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The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?

The National Collegiate Athletic Association ("NCAA") dominates contemporary regulation of intercollegiate sports, making it virtually impossible for colleges and universities to engage in high quality interscholastic competition without complying with the myriad requirements it promulgates. Some view the NCAA as a protector of all that is pure and decent in the world of college sports. Others, perhaps more realistically, characterize the organization as a facilitator of anticompetitive practices among its constituent institutions. Conventional judicial wisdom suggests that NCAA regulations fall into two general categories: (1) rules designed to promote and preserve the eligibility and amateur status of student-athletes; and (2) other forms of regulation with a more economic purpose.[1]

This dichotomous approach to the NCAA's oversight role has been noted by federal courts in numerous antitrust suits challenging various aspects of NCAA rulemaking.[2] Courts tend to routinely validate restrictions allegedly designed to promote the goal of amateurism, while other NCAA rules and regulations

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1 *See* Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (noting the NCAA engages in "two distinct kinds of rulemaking activity"—one rooted in concern for amateurism and the other "increasingly accompanied by a discernible economic purpose").

2 *See infra* text accompanying notes 37–115.

are subject to closer judicial scrutiny. Some, however, perceive this two-pronged analytical model as flawed and anachronistic.[3] In any event, the NCAA continues to be the target of a relatively steady stream of antitrust challenges to its regulatory authority, and the line of demarcation between the two methods of analysis has become increasingly blurred.

This Article begins with a brief description of the development of the NCAA and its emergence as the preeminent regulator of intercollegiate athletics. Part II discusses the antitrust litigation challenging various NCAA rules and regulations and the creation of a dichotomous antitrust analysis that separates restraints on athletes from other commercial trade restrictions in the context of amateur sports. Part III then deconstructs and criticizes this bifurcated approach, arguing that the conventional analysis is flawed and archaic given the economic realities of contemporary NCAA competition. Part IV offers some alternative approaches to the issues, including a somewhat different application of antitrust principles as well as possible legislative considerations.

I
THE HISTORICAL BACKGROUND AND GROWTH OF THE NCAA

A. Formation and the Early Years

In early December 1905, the Chancellor of New York University convened a meeting of thirteen institutions to discuss reformation of college football playing rules in response to the growing number of serious injuries and deaths in the sport.[4] On December 28, the Intercollegiate Athletic Association of the United States ("IAAUS") was founded with sixty-two

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3 *See infra* text accompanying notes 116–26.

4 The History of the NCAA, http://www.ncaa.org/about/history.html (last visited Nov. 1, 2007). The meetings resulted from the urging of President Theodore Roosevelt, who encouraged reform rather than abolition of intercollegiate football. *See id*. From this seemingly narrow, well-intentioned effort to combat unnecessary physical injury in football, the NCAA's role grew dramatically after World War II. *See id.*; *see also* ARTHUR A. FLEISHER III, BRIAN L. GOFF & ROBERT D. TOLLISON, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 39–40 (1992) (recognizing the need to address "brutal and violent techniques"); ANDREW ZIMBALIST, UNPAID PROFESSIONALS 8 (1999) (noting that seven college football players died from game-related injuries in 1893, twelve in 1894, and eighteen in 1905, bringing the 1890–1905 total to 330).

members.[5] The IAAUS "officially was constituted" on March 31, 1906, and became the NCAA in 1910.[6] Although football violence was the "catalyst" responsible for spawning the birth of the NCAA, "problems relating to amateurism and eligibility rules received as much, if not more, attention at the first NCAA Annual Meeting in 1906."[7] Commentators have explained that while the "original mission" of the NCAA "focused on providing public goods" by reducing violence and standardizing play, the NCAA "quickly turned its attention from standardizing rules to instituting the outlines of a cartel."[8]

From these rather modest beginnings, the NCAA steadily grew in stature and the scope and complexity of its rules and regulations expanded significantly as well.[9] Fleisher, Goff, and Tollison characterize the period from 1905 through 1946 as a time of "early restraints," when the NCAA adopted eligibility rules and output restrictions and engaged in other cartel-like activities.[10] New eligibility requirements determined the allowable length of participation and required full-time student status, while other regulations pertained to amateur status and the "financial remuneration" of athletes.[11] In 1916, the NCAA defined the "amateur athlete" as "one who participates in competitive physical sports only for the pleasure, and the

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5 The History of the NCAA, *supra* note 4.

6 *See id.*

7 ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE 33 (1998). Articles VI and VII of the NCAA's 1906 by-laws reflected an "unequivocal, uncompromising" position on amateurism that was "virtually indistinguishable" from the British model at universities like Oxford and Cambridge. *Id.* More specifically, no scholarships or financial aid based on athletic rather than academic ability were permissible. *Id.* Prior to the formation of the NCAA, professionalism already had begun to creep into intercollegiate sports. *See* ZIMBALIST, *supra* note 4, at 6–7 (explaining that "[i]ntercollegiate sports in the United States lost its innocence on day one" because in 1852 the Harvard and Yale rowing crews were lured with lavish prizes and unlimited alcohol). In the 1880s, Yale had a $100,000 football slush fund, and the university paid players and offered them jobs. *Id.* at 7; *see also* JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 37 (2006) (referring to some college football players during this era as "ringers").

8 FLEISHER ET AL., *supra* note 4, at 40.

9 *See infra* notes 17–36 and accompanying text.

10 *See* FLEISHER ET AL., *supra* note 4, at 41.

11 *Id.*

physical, mental, moral, and social benefits directly derived therefrom."[12]

Although the period from 1906 to 1920 has been described as "generally uneventful for the NCAA,"[13] it was also a period during which the NCAA "extended its grasp beyond football" and attempted to generate support for uniform university compliance with NCAA regulations covering eligibility and amateurism.[14] The tremendous growth in popularity of college football beginning in the 1920s[15] apparently made actual enforcement of the NCAA amateur code so difficult that it "presented a dilemma not unlike the one posed by the Eighteenth Amendment of the U.S. Constitution where in it prohibited the manufacture and sale of alcoholic beverages."[16] Increasingly, it had become evident that reliance upon voluntary compliance by NCAA member institutions would not solve the myriad problems created by the dramatic expansion of intercollegiate athletics and the financial opportunities such growth presented. Without any credible enforcement threat to encourage or coerce adherence to rules and regulations, the temptation to ignore standards that interfered with athletic and financial success was simply too great.

B. The Modern Era

Consequently, in 1948, the NCAA took a significant step by adopting the so-called Sanity Code in an effort to develop a meaningful enforcement mechanism to assure compliance with

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12 SACK & STAUROWSKY, *supra* note 7, at 34–35 (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE ELEVENTH ANNUAL CONVENTION 118 (1916)). In 1922, the NCAA redefined the amateur athlete as "one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is *nothing more than an avocation*." *Id.* at 35 (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, PROCEEDINGS OF THE SEVENTEENTH ANNUAL CONVENTION, (1922)).

13 FLEISHER ET AL., *supra* note 4, at 42.

14 *Id.*

15 *See* CROWLEY, *supra* note 7, at 61–66 (describing the "ballyhoo years" and explaining how radio fueled public interest in college sports); FLEISHER ET AL., *supra* note 4, at 42–45 (characterizing the period from the 1920s to the 1950s as a "golden age" for college football and documenting the growth of college sports and its commercialization).

16 SACK & STAUROWSKY, *supra* note 7, at 35. These commentators note that "the NCAA had no effective enforcement powers until 1948 and depended on individual schools and conferences to police themselves." *Id.*

its rules and regulations.[17] The Sanity Code restricted financial aid to student-athletes by requiring that recipients utilize the "normal channels" that other students were compelled to follow.[18] Aid was restricted to tuition and fees and could not be awarded based on athletic ability.[19] In addition, the Sanity Code created a compliance mechanism through a Compliance Committee that could terminate an institution's NCAA membership.[20]

From an antitrust perspective, this attempt to secure concerted action from NCAA member institutions also laid the foundation for, and increased the likelihood of, Sherman Act challenges to rules and regulations that arguably restrained competitive forces in the marketplace.[21] The transition from an advisory set of standards to a joint agreement to adhere to rules and regulations, coupled with NCAA enforcement, provided the requisite concerted action and potentially anticompetitive consequences necessary to invoke Sherman Act antitrust principles.

The Sanity Code did not enjoy a long life; in fact, within two years the Code was dead.[22] During the 1950s, the NCAA developed new regulations governing financial aid to athletes, and economic support could now be given without regard to financial need or "remarkable academic ability."[23] In essence, financial inducements could be used to entice gifted athletes to participate in sports and the original amateur ideal had been

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17 FLEISHER ET AL., *supra* note 4, at 47.

18 *Id.*

19 *Id.* The Sanity Code also barred university officials from offering financial aid to potential students based on athletic ability. *Id.*

20 *Id.* at 47–48. The severity of this expulsion penalty and the absence of less onerous alternatives arguably caused the "downfall" of the Code. *Id.* at 48. For other discussions of the Sanity Code, see CROWLEY, *supra* note 7, at 69 (describing the Code as "not just another in a long line of codes" but one with "teeth"); SACK & STAUROWSKY, *supra* note 7, at 44 (explaining that the Code represented a compromise between schools that advocated full athletic scholarships and their opponents).

21 *See* ZIMBALIST, *supra* note 4, at 10 (explaining that some economists argue that "the Sanity Code marks the beginning of the NCAA behaving as an effective cartel").

22 *See* SACK & STAUROWSKY, *supra* note 7, at 46; *see also* FLEISHER ET AL., *supra* note 4, at 48–50; ZIMBALIST, *supra* note 4, at 23.

23 *See* SACK & STAUROWSKY, *supra* note 7, at 47.

replaced with a significantly different model.[24] Notwithstanding this liberalization of the criteria for financial aid to athletes, schools began a "spending spree" to buy winning teams.[25] Despite "ever more detailed regulations," and increased enforcement efforts by the NCAA, schools throughout the nation "devised new ways to pay their athletes on the side."[26] The increased commercialization of intercollegiate sports and the opportunity to reap vast amounts of revenue from successful football and basketball programs created significant incentives for schools to do whatever they could to maximize athletic success. The NCAA, with a revised enforcement mechanism and rules addressing student-athlete eligibility, "capping" financial inducements, limiting transfers, and penalizing "under-the-table payments," created the foundation for "today's corporate college sport."[27]

The contemporary array of NCAA rules and regulations governing student-athlete eligibility and financial aid finds its genesis in the post–Sanity Code developments of the 1950s. Today, the NCAA consists of over 1200 educational institutions, athletic conferences, and related organizations, and it operates national annual championships in twenty-two sports across three divisions of athletic competition.[28] The NCAA Division I Manual contains numerous provisions addressing both student-athlete academic eligibility issues and questions of amateurism.

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24 *See* ZIMBALIST, *supra* note 4, at 23–24 (noting that in 1956 the NCAA began to permit full grants-in-aid that included tuition, fees, room and board, books, and $15 per month for "laundry money").

25 *See* SACK & STAUROWSKY, *supra* note 7, at 48.

