year in high school . . ."). Article 13.02.4 of the NCAA Bylaws defines "contact" as "any face-to-face encounter between a prospective student-athlete or the prospective student-athlete's parents, relatives or legal guardians and an institutional staff member or athletics representative during which any dialogue occurs in excess of an exchange of a greeting." *Id.* art. 13.02.4.

<sup>72</sup> See *id.* art. 13.1.3.1 ("Telephone calls to an individual (or his or her relatives or legal guardians) may not be made before July 1 following the completion of his or her junior year in high school (subject to the exceptions below); thereafter, staff members shall not make such telephone calls more than once per week."). Specific exceptions for a number of sports, including men's football and men's and women's basketball, modify this general provision by permitting limited telephone calls in the junior or sophomore year. See *id.* art. 13.1.3.1.2–4. Nevertheless, the principle remains the same—contact with recruits should be limited to give student-athletes room to lead ordinary lives.



recruits until their junior year.<sup>73</sup> Finally, schools may pay for a recruit to visit the campus only once during the recruit's senior year,<sup>74</sup> and recruits are limited to a total of five such visits.<sup>75</sup>

The above-described rules ostensibly take the pressure off of athletic recruits by keeping options open and restricting communication from institutions to underclassmen. If no student can make binding decisions until his or her senior year, then a prospective recruit need do nothing before then because waiting costs nothing. Unfortunately, things do not work out this way because the structure of the market for athletic recruits gives universities and student-athletes strong incentives to exploit loopholes to do exactly what the NCAA discourages.<sup>76</sup>

For purposes of this analysis, three important loopholes exist in the NCAA rules. First, although college coaches cannot meet with student-athletes off campus until their senior year, nothing prevents on-campus face-to-face meetings. Second, although coaches cannot call students until their senior year, nothing stops prospective student-athletes from calling coaches and discussing any topic, including scholarships. Third, nothing stops college coaches from telling people who may know a particular student-athlete—perhaps a coach, mentor, or other mutual acquaintance—that the coach is interested in a particular player. Together, these loopholes make it possible for a university to inform recruits of the university's interest well before the dates contemplated by NCAA rules, and arrange for substantive on-campus or telephone conversations during which scholarships can be informally offered and accepted.<sup>77</sup> These deals are non-binding in that neither party can enforce

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<sup>73</sup> See *id.* art 13.4.1. The bylaws require:

In sports other than men's basketball and men's ice hockey, a member institution shall not provide recruiting materials, including general correspondence related to athletics, to an individual (or his or her parents or legal guardians) until September 1 at the beginning of his or her junior year in high school. In men's basketball and men's ice hockey, an institution shall not provide recruiting materials, including general correspondence related to athletics, to an individual (or his or her parents or legal guardians) until June 15 at the conclusion of his or her sophomore year in high school.

*Id.*

<sup>74</sup> See *id.* art. 13.6.2.1 ("A member institution may finance only one visit to its campus for a prospective student-athlete."); *id.* art. 13.6.2.2.1 ("A prospective student-athlete may not be provided an expense-paid visit earlier than the opening day of classes of the prospective student-athlete's senior year in high school.")

<sup>75</sup> See *id.* art. 13.6.2.2.

<sup>76</sup> See *supra* notes 5–7 and accompanying text.

<sup>77</sup> See Klein, *supra* note 2 (describing how the University of Southern California made contact with an eighth grader by asking an intermediary to give him Head Coach Lane

them, and no consequences such as loss of eligibility follow from breaking one of these deals. This does not mean, however, that the parties do not take them seriously. Although not all deals are honored,<sup>78</sup> many institutions and recruits live up to their informal obligations.<sup>79</sup>

### B. Basic Incentives for Institutions and Student-Athletes

The incentives to exploit these loopholes originate in the competition among universities for student-athletes. Schools obviously differ in their ability to attract players. A “big time” program frequently signs the most desired recruits, leaving lesser programs with fewer options from which to choose. Nevertheless, each school has peers against whom it competes for similarly gifted recruits. This puts the coaches who recruit in an interesting situation.

Coaches rationally prefer to recruit from as large a pool as possible because the large number increases the chance of finding able players. This chance increases if the coach can somehow reduce the number of competitor schools recruiting from the same pool. A coach who believes that he or she can persuade recruits to accept an early scholarship offer therefore has considerable incentive to recruit before the senior year to avoid competition from those waiting until then.<sup>80</sup> This in turn creates incentives to begin recruiting even earlier and earlier. Once a few coaches begin recruiting early, others will follow suit and crowd the market. Some coaches will respond by recruiting even earlier, again leading others to follow suit.<sup>81</sup> This push towards early recruiting will

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Kiffin’s number); *How Does a College Coach Offer a Sophomore or Freshman During the Football Recruiting Process?*, *supra* note 1 (describing the process of extending scholarships to underclassmen).

<sup>78</sup> See *supra* notes 14–15 and accompanying text.

