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Trick Play: Are the NCAA's New Division I-A Requirements an Illegal Boycott

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TRICK PLAY: ARE THE NCAA'S NEW DIVISION I-A REQUIREMENTS AN ILLEGAL BOYCOTT?

*Christopher B. Norris**

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I. FIRST DOWN: INTRODUCTION

THIS college football team finished the 2002 season as the number one ranked team in the nation. In doing so, it completed its 26th straight winning season and won its fourth straight conference championship with a record of 11-1. Its .844 winning percentage over those twenty-six years is the best in college football—better than Nebraska, Miami, Notre Dame and Michigan. The head coach, in his 23rd season, has the best winning percentage of any active coach in college

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football and reached the 200-win plateau faster than legendary coaches Joe Paterno of Penn State, Tom Osbourne of Nebraska, Bobby Bowden of Florida State, and Paul "Bear" Bryant of Alabama. A former quarterback is now one of the most recognizable names in professional football, having recently led his National Football League (NFL) team to a victory in the Super Bowl. The school has had 32 football Academic All-Americans, fourth in Division I behind Nebraska, Notre Dame, and Ohio State. In 2002, the team played its home games in front of an average crowd of . . . 5,260 people. Meet the University of Dayton (UD) Flyers football team.

Dayton, Ohio is a basketball town and, particularly, a Flyer basketball town. UD Arena, which sits approximately 200 yards from the football stadium, regularly entertains sellout crowds of over 13,000 rabid fans for men's basketball games. The hoops team has ranked in the top twenty-five in attendance for Division I basketball over the last three-years. And while the basketball team is currently enjoying a streak of three straight twenty-win seasons, including a four-seed in the 2003 NCAA Basketball Tournament, basketball attendance between the 1992-93 and 1994-1995 seasons was well over 10,000, despite the fact that the team won a total of seventeen games during that three-year span. What could possibly be the source of this disparity of enthusiasm between UD's basketball and football program?

One possible answer is that fans are drawn to the level of competition and the seemingly higher stakes involved with UD's basketball team. This explanation has its genesis in the National Collegiate Athletic Association's (NCAA) organization of its member institutions and, particularly, the organization of Division I members based upon the strength of their football programs. As part of a Division I program, UD basketball competes at the highest level of college basketball and has an opportunity every year to participate in one of college athletics most compelling events, the NCAA Basketball Tournament. But the Flyer football program is relegated to a subcategory of Division I called Division I-AA.¹ Division I-AA schools participate in a playoff system to decide a champion and do not compete in the Bowl Championship Series (BCS) that is the source of so much controversy every football season. Stated more simply, the basketball team competes against opponents that fans see on television and read about in newspapers everyday, while the football team's opponents are likely to be relatively unknown to fans.

The football program at Southern Methodist University (SMU) is an illustration of another phenomenon concerning attendance at sporting events—fans are attracted to winning. SMU is located in the heart of

1. To be precise, Dayton participates in Division I-AA Non-Scholarship, a growing "sub" subdivision of Division I-AA that has yet to acquire enough schools to warrant a separate NCAA championship. The Flyers finished the season as the top-ranked I-AA Mid Major team—a collection of teams that play at the non-scholarship or limited scholarship level. By the way, Jon Gruden, current head coach of the World Champion Tampa Bay Buccaneers, is a former Flyer quarterback.

Dallas, Texas, the ninth largest city in the country. In 2000, it completed construction of Gerald J. Ford Stadium, a 32,000-seat facility that includes a first-rate locker room and training center. SMU provides the maximum number of scholarships allowed by the NCAA for Division I-A programs and has a full complement of coaches. In 2002, the Mustangs averaged 18,292 in home paid attendance, well above the 17,000 NCAA minimum requirements for Division I-A status. But a closer look reveals the impact of a 3-9 season on fan support. The excitement of a new season and the first game for new head coach Phil Bennett resulted in a paid attendance of 25,744 for the Mustangs' 37-7 opening day loss to Navy, a team that did not win a game during the 2000 season. The excitement lasted another week as SMU hosted Texas Tech University in front of a packed house of 32,000 who watched the Red Raiders hand the Mustangs another defeat. But, through the last four home games of the season, SMU averaged just 13,002 in paid attendance per game, well below the 17,000 that the NCAA requires its schools to average for home attendance.²