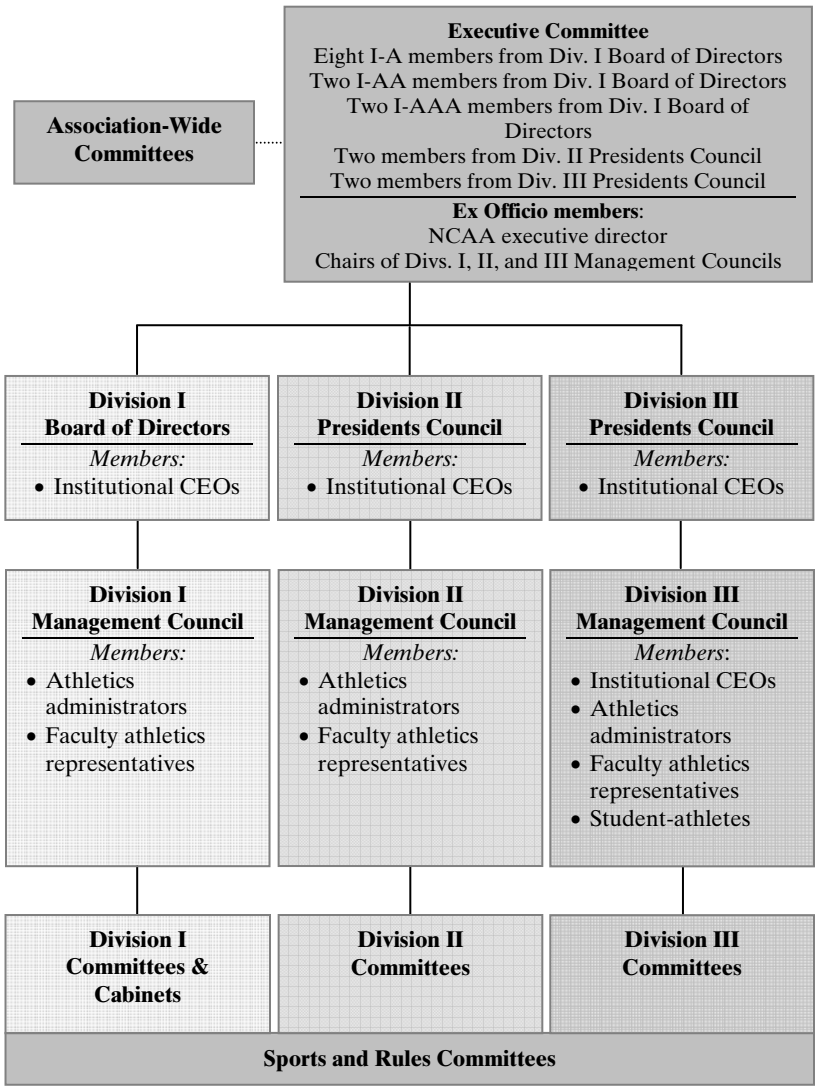
26 *See* ZIMBALIST, *supra* note 4, at 24–25.

27 SACK & STAUROWSKY, *supra* note 7, at 49; *see also* FLEISHER ET AL., *supra* note 4, at 51–56 (explaining that the Sanity Code period and subsequent handling of enforcement signaled a new era of NCAA regulation).

28 *See In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1146 (W.D. Wash. 2005). In 1997, the NCAA changed its governance structure to provide greater autonomy for each division and more control by university and college presidents. *See* The History of the NCAA, *supra* note 4. This restructuring allows school and conference athletic department administrators to play a "primary role" in the maintenance of college sports and allows them to develop legislation for the presidents to consider for each NCAA division. *See* NCAA Governance Org Chart, http://www2.ncaa.org/portal/legislation_and_governance/committees/governance_org_chart.html (last visited Nov. 15, 2007).

Student-athletes may not be represented by agents,[29] may receive financial aid only to the extent of the "cost of attendance that normally is incurred by students enrolled in a comparable

NCAA Governance Structure



[29] Nat'l Collegiate Athletic Ass'n, 2007–08 NCAA Division I Manual § 12.3.1, at 68 (2007) [hereinafter NCAA Manual], *available at* http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf.

program,"[30] and may not accept any "direct or indirect salary, gratuity or comparable compensation."[31] Compensation may be paid to student-athletes "[o]nly for work actually performed . . . [a]t a rate commensurate with the going rate in that locality for similar services."[32] Donors may not contribute funds to finance a scholarship or grant-in-aid for any particular athlete.[33] The receipt of improper financial aid by a student-athlete can render that person ineligible for intercollegiate athletic competition.[34] Further, the NCAA may establish limits on the number of financial aid awards each school may award.[35]

These regulations operate to diminish or eliminate potential economic competition for players in major NCAA sports such as Division I-A (now FBS) football and Division I basketball, despite the fact that revenues from those sports may generate millions of dollars for the institutions involved. Players receive "compensation" for their athletic contributions in the form of scholarships, but the value of the monetary rewards are limited by the "caps" created by NCAA rules. If these issues arose in a professional sports context, without the benefit of a collective bargaining agreement addressing the limits on competition for players and other compensation questions, serious Sherman Act antitrust concerns most certainly would arise.[36] Whether the

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30 *Id.* § 15.01.6, at 176.

31 *Id.* § 12.1.2.1.1, at 63.

32 *Id.* § 12.4.1, at 69.

33 *Id.* § 15.01.4, at 175.

34 *Id.* § 15.01.2, at 175.

35 *Id.* § 15.01.7, at 176. In addition to the economic restraints placed on student-athletes, the NCAA has imposed a myriad of academic eligibility and performance requirements. *See generally* MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 108–11, 136–39 (2005); PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 770–810 (3d ed. 2004). This Article does not contend that the academic requirements imposed on NCAA student-athletes or institutions present significant antitrust questions.

36 Prior to the development of player unions in professional sports, a number of antitrust cases were litigated successfully by players challenging leagues' attempts to regulate competition for players' services through the draft and restrictions on free agency. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978) (striking down NFL draft); Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976) (finding "Rozelle Rule," which inhibited free agency, illegal); Kapp v. NFL, 390 F. Supp. 73, 86–87 (N.D. Cal. 1974) (concluding that several restraints on NFL players violated federal antitrust law). Such restraints in professional sports are now included in collective bargaining agreements and enjoy protection from antitrust law pursuant to the nonstatutory labor exemption. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996); Clarett v. NFL, 369 F.3d 124, 142–43 (2d Cir. 2004).

designation of NCAA players as "student-athletes" and "amateurs" is sufficient to create a legal distinction is the subject of much contemporary scholarly debate and considerable antitrust litigation.

II
NCAA ANTITRUST LITIGATION—A DICHOTOMOUS APPROACH

Prior to the Supreme Court's 1984 decision in *NCAA v. Board of Regents*,[37] very few antitrust claims had been asserted against the NCAA. Courts tended to be dismissive of antitrust challenges to NCAA rules and regulations and often focused on the NCAA's alleged noncommercial objectives.[38] Federal judges resisted the idea of interfering with what was perceived to be a legitimate effort to promote amateurism and fair competition in NCAA athletics.[39] Even when the plaintiff was not a student-athlete challenging amateurism or eligibility standards, the NCAA generally prevailed.

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[37] 468 U.S. 85 (1984).

[38] *See, e.g.*, Ass'n for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 584–90 (D.C. Cir. 1984) (rejecting Sherman Act claims that the NCAA unlawfully used monopoly power in men's sports to enter women's sports and force plaintiff out of business; effect more important than intent); Hennessey v. NCAA, 564 F.2d 1136, 1147–54 (5th Cir. 1977) (rejecting antitrust challenge to NCAA rule limiting the number of assistant basketball and football coaches); Weiss v. E. Coll. Athletic Conference, 563 F. Supp. 192, 194–96 (E.D. Pa. 1983) (rejecting challenge to rule requiring one year of ineligibility after transfer); Justice v. NCAA, 577 F. Supp. 356, 382–84 (D. Ariz. 1983) (rejecting group boycott claim by football players whose school had been deemed ineligible for both postseason play and television appearances for two years following rule violations); Jones v. NCAA, 392 F. Supp. 295, 303–04 (D. Mass. 1975) (rejecting antitrust claim by college hockey player deemed ineligible for violation of NCAA amateurism rules); Coll. Athletic Placement Serv., Inc. v. NCAA, 1975 Trade Cas. (CCH) ¶ 60,117 (D.N.J. 1974) (rejecting boycott claim by college athletic placement company based on NCAA rule rendering ineligible any athlete using plaintiff's services).

[39] However, in *Justice v. NCAA*, the court did acknowledge that "the NCAA is now engaged in two distinct kinds of rulemaking activity." *Justice*, 577 F. Supp. at 383. One type is "rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose." *Id.* The *Justice* court made this distinction by citing the district court and court of appeals decisions in *Board of Regents*, and by recognizing that the Supreme Court had granted certiorari in that significant case. *Id.*

A. The Board of Regents *Decision and the Dichotomous Approach*

In the wake of the relatively few federal district and appellate court antitrust decisions dealing with allegedly anticompetitive NCAA practices, the Supreme Court decided *Board of Regents*. In the context of an antitrust challenge to the NCAA's college football television plan, the Supreme Court set the stage for the modern dichotomous approach to antitrust analysis of NCAA regulatory activity. Importantly, the Supreme Court implicitly determined that the NCAA is not a single entity by applying section 1 of the Sherman Act to the collective actions of the NCAA member institutions.[40] Also, the Court was not deterred

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[40] *Board of Regents*, 468 U.S. at 99 (noting that the NCAA is "an association of schools which compete against each other to attract television revenues"); *see also* Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004) (reaffirming that the NCAA is not a single entity). Section I of the Sherman Antitrust Act, 15 U.S.C. § 1 (2006), only applies to concerted rather than unilateral conduct in restraint of trade. The prevailing view regarding professional sports is that leagues are not single entities; rather, they are a combination of separate teams cooperating to produce a joint product. *See, e.g.*, Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir. 1994); L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387–90 (9th Cir. 1984); N. Am. Soccer League v. NFL, 670 F.2d 1249, 1251–52 (2d Cir. 1982); Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*, 20 ARIZ. ST. L.J. 953, 958–70 (1988). *But see* Levin v. NBA, 385 F. Supp. 149, 152 n.6 (S.D.N.Y. 1974); S.F. Seals, Ltd. v. NHL, 379 F. Supp. 966, 969–70 (C.D. Cal. 1974) (supporting single entity approach). *Cf.* Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 597–601 (7th Cir. 1996) (suggesting that the NBA might be a single entity for some purposes). *See also* Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007) (identifying NFL as a single entity for "league-wide policy other than labor disputes"); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 14–23 (1983) (criticizing cases denying single entity status to the NFL); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 260–62 (1984) (arguing that courts improperly treat teams as separate entities); Nathaniel Grow, Note, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183 (2006) (suggesting that courts should presume sports leagues are single entities in nonlabor matter). Recently, one commentator argued that college conferences should be viewed as single entity sports leagues, but that the NCAA itself is not a single actor. *See* Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 80–82 (2006). This Article does not address potential NCAA liability pursuant to section 2 of the Sherman Act.

by either the nonprofit status of the NCAA[41] or the NCAA's "good motives" in acting as the "guardian of an important American tradition."[42]

Although the Court's focus in *Board of Regents* was on the antitrust implications of output and price restraints regarding the presentation of college football on television,[43] Justice Stevens did utter now famous (perhaps infamous) dicta about the role of the NCAA in maintaining a distinction between amateur intercollegiate athletics and minor league professional sports. Justice Stevens opined that "[i]n order to preserve the character and quality of the 'product,' athletes *must not be paid, must be required to attend class*, and the like."[44] The issue of academic and economic regulation of college athletes was not directly before the Court, but the majority opinion nevertheless laid a strong foundation for subsequent arguments that the antitrust laws should not invalidate restraints on competition for the services of NCAA student-athletes.