<sup>79</sup> See Mordecai Browner, *What Good Is a Verbal Commitment?*, BLEACHER REP. (July 19, 2006), <http://bleacherreport.com/articles/205-what-good-is-a-verbal-commitment> (describing as ethical the practice of honoring non-binding verbal commitments and criticizing as unethical those who do not honor them); David La Vaque, *Verbal Commitments: A Lot of Talk?*, USCHO (June 22, 2004), <http://old.uscho.com/news/college-hockey/id,8549/VerbalCommitmentsALotofTalk.html> (reporting on one coach who always honors verbal commitments but recognizes the possibility that the practice may change); Gary Parrish, *Verbal Commitments? Not Big Problem, Can’t Be Fixed, so Move on*, CBS SPORTS (Aug. 30, 2006), <http://www.cbssports.com/collegEBasketball/story/9628045/1> (reporting a coach’s statement that “94 out of 100” college basketball coaching staffs take informal early commitments seriously).

<sup>80</sup> See Forde, *supra* note 1 (“In recruiting,” said one assistant coach of a top-10 program, “it’s all about being first. If you get in on the kid in eighth grade, you’re first.”).

<sup>81</sup> See Gregory, *supra* note 3, at 57 (reporting Scout.com claim that number of high school juniors committing to early non-binding scholarship deals increased 430% from 2003–2007); Dave Hanneman, *Give Recruits Time to Grow up*, COURIER (Findlay, Oh.) (June 29, 2010), [http://thecourier.com/Sports/columns/2010/Jun/DH/ar\\_DH\\_062910.asp?d=](http://thecourier.com/Sports/columns/2010/Jun/DH/ar_DH_062910.asp?d=)

stop only when coaches perceive that they can no longer make sufficiently informed recruiting decisions because the athletes are too young to indicate clearly how good they will be when they enter college, or when athletes refuse to accept early scholarship offers because they realize that their preferences may change.

Student-athletes have similar incentives. They would like to be recruited when the most scholarships are available, and they would like to avoid competition from other recruits. Accordingly, when coaches begin committing scholarships before the senior year, student-athletes will eagerly pursue deals for two reasons. First, waiting means a reduction in the number of available scholarships.<sup>82</sup> Indeed, coaches sometimes pressure recruits by pitting them against one another in a race to accept a single available scholarship.<sup>83</sup> Second, negotiating early reduces the number of competitors unless all potential recruits do likewise. These incentives predispose student-athletes to respond positively when institutions offer early commitments. Indeed, aggressive student-athletes may respond to early offers by pressing other institutions for better offers, thereby increasing the momentum and pressure of early recruiting.

These basic incentives explain why existing NCAA rules do so little to slow informal early commitment. Institutions and recruits will always act in their perceived self-interest, so unless the NCAA changes existing incentives, behavior will not change. Indeed, the NCAA's well-intentioned prohibition against binding early commitment actually increases the attractiveness of early recruitment by largely eliminating the associated risks.

An institution will refrain from making early commitments when dangers associated with early commitment, particularly the possibility of incorrectly measuring a player's athletic potential, outweigh the perceived benefits. If an institution knows that it must honor every early commitment it makes, the institution will not spend one of its precious scholarships unless it is quite confident about a recruit's athletic potential.<sup>84</sup> This means waiting until the recruit is old enough to make his collegiate potential fairly clear. If an institution knows that it does not

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062910,2010,Jun,29&c=sc\_2 (asserting that institutions recruit earlier and earlier to keep up with their competitors).

<sup>82</sup> See NCAA MEMBERSHIP & ACADEMIC AFFAIRS STAFF, *supra* note 7, art. 15.5 (establishing limits on the number of scholarships available to each institution in Division I sports).

<sup>83</sup> See Pennington, *supra* note 9.

<sup>84</sup> See Forde, *supra* note 1 (reporting that Kentucky's men's basketball coach stated "there's a bigger chance of misevaluation, the earlier it is").

have to honor its commitments, however, it can afford to behave more aggressively. Scholarship offers can be made to younger recruits because the absence of a binding commitment acts as insurance against mistakes. If an institution decides that a player is not as good as previously thought, the institution merely disavows its commitment, freeing the scholarship for use on another recruit.<sup>85</sup> To be sure, an institution that frequently backs out of early commitments may lose enough credibility to scare away future recruits. Nevertheless, the continuing existence of both early informal commitment and broken deals suggests that the cost of occasionally canceling an early scholarship deal is lower than the benefits of making progressively earlier informal commitments.<sup>86</sup>

Like institutions, student-athletes who seek early commitments risk getting stuck with a deal that later proves undesirable. Here too, the NCAA's elimination of early binding commitment has made it easier for recruits to participate in early recruiting. Remember, a student-athlete breaking a binding letter of intent commitment would lose eligibility and have to sit out a year of participation in athletics,<sup>87</sup> but a recruit who changes his or her mind about an informal early commitment can simply back out. Indeed, it is likely that the costs of breaking commitments are even lower for recruits than institutions because recruits do not need to maintain a reputation for honoring commitments. The only party a recruit needs to convince is the next school to which he or she commits. Because that school already knows that it is inducing someone to break an existing commitment, the recruit's reputation probably plays a relatively low role in the deal-making process.