There are a variety of reasons why a school like UD decides to concentrate its efforts, and financial resources, on its basketball program, while relegating its football program to second-tier status, or why SMU has chosen to invest so heavily in its football program, despite the uphill battle it faces. Some of those reasons include conference affiliation, national reputation, prestige, geographic region, and tradition. One of the most significant factors in an institution's decision whether to attempt to field a top-tier football program is certainly the NCAA requirements for each division. The NCAA Board of Directors dictates financial, scheduling, attendance, and facility requirements for member institutions in Division I, Division II, and Division III. The consequences for failing to meet these requirements can subject an institution to "enforcement procedures" or reclassification by the NCAA.³ "Enforcement procedures" may include suspension or termination of membership,⁴ which, *inter alia*, has the effect of blackballing the institution from athletic competition with any other NCAA member⁵ and preventing the institution from competing in any NCAA Championship.⁶

Recently, the NCAA adopted dramatic changes in its Division I-A requirements that will affect the future status of current Division I-A members and Division I-AA schools who desire to participate in Division I-A football. Many large, successful Division I-A programs will not be affected by this change, but there are some Division I-A schools, including SMU, that may be in danger of losing that status when the new requirements become effective on August 1, 2004. Particularly, many "mid-major" programs playing in conferences such as the Western Athletic

2. See *WAC Football (SMU team Page)*, at www.wacsports.com/stats.asp?page=stats/football/2002/smu.htm (last visited Oct. 27, 2003).

3. 2002-2003 NCAA DIVISION I MANUAL § 3.2.4.2 (Michael V. Earle ed., 2002).

4. *Id.* § 3.2.5.1.

5. *Id.* § 3.2.4.8.

6. *Id.* § 20.8.1.

Conference (WAC), the Sun Belt Conference, and the Mid-American Conference (MAC) are at a great risk of losing their Division I-A classification under the new rules.⁷

The most important advantage to membership in Division I-A is financial. This advantage is the result of regional and national television exposure as well as opportunities to participate in bowl games or the national championship game, though that is limited by the structure of the Bowl Championship Series (BCS). More importantly, the financial benefits come regardless of individual success, since television and bowl revenue are pooled and divided among the teams playing in a particular conference.⁸ Hence, the success of one team in a small conference may provide a windfall for every school in that conference.

This comment will focus on the possible procompetitive justifications and anticompetitive effects of these new criteria on Division I-A schools and, ultimately, whether these new criteria create antitrust liability for the NCAA. While all of the new requirements raise some antitrust questions, the amendment that is likely to invite the most controversy is the change in the home attendance requirement for Division I-A programs. Previously, Division I-A schools were required to average 17,000 in ticket sales per home football game. Under the new requirements, a school must “demonstrate an average actual attendance of at least 15,000 for all home games.”⁹ The change from paid attendance to actual attendance is particularly troublesome because home attendance is often a factor of externalities beyond an institution’s control. While colleges and universities can exercise some control over paid attendance through marketing, promotions, ticket prices and corporate sponsorship plans, actual attendance may be determined by the whims of the local sports fan. In addition to some of the factors listed earlier such as level of competition and win-loss record, actual attendance can also be affected by the weather, the starting time of the game, or how many of the opponent’s fans make the trip.

Part II of this comment will lay the framework for a discussion of the NCAA’s possible antitrust liability. The first task is to understand the structure of the NCAA, particularly how it organizes its members into the various classifications. Second, it is important to understand the economic realities of college athletics and the vast “rich-poor gap” that exists between institutions, even those within the same classification. Third, it is important to understand what the current rules require, what the new rules will require, and some of the motivations that led to the change. The last foundational brick to be laid is to create a general understanding

7. *New NCAA Rules Big Hurt on Small Schools*, at <http://stacks.msnbc.com/news/761452.asp> (last visited June 3, 2002).

8. *Financial Lowdown: Full Reports*, at http://sportsillustrated.cnn.com/si_online/news/2002/03/15/conference_reports (last visited Mar. 15, 2002).

9. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm> (last visited Feb. 9, 2003).

of American antitrust law and the assorted terms and theories that would play a part in any cause of action against the NCAA.

Part III will address a few of the preliminary questions that must be answered before a full analysis of the NCAA's possible antitrust liability can begin. At least some preliminary thought should be given to whether NCAA requirements for its member institutions are the manifestation of a conspiracy. Assuming that a conspiracy exists, recent caselaw suggests that there is some confusion as to whether antitrust law applies to NCAA rules at all. Presuming applicability, it is critical to determine the exact type of antitrust behavior undertaken and the appropriate standard to apply. Finally, Part IV will apply the appropriate standard to each of the rule changes and discuss the NCAA's possible antitrust liability.

II. SECOND DOWN: BACKGROUND

A. DIVIDING UP THE NCAA

As of September 1, 2002, the NCAA was composed of 1,033 colleges and universities, with over 361,000 men and women participating in intercollegiate athletics.¹⁰ These institutions are divided into three general categories: Division I, Division II and Division III. Each category has particular participation, scheduling, and financial aid requirements and limitations. For example, Division I schools are required to sponsor fourteen varsity sports, with a minimum of seven men's teams and seven women's teams, all of which are required to play a high percentage of contests against other Division I opponents. Division II schools must sponsor four men's and four women's sports, while Division III schools are required to sponsor five men's and five women's sports. Athletic financial aid is more limited in Division II than Division I and prohibited at Division III schools.¹¹

The 325 Division I schools are divided into three sub-categories that relate to their football program: Division I-A, Division I-AA and Division I-AAA. Division I-AAA schools do not compete in football, but still meet the Division I requirements to compete at that level in all of their other sports. Division I-AA institutions field a football team, though not all schools offer scholarships for the sport, and have limited requirements in terms of scheduling. Division I-A teams compete at the highest level of college football and, accordingly, require the highest level of financial, personnel, and facility commitment to their football programs.¹²

10. *Composition of the NCAA*, at http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited Feb. 9, 2003).

11. *See What's the difference between Divisions I, II and III?*, at http://www.ncaa.org/about/div_criteria.html (last visited on Feb. 9, 2003).

12. *See generally id.*

B. THE BUSINESS OF COLLEGE ATHLETICS

Naturally, the financial commitment an institution is required to make to its athletic program is significantly greater in Division I than Division II and Division III and greater in Division I-A than in Division I-AA and I-AAA. For example, the average total expenses in 1999 were twenty million dollars for a Division I-A athletic program, \$5.4 million for a Division I-AA program, and \$4.7 million for a Division I-AAA program. Division II schools with a football program spent an average of \$1.9 million, while schools without a football team spent \$1.4 million. Division III athletic departments who fielded a football team spent an average of \$663,000 in 1999, while Division III programs without a football team spent only \$351,000.¹³

The same NCAA study showed that Division I-A institutions brought in \$21.9 million in average total revenue in 1999, but that number is skewed by the success of top-tier football schools. While sixty-four percent of those schools turned a profit on their football program,¹⁴ only forty-nine of the 114 Division I-A athletic programs turned a profit without university support.¹⁵ Athletic departments with football teams at the top of Division I-A can make as much as \$15 million a season in stadium revenue alone.¹⁶ The year after its national championship season in 1998, the University of Tennessee (UT) brought in \$3.3 million dollars in just merchandising revenue. That figure dropped to 2.4 million by 2001, but is still well above the \$1.5 million it averaged in the two years leading up to the national title game.¹⁷ A recent report estimated UT's athletic revenue at "more than \$35 million" and Louisiana State University's (LSU) athletic website listed its athletic department's annual revenue at over \$37.5 million.¹⁸

These same major football programs also have the opportunity to appear on national and regional television regularly, opening up millions of dollars in additional revenue. A side effect of this particular benefit is that television revenue is often required to be shared with other conference members, meaning teams with little national visibility who play in a major conference, such as Vanderbilt University, line their pockets with revenue generated by the success of recent conference champions such as UT, Florida, LSU, and the University of Georgia. In 2000, the Southeast-

13. *NCAA Fact Sheet*, at http://www.ncaa.org/about/fact_sheet.pdf (last visited Feb. 9, 2003).