The *Board of Regents* decision made another important contribution to the debate over application of antitrust principles to NCAA regulations when it concluded that "maintaining a competitive balance among amateur athletic teams is legitimate and important."[45] Despite the fact that the college television plan at issue ultimately was determined not to promote competitive balance in any significant way,[46] the Court seemingly accepted the notion that collective action by sports leagues that demonstrably enhanced competitive balance was indeed a legitimate, procompetitive justification that should be

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41 B*oard of Regents*, 468 U.S. at 100–02. The Court noted that the "economic significance of the NCAA's nonprofit character is questionable at best." *Id.* at 100 n.22.

42 *Id.* at 101 n.23. The Court explained that "good motives will not validate an otherwise anticompetitive practice." *Id.*

43 The Court ruled that the NCAA had violated section 1 of the Sherman Act by limiting television appearances for college teams and fixing the price of televised games. *See id.* at 120. It also utilized rule of reason analysis rather than a per se rule because league sports require some horizontal restraints to produce a finished product. *Id.* at 100–02.

44 *Id.* at 102 (emphasis added).

45 *Id.* at 117.

46 *Id.* at 117–20. Justice Stevens asserted that the NCAA imposes a variety of restraints to preserve amateurism that address the goal of competitive balance. *Id.* at 119.

considered in a rule of reason antitrust analysis.[47] This recognition of competitive balance as a valid concern could potentially justify some NCAA restraints on competition for student-athletes.

Board of Regents provided important precedential support for the two-pronged antitrust approach to NCAA regulation. The Supreme Court suggested that while joint economic action by NCAA members on matters not dealing with the regulation of players should be subjected to rule of reason analysis under section 1 of the Sherman Act, regulations governing player eligibility and amateurism might be exempt or at least subject to less stringent antitrust scrutiny.[48] The foundation for a dichotomous antitrust approach to the NCAA's conduct was now in place, despite the fact that economic restraints on student-athletes were not even before the Court.

In the wake of *Board of Regents*, lower federal courts seized the opportunity to treat NCAA player restraints in a significantly different manner from other NCAA regulations. When dealing with antitrust claims in a nonplayer context, the judicial approach has been rather unremarkable and consistent with more traditional antitrust methodology. However, when restraints in alleged player service markets arise, federal courts either decline to apply antitrust doctrine at all, or seem to adopt a more deferential approach that protects the NCAA from successful challenges to its regulatory scheme. As a result, antitrust cases in the amateur athletic context tend to reach results similar to those in professional sports on issues not involving players, but courts reach markedly different conclusions when considering player restraints. Sometimes, however, these attempted lines of demarcation are blurred.[49]

B. NCAA Regulation and Nonplayers

In recent cases, mainstream antitrust principles have been invoked to deal with claims by nonplayer market participants. For example, in *Law v. NCAA*,[50] the Court of Appeals for the

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[47] This conclusion is contrary to the result reached in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), where competitive balance was deemed irrelevant in a rule of reason analysis dealing with the NFL draft.

[48] *Board of Regents*, 468 U.S. at 123.

[49] *See infra* notes 108–15 and accompanying text.

[50] 134 F.3d 1010 (10th Cir. 1998).

Tenth Circuit utilized the so-called "quick look" rule of reason to invalidate an NCAA rule limiting the annual compensation of certain entry-level coaches.[51] The NCAA proffered three alleged procompetitive justifications for the horizontal salary restraint: (1) retention of entry-level positions; (2) cost reduction; and (3) competitive balance.[52] In rejecting these attempted rationales for the challenged practice, the court endorsed the idea that competitive balance was a legitimate, procompetitive objective, but found that the salary restriction failed to actually promote that goal.[53] The court applied rather straightforward Sherman Act principles and concluded that the restraint had a net anticompetitive effect rendering it illegal under the rule of reason.[54] It mattered not that the coaches were employees at NCCA institutions or that they were teaching student-athletes.[55] The coaches were engaged in a trade or business and competition for their services had been restrained unreasonably through the concerted action of their employers.[56] Unless the obvious anticompetitive impact of the artificial "cap" on their salaries could be offset by countervailing benefits to competition in some legally cognizable relevant market, the coaches had to prevail.

In *Worldwide Basketball and Sports Tours, Inc. v. NCAA*,[57] the Sixth Circuit similarly applied conventional antitrust analysis to an NCAA rule limiting member institutions' participation in outside men's basketball tournaments. The plaintiffs were promoters of outside certified tournament events who argued

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51 *Id.* at 1020. The court noted that the quick look approach may be applied when anticompetitive effects are so obvious that it is appropriate to proceed directly to the question of whether there are valid procompetitive justifications for a restraint. *Id.* at 1020–21.

52 *Id*. at 1021–24.

53 *Id.* In reaching this conclusion the *Law* court distinguished and disagreed with the approach taken in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), which affirmed the dismissal of an antitrust claim challenging a limit on the number of assistant football and basketball coaches. *Law*, 134 F.3d at 1020–21.

54 *Id.* at 1019–20.

55 *Id.* at 1022.

56 Interestingly, while the court rejected the idea of considering "social" values apart from competitive impact, it did note that "courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics. *Id.* at 1021 n.14. This distinction arguably carries forward the dichotomy suggested by *Board of Regents*.

57 388 F.3d 955 (6th Cir. 2004).

that the NCAA had violated section 1 of the Sherman Act by imposing the challenged restraints.[58] Although the Court of Appeals rejected the district court's use of a quick-look rule of reason in granting an injunction,[59] it unequivocally recognized that federal antitrust law applies to NCAA activity that restrains competition in commercial markets.[60] More specifically, the court noted that "[t]he dispositive inquiry . . . is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial."[61] The Sixth Circuit had no difficulty concluding that the so-called "Two in Four Rule"[62] "has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters."[63]

Turning to the merits, the *Worldwide Basketball* opinion then acknowledged that some rule of reason cases may be decided pursuant to a truncated, quick-look approach when anticompetitive effects are obvious and no elaborate market analysis is required prior to an examination of countervailing procompetitive justifications.[64] However, the facts in *Worldwide Basketball* led the court to conclude that a quick-look analysis was inappropriate because anticompetitive effects were not sufficiently conspicuous.[65] Rather, it was incumbent on the plaintiffs to demonstrate the existence of a relevant market and the presence of actual anticompetitive effects within that market.[66] The contours of a relevant market were not "readily apparent," and therefore it was impossible to assess any anticompetitive effects "on customers rather than merely on competitors."[67]

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58 *Id.* at 957–58.

59 *Id.* at 961.

60 *Id.* at 958.

61 *Id.* at 959.

62 The rule challenged in this case permitted each team to participate in one "certified" basketball event per academic year and in not more than two such events every four years. *Id*. at 957.

63 *Id.* at 959.

64 *Id.* at 960–61. In making this observation, the court relied on the Supreme Court's decision in *Board of Regents* as well as other Supreme Court and lower federal court decisions.

65 *Id.* at 961.

66 *See id.* at 961–64.

67 *Id.* at 961. Although the district court had determined the relevant market to be "Division I mens' [*sic*] college basketball," the record was insufficient to support

Despite the fact that the NCAA prevailed in *Worldwide Basketball*, the Sixth Circuit nevertheless established that when NCAA regulations do have an anticompetitive impact on nonplayers, they may be subject to rule of reason scrutiny under section 1 of the Sherman Act.[68] The court's decision to use the full-blown, structured rule of reason approach, rather than a quick-look rule of reason, signals that the court was not convinced that the alleged anticompetitive effects were sufficiently obvious. No antitrust immunity or exemption was conferred on the NCAA; rather, section 1 of the Sherman Act applied to NCAA conduct that had a commercial impact. The plaintiffs, however, were compelled to prove all the essential components of a valid Sherman Act claim. Had the plaintiffs more effectively defined a relevant market, they might have prevailed. In contrast, in a case like *Law*, the anticompetitive effects were sufficiently obvious to relieve plaintiffs of the obligation to define and prove the existence of a relevant market and the requisite anticompetitive effects within the well-defined market.[69] Thus, the common thread running through these decisions is that NCAA rules and regulations that have an obvious or demonstrable anticompetitive impact in legally

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that market definition and the appellate court felt compelled to reverse the granting of a permanent injunction. *Id.* at 962–63.

[68] *See id.* at 961.

[69] In another challenge to NCAA rules that involved men's college basketball tournaments, a federal district court denied both plaintiffs' and the NCAA's motions for summary judgment. *See* Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563, 569 (S.D.N.Y. 2004); Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004). This dispute involved NCAA rules that were alleged to reduce competition from non-NCAA sponsored preseason and postseason tournaments. Judge Cedarbaum declined to find that the NCAA rules were either reasonable or unreasonable as a matter of law. Triable issues of fact were presented on both section 1 and section 2 Sherman Act claims. Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d at 569, 573. Although this litigation ultimately was settled with an NCAA buyout of the NIT, the summary judgment decisions strongly support the idea that antitrust law applies to NCAA activity that has a competitive impact on competitors and other nonplayer market participants as well as the marketplace. *Cf.* Bassett v. NCAA, 2005-1 Trade Cas. (CCH) ¶ 24,822 (E.D. Ky. 2005) (finding that NCAA recruiting rules governing coaches' conduct are "not commercial in nature"); Adidas Am., Inc. v. NCAA, 64 F. Supp. 2d 1097 (D. Kan. 1999) (dismissing antitrust claim challenging NCAA by-law limiting size of advertising space on uniforms during NCAA games; finding absence of purpose or effect of giving NCAA or member schools any economic advantage in a commercial transaction).

cognizable relevant markets may be the subject of federal antitrust challenges.

C. NCAA Restraints on Student-Athletes

In contrast to the rather traditional antitrust methodology utilized in *Law* and other cases not involving student-athletes, disputes involving alleged restraints on NCAA players have proceeded down a somewhat different legal path. In some cases, antitrust claims have been rejected summarily because jurists have determined that antitrust laws have no application to restraints on amateur student-athletes. In other cases, courts have engaged in antitrust analyses but concluded that the NCAA acted lawfully in imposing restraints. Further, some courts have suggested that, at least at the preliminary stages of litigation, NCAA athlete claims can move forward. In the process of perpetuating the dichotomy suggested by *Board of Regents*, lower federal courts also are beginning to blur the distinction between restraints on players and restraints on other actors.

1. Inapplicability of Antitrust Principles

Several antitrust decisions simply determine that the antitrust laws should not apply to NCAA rules governing eligibility and amateurism. A pre–*Board of Regents* example of this approach is *Jones v. NCAA*,[70] where a college hockey player lost his eligibility after violating amateurism rules by receiving improper compensation.[71] The court decided that "the instant case is particularly inappropriate for application of the Sherman Act," because the plaintiff "is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws."[72] Thus, the *Jones* court concluded that the "competition" the plaintiff sought to protect was not in any legally cognizable market but "in the hockey rink as part of the educational program of a major university"

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[70] 392 F. Supp. 295 (D. Mass. 1975).

[71] *Id.* at 297–98.