### C. *The Broken Commitment*

The foregoing shows why institutions and student-athletes vigorously pursue early recruitment, as well as the exacerbating effect that existing NCAA rules unintentionally provide.<sup>88</sup> This state of affairs contradicts the NCAA's professed commitment to the primacy of academics in the life of the student-athlete.<sup>89</sup> There is, however, much more for a student-athlete who enters the early recruiting market. He or she must

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<sup>85</sup> See *id.* ("In a field this tenaciously competitive, being first is a powerful incentive. And if you end up first on a kid who doesn't develop, well, it's always easy enough to disengage from a verbal commitment.")

<sup>86</sup> See Hanneman, *supra* note 81 (reporting increased use of early commitments).

<sup>87</sup> See *NLI Provisions: Basic Penalty*, *supra* note 68.

<sup>88</sup> See *supra* notes 80–87 and accompanying text.

<sup>89</sup> See *DIVISION I MANUAL*, *supra* note 7, art. 2.9.

deal not only with the pressure of making a premature commitment about college, but also the possibility that agreements will not be honored.<sup>90</sup> Although institutions and recruits both face this uncertainty, recruits poignantly and unfairly bear its worst side effects because institutions can effectively hedge their bets and diversify risk.<sup>91</sup> This leaves recruits in a position where they may feel helpless and potentially coerced into making the very premature decisions the NCAA wants to discourage.

Early commitments get broken for many reasons. Players sometimes change their minds.<sup>92</sup> A better, previously uninterested recruit may contact a coach.<sup>93</sup> A coach may decide that a recruited player has not lived up to his potential.<sup>94</sup> A coach may leave the school.<sup>95</sup> Regardless of the reason for broken commitments, schools and recruits alike must plan for the possibility that they will rely on a promise that evaporates, because broken promises, even informal ones, impose meaningful costs on the jilted party, primarily in the form of foregone opportunity.<sup>96</sup>

There are two rational responses to the possibility of a broken early commitment. First, a party could look for signals about seriousness of commitment. Second, a party could formulate alternate plans against

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<sup>90</sup> See *supra* note 14 and accompanying text.

<sup>91</sup> See *infra* note 103 and accompanying text.

<sup>92</sup> See, e.g., John Carroll, *De-commitments Part of Recruiting's Ugly Side*, ESPN (Nov. 1, 2006), [http://sports.espn.go.com/ncaa/recruiting/columns/story?columnist=carroll\\_john&id=2645863](http://sports.espn.go.com/ncaa/recruiting/columns/story?columnist=carroll_john&id=2645863) (discussing recruits who change their minds after making verbal commitments); Andy Staples, *Brown Saga Reveals Recruiting Flaws; Here's How to Fix Them*, SI.COM (Mar. 16, 2009), [http://sportsillustrated.cnn.com/2009/writers/andy\\_staples/03/16/brown-tennessee/index.html](http://sportsillustrated.cnn.com/2009/writers/andy_staples/03/16/brown-tennessee/index.html) (discussing same).

<sup>93</sup> See, e.g., Bruce Pascoe, *UA Rescinds Scholarship Offer*, ARIZ. DAILY STAR, Sept. 30, 2008, at C1, available at [http://azstarnet.com/sports/basketball/college/wildcats/article\\_61f3cd46-116a-5843-9c05-ecfa76503b39.html](http://azstarnet.com/sports/basketball/college/wildcats/article_61f3cd46-116a-5843-9c05-ecfa76503b39.html) (noting that the University of Arizona rescinded a scholarship offer after receiving commitments from other players and deciding to go "in a different direction").

<sup>94</sup> See, e.g., Jason Bodnar, *M. Hoops Frosh Files Suit Against Northwestern*, DAILY PENNSYLVANIAN, Mar. 29, 2000, <http://www.dailypennsylvanian.com/node/19978> (reporting that Northwestern University allegedly withdrew a scholarship that a recruit had accepted, and told the recruit's father that the recruit could no longer help the team); Forde, *supra* note 1 (noting that the University of Maryland rescinded an offer to Tamir Goodman after concluding he was not as good as originally thought).

<sup>95</sup> See, e.g., Jeff Elliott, *Wolfson's Rozier to Sign with Jacksonville University After FIU Reversal*, FLA. TIMES UNION, Apr. 23, 2009, [http://jacksonville.com/sports/high\\_school/2009-04-23/story/wolfsons\\_rozier\\_to\\_sign\\_with\\_jacksonville\\_university\\_after\\_fiu\\_r](http://jacksonville.com/sports/high_school/2009-04-23/story/wolfsons_rozier_to_sign_with_jacksonville_university_after_fiu_r) (reporting that Florida International University withdrew an apparent commitment after a change in head coach).

<sup>96</sup> For example, a school that promises a scholarship to a recruit passes up the opportunity to fill that slot with a different player. Similarly, a recruit who accepts an informal scholarship promises that he or she will not accept a similar offer from another school.

the contingency that a promise gets broken. For better or worse, existing NCAA regulations make it effectively impossible for schools and recruits alike to send and receive reassuring signals of early commitment.<sup>97</sup> If the NCAA allowed early binding commitments, schools and recruits could sign enforceable written agreements. Indeed, this is precisely what happens during a student's senior year when he or she signs a letter of intent,<sup>98</sup> and it separates those who are merely "window shopping" from those who truly want to commit. Without this possibility, however, there is no way for a school or recruit to determine if the other party is serious. Both sides must simply accept unenforceable verbal assurances—precisely the same assurances given by a party who is trying to deceive the other.<sup>99</sup> The unclear signals about seriousness of purpose mean that parties must rely on contingency plans to hedge the risk of broken early commitments, and it is here that recruits face pressures much more severe than those faced by schools.