14. *Id.*

15. Bill Brewer, *Big Orange, the Color of Money*, KNOXVILLE NEWS SENTINEL, (Sept. 15, 2002), http://www.knoxnews.com/cr/cda/article_print/1,1250,kns_347-1417723,00.

16. Roger G. Noll, *The Business of College Sports and the High Cost of Winning*, THE MILLIKEN INSTITUTE REVIEW 24, 27 (Third Quarter 1999).

17. Gary Lundy, *Licensing Now Source of Big Bucks for UT, Other Schools*, KNOXVILLE NEWS SENTINEL (Sept. 15, 2002), at http://www.knoxnews.com/kns/business/article/0,1406,KNS_376_1417496,00.html.

18. Brewer, *supra* note 15, at http://www.knoxnews.com/cr/cda/article_print/1,1250,kns_347_1417723,00.html; *Inside LSU Athletics*, at http://www.lsusports.net/ad/randomlink_printable.cfm?pagecode@hletics (last visited July 13, 2003).

ern Conference distributed over \$79 million dollars between its twelve member schools for an average of \$6,585,468. Similarly, the Big Ten Conference paid out over seventy-eight million dollars to its eleven members for an average of \$7,171,462, the Big 12 Conference split \$57 million for an average of \$4,771,584 per school, and PAC-10 Conference schools took home an average of \$5,412,345.¹⁹ The lion's share of the money dispersed came from football television rights or payments for participation in bowl games at the end of the season, which are also split between conference members.²⁰ All of these figures are prior to the six billion dollar television licensing agreement brokered between the NCAA and two television networks that went into effect in September of 2002.²¹

The aforementioned "mid-major" conferences did not fare so well in 2000. The WAC split \$2.6 million among its ten members; the Mid-American Conference distributed an average of \$103,003 to its thirteen members; and the Sun Belt split up a little less than \$1.2 million between its ten members. All three conferences operated at a loss in 2000. In fact, the combined total revenue of all three conferences, \$8,827,707 is not significantly higher than the average payouts to one school in the major conferences.²² Indeed, the canyon between the "haves" and the "have-nots" in Division I-A has never been greater.

C. THE OLD AND NEW CRITERIA

The NCAA sets stringent requirements for Division I-A programs in an effort to maintain the level of competition that college football fans have come to expect. In addition to the other Division I requirements, I-A schools must play sixty percent of their football games against a Division I-A opponent²³ and average 17,000 in paid attendance per home football game²⁴ (or 20,000 for all of its games)²⁵ over a rolling four year period. An exception can be made if an institution is a member of a NCAA member conference that "conducts championship competition in the sport of football" where at least six members sponsor football.²⁶ If more than half of the football-playing institutions in that conference meet the attendance requirement for the previous four years, the delinquent institution may retain its Division I-A status.²⁷ In addition, the stadium in which a Division I-A program plays its home games must "contain a

19. *Final Lowdown: Full Reports*, at http://sportsillustrated.cnn.com/si_online/news/2002/03/15/conference_reports.

20. *See id.*

21. Brewer, *supra* note 15, at http://www.knoxnews.com/cr/cda/article_print/1,1250,KNS_347_1417723,00.html.

22. *Final Lowdown: Full Reports*, http://sportsillustrated.cnn.com/si_online/news/2002/03/15/conference_reports.

23. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.0.6.2.

24. *Id.* § 20.9.6.3(a).

25. *Id.* § 20.9.6.3.3.

26. *Id.* § 20.9.6.3.2. For example, the Big 12 Conference, Southeastern Conference (SEC), and Western Athletic Conference (WAC) are in this category.