[72] *Id.* at 303.

without "any nexus to commercial or business activities" of the NCAA.[73]

In a similar vein, in *Gaines v. NCAA*,[74] another federal district court denied a college football player's motion for a preliminary injunction in an antitrust challenge to the NCAA's rule declaring ineligible any player who participates in the National Football League draft.[75] The court relied on the dichotomy attributable to *Board of Regents* and explained that "there is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football by enforcing the eligibility rules."[76] Relying on *Board of Regents*, as well as cases like *Justice* and *Jones*, the *Gaines* court opined that "[e]ven in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body."[77] The court concluded that because the "overriding purpose" of the NCAA's no-draft rule was to "preserve the unique atmosphere of competition between 'student-athletes,'" the NCAA regulation should not even be addressed under federal antitrust law.[78]

In *Smith v. NCAA*,[79] a student-athlete challenged an NCAA rule prohibiting a graduate student from participating in intercollegiate athletics at any institution other than the one at which the student had been an undergraduate.[80] The Court of Appeals for the Third Circuit agreed with the district court that the Sherman Act did not apply to this type of NCAA

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73 *Id.* The *Jones* court also indicated that, even if federal antitrust laws applied to the case, it was unlikely that plaintiff could prevail. *Id.* The court based this conclusion on the absence of any anticompetitive "scienter" attributable to the NCAA. *See id.* at 303–04.

74 746 F. Supp. 738 (M.D. Tenn. 1990).

75 *See id.* at 740.

76 *Id.* at 743.

77 *Id.* at 744.

78 *Id.* However, the *Gaines* court, like the court in *Jones*, went on to analyze the no-draft rule on the assumption that federal antitrust law applied. It similarly determined that the plaintiff would likely fail on the merits of his antitrust claim. *Id.* at 745–47.

79 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

80 *Id.* at 182.

regulation.[81] The Third Circuit noted that "the Supreme Court has suggested that antitrust laws are limited in their application to commercial and business endeavors."[82] Thus, because the NCAA eligibility rules "are not related to the NCAA's commercial or business activities," nor intended to give the NCAA "a commercial advantage," they are protected from antitrust scrutiny as a means to "ensure fair competition."[83]

More recently, in *Pocono Invitational Sports Camp, Inc. v. NCAA*,[84] a district court declared that federal antitrust law should not be applied to certain NCAA regulations.[85] Interestingly, this decision addressed the question in a context that more directly affected the business interests of nonathletes. The plaintiffs in *Pocono* were operators of *for-profit* summer basketball camps for children and teenagers.[86] The camp operators challenged a series of NCAA rules that dealt with issues like certification of camps and NCAA coach visits.[87] In essence, plaintiffs argued that the pattern of NCAA regulation inhibited their ability to compete in the market for summer basketball camps in the United States.[88]

Despite the fact that the antitrust plaintiffs in *Pocono* were not even student-athletes challenging amateurism or eligibility rules, the court nevertheless treated the NCAA rules as the equivalent of regulations designed to promote amateurism. Relying on decisions like *Smith*, *Gaines*, and *Jones*, the *Pocono* court determined that "when the NCAA promulgated these rules it was acting in a paternalistic capacity to promote amateurism and education," and therefore these "recruiting

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81 *Id.* at 184–86.

82 *Id.* at 185.

83 *Id.* The *Smith* court purported to distinguish *Law* as a decision involving a horizontal price restraint in a commercial activity. *Id.* at 186. The *Smith* court also followed the approach taken in *Jones* and *Gaines* by engaging in an antitrust analysis on the assumption that federal law applied. In so doing, it concluded that, even if rule of reason analysis applied, the procompetitive virtue of preserving amateur intercollegiate athletics and an even playing field would validate the challenged regulation. *Id.* at 186–87; *see also* Bowers v. NCAA, 9 F. Supp. 2d 460, 497–98 (D.N.J. 1998) (dismissing eligibility claim).

84 317 F. Supp. 2d 569 (E.D. Pa. 2004).

85 *See id.* at 584.

86 *Id.* at 571–72. Plaintiffs' camps competed with camps operated by some NCAA members. *Id.* at 572.

87 *See id.* at 572–79.

88 *See id.* at 586.

rules are also immune."[89] The court rejected plaintiffs' claim that "the rules are commercial because they impose costs on the camps and affect who can coach at and visit the camps," dismissing these alleged effects as merely "incidental."[90]

Even though the restraints in *Pocono* did not fit neatly into the student-athlete part of the dichotomy suggested by *Board of Regents*, the court nevertheless chose to treat the challenged rules as if they did involve amateurism and eligibility issues. This arguably blurs any clear line of demarcation between NCAA economic regulation and rulemaking focusing on the student-athlete.

2. Judicial Consideration of Antitrust Claims on the Merits

Another line of precedent addressing NCAA regulation of intercollegiate athletes applies federal antitrust law and engages in a rule of reason analysis on the merits. In addition, even cases initially concluding that the Sherman Act does not apply often offer opinions regarding the substantive analysis. However, these cases also determine that student-athletes cannot prevail, and they endorse NCAA regulation as a means of preserving the distinctiveness of amateur sports and promoting competitive equity.

In *McCormack v. NCAA*,[91] alumni, college football players, and cheerleaders challenged an NCAA regulation regarding compensation restrictions for student-athletes.[92] More specifically, plaintiffs alleged that the rule in question amounted to illegal price fixing and a boycott in violation of the Sherman Act.[93] Assuming for purposes of its decision that the football players had antitrust standing and that the antitrust laws applied

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89 *Id.* at 584.

90 *See id.* In somewhat cryptic fashion, the court did note that, even though "[t]he rules challenged in this case do not constitute trade or commerce[,] . . . [c]ertainly there are recruiting rules that[,] . . . under the rule of reason, would be cognizable under the Sherman Act." *Id.* at 584 n.16. The court made no attempt to clarify this comment or provide any examples. The *Pocono* decision, like several earlier ones, also went on to discuss the merits of the case on the assumption that antitrust law did apply. In so doing, it determined that plaintiffs could not prevail on the merits because they failed to adequately define a relevant market. *Id.* at 586–87.

91 845 F.2d 1338 (5th Cir. 1988).

92 *Id.* at 1340.

93 *Id.*

to NCAA eligibility rules,[94] the court invoked the rule of reason and found "little difficulty in concluding that the challenged restrictions are reasonable."[95]

In support of this conclusion, the *McCormack* court relied on *Board of Regents* and opined that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[96] Thus, the court found that the NCAA "markets college football as a product distinct from professional football[,] [and] [t]he eligibility rules create the product and allow its survival in the face of commercializing pressures."[97] The NCAA's goal "is to integrate athletics with academics" and the challenged restrictions "reasonably further this goal."[98] The *McCormack* court further noted that because "the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."[99] Thus, the antitrust attack failed because the court believed that creating a line of demarcation between professional and amateur sports by restricting compensation to student-athletes was legally permissible and procompetitive under federal antitrust law.[100]

Similarly, in *Banks v. NCAA*,[101] the Seventh Circuit Court of Appeals affirmed the dismissal of a college football player's antitrust challenge to the NCAA's no-draft and no-agent rules, which had terminated the athlete's eligibility to participate in intercollegiate sports.[102] The court noted that the district court had dismissed Banks's antitrust claim because of a failure to allege an anticompetitive effect in any "identifiable market."[103] The Seventh Circuit relied heavily on *Board of Regents* as support for the notion that keeping a clear line of demarcation

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94 *Id.* at 1342–43.

95 *Id.* at 1344.

96 *Id.* (quoting NCAA v. Board of Regents, 468 U.S. 85, 117 (1984)).

97 *Id.* at 1344–45.

98 *Id.* at 1345.

99 *Id.*

100 *See id.* at 1343–45.

101 977 F.2d 1081 (7th Cir. 1992).

102 *See id.* at 1082.

103 *Id.* at 1086–87.

between professional and amateur sports is a valid and lawful objective.[104]

The *Banks* court considered "college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations," and held that "the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students."[105] Thus, while the court relied primarily on Banks's failure to allege any anticompetitive effects within a legally cognizable relevant market, it supported its conclusions by emphasizing the need to maintain clear distinctions between professional and amateur sports. The Seventh Circuit rejected the idea that the players are sources of labor,[106] and focused instead on the myriad NCAA rules designed to promote the idea that intercollegiate athletic participation is part of an overall educational experience for the student-athlete.[107]

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[104] *See id.* at 1089–90.

[105] *Id.* at 1090. The court noted that its conclusion was "buttressed by the fact that a very small number of college athletes go on to participate in professional athletics." *Id.* at 1090 n.12. Elaborating, the court explained that out of over 12,000 Division I-A college football players, fewer than 300 get to the NFL each year. *Id.*

[106] *Id.* at 1090–91.

[107] The court noted that NCAA rules require class attendance, minimum grade point averages, and satisfaction of other academic standards. *Id.* at 1090. The court also explained that:

> We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes [*sic*] proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.

Id. at 1091. In *Gaines v. NCAA* (a section 2 case), after the court initially concluded that federal antitrust law should not even apply to NCAA eligibility rules, it went on to offer an alternative ruling on the merits. 746 F. Supp. 738, 744–45 (M.D. Tenn. 1990). In so doing, it also endorsed the idea that NCAA regulation preserves the "amateur appeal" of college football. *Id.* at 746. Keeping NCAA football distinct from the NFL product arguably widens consumer choice and is therefore procompetitive. *Id.* at 747. Other cases that initially conclude that NCAA amateurism rules should not trigger substantive antitrust analysis but nevertheless go on to consider the merits include *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *vacated in part on other grounds*, 525 U.S. 459 (1999), *Pocono Invitational Sports Camp, Inc. v. NCAA,* 317 F. Supp. 2d 569 (E.D. Pa. 2004), and *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975). These cases also focus on plaintiffs' problems with market definition, the NCAA's desire to maintain a clear line of demarcation

3. A Blurring of the Dichotomy

Although the foregoing cases appear to maintain the dichotomous approach suggested in *Board of Regents* by addressing restrictions imposed on college athletes differently from restraints on more traditional market participants, any clear line of distinction may be breaking down. In *In Re NCAA I-A Walk-On Football Players Litigation*,[108] nonscholarship, walk-on football players challenged the NCAA's limitation on the number of full grant-in-aid football scholarships.[109] Although the court clearly stated that athletes may not be paid to play,[110] it also emphasized that the NCAA is not exempt from Sherman Act scrutiny and that financial aid to college students should be regarded as commercial activity.[111] The court then refused to grant the NCAA judgment on the pleadings because it viewed the scholarship limitation as different from other NCAA eligibility rules dealing with class attendance or entering a professional draft.[112] Relying on plaintiffs' allegations that the cap on full scholarships was motivated by cost containment goals rather than an effort to promote competitive balance, the court declined to dismiss at the pleading stage.[113] The court also seemingly departed from earlier case law by finding that plaintiffs' allegation of a relevant market of "Division I-A football" was sufficient to survive a motion to dismiss.[114]

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between professional and amateur athletics, and the promotion of fair competition as reasons for rejecting antitrust claims challenging NCAA rules. *See also* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063–64 (9th Cir. 2001) (rejecting antitrust challenge to intercollegiate athletic association rule on transfer student athletic eligibility for failure to allege proper market or anticompetitive effects); Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996) (finding that sanctions for recruiting violations were not an antitrust violation, and that maintaining a distinction between amateur and professional sports is a valid goal).