Schools and recruits have significantly different options for dealing with this risk. Consider first the option available to recruits. A recruit can protect him- or herself against a school that breaks an early commitment only by finding an alternate scholarship, but doing this jeopardizes the very commitment upon which the recruit hopes to rely. Schools that offer informal early commitments understandably expect committed recruits to stop courting other schools.<sup>100</sup> Accordingly, a recruit who tries to make contingency plans must violate the very understanding upon which his preferred deal rests. If a coach finds out that a committed recruit is discussing things with another school, it is only natural to conclude that the recruit is not truly serious about honoring his commitment and to begin recruiting other players in antici-

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<sup>97</sup> See *supra* notes 14–15 and accompanying text.

<sup>98</sup> See *supra* note 66 and accompanying text.

<sup>99</sup> For example, a recruit who asks a coach for a better assurance may be told, "I'd give you a written agreement right now if I could, but I'm giving you everything the NCAA will let me give you." Similarly, recruits asked about their intentions may say, "Coach, I'll sign a letter of intent right now," knowing that no such letter could be given.

<sup>100</sup> See Jeff Call, *BYU Football: Cougars Rescind Scholarship Offer to Hawaiian Prep Star*, DESERET NEWS, Jan. 29, 2010, <http://www.deseretnews.com/article/700005774/BYU-football-Cougars-rescind-scholarship-offer-to-Hawaiian-prep-star.html> (reporting that BYU withdrew from an early commitment when a recruit took a visit to Notre Dame); Jeff Hood, *Georgia Tech Rescinds Scholarship Offer to Florida QB After Auburn Trip*, PALM BEACH DAILY NEWS, Feb. 2, 2009, [http://www.palmbeachdailynews.com/sports/content/shared-blogs/ajc/cfbrecruit/entries/2009/02/02/georgia\\_tech\\_pu.html](http://www.palmbeachdailynews.com/sports/content/shared-blogs/ajc/cfbrecruit/entries/2009/02/02/georgia_tech_pu.html) (reporting that Georgia Tech withdrew from an early commitment with a player because the recruit took an official visit to another school).

pation of a broken deal.<sup>101</sup> Of course, a recruit could try to conduct secret negotiations for backup plans, but such an effort would likely fail, because the coaching community is small and coaches frequently exchange information about the players they are recruiting.<sup>102</sup>

By contrast, institutions face no impediment to making contingency plans. They can freely recruit other players without jeopardizing existing commitments because it is completely normal for schools to recruit multiple players.<sup>103</sup> Recruits who discover that schools are interested in other players are therefore less likely to worry about broken commitments than schools learning that their supposedly committed recruits are interested in other schools. Accordingly, broken commitments are not as catastrophic for schools as they are for recruits. A school that loses a recruit can usually replace him or her with another recruit, someone from the existing roster, or even a recruit from a future year.

In short, to use the jargon of risk aversion, recruits suffer more than schools from the possibility of broken early commitments because recruits cannot effectively manage the risk of disappointment through diversification. Recruits are one-time players in the early commitment game, and those who try to court multiple prospects actually damage their chances of keeping commitments they have.<sup>104</sup> By contrast, schools are repeat players who easily diversify risk over multiple recruits and multiple recruiting years. Accordingly, coaches may worry that early recruits will break their commitments, but they know that they will not suffer catastrophic consequences because alternate plans will have been made.<sup>105</sup> Recruits have no such luxury.

It is, of course, possible to defend the present scheme of early recruitment. Recruits and institutions both know that binding deals cannot be made until the letter-of-intent date arrives.<sup>106</sup> They both should know that the promises made in recruiting sometimes amount to sweet nothings upon which no one should rely.<sup>107</sup> Because institutions and

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<sup>101</sup> See Call, *supra* note 100 (reporting that BYU does not approve of committed players visiting other schools).

<sup>102</sup> See Pennington, *supra* note 9 (reporting on a coach who said, "what [players] don't know is that we coaches all talk to each other, and we know the truth").

<sup>103</sup> See Staples, *Oregon Pulls Offer*, *supra* note 14 (reporting that some coaches make two hundred to three hundred scholarship offers when they have only twenty-five scholarships available).

<sup>104</sup> See Call, *supra* note 100 (reporting that BYU withdrew an offer after a recruit visited another school); Hood, *supra* note 100 (reporting same).

<sup>105</sup> See Staples, *Oregon Pulls Offer*, *supra* note 14.

<sup>106</sup> See *About the National Letter of Intent (NLI)*, *supra* note 12.

<sup>107</sup> See Pascoe, *supra* note 93 (noting rescinded scholarship offer); Bodnar, *supra* note 94 (noting same); Elliott, *supra* note 95 (noting same); Forde, *supra* note 1 (noting same).

recruits both occasionally suffer from broken informal commitments, the participants in early recruiting meet as equals, “big boys” who understand that it is sometimes necessary to trust a relative stranger and skirt the spirit of rules to get things one wants. Indeed, the process of early recruitment arguably teaches student-athletes about the importance and value of honoring one’s word.