27. *Id.* § 20.9.6.3.2.

minimum of 30,000 permanent seats,"²⁸ though this requirement, as well as the paid attendance requirement, can be waived by a two-thirds majority vote of the Management Council representing Division I-A conferences if "circumstances exist that are beyond the control of the institution."²⁹ There are a number of additional rules related to meeting the paid attendance minimum, including: conditions for counting student attendance, calculating seats sold in luxury boxes, and setting a minimum price for counted tickets.³⁰

On April 25, 2002, the NCAA gutted the previous Division I-A requirements in favor of a streamlined approach that sets five conditions for Division I-A membership. The stated rationale of the new standards, which become effective on August 1, 2004, is to ensure that all Division I-A institutions exhibit similarities in their "level of competition, resource allocation and public support."³¹ First, a school must provide an average of ninety percent of the maximum number of football scholarships³² allowed over a rolling two-year period. Second, each school must play at least five home games each season against another Division I-A opponent. Third, the school must sponsor at least 16 varsity sports, two more than the normal Division I minimum, with a minimum of six men's sports and eight women's sports. Fourth, the school must offer a minimum of 200 athletic scholarships or offer four million dollars in athletic financial aid.³³ Last, the school must average 15,000 in attendance for all of its home football games.³⁴

The changes will not only raise the bar for many schools already struggling to retain their Division I-A status, they also purposefully eliminate several waivers of the Division I-A criteria.³⁵ No longer can a program be saved by a vote of the Management Council³⁶ or the success of its conference partners.³⁷ Nor can a school schedule away games against schools that draw high attendance to meet the exception for averaging 20,000 in attendance for all games.³⁸ Additionally, the attendance requirement is no longer calculated over a four-year period,³⁹ although schools are required to take an annual audit of their football attendance and maintain a record of that audit for four years. Last, these new rules

28. *Id.* § 20.9.6.3(b).

29. *Id.* § 20.9.6.3.4.

30. *Id.* § 20.9.6.3.5.

31. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

32. Division I-A schools can carry eighty-five scholarships per year, with a maximum of twenty-five new scholarships.

33. "The national service academies are exempt from all financial aid requirements set forth in Bylaw 20.9.6." 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.6.4.1.

34. *Adopted Membership – Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm> (last visited Feb. 9, 2003).

35. *Id.*

36. *Id.*

37. See 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.6.3.2.

38. *Id.* § 20.9.6.3.3.

39. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm> (last visited Feb. 9, 2003).

prevent schools from reaching the attendance minimum through ticket sales,⁴⁰ which can often be manipulated through marketing tactics such as pricing or corporate sponsorship, and force the institutions to find a way to get “butts in the seats.”⁴¹

It would be an error to presume that this change is the sole result of powerful Division I-A institutions manipulating the system to protect their own interest at the expense of other NCAA members. In fact, a remarkable aspect of this change is that it received solid support from Division I-AA schools, who were “tired of seeing their best programs—Troy State, Marshall, Idaho and Central Florida—bolt for I-A.”⁴² Not all Division I-AA institutions have an ambition to move up in classification and, some of those schools are concerned that such departures have “weakened the product” of Division I-AA football.⁴³ The result of this unusual alliance is the creation of a major roadblock for the aspirations of many Division I-AA programs and an uncertain future for a significant number of borderline Division I-A programs.

D. AN ANTITRUST PRIMER

Congress passed the Sherman Antitrust Act, named for its sponsor Senator John Sherman, in 1890 to assuage some of the economic harms of the concentration of wealth caused by the Industrial Revolution such as long hours, high prices, and low wages.⁴⁴ Section one of the Sherman Act seeks to promote competition by preventing collusion among different players in the market. It outlaws “[e]very contract, combination. . . or conspiracy, in restraint of trade” and has been applied to such activities as price fixing, market allocation, boycotts or concerted refusals to deal and output restrictions.⁴⁵ Section two focuses on the behavior of individual firms in the market by prohibiting monopolistic conduct, attempts to monopolize, or conspiracies to monopolize, but does not make illegal a monopoly created by natural market forces.⁴⁶ The Sherman Act authorizes the Department of Justice (DOJ) to seek criminal sanctions for violators including a maximum fine of \$10,000,000 for a corporation or \$350,000 and maximum of three years in prison for an individual.⁴⁷

Responding to inadequacies in the scope and enforcement of the Sherman Act, Congress passed the Clayton Act in 1914, which provides that any person injured by a violation of “the antitrust laws” may sue the alleged violator in federal court and receive treble damages for their in-

40. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.6.3.4.

41. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.html>.

42. *New NCAA Rules Big Hurt on Small Schools*, at <http://stacks.msnbc.com/news/761452.asp>, (June 3, 2002).

43. *Id.*

44. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis*, 50 OHIO ST. L.J. 257, 288-98 (1989).

45. 15 U.S.C. § 1 (2000).

46. 15 U.S.C. § 2.

47. 15 U.S.C. § 1.

jury.⁴⁸ It also identifies the legal parameters of a cause of action for specific antitrust practices including: price discrimination,⁴⁹ mergers,⁵⁰ tying arrangements, and exclusive dealing contracts.⁵¹ In the same year, Congress also created the Federal Trade Commission (FTC), which now shares responsibility with the DOJ for enforcing federal antitrust laws.⁵² In addition to a federal remedy, a person or corporation may also have a remedy under state law.⁵³

A discussion of the antitrust implications of regulations promulgated by the NCAA must focus on restraints of trade under section one of the Sherman Act because of the nature of the NCAA. By definition, the NCAA is not a monopolist, but the result of a group of competitors who have combined to place some restraints on the market. This illustrates a wrinkle in Sherman Act jurisprudence—while the language of the statute reads, “[e]very contract, combination. . .or conspiracy, in restraint of trade” is illegal; it would be impractical to take the words too literally. Such an interpretation of the statute would paralyze business and industry since the nature of every contract is to restrain trade by obligating one party to another. The U.S. Supreme Court’s decision in *Standard Oil Co. v. United States*⁵⁴ recognized this dilemma and followed pre-1890 antitrust common law to hold that the Sherman Act prohibits contracts, combinations or conspiracies that are “undue” or unreasonable restraints of trade.⁵⁵ Since the landmark decision in *Standard Oil*, this “rule of reason” has been in an almost constant state of fluctuation as courts struggled to determine what sort of restraints are reasonable.⁵⁶

Some restraints, however, are regarded as so anticompetitive that they are considered illegal without regard to the actor’s motivations. An agreement “formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing” prices is presumed to be unreasonable and is considered *per se* illegal.⁵⁷ Defenses that the price “fixed” is reasonable or that the price constraint is reasonable to protect competitors in the market are rejected. The rule of reason’s purpose is not to determine whether competition is reasonable in a certain market (the Sherman and Clayton Acts reflect a legislative judgment that competition is always reasonable), but to determine whether the effect on competition

48. 15 U.S.C. § 15.

49. 15 U.S.C. § 13(b) (as amended by the Robinson-Patman Act, 1936).

50. 15 U.S.C. § 18.

51. 15 U.S.C. § 14.

52. 15 U.S.C. §§ 41, 45.

53. *E.g.*, TEX. BUS. & COM. CODE ANN. § 15.05 (Vernon 2001); CAL. BUS. & PROF. CODE § 16750 (West 2002); N.Y. GEN. BUS. LAW § 341 (McKinney 2002).

54. 221 U.S. 1, 60 (1911).

55. *Id.* at 60-62. Although the Court applied a rule of reason analysis in reviewing Standard Oil’s conduct, it still decided to break up the oil conglomerate in what has become the seminal case in American antitrust jurisprudence. *Id.* at 81-82.

56. *See* Smith v. NCAA, 139 F.3d 180, 86-87 (8th Cir. 1998); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102-03 (1984); *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332, 343 (1982).

57. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

of a particular activity is reasonable.⁵⁸ Antitrust laws are meant to protect “competition, not competitors,”⁵⁹ and it may be beneficial to consumers for some competitors to leave the market. Of course, the relationship between the rule of reason and the *per se* rule is too complex to succinctly explain in a few sentences, but an exhaustive recount of their development is not necessary for the purposes of this comment. It is enough to know that two standards exist and the decision to choose one or the other is often dispositive of the matter.