108 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

109 *Id.* at 1146–47. The NCAA rule limited the number of football scholarships to 85. *Id.* at 1147.

110 *Id.* at 1148.

111 *Id.* at 1149.

112 *Id.*

113 *See id.*

114 *See id.* at 1150. The court noted that a relevant product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand. *Id.* This test for product market definition is derived from *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956). *See also* United States v. Grinnell Corp., 384 U.S. 563, 570–72 (1966); Int'l Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 249–50 (1959).

Elaborating, the court explained that the plaintiffs had alleged "a sufficient 'input' market in which NCAA member schools compete for skilled amateur football players."[115]

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[115] *Id.* Plaintiffs also adequately alleged NCAA market power and competitive harm by asserting that the NCAA is a monopsonist—*i.e.*, a dominant buyer in the relevant market. *Id.* at 1151. It would be more accurate to view the NCAA as a collusive monopsonist. In any event, monopsony may injure "efficient allocation by reducing the quantity of the input product or service below the efficient level." LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, 155 (2d ed. 2006); *see also* Stephen R. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519 (discussing consumer welfare and effect of player restraints on product quality in professional sports). Subsequently, class certification was denied in this case. *In re* NCAA I-A Walk-On Football Players Litig., 2006-1 Trade Cas. (CCH) ¶ 75,314, at 105,203 (W.D. Wash. May 3, 2006). The case was then dismissed by stipulation of the parties and order of the court on May 22, 2007.

However, another recent antitrust claim against NCAA restraints on student-athletes is proceeding. On September 21, 2006, in an unreported order and opinion in *White v. NCAA*, Judge Klausner denied the NCAA's motion to dismiss the Second Amended Complaint in an antitrust challenge to its grant-in-aid cap on financial awards to student-athletes. *See* White v. NCAA, No. CV 06-999-RGK, slip op. at 4 (C.D. Cal. Sept. 21, 2006), *available at* http://www1.ncaa.org/eprise/main/administrator/white_v_ncaa/11.pdf. The court found that the plaintiff class had adequately alleged NCAA market power in relevant product and geographic markets—major college football and major college basketball within the United States. *Id.* at 3. The complaint alleged that there were no reasonably interchangeable substitutes. *Id.* The court also ruled that plaintiffs had sufficiently pled harm to competition by alleging that student-athletes, as consumers of a unique combination of higher education and coaching services, were adversely affected by the financial aid cap. *Id.* at 4. On October 19, 2006, the court granted plaintiffs' motion for class certification. White v. NCAA, No. CV 06-0999-RGK, slip op. at 7 (C.D. Cal. Oct. 19, 2006), *available at* http://www1.ncaa.org/eprise/main/administrator/white_v_ncaa/15.pdf.

The case was scheduled for trial in January 2008, but has been postponed pending settlement negotiations. *Newsire: NCAA Aid Limits Could Be Raised*, L.A. TIMES, Jan. 5, 2008, at D7. The parties have reached a tentative settlement to the lawsuit. Greg Johnson & Robyn Norwood, *NCAA Settles Expense Suit*, L.A. TIMES, Jan. 31, 2008, at D9; *see also* Stipulation and Agreement of Settlement Between Plaintiffs and Defendant NCAA, White v. NCAA, No. CV 06-0999 VBF (C.D. Cal. Jan. 29, 2008), *available at* http://www.ncaa.org/wps/wcm/connect/resources/file/eb275f4ccd66f16/Stipulation_and_Agreement_of_Settlement_between_White_and_NCAA.PDF?MOD=AJPERES. The settlement provides that the NCAA denies any wrongdoing but will make available $218 million to Division I schools for academic years 2007–08 through 2012–13 to be used under guidelines for the Student-Athlete Opportunity Fund. The NCAA will provide an additional $10 million over three years to be distributed on a claims-made basis to qualifying former student-athletes. On February 4, 2008, the court preliminarily approved the settlement and scheduled a final hearing for June 30, 2008. *See* Order Preliminarily Approving Settlement and Providing for Notice to the Class, White v. NCAA, No. CV 06-0999 VBF (C.D. Cal Feb 4, 2008), *available at* http://www.ncaaclassaction.com/pa.pdf. For a very recent discussion of *White*, see Christian Dennie, *White Out*

The *Walk-On* decision could be viewed simply as an example of judicial reluctance to dismiss an antitrust complaint at the pleading stage when plausible allegations have been articulated. However, the case may have more profound implications. First, when compared and contrasted with the *Pocono* decision, *Walk-On* suggests a blurring of any real distinction between NCAA regulations addressing athletes as opposed to rules affecting more traditional market participants. In *Pocono*, even though the plaintiffs were business people operating basketball camps, the court treated the challenged restraint as if it related to student-athlete eligibility. In *Walk-On,* even though the regulation directly affected student-athletes, the court allowed the case to proceed. *Walk-On* also arguably represents a departure from the cases that decline to recognize any "market" for the services of student-athletes.

In sum, it appears that the *Board of Regents* dicta that apparently endorsed a dichotomous approach to antitrust analysis regarding NCAA regulation is ripe for reconsideration. More specifically, the line of demarcation between professional and intercollegiate athletics is not as clear as some would have it, and NCAA regulations directed at student-athletes should be properly characterized as more commercial in nature than earlier case law suggests. The subsequent sections of this Article both criticize the state of the case law and offer some alternative approaches to the current jurisprudence.

III
A CRITIQUE OF THE DICHOTOMOUS APPROACH

Over two decades of antitrust decision making regarding the NCAA have followed the Supreme Court's decision in *Board of Regents*. The preceding section of the Article explains how these cases have borrowed from *Board of Regents*' dicta and approached NCAA antitrust disputes by attempting to distinguish between restraints on student-athletes and restraints on conventional business people. As a result, the courts have treated antitrust claims by traditional market participants more seriously than those advanced by players. More recently, however, it appears that any clear distinction between these two

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Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose, 7 VA. SPORTS & ENT. L.J. 97 (2007).

categories of cases is eroding. Perhaps this signals that a more realistic and economically sound view of contemporary NCAA athletics may be emerging.

A. The Existence of a Legally Cognizable Market for Student-Athletes

Judicial reliance on the dichotomy suggested by *Board of Regents* has been criticized frequently and consistently by commentators with good reason.[116] Without student-athletes, the NCAA could not pursue its commercial goals or realize any of its economic objectives. Simply put, college players are the raw materials comprising the most essential ingredient of any NCAA sports product. Some commentators even contend that student-athletes are the equivalent of professional athletes for

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[116] *See, e.g.*, Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 213–15 (1990); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1089–94 (1997); Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483, 515 (1994); James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 15–16 (1985); Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 61–64 (1995); Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 335–42 (2005); Christopher Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 244–47 (2004); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 37–41 (2000); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2654–57 (1996); Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 871–77 (2002); Kristin R. Muenzen, Comment, *Weakening It's Own Defense? The NCAA's Version of Amatuerism*, 13 MARQ. SPORTS L. REV. 257, 265–72 (2003); Stephen M. Schott, Comment, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 36–37 (1996); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1307–08 (1992). *Cf.* Benjamin A. Menzel, Comment, *Heading down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857, 867–72 (2002) (suggesting that deregulation of amateurism may create complications, including more antitrust problems). Other commentators are less critical. *See, e.g.*, Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 574–75; Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 ANTITRUST BULL. 373, 389–95 (1987). *See also* MITTEN ET AL., *supra* note 35, at 280–81 (collecting literature and noting different viewpoints).

labor law purposes.[117] The notion that there is no real competition for the services of NCAA athletes flies in the face of undeniable facts. Vigorous recruiting efforts, particularly for the best high school football and basketball players, are an integral part of every college coaching staff's duties.[118]

Courts have realized that dealings between institutions of higher education and their students often are unquestionably commercial in nature and therefore may be susceptible to antitrust challenges.[119] Further, the assumption that so-called student-athletes in high profile Division I football and basketball programs are students first and athletes second may reflect more of an idealistic fantasy than modern reality.[120] It may be more

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117 It has been suggested that NCAA athletes should be treated as employees for purpose of federal labor law. *See, e.g.*, Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 79 (2006); J. Trevor Johnston, Comment, *Show Them the Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORT L. 203, 231–33 (2003); Jonathan L.H. Nygren, Note, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 371–84 (2003); *see also* C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL'Y 125, 127–29 (1996) (raising the question of possible employment status); *cf.* Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 750–52 (2007) (suggesting that Congress decide whether athletes are employees).

118 *See* Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 MARQ. SPORTS L.J. 123, 132 (1993) (noting schools "participating in 'big-time' intercollegiate athletics spend considerable resources ferreting out athletic talent and luring the talented to their respective campuses"); *see also* MURRAY SPERBER, COLLEGE SPORTS INC. 229–55 (1990) (discussing the recruitment process); TED WEISSBERG, BREAKING THE RULES 49–62 (1995) (detailing the extensive recruiting efforts for top athletes).

119 *See* Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 67–68 (2d Cir. 1997) (alleged monopolization of student housing subject to antitrust laws); United States v. Brown Univ., 5 F.3d 658, 665–68 (3d Cir. 1993) (financial aid agreement subject to Sherman Act; exchange of money for services, even by nonprofit educational institutions, is a "quintessential commercial transaction").

120 The academic ideal to which the NCAA clings—that student-athletes are students first and players second—may be more fictional than real. *See* MURRAY SPERBER, BEER AND CIRCUS 130–34 (2000) (discussing academic fraud and cheating); SPERBER, *supra* note 118, at 277–85 (discussing lack of academic progress among athletes); McCormick & McCormick, *supra* note 117, at 122 (noting that top college athletes "do not spend the majority of their time engaged in learning, education and academic inquiry, but rather in furtherance of their work as athletes"). In fairness, the NCAA has made efforts to improve academic integrity and standards for student-athletes. *See supra* note 35 and accompanying text; *infra note* 134 and accompanying text.

appropriate to view many of the best college athletes as professionals-in-training at NCAA-fixed levels of compensation. Regardless of whether NCAA student-athletes are viewed primarily as employees or students, they are inextricably intertwined with university activities that are irrefutably commercial.

This economic reality calls into serious question the validity of the dichotomy attributable to *Board of Regents* and cases relying on the distinction between NCAA rules dealing with student-athletes and other forms of regulation. That is not to say that all NCAA requirements should trigger antitrust analysis; rather, only NCAA rules restraining interstate trade or commerce should be vulnerable to Sherman Act challenges. Some NCAA rules affecting student-athletes, such as those addressing academic requirements or the use of performance enhancing substances, would seem to generate no significant antitrust concerns. However, the amateurism rules that restrict compensation and other economic benefits to NCAA athletes should not escape antitrust scrutiny by means of a dichotomy that does not comport with real world economic models. Salutary purposes advanced by the NCAA to support its regulations should not supplant judicial scrutiny of the actual economic effects of NCAA rulemaking.