There is undoubtedly some appeal in this defense of early recruitment. One should remember, however, that these informal deals are not made between two experienced, savvy adults. Instead, they involve offers from experienced, repeat-player institutions making unenforceable promises to single-player minors, teenagers who probably do not understand the intricacies of the rules, customs, and risks they encounter.<sup>108</sup> When one considers that universities do not suffer the consequences of broken commitments the way recruits do, it looks like the current system of early recruitment allows universities to exploit the inexperience and insecurity of recruits to push recruits into premature decisions about college without giving the certainty that recruits deserve in return.

### III. THE NCAA RESPONSE: A PROPOSED RULE

The NCAA may not understand exactly how its existing regulations exacerbate the problems of early recruiting, but it does know that the problem is getting out of hand and is trying to do something about it.<sup>109</sup> The reasons for this may not be entirely noble. Although some will support action to curtail early recruiting out of concern for the interests of recruits, others will support it to spare institutions from the risks associated with early judgments about the ability of prospective student-athletes.<sup>110</sup> Nevertheless, in 2010 the DI Cabinet began reviewing Division I recruiting rules, taking comments from coaches and other inter-

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<sup>108</sup> See Bodnar, *supra* note 94 (discussing an instance where a coach sent an early e-mail to a recruit entitled “Scholarship Offer” but later denied offering him a scholarship).

<sup>109</sup> See DIVISION I PROPOSAL 2010-42, *supra* note 18.

<sup>110</sup> See Don Kausler, Jr., *Saban Doesn’t Support NCAA Proposal to Limit Support Staffs*, ALA. LIVE BLOG (June 29, 2010, 4:56PM), [http://blog.al.com/tide-source/2010/06/saban\\_doesnt\\_support\\_ncaa\\_prop.html](http://blog.al.com/tide-source/2010/06/saban_doesnt_support_ncaa_prop.html). Alabama football coach Nick Saban stated:

Guys get offered so early now, you really don’t have a chance to evaluate them. That’s not really fair to the young man or the institution, because if they early commit and they aren’t what you thought they were, whether it’s personally, academically or athletically, it can be a potentially tough situation for either side.

*Id.* (internal quotation marks omitted).



ested parties. In late June 2010, the DI Cabinet proposed legislation prohibiting early offers of financial aid.<sup>111</sup> Under the proposed rule, which was ultimately rejected by the Division I Legislative Council, institutions could not make verbal athletic scholarship offers until July 1 of a recruit's junior year.<sup>112</sup> Additionally, institutions would need to have on file a recruit's high school transcript showing five completed semesters or seven completed quarters before extending a verbal offer.<sup>113</sup> Ironically, the proposed rule also permitted coaches to call recruits even earlier than present rules do. Coaches could make one call per month on or after June 15 of a recruit's sophomore year and two calls per week after August 1 of the senior year.<sup>114</sup>

The DI Cabinet undoubtedly wanted its proposal to relieve the pressure on student-athletes to make premature decisions about college, but it probably would have had little effect on existing practices and possibly would have made things worse. In theory, prohibition against early informal scholarship offers eliminates the incentive that institutions have to recruit early.<sup>115</sup> Coaches who recruit before a recruit's junior year do not gain a meaningful competitive advantage because institutions can offer nothing. All potential recruits will therefore be available when offers can be made in the junior year. Likewise, prospective student athletes have no need to make premature decisions about college because nothing can happen until the junior year.

In practice, however, the DI Cabinet's proposal would probably not have worked as advertised. As an initial matter, the proposal still permitted business as usual during the junior year. More importantly, the NCAA would have had great difficulty enforcing the rule because the basic incentives to recruit early remain,<sup>116</sup> and violations would have been almost impossible to detect. Nothing in the proposal stops coaches and recruits from communicating as they do now during unofficial visits or in telephone conversations initiated by recruits,<sup>117</sup> and there is no way to monitor what promises get made during private conversations.

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<sup>111</sup> See Hosick, *supra* note 17.

<sup>112</sup> See DIVISION I PROPOSAL 2010-42, *supra* note 18. For more on the proposal's rejection, see Moltz, *supra* note 20.

<sup>113</sup> See *id.*

<sup>114</sup> See Hosick, *supra* note 17.

<sup>115</sup> See *supra* notes 80–86 and accompanying text.

<sup>116</sup> See Forde, *supra* note 1 (discussing coaches' desire to be the first to recruit a player); Hanneman, *supra* note 81 (asserting that institutions recruit earlier and earlier to keep up with competitors).

<sup>117</sup> See *How Does a College Coach Offer a Sophomore or Freshman During the Football Recruiting Process?*, *supra* note 1 (describing methods coaches use to circumvent recruiting rules).

Granted, institutions theoretically cannot make even informal offers without the necessary transcripts on file. Institutions anxious to jump the gun can skirt this problem, however, by entering into supposedly informal understandings about non-binding offers to be made when the time for making informal scholarship deals arrives. Accordingly, the DI Cabinet's proposal bore considerable resemblance to existing rules that supposedly postpone scholarship commitments until a recruit's senior year.<sup>118</sup> These rules may offer reminders about how institutions ought to behave, but in the end competitive pressure will drive many to ignore lofty principle for the pursuit of competitive advantage.