In addition to price fixing, a concerted refusal to deal, or boycott, is another type of “contract, combination. . .or conspiracy” that usually receives *per se* treatment by courts. A boycott is defined as “collective action by a group of competitors for the purpose of interfering with other competitors.”⁶⁰ In a traditional horizontal price fixing arrangement, competitors avoid price competition by conspiring to set a price or prices for a particular product. In contrast, a group boycott occurs when competitors band together to gain market power and avoid price competition by destroying their rivals. It is often manifested by an agreement not to do business with the unlucky competitor, generally a common distributor or manufacturer who has been price-cutting. For example, a group of dress designers and manufacturers, through their trade organization, agreed to boycott retailers who sold “knock-offs” of their clothing.⁶¹ In one of its most important decisions concerning group boycotts, the Supreme Court decided this agreement was a Sherman Act violation and affirmed an FTC decree ordering the designers to cease and desist.⁶²

III. THIRD DOWN: PRELIMINARY QUESTIONS

A. DOES A CONSPIRACY EXIST?

A threshold question in determining whether antitrust liability will exist for the NCAA is to determine if there is a contract, combination or conspiracy in the decision to set standards for Division classification. A firm cannot conspire with itself or a wholly owned subsidiary because any two actors have a “unity of purpose.”⁶³ If the NCAA and its member institutions are considered a single entity, then their conduct falls out of the realm of section one of the Sherman Act. In *Chicago Professional Sports Limited Partnership v. NBA*, the Seventh Circuit held that the National Basketball League (NBA) should be treated as a single firm because it “produces a single product,” and cooperation among the teams is

58. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691-92 (1978).

59. Brown Shoe Co. v. United States, 370 U.S. 294, 345 (1962); see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

60. WILLIAM R. ANDERSON & C. PAUL ROGERS III, ANTITRUST LAW: POLICY AND PRACTICE 370 (3d ed. 1999).

61. Fashion Originator's Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 461 (1941).

62. *Id.* at 465-67.

63. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 771, 777 (1984).

“essential” even if teams have some independent decision-making ability.⁶⁴ On the other hand, members of the National Football League (NFL) were considered by the First Circuit to be independent entities who are capable of conspiring because they “compete in several ways off the field, which itself tends to show that the teams pursue diverse interests and thus are not a single enterprise.”⁶⁵

This is, perhaps, the easiest preliminary question to answer, not only because it seems intuitive in such a competitive environment as college athletics, but also because the U.S. Supreme Court has addressed the issue directly. In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court found that the NCAA is an agreement among independent member institutions that conspired to place horizontal price and output restraints on the “live college football market” in violation of the Sherman Act.⁶⁶ The restraints limited the total number of televised college football games, limited the number of televised appearances for any individual team, and effectively precluded price competition by networks for the rights to televise an institution’s games. The NCAA reached agreements with the Columbia Broadcasting System (CBS) and the American Broadcasting Company (ABC) to broadcast college football games on alternating Saturdays during the season. Each network had exclusive negotiating rights for its weekend, but those negotiations were limited in practice by the “minimum aggregate compensation” of \$131,750,000 over four years that the networks had agreed to pay the member institutions in the NCAA deal. Essentially, there was a single buyer for the one televised game of the week for a price that, while technically negotiated, was limited by the overall contract price and “suggestions” made by an NCAA representative. The plan also prohibited any one institution from appearing on TV “more than a total of six times,” and “four times nationally,” during any two-year period.⁶⁷ The members of five major conferences, all NCAA members, formed the College Football Association (CFA) and signed an independent television deal with the National Broadcasting Company (NBC). In response, the NCAA threatened disciplinary action against the *entire* athletic program of any school that complied with the CFA-NBC contract.⁶⁸

The Court stated that the NCAA is an “association of schools which compete against each other to attract television revenue, not to mention fans and athletes” and an agreement among the member institutions limiting television exposures and rights fees is a horizontal restraint of trade.⁶⁹ In distinguishing its holding from *Board of Regents*, the Seventh Circuit relied on the fact that “the NBA has no existence independent of sports” and its ability to create new franchises, a power not available to

64. 95 F.3d 593, 598-99 (7th Cir. 1996).

65. *Sullivan v. NFL*, 34 F.2d 1091, 1099 (1st Cir. 1994).

66. 468 U.S. 85, 95, 99-100, 113, 120 (1984).