There is indeed a "market" for NCAA athletes in different sports and "compensation" for these athletes is paid in the form of scholarships. Collectively, NCAA members completely control these markets. What the NCAA has done is place a "cap" or "ceiling" on payments that would raise serious antitrust questions in the context of professional athletics.[121] If courts

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[121] In professional sports, prior to the evolution of a collective bargaining relationship between player unions and team owners, courts found that concerted action to limit player compensation gave rise to antitrust concerns. *See supra* note 36. Today, the fact that such restraints are an integral part of collective bargaining agreements between players and management shields them from antitrust scrutiny pursuant to the nonstatutory antitrust exemption. *See supra* note 36. Unless and until NCAA players are recognized as employees who may decide to unionize and collectively bargain, no such exemption would apply to the NCAA-imposed restrictions on compensation. NCAA schools collectively dominate the market as "purchasers" of top-level college football and basketball talent. Players must comply with NCAA rules or not participate at the highest levels of intercollegiate sports. Further, NCAA institutions may also be viewed as "sellers" of a unique combination of educational and coaching services. *See supra* note 115. The Second Amended Complaint in *White* alleged that the NCAA's "artificial cap" on grants-in-aid, set below the full cost of attendance, violated section 1 of the Sherman Act.

continue to accept the idea that NCAA restrictions on athletes' compensation are somehow noncommercial, the *Board of Regents* dichotomy will apply. However, if courts begin to recognize that the academic ideal offered by the NCAA is more of a historical anachronism or a modern fiction, they will no longer be able to justify summary dismissal of student-athlete antitrust claims by simply relying on the dicta that athletes must not be paid. Rather, these courts will be required to assess the anticompetitive and procompetitive effects of challenged restraints within well-defined markets. In sum, the contemporary reality for at least some NCAA sports seems more consistent with the professional model than the archaic amateur standard.

B. The Propriety of Rule of Reason Analysis

Assuming that courts will begin to repudiate any reflexive reliance on the *Board of Regents* bifurcated approach and more seriously analyze antitrust claims made by NCAA student-athletes, questions arise regarding the proper method of substantive antitrust analysis. Undoubtedly, the rule of reason rather than any *per se* rule of invalidity is the appropriate methodology because of the unique nature of league sports and the need for cooperation on rules of play and other matters. This approach requires antitrust plaintiffs to allege and prove anticompetitive effects within legally cognizable relevant markets. If plaintiffs succeed in this endeavor, defendants then must offer procompetitive justifications for their actions. The legality of the restraints in question ultimately will depend on their net competitive effects.

Courts that have engaged in substantive antitrust analysis regarding NCAA regulations affecting student-athletes have not done a particularly satisfactory job of assessing either the anticompetitive consequences or the procompetitive impact of particular restraints. Rather, courts often simply have assumed

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Second Amended Complaint at ¶ 3, White v. NCAA, No. CV 06-0999-RGK (C.D. Cal. Sept. 8, 2006), *available at* http://wwwl.ncaa.org/eprise/main/administrator/white_v_ncaa/6.pdf. The complaint asserted that NCAA major college football and basketball are distinct product markets within which the NCAA wields market and monopoly power. *Id.* at ¶¶ 39, 55, 74. Absent the "cap," the complaint alleged that student-athletes would receive "athletic scholarships that would, at a minimum, cover . . . true full costs of attendance." *Id.* at ¶ 67.

that NCAA restraints are needed to maintain a line of demarcation between amateur and professional sports or to promote and maintain competitive balance among competitors. A more detailed and careful analysis of these issues would be appropriate and more consistent with accepted antitrust principles.

1. Assessing Anticompetitive Effects

First, courts must acknowledge that schools compete for student-athletes, and then assess the anticompetitive consequences of NCAA limits on compensation. Commentators have recognized that the economic impact of the NCAA's amateurism rules creates a wealth transfer from the players to their schools.[122] Without the NCAA restrictions on payments to student-athletes, premier players might receive considerably more for their skills than the amounts prescribed by NCAA rules. This might leave less money for coaches' salaries or other expenditures, but it would be the predictable by-product of enhanced competition for the best athletes.

Thus, the NCAA amateurism rules adversely affect competition in much the same way that the college television

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[122] *See, e.g.*, FLEISHER ET AL., *supra* note 4, at 29–30; RODNEY D. FORT, SPORTS ECONOMICS 494, 498–502 (2d ed. 2006); Lawrence M. Kahn, *The Economics of College Sports: Cartel Behavior vs. Amateurism* 21 (Inst. for the Study of Labor, Discussion Paper No. 2186, June 2006), *available at* http://ftp.iza.org/dp2186.pdf. Other commentators have noted that NCAA sports are big business generating substantial revenues. *See, e.g.*, Edelman, *supra* note 116, at 870 (the NCAA "reap[s] significant revenues from the players' work product"); Goldman, *supra* note 116, at 206 ("Amateur athletics at the major college level is big business."); Pekron, *supra* note 116, at 58 ("NCAA athletics are a moneymaking machine . . . ."); Schott, *supra* note 116, at 27 (college sports are "marketed, packaged and sold just like other commercial products"); Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 270 (1996) ("[I]ntercollegiate athletic programs can potentially generate millions of dollars in revenue."). Professor (now Dean) Roberts noted:

> [D]espite the inherent difficulty of proving that antitrust goals are significantly harmed by the NCAA's fixed "salary" system, the sensitivity of antitrust law to price and the basic assumptions underlying antitrust policy suggest that the mere fact of the wage fix is sufficient to establish the requisite anticompetitive harm in a prima facie rule of reason case. While we cannot easily identify the manner and extent of the wealth transfers and resource misallocations, they surely are there.

Roberts, *supra* note 116, at 2651. *See also* United States v. Walters, 997 F.2d 1219, 1225 (7th Cir. 1993) (commenting in dicta that some might think the NCAA uses monopsony power to obtain athletic services below market price).

plan in *Board of Regents* and the restricted earnings rule in *Law* impaired the competitive process. In each case, prices or wages are artificially distorted by concerted interference with the free play of competitive forces. Although the NCAA and its constituent schools might argue that these restraints are reasonably necessary for the maintenance of amateur athletics in a competitively balanced league format, that argument should be part of the defendants' case when attempting to argue that there are offsetting procompetitive justifications for anticompetitive conduct.

2. Consideration of Alleged Procompetitive Justifications

The NCAA offers two principal justifications for the restrictions on payments to student-athletes: (1) the need to maintain a clear line of demarcation between professional and amateur sports; and (2) the importance of preserving and promoting competitive balance in college athletics. Indeed, if the NCAA rules regarding amateurism actually further these goals, they might withstand antitrust scrutiny despite their arguably obvious anticompetitive effect. In *Board of Regents*, the Supreme Court recognized that the maintenance of competitive balance may be a valid procompetitive justification for NCAA action. Also, efforts to keep amateur sports distinct from professional athletics plausibly are a procompetitive, output expansive means of providing consumers (sports fans) with a larger number of sports entertainment alternatives.

However, the problem with these putative justifications for NCAA amateurism rules is that the facts arguably do not fit the theory. Specifically, any allegedly clear line of demarcation between amateur and professional sports based on player compensation may be blurred much more in the modern intercollegiate sports context than in an ideal amateur model. Players already are being "paid" because of the economic value of the scholarships they receive in return for their athletic skills. These payments are not uniform because the value of an educational "free ride" apparently varies from school to school based on the wide disparity in tuition and other costs of higher education. The key factor in the NCAA rules is that a "cap" is effectively placed on student-athlete remuneration. This is arguably a quintessential example of a horizontal price restraint, albeit in the setting of league sports where some horizontal restraints are essential to create the finished product.

The foregoing casts doubt on the notion that consumers perceive or value intercollegiate sports as a qualitatively different product based on some artificial "compensation" distinction between professional and college athletes. Both the professional and "amateur" are being paid, but the compensation for the professional is governed by a combination of collective bargaining and individual contract negotiation, while payments to college athletes are dictated and capped by NCAA members' concerted action. Further, even within the NCAA regime, illicit payments in violation of NCAA regulation have been uncovered repeatedly over the years.[123] These violations of NCAA amateurism rules (cartel "cheating" to some) have not diminished student, faculty, or alumni support for successful college football or basketball teams. On the contrary, many fans of perennial powerhouses in major college sports tolerate evasion or violation of NCAA rules, particularly if it translates into athletic success. In short, the notion that consumers of college sports distinguish them from professional sports based on payments (or lack thereof) to the athletes is highly questionable.[124] Any real distinction between professional and student-athletes should be predicated on keeping the "student" in the concept of the student-athlete.[125]

The second oft-cited procompetitive justification for NCAA amateurism regulation is that paying student-athletes would adversely affect competitive balance. The *Board of Regents* decision lends considerable credence to competitive balance as a legitimate NCAA objective. However, there is reason to doubt

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123 *See, e.g.*, FLEISHER ET AL., *supra* note 4, at 100–22; SACK & STAUROWSKY, *supra* note 7, at 35–40; SPERBER, *supra* note 118, at 264–74; WEISSBERG, *supra* note 118, at 89; ZIMBALIST, *supra* note 4, at 45–46.

124 *See* Edelman, *supra* note 116, at 871 (noting that "today's amateurism includes a significant commercial component"); Pekron, *supra* note 116, at 54 (explaining that the NCAA system is really "semi-professional" and that "consumers of the NCAA product do not believe that the sport is amateur, and . . . often do not seem to want their teams to be amateur"); Roberts, *supra* note 116, at 2659 (suggesting that paying players would not dissuade college sports fans).

125 It is worth considering whether supporters of college teams identify more with players who are also legitimate students. The attempt to create a distinction between players who are merely "hired guns" and those who really function as students might be a more valid basis for drawing a line of demarcation between professional and student-athletes. *See infra* notes 134–36 and accompanying text for a brief discussion of how the NCAA should enhance and maintain the professional/amateur distinction along academic rather than economic lines.

that the NCAA amateurism rules are reasonably necessary to promote competitive balance. Instead, these regulations function more as cost control devices that simply shift wealth from players to coaches, universities, and others that reap economic rewards from the efforts of student-athletes. As one commentator has explained:

> Clearly, the amateur requirement cannot enhance competitive balance. The full tuition grant cap is higher at colleges with higher tuition. Thus, those colleges have a talent recruiting advantage along this dimension. The source of this recruiting advantage is that higher tuition typically signals higher quality of education and degree value. Because the cap imposed by the NCAA amateur rules does not impose equal spending by all athletic departments (i.e., there is no minimum requirement), this cannot improve competitive balance. Finally, as with all caps, players make less than they would in a competitive system.[126]

Further, as cases such as *Board of Regents* and *Law* have recognized, limiting only one type of spending or income does not significantly address the competitive balance issue. Spending lavish amounts on high-profile head coaches, building state-of-the-art stadiums and practice facilities, and providing other permitted inducements to athletes to attend particular institutions are not activities regulated in a manner designed to promote competitive balance. In the same way that the NCAA's plan for televising college football and its salary limits on assistant coaches failed to provide a sufficient procompetitive justification in *Board of Regents* and *Law*, respectively, the competitive balance rationale seems more pretextual than real when analyzed in the context of the NCAA amateurism rules. These regulations address only one part of the competitive balance issue and function more as a cost containment mechanism than an economically realistic and procompetitive method of fostering balanced competition.

In sum, courts considering legal challenges to the NCAA amateurism rules have failed either to acknowledge that legitimate antitrust questions are raised or to properly apply the rule of reason pursuant to the Sherman Act. Even when courts undertake antitrust analyses, they often fail to appreciate the existence of legally cognizable markets for the services of

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[126] FORT, *supra* note 122, at 496; *see also* Roberts, *supra* note 116, at 2666–67 (questioning whether NCAA rules foster competitive balance).

student-athletes and the anticompetitive consequences of NCAA regulation within these markets. Courts also reflexively accept the idea that NCAA restrictions on compensation to student-athletes are necessary to maintain a clear line of demarcation between professional and amateur sports and to promote competitive balance. This results in an unduly truncated and insufficient consideration of antitrust claims brought by NCAA student-athletes.