If institutions began flouting or skirting the DI Cabinet's proposed rule, the pressure faced by student-athletes would likely have gotten worse. One of the major problems that recruits presently face is the inability to tell whether an informal commitment will be kept.<sup>119</sup> Things are bad enough when coaches and recruits reach explicit informal early deals, and the proposed rule would have encouraged institutions to behave in ways that increase uncertainty. Coaches who want to recruit early but avoid outright violation of the rule will, as noted above, create oblique understandings that amount to scholarship offers.<sup>120</sup> Even if the winking and nodding is explicit enough to signal clear intention, recruits will understandably be nervous about whether they properly understand what is going on. Imagine the dialog:

Recruit: "Coach, I'm really excited about playing for you and your school. Can I count on getting a scholarship?"

Coach: "Well, NCAA rules won't let me offer you one. So let me say this. You're a fine player, the kind of player who can make an immediate impact as a freshman. If you got a scholarship offer from us when the rules allow it, will you accept it? Can we count on you being a member of our team?"

Recruit: "Well gee Coach, sure."

Coach: "Good. Just trust me, and things will work the way you want."

What is a recruit supposed to do in response to such a conversation? He or she has all of the uncertainty created by the existing rules, plus the uncertainty of not knowing if the coach was really extending a firm

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<sup>118</sup> DIVISION I MANUAL, *supra* note 7, art. 13.9.2 (prohibiting formal acceptance of an athletic scholarship until the NLI signing date has passed).

<sup>119</sup> See Pascoe, *supra* note 93 (noting rescinded scholarship offer); Bodnar, *supra* note 94 (noting same); Elliott, *supra* note 95 (noting same); Forde, *supra* note 1 (noting same).

<sup>120</sup> See *supra* notes 90–102 and accompanying text.

deal. This extra uncertainty would normally give a recruit even more reason to talk with other schools and make contingency plans, but doing so would still expose the recruit to the risk that the coach will discover the recruit's interest in other schools and begin looking for a replacement.<sup>121</sup> In short, the DI Cabinet's recently rejected proposal would probably not have made things any better for prospective student-athletes, and it may have made things a lot worse.

#### IV. REAL REFORM AND A PROPOSAL

The foregoing shows that the NCAA cannot significantly reduce the undesirable consequences of early recruiting simply by prohibiting institutions from making early scholarship offers.<sup>122</sup> Such regulation may be simple and direct, but it does little to change underlying incentives that encourage institutions and student-athletes to seek early commitment.<sup>123</sup> Accordingly, reform will be effective only if it makes early recruiting less attractive.

This Article's earlier analysis showed that institutions pursue early commitments because they perceive that the benefits outweigh the costs.<sup>124</sup> Those who recruit early have a better chance of landing top talent because they enter the market before competitors do. This sets up a race in which coaches feel compelled to recruit earlier and earlier in order to get to recruits before the competition.<sup>125</sup> The primary curb on this race is the possibility that early judgments about athletic talent will prove mistaken. This risk increases as institutions recruit earlier and earlier.<sup>126</sup> At some point, the risk will outweigh the benefit of early recruitment. If institutions can cancel any commitments they make, however, as indeed they can under present rules, the risk of early recruitment falls. Indeed, it is likely that the NCAA has unwittingly increased the attractiveness of early recruitment by essentially making all early commitments non-binding.

It is highly unlikely that many of these basic incentives can be changed. As long as coaches compete for recruits, there will be an incentive to beat the competition to the punch. It is, however, possible to

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<sup>121</sup> See Call, *supra* note 100 (reporting on the withdrawal of a scholarship offer because a recruit visited another school); Hood, *supra* note 100 (reporting same).

<sup>122</sup> See *supra* notes 60–79 and accompanying text.

<sup>123</sup> See *supra* notes 60–79 and accompanying text.

<sup>124</sup> See *supra* notes 80–87 and accompanying text.

<sup>125</sup> See Forde, *supra* note 1; see also *supra* notes 80–81 and accompanying text.

<sup>126</sup> See Forde, *supra* note 1.

change the nature of early recruiting bargains in ways that make early commitments less attractive to institutions and less stressful for recruits.

For example, consider what would happen if the NCAA allowed early binding commitments.<sup>127</sup> Coaches would become more cautious about extending early offers because they would have to live with their mistakes. Very high school freshman athletes are sure bets. A coach who can back out of a deal may take a chance on a scholarship promise. But if things were truly serious, a coach would frequently prefer the relatively sure bet offered by a junior or senior. Recruits would also become more reluctant to accept early scholarship offers. Under the present system, recruits (particularly the most highly desired ones who are most likely to receive early offers) feel free to accept early informal commitments because they can back out if a better deal comes along or their preferences change.<sup>128</sup> The proposed system would actually make prized recruits more judicious about accepting early scholarship offers because they too will have to live with the consequences of their choices. A recruit receiving an early scholarship offer from a mid-level program would have to weigh its value against the possibility that a top-tier program will make an offer in the future. Although some of these recruits may still prefer certainty to the possibility of something better, others will choose to wait and see what happens. Accordingly, allowing early binding commitments would probably reduce the prevalence of early recruiting at younger ages by making institutions and recruits less willing to make deals with each other.