IV
ALTERNATIVE APPROACHES TO THE PROBLEM

The current state of antitrust doctrine regarding NCAA amateurism rules appears to be inconsistent with the economic realities of contemporary intercollegiate athletics. The distinction perceived by federal courts between NCAA regulation aimed at student-athletes and other forms of economic regulation reflects more of an anachronistic, historical ideal than the actual modern paradigm.[127] College athletes, particularly in men's elite Division I football and basketball programs, are the most important component in producing a highly valued and commercially viable product. This suggests that current judicial approaches to the problem are inconsistent with American antitrust principles.

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[127] As Judge Flaum noted:

> The NCAA would have us believe that intercollegiate athletic contests are about spirit, competition, camaraderie, sportsmanship, hard work (which they certainly are) . . . and nothing else. . . . It is consoling to buy into these myths, for they remind us of a more innocent era—an era where recruiting scandals were virtually unknown, where amateurism was more a reality than an ideal, and where post-season bowl games were named for commodities, not corporations. . . . [I]t is disquieting to think of college football as a business, of colleges as the purchasers of labor, and of athletes as the suppliers.
>
> The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed. College football is a terrific American institution that generates abundant nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges . . . . An athlete's participation offers all of the rewards that attend vigorous competition in organized sport, but it is also labor, labor for which the athlete is recompensed.

Banks v. NCAA, 977 F.2d 1081, 1098–99 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (citations omitted).

Several alternatives to the status quo should be considered. One possible solution is judicial reconsideration of the issues presented and the development of a more detailed and structured rule of reason analysis with respect to NCAA amateurism regulations. A second approach would involve substantial policy reform within the NCAA to either amend or abolish some of the restraints that have been the subject of student-athlete antitrust suits. Finally, in the absence of sufficient judicial or NCAA action to remedy the problem, Congress could design a legislative response.

A. A Change in Judicial Philosophy?

Federal courts hearing antitrust challenges to NCAA rulemaking should consider more seriously the criticisms targeting current judicial approaches to NCAA amateurism rules. Specifically, courts should recognize that their refusal to apply federal antitrust law to these disputes is inconsistent with the reality that NCAA student-athletes are engaged in a commercial endeavor both as students (consumers of educational services) and as athletes (sellers of sports talent). As such, their antitrust claims deserve to be adjudicated on the merits rather than summarily dismissed as beyond the scope of federal law.

When considering the merits of these antitrust challenges, courts should apply the typical rule of reason analysis found in most Sherman Act litigation. The plaintiffs should be required to allege and prove NCAA market power and anticompetitive effects within well-defined product and geographic markets. For example, college football players could allege that compensation restraints restrict and distort competition within the market for Division I-A collegiate football players in the United States. Plaintiffs should be required to demonstrate that, in the absence of NCAA regulation, economic rewards would be more responsive to the forces of supply and demand.[128] This would

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[128] Of course, if a court felt that the anticompetitive effects were sufficiently obvious, it might decide to opt for the quick-look rule of reason used in cases like *Law v. NCAA*, 134 F.3d 1010, 1016–19 (10th Cir. 19989). As *Law* also recognizes, if a more traditional ruile of reason analysis is required, reasonableness under section 1 of the Sherman Act will still be determined by the net impact of a restraint on competition. *Id.* at 1016–17 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978)); *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770–71 (1999). *Law* views structured rule of reason analysis in terms of shifting burdens of

also require courts to acknowledge the existence of real economic markets in which schools actually compete for student-athletes.

Assuming plaintiffs sufficiently demonstrate the existence of anticompetitive effects within properly defined markets, a rule of reason approach should then afford the NCAA an opportunity to offer proof to offset plaintiffs' evidence of competitive harm. The rule of reason is dedicated to a determination of the net competitive impact of a challenged restraint, so the NCAA should certainly be permitted to demonstrate procompetitive justifications for its actions. If the NCAA can demonstrate that procompetitive benefits ultimately outweigh any anticompetitive harm, the challenged restraint should be deemed reasonable and lawful under the Sherman Act. Less restrictive alternatives also may be relevant in determining the reasonableness of a restraint.

Courts generally have accepted, without any skepticism, the notion that NCAA amateurism rules promote competitive balance and maintain a necessary line of demarcation between professional and amateur sports. On their face, these objectives seem to be procompetitive because they address concerns about consumer welfare. Competitively balanced league sports result in a more desirable finished product for consumers, broadcasters, and advertisers. The creation and maintenance of a distinct product (college sports) also seems to be consistent with the idea of creating more sports consumption alternatives and maximizing consumer satisfaction. The problem, however, is that a judicial assumption or unsubstantiated conclusion that amateurism rules further these goals is no substitute for actual proof.

In a rule of reason antitrust analysis, once anticompetitive effects are adduced, the burden is on defendants to prove that their actions actually further procompetitive goals. Merely identifying the objective is inadequate; the defendants' actions

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proof. *Law*, 134 F.3d at 1019. Plaintiffs must first prove anticompetitive effects, followed by defendants' proof of procompetitive virtues. *Id.* Plaintiffs may then offer proof that substantially less restrictive alternatives exist or that the conduct is not reasonably necessary to achieve any legitimate end. *Id.* The goal is to determine whether, on balance, a restraint is reasonable. *Id.*; *see generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 259–60 (3d ed. 2005) (providing a "tentative road map" for identifying anticompetitive agreements among competitors).

must significantly promote valid economic results. Thus, courts should require the NCAA to offer probative evidence that its amateurism rules actually address the competitive balance issue. The NCAA should shoulder the burden of demonstrating that relaxation or abolition of these regulations would impair or destroy the competitive balance required to present a high quality slate of games. This proof is what the rule of reason requires, and the current case law is devoid of actual evidence in the record to support the competitive balance justification.

In a similar vein, the simple assumption by courts that maintaining a line of demarcation between amateur and professional sports is essential and promoted by the NCAA's amateurism rules is insufficient in a structured rule of reason analysis. Rather than allowing the NCAA to justify its rules by its own *ipse dixit*, courts should require the NCAA to offer proof that the regulatory scheme does further the announced goal. Student-athletes already are compensated for their playing skills, but they are recompensed at fixed or capped levels. Fans understand that the players they watch are receiving "payment" for their services, yet this does not seem to detract from support for the team. If removing the restrictions on student-athlete compensation somehow will detract from consumer interest in college sports, that is something that the NCAA should be required to prove. Judicial assumptions or the NCAA's conclusory statements are not the equivalent of proof to support the alleged procompetitive justification.

Finally, because NCAA regulation does occur within the context of the educational process, it may be that noneconomic goals should be considered. Although Sherman Act rule of reason analysis usually is confined to economic effects, some authority suggests a broader analysis in the higher education context.[129] If current NCAA rules expand athletic opportunities for male and female athletes in sports that insignificantly or negatively affect schools' finances, courts might consider the expansion of athletic opportunity as a procompetitive

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[129] In *United States v. Brown University*, the Court of Appeals for the Third Circuit decided that collective action by colleges and universities regarding distribution of financial aid should be considered under a full-blown rather than a quick-look rule of reason analysis, and noted that the district court should "more fully investigate the procompetitive and *noneconomic justifications* proffered by MIT." United States v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993) (emphasis added).

justification. Once again, however, it should be incumbent on the NCAA to actually demonstrate the connection between its actions and any legitimate, procompetitive objectives.

In sum, current judicial approaches to NCAA amateurism rulemaking are legally inadequate and ignore the realities of the marketplace. Courts should undertake a more thorough, structured rule of reason analysis that ultimately puts the burden on the NCAA to demonstrate that its rules actually promote legitimate and lawful objectives. If the NCAA's regulatory scheme is reasonably necessary to promote legally cognizable procompetitive effects, its rules should be deemed valid. If, however, the NCAA fails to carry the burden of proving sufficient procompetitive virtues, some or all of its amateurism rules may fail to withstand antitrust scrutiny. If this occurs, schools may be free to make individual decisions regarding compensation and other benefits for their student-athletes.[130] In either case, courts will scrutinize the actual anticompetitive and procompetitive effects of a challenged restraint and not allow the NCAA to rely on outdated assumptions about intercollegiate athletics.

B. NCAA Regulatory Reform

The NCAA itself could attempt to forestall judicial or legislative attacks on its existing regulatory scheme by engaging in serious policy reform. After the NCAA departed from a regime limiting financial aid to student-athletes based on the same criteria applicable to other undergraduates, it essentially decided to pay players for their services—at fixed maximum levels of compensation. It would not be a huge departure for the NCAA to acknowledge that athletes in Division I football and basketball often are "underpaid" compared to coaches and others who benefit from their efforts.[131] As already noted, some

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[130] Any decision by an educational institution receiving federal funds regarding student-athlete compensation would, of course, have to comply with the requirements of Title IX. *See infra* note 133. The current state of Title IX case law and regulation would make it difficult to compensate athletes in men's revenue-producing sports unless comparable compensation were offered to female athletes whose sports have a negative revenue impact. This undoubtedly would complicate matters for any institution wishing to extend additional economic benefits to male football or basketball players in profitable programs.

[131] The "big business" aspects of NCAA sports prompted Bill Thomas, the Chairman of the House Ways and Means Committee, to send a letter to Dr. Myles

commentators even suggest that these student-athletes are the functional equivalent of employees and should be given the same legal protection as other workers.

The NCAA should consider allowing schools to pay stipends to student-athletes. Many college players are from economically disadvantaged backgrounds and allowing payments of "walking around money" would seem both equitable and economically viable.[132] Unless Title IX were changed, schools would be required to offer these benefits to both male and female student-

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Brand, President of the NCAA, on October 2, 2006. *See Congress' Letter to the NCAA*, USA TODAY, Oct. 5, 2006, http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm (last visited Nov. 8, 2007). The letter posed a series of questions to determine, in part, whether the NCAA deserves to maintain its tax-exempt status. *Id.* Inquiries included: (1) how does the NCAA accomplish its purpose of maintaining the athlete as an integral part of the student body?; (2) other than prohibiting compensation of student-athletes, how does the NCAA maintain a clear line of demarcation between major college athletics and professional sports?; (3) why should the federal government and taxpayers subsidize activities that pay for escalating coaches' salaries, costly chartered travel and state-of-the-art athletic facilities?; and (4) are NCAA schools admitting athletes who could not be admitted without athletic prowess? *Id.* Many other questions also were posed regarding NCAA finances and its mission. *See id*; *see also* Mark Alesia, *Brand's Salary on the Rise*, INDIANAPOLIS STAR, June 28, 2007, at 1 (noting that the NCAA's president received over $895,000 for 2005–06 and listing six-figure salaries of eight other NCAA employees); John R. Gerdy, *For True Reform, Athletics Scholarships Must Go*, CHRON. HIGHER EDUC., May 12, 2006, at B6 (arguing for the dismantling of the "professional model of college athletics" and the elimination of athletic scholarships); Brent Schrotenboer, *NCAA's Profits Get More Scrutiny*, SAN DIEGO UNION-TRIB., Mar. 14, 2007, at D1 (noting that the NCAA men's basketball tournament was expected to "pull in more than $500 million in television advertising revenue, "fueling" the eleven-year, six-billion-dollar television rights deal between CBS and the NCAA that began in 2003); Carol Slezak, *NCAA States Obvious, Avoids Hard Questions*, CHI. SUN-TIMES, Oct. 31, 2006, at 95 (discussing commercialized nature of NCAA sports); Brad Wolverton, *Congress Broadens an Investigation of College Sports*, CHRON. HIGHER EDUC., Sept. 22, 2006, at 36 (discussing Congressional interest in NCAA finances and business dealings).