Additionally, early binding commitments would ameliorate the uncertainty that recruits face over the possibility of broken deals.<sup>129</sup> Student-athletes and coaches alike would be able to distinguish between those who are window-shopping and those who are serious. When two serious parties meet and agree, neither will have any reason to make contingency plans that could motivate the other side to break the deal. Although the NCAA might prefer that students not commit early at all, the practice will probably never disappear.<sup>130</sup> Given this reality, those

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<sup>127</sup> See Staples, *supra* note 92 (advocating an early signing period for underclassmen who have made up their minds about which college to attend).

<sup>128</sup> See *supra* note 92 and accompanying text.

<sup>129</sup> See Pascoe, *supra* note 93 (noting rescinded scholarship offer); Bodnar, *supra* note 94 (noting same); Elliott, *supra* note 95 (noting same); Forde, *supra* note 1 (noting same); see also *supra* notes 93–95 and accompanying text.

<sup>130</sup> See Staples, *supra* note 6 (stating that coaches will follow the actions of other coaches, including early recruiting, if those actions are remotely successful).

who commit early at least ought to get certainty in return, and allowing early binding commitment will accomplish that.

Finally, and perhaps most importantly, acceptance of early binding commitments would allow the NCAA to structure their availability in a manner that can further discourage their use. For example, the NCAA could require institutions to guarantee scholarships for more than one year when offering them before the senior year. If an institution knew that early scholarship offers to underclassmen had to be guaranteed for more than the ordinary one year, it would make such early commitments even less attractive by making mistakes even more costly. If, for example, an early scholarship offer to a freshman had to contain a guarantee of four years of aid, schools would offer them only to the finest prospects, and casual commitments would probably disappear. Coaches would, of course, object to the notion that any athlete is worth a multi-year scholarship commitment. That, however, is exactly the point. The NCAA may not be able to eliminate early commitment, but it can make early commitments rare and fair. When an institution asks a student-athlete to make a binding commitment to a college before his senior year, the institution asks for a lot and puts the recruit under the very pressure that the NCAA wants to eliminate.<sup>131</sup> It is only fair to give student-athletes who must deal with this pressure the security of knowing that their place in college is guaranteed for an amount of time commensurate with the early nature of their commitments.

The foregoing observations lead to this Article's proposal. The NCAA should allow institutions to make formal, binding scholarship offers to recruits at any time. The specific terms of these offers would depend on the recruit's grade in school. Seniors would, as they do now, get a one-year guaranteed scholarship. High school juniors would get two guaranteed years, sophomores three, and freshmen four. These scholarships would have to be honored and would count against the institution's overall scholarship limit even if the athlete were to get cut from the relevant team or decide to stop playing the sport. Additionally, institutions would not be allowed to withdraw offers that will have been made until an NCAA-imposed deadline for acceptance has passed. For example, the NCAA could require institutions to keep all offers open until the following July 1. Once the July 1 date passed, unaccepted offers would automatically expire. Institutions would, of course, be free to extend new offers for fewer guaranteed years if they so desired.

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<sup>131</sup> See Hosick, *supra* note 17 (discussing the NCAA's desire to decrease pressure on recruits by proposing new recruiting rules).

This proposal will undoubtedly seem unconventional to many college sports veterans. It will probably work better than the DI Cabinet's recently rejected proposal for curtailing early commitments, however, because it fundamentally changes the conditions under which institutions and recruits operate, making early commitment less desirable for institutions and more fair to all concerned.

First, the proposal will effectively replace an often-used market for early informal commitments with a rarely-used market for early binding commitments. This will happen because the proposal forces institutions to live with their mistakes, and it raises the price of mistakes as institutions pursue younger recruits. Very few institutions will want to make multi-year commitments to unproven youngsters, so institutions will rarely make early formal offers, restricting those offers to the most gifted athletes.

Of course, some coaches will continue recruiting underclassmen and will make informal offers in hopes of getting a jump on the competition. These informal offers will interest recruits much less than they presently do, however, because informal offers will no longer represent unequivocal enthusiasm for the recruit. Under existing rules, the best deal a recruit can get is a one-year, informal deal that could evaporate at any time.<sup>132</sup> Recruits who wonder about a coach's sincerity or enthusiasm cannot get meaningful reassurance because words are all that can be offered. An insincere coach can feign genuine enthusiasm by telling the recruit that the informal offer is the very best he or she can give under NCAA rules.<sup>133</sup>

The proposal renders this tactic much less effective because the availability of binding early commitments would allow coaches who are truly serious about a recruit to give an enforceable promise. A coach's failure to offer a binding early commitment would tell a recruit that the coach's enthusiasm for him or her is limited, and it is entirely possible that a rival institution will eventually offer the recruit a binding commitment. Indeed, it is quite likely that lesser programs will use offers of early binding commitment to send unambiguous signals about a recruit's value in order to sign the recruit away from more prestigious programs that will not have made similar offers. Recruits therefore will have relatively few reasons to accept early non-binding offers and good reasons to wait for something better. To the extent that recruits accept

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<sup>132</sup> See DIVISION I MANUAL, *supra* note 7, art. 15.3.3 ("If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.").