132 The stipend idea often has been discussed by commentators. *See, e.g.*, Edelman, *supra* note 116, at 884–85; Goplerud, *supra* note 116, at 1089–90; Christopher W. Haden, Chalk Talk, *Foul! The Exploitation of the Student-Athlete: Student-Athletes Deserve Compensation for Their Play in the College Athletic Arena*, 30 J.L. & EDUC. 673, 679–81 (2001); Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 57–65 (2000); Schott, *supra* note 116, at 44; Sobocinski, *supra* note 122, at 288 n.214. Further, the NCAA has deregulated amateurism considerably for Division II and III by permitting some aspects of professionalism for student-athletes, including acceptance of prize money, signing a professional contract, and entering a draft. *See* MITTEN ET AL., *supra* note 35, at 281–82. For a critical assessment of these changes, see generally Menzel, *supra* note 116.

athletes, and this arguably would temper the payment of exorbitant amounts of money.[133] Of course, any effort by the NCAA to limit the amount of stipends could raise antitrust concerns as a maximum price or wage fix, but the NCAA might be in a better position than it is now given the complete bar on extra benefits. Competitive balance arguments might be more plausible if higher compensation limits were implemented.

Finally, if the NCAA really wishes to maintain a clear line of demarcation between amateur and professional sports, it should realize that such a distinction probably rests less on the question of compensation and more on emphasizing the "student" part of student-athlete. To its credit, the NCAA has stepped up efforts to ensure that college players also participate in the academic aspects of the undergraduate experience.[134] Of course, imposing initial academic eligibility requirements and monitoring the

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133 Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964, 20 U.S.C. § 1681(a) (2006), prohibits sex discrimination in any education program or activity "receiving Federal financial assistance." This legislation was strengthened by the Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 1687–88 (2006), which legislatively overruled case law limiting Title IX to situations where athletic departments directly received federal funds. Current regulations promulgated by the Office of Civil Rights in the Department of Education to enforce Title IX are designed to promote equality in financial assistance. *See* 34 C.F.R. § 106.37 (2007) (discussing financial assistance); *id.* § 106.41(c) (addressing equal opportunity). Section 106.37(a) specifically prohibits providing "different amounts or types of such assistance" based on sex, and section 106.37(c) requires that "reasonable opportunities" be made available for members of each sex to receive scholarships "in proportion to the number of students of each sex participating in [sports]."

Several commentators have acknowledged that paying student-athletes could create significant conflicts with Title IX principles. *See* Edelman, *supra* note 116, at 883 (noting "revenue sharing" between athletes and schools needs "careful tailoring" to comply with Title IX); Goplerud, *supra* note 116, at 1100 (explaining stipends would have to be offered to proportionate number of women athletes); Nygren, *supra* note 117, at 392–93 (noting that extending extra benefits to athletes in revenue-generation sports appears to violate Title IX); Parent, *supra* note 116, at 239 (acknowledging burden of paying stipend to all student-athletes required by Title IX); Pekron, *supra* note 116, at 26 n.10 (noting "pay-for-play" scheme may face "serious problems" because of Title IX); Schott, *supra* note 116, at 49 (noting that limiting compensation to males in revenue-producing sports would be "impossible" under Title IX).

134 *See supra* note 35. These academic regulations include admissions standards that focus on performance in "core" high school courses as well as on the SAT or ACT exam. *See* NCAA MANUAL, *supra* note 29, § 14.3, at 140–47. More recently, the NCAA also has adopted academic progress standards to monitor student-athlete scholastic performance in college. *See id.* § 14.4, at 147–54, §§ 23.01–23.4, at 363–66; WEILER & ROBERTS, *supra* note 35, at 771–72, 775–818.

academic progress of student-athletes only can work if adequate measures are in place to prevent academic fraud and other wrongdoing. Further, if colleges and universities permit the proliferation of "Mickey Mouse" courses[135] and the implementation of testing and grading procedures that provide for "social promotion,"[136] NCAA academic reform will be ineffective.

Still, college athletes are different from their professional counterparts because they are actually part of the student body; they need to be legitimate students. News reports about athletes who have exhausted their eligibility but can barely read or write significantly detract from the student-athlete concept. The failure of so many premier college athletes to earn degrees also erodes the professional/amateur distinction.[137] NCAA efforts to focus on the academic aspects of the student-athlete concept are both laudable and less likely to create antitrust issues.[138]

C. Legislative Alternatives

If the NCAA cannot resolve the problems presented by its regulation of student-athletes internally, and if the courts do not adequately address the problem, perhaps Congress will be the

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135 During a discussion on higher education expansion, Great Britain's Higher Education Minister, Margaret Hodge, defined a "Mickey Mouse course" as "one where the content is perhaps not as rigorous as one would expect and where the degree itself may not have huge relevance in the labour market." '*Irresponsible' Hodge Under Fire*, BBC NEWS, Jan. 14, 2003, http://news.bbc.co.uk/2/hi/uk_news/education/2655127.stm (last visited Nov. 11, 2007).

136 The term "social promotion" refers to "the practice of promoting a student from one grade level to the next on the basis of age rather than academic achievement." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2005).

137 *See* Editorial, *Rutgers Too Quick to Pull Race Card on Professor*, HOME NEWS TRIB., Sept. 28, 2007 (discussing remarks of Professor William C. Dowling on functional illiteracy of some student-athletes); Jon Solomon, *Auburn Professor Alleges Fake Classes: University Investigation Under Way*, BIRMINGHAM NEWS, July 14, 2006, at 1E (mentioning illiterate former Auburn football player); Kurt Streeter, *Using Their Brains*, L.A. TIMES, Oct. 9, 2007, at D1 (noting low graduation rates for some college football players, but better rates at Stanford).

138 Such academic reform presents its own set of problems, including claims of racial discrimination. *See, e.g.*, Pryor v. NCAA, 288 F.3d 548, 552 (3d Cir. 2002); Cureton v. NCAA, 198 F.3d 107, 111–12 (3d Cir. 1999). This Article acknowledges the important concern that stricter academic requirements could result in exclusion of more minority student-athletes, but focuses primarily on the antitrust implications of the current NCAA regime.

last resort.[139] The political cross-currents that so often accompany the legislative process suggest that the viability or desirability of this alternative might be criticized severely. Yet, there is potential for Congress to be of some help, even if it is through hearings and the mere threat of legislative intervention.

One possible legislative solution would be for Congress to create an antitrust exemption for the NCAA.[140] An exemption could be limited to amateurism regulations, or it could be more extensive by treating the NCAA as a single economic entity and thereby removing much of its rulemaking from section 1 of the Sherman Act. This certainly would satisfy the NCAA and perhaps some of its membership. However, this would also perpetuate the inequities that run rampant in the current system and make legal significantly anticompetitive conduct. The easing of any burden on the judicial system could be outweighed by the negative impact of allowing the NCAA to continue to engage in an unsupervised distortion of market forces.

A different legislative approach could require the payment of college athletes or granting them legal status as employees. Of course, Congress also might have to consider what to do about possible conflicts with Title IX. If all male and female athletes were given equal financial remuneration, Title IX would not be offended. On the other hand, if Congress chose to provide relief

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[139] For a discussion of possible legislative reform, see Parent, *supra* note 116, at 234–36 (discussing possible legislative approaches); Jeff Barker, *Congressman Thinks Colleges Should Pay Athletes*, BALT. SUN, May 2, 2007, at 1E (discussing Congressman Rush's desire to consider congressional action to deal with issue of paying college athletes).

[140] In 1992, in response to antitrust litigation surrounding the Ivy Overlap Agreement dealing with higher education financial aid, *see, e.g.*, United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993), Congress enacted a temporary exemption allowing schools a limited degree of collaboration regarding financial aid practices, *see* Higher Education Amendments of 1992, Pub. L. No. 103-325, 106 Stat. 448. Congress has renewed this exemption several times and it is scheduled to expire on September 30, 2008. *See* Need-Based Educational Aid Act of 2001, Pub. L. No. 107-72, 115 Stat. 648. The details of the exemption and its impact are addressed in a September 2006 report from the U.S. Government Accountability Office to Congressional Committees. *See generally* GOV'T ACCOUNTABILITY OFFICE, GAO-06-963, HIGHER EDUCATION: SCHOOL'S USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 1–23 (Sept. 2006). The rationale for this legislation was to promote equal access to education. *See id.* at 1. Congress conceivably could consider a similar approach in the NCAA context to promote greater access to athletic opportunities for both men and women in sports with negative revenue.

only for revenue-generating sports like major men's football and basketball (and perhaps women's basketball), clear conflicts with Title IX would arise. Congress would have to consider and balance the political, social, and economic costs and benefits of creating any limited exceptions to Title IX's rigorous requirements. Potential damage to athletic opportunities for female participants and the obvious economic inequality that would result might be deemed too deleterious. On the other hand, perhaps the American public would be receptive to making exceptions based on real economic distinctions between revenue-producing college sports and others that fail to generate income.

At the end of the day, a legislative solution may not be optimally practical or viable. Rather, it is probably better for the NCAA to address these problems and for the courts to try and resolve these disputes on a case-by-case basis with a more enlightened and modern rule of reason approach.

CONCLUSION

The current state of antitrust law relating to the NCAA and student-athletes is inconsistent with economic reality and sound policy. Major college football and basketball players are essential components of a finished product that generates considerable revenue for schools and athletic conferences. Judicial failure to recognize that there is a market for the services of these athletes arguably may result in an unjustifiable restraint on competition and an illegal wealth transfer from student-athletes to their schools. The student-athletes are economically injured as sellers of sports talent and as consumers of higher education. Federal courts should apply the Sherman Act to the NCAA's amateurism rules and engage in a structured rule of reason analysis that focuses on the facts rather than assumptions or mere conclusions. More specifically, courts should assess the actual anticompetitive and procompetitive effects of NCAA rules when challenged. Courts should not merely assume or accept justifications for NCAA action without actual proof that legitimate goals are furthered by particular regulations.

In addition, the NCAA should consider an internal solution, such as stipends or other forms of payment to athletes, as an alternative to the current compensation limits. NCAA reform

may be the most efficient and desirable vehicle to transform the status quo into a system that is both equitable and consistent with American antitrust policy.

Finally, in the absence of an effective judicial response or an NCAA change of heart, Congress should hold hearings to accumulate information from all interested parties. After gathering sufficient data to understand the problems presented by existing NCAA rules and regulations, Congress should consider enacting legislation to create greater economic fairness for student-athletes. Whether this takes the form of recognizing employment status for NCAA players, or whether Congress legislates in a manner that endorses pay-for-play, something must be done to prevent the continued economic exploitation of NCAA student-athletes. The system is broken and in dire need of repair.