<sup>133</sup> See *supra* notes 120–121 and accompanying text.

early non-binding offers, the deals will be more unstable than ever because recruits will happily break non-binding deals to gain the security of binding offers from other institutions. This instability will mean that institutions and recruits alike will no longer expect informal deals to be honored as they do now. Those who want to window shop can make informal deals knowing full well that deals are “being tried on for size,” and those who are serious about getting deals made will use the formal binding commitments proposed here.

Second, and perhaps more importantly, the proposal will make early recruiting more fair for recruits. As noted above, recruits will get clearer signals about an institution’s genuine degree of interest. Additionally, recruits will not be subject to the “exploding offers” that some coaches have used to pressure recruits into premature decisions about early informal commitments because early binding offers will have to be kept open until July 1.<sup>134</sup> Even better, recruits who accept binding offers will no longer have to worry about whether their deals will be secure. They will be able to rely on the promises they will have received without worrying that a coach might leave or change his mind. Finally, the increased number of guaranteed scholarship years will give recruits something in return for the fuss of making premature decisions about college.

There are, of course, problems with this proposal that must be acknowledged. First, it is possible that institutions will try to preserve the status quo by refusing to offer anything but informal one-year commitments.<sup>135</sup> Institutions have good reason for trying to do this. Early informal one-year commitments carry less risk than formal multi-year ones because they allow institutions to avoid the primary danger of early recruiting (namely making a mistake about a recruit’s ability). Institutions may therefore offer only informal one-year deals in the hope that recruits will accept them in the absence of anything better. Such a strategy would probably fail, however, because it would rely on an unusual degree of cooperation between fierce competitors. Early recruiting has become a problem precisely because coaches are trying to sign recruits before their competitors can. If an institution decides not to make early binding commitments to prize recruits, it seems quite unlikely that its competitors will all follow suit. Someone will decide to

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<sup>134</sup> See Pennington, *supra* note 9 (describing the pressure coaches put on recruits by playing them off on one another).

<sup>135</sup> See Forde, *supra* note 1 (noting that coaches want to be first to recruit a player, knowing they can just disavow commitments to recruits who do not develop into college-caliber athletes).

“up the ante” by offering binding commitments to a few recruits.<sup>136</sup> Once this happens, the possibility of early binding commitments gives recruits options and information that render informal commitments considerably less attractive.

Second, the availability of early binding commitments raises the possibility that highly prized recruits will become subject to constant recruiting pressure that they do not face now. If early binding commitments become legal, then institutions and recruits will have to communicate with each other directly more than NCAA rules presently allow.<sup>137</sup> It would be unfair to expect either side to make serious commitments without the benefit of face-to-face meetings and official campus visits. This could create chaos for highly-prized recruits, particularly if institutions could communicate with underclassmen as freely as with seniors. There is, however, no particular reason why recruiting for underclassmen should imitate recruiting for seniors. Formal recruiting of underclassmen need not occur in the fall because the recruits in question will not be enrolling in college for at least another year. Communication, official visits, and signings could therefore be limited to specific times of year when interference with a recruit’s academics can be minimized (holiday periods and summers, for example) with full confidence that there is no need to rush. Limits like these might seem onerous to coaches who would prefer 24/7 recruiting, 365 days per year, but they would be workable. If institutions and recruits do not know enough about each other to comfortably make an early binding commitment, then they should simply wait. Early commitments should be used only in extraordinary cases. For the vast majority of athletes, early commitments should be discouraged, and if abbreviated recruiting periods for underclassmen contribute to the necessary disincentives, so much the better.

#### CONCLUSION

The NCAA has laudably begun the process of curbing informal scholarship deals with underclassmen. The recently rejected DI Cabinet proposal would probably have done little to change existing practices. Institutions that want to make early deals would still do so, and their chances of suffering adverse consequences would be low. Real reform

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<sup>136</sup> See *id.* (discussing coaches’ desire to be first in the recruiting game).

<sup>137</sup> See DIVISION I MANUAL, *supra* note 7, arts. 13.1.1, 13.1.3, 13.4.1, 13.6.2 (limiting the amount of contact institutions can have with potential recruits and prohibiting such contact before a recruit’s senior year).



will be difficult to achieve unless institutions bear real costs for pursuing underclassmen and the value of early scholarship deals is diminished.

This Article has made a proposal to accomplish real reform by allowing early binding commitments. Although this may seem counterintuitive, this proposal will force institutions to live with any early recruiting “mistakes” that are made, will raise the cost of early recruitment by increasing the length of the scholarship commitment associated with early deals, and will destabilize informal commitments so that parties will no longer realistically expect them to be honored. Together, these effects will discourage institutions from making early scholarship offers. And, to the extent that such offers are made, the proposal made here will give recruits who decide to commit early real security that they do not enjoy today.

Granted, no proposal is perfect. Nevertheless, the one made here hopefully will advance the dialog that takes place as the NCAA evaluates a new framework to deal with the difficulties of early recruitment.