67. *Id.* at 92-94.

68. *Id.* at 89, 94-95.

69. *Id.* at 99.

the NCAA.⁷⁰ The common factor in these two decisions is, ironically, competition off the field, not on the field. Educational institutions are obviously not created for the purpose of promoting athletic competition, while the NBA was created for that purpose alone. Since the Supreme Court's decision, courts have treated the NCAA as a combination of competitors, capable of conspiring to violate antitrust laws.⁷¹ While the broader holding in *Board of Regents* significantly impacts the appropriate standard to apply for antitrust cases involving the NCAA, the preliminary conclusion that the organization is subject to antitrust scrutiny is critical before the next step can be taken.

B. DOES ANTITRUST LAW APPLY TO THE NCAA'S MEMBERSHIP REQUIREMENTS?

The next step seems more like a half step. While *Board of Regents* clarified that antitrust law does apply to NCAA activities, more recent decisions have created doubt about which particular NCAA activities are subject to antitrust scrutiny. The crux of this issue relates to the limitations placed on Congress by the Commerce Clause of the U.S. Constitution.⁷² In fact, the Sherman Act tracks language of the Commerce Clause in restricting its purview to restraints of "trade or commerce among the several states, or with foreign states."⁷³ The NCAA seems to be the ultimate interstate activity, with ties to universities in all fifty states, but some of its activities are commercial and some non-commercial in nature. The Act's purpose is to attack or prevent "combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."⁷⁴

Whether the NCAA's primary purpose is commercial in nature, it is clear that courts have felt compelled to enforce antitrust laws with respect to some of the organization's activities. In *Board of Regents*, the Court distinguished the television plan, a patently commercial endeavor, from the NCAA's other rules regarding eligibility, but "did not comment directly on whether the Sherman Act would apply to the latter."⁷⁵ It did however cite *Jones v. NCAA* with approval, which held that *eligibility* rules were not the subject of antitrust scrutiny.⁷⁶

Several appellate and district courts have stepped through the door that the Supreme Court opened. One such case was the result of one of the most highly publicized scandals in collegiate football history. The

70. *NBA*, 95 F.3d at 599.

71. *E.g.*, *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990); *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992); *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

72. U.S. CONST. art. II, § 8, cl. 3.

73. 15 U.S.C. § 1 (2000).

74. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 (1959); *see also Smith v. NCAA*, 139 F.3d 180, 185 (3rd Cir. 1998); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491-93, 495 (1940).

75. *Smith*, 139 F.3d at 185.

76. *Id.*

NCAA suspended the SMU football program for the 1987 season and imposed severe restrictions for the 1988 season following the revelation that some players were receiving compensation to play for the Mustangs. In response to this crippling decision for the SMU football program,⁷⁷ Davis R. McCormick, an attorney and SMU alumnus, filed a class action suit on behalf of the institution, its current and previous students, and members of the football and cheerleading squads. In holding the NCAA's eligibility rules were reasonable, the Fifth Circuit assumed, "without deciding, that the antitrust laws apply to eligibility rules."⁷⁸ In affirming the district court's dismissal of the complaint, the court of appeals also held the plaintiffs to be without standing, since SMU was not a party to the suit, but gave them credit "for making a college try."⁷⁹

In contrast, the U.S. District Court for the Middle District of Tennessee refused to issue an injunction restoring the eligibility of Bradford Gaines, a Vanderbilt football player, for the 1990 season.⁸⁰ Gaines had declared himself eligible for the NFL draft and participated in the leagues annual scouting combine in Indianapolis, but was not selected by any team during the draft. Gaines declaration and his use of a representative to speak to NFL teams about possible free agent contracts violated the NCAA's "no-draft"⁸¹ and "no-agent"⁸² rules.⁸³ The court cited the overriding purposes of the NCAA eligibility rules "to prevent commercializing influences from destroying the unique 'product' of NCAA college football" and to "preserve the unique atmosphere of competition" between "student-athletes" in exempting the eligibility rules from antitrust scrutiny.⁸⁴ In doing so, the court specifically rejected the U.S. District Court for the Northern District of Indiana's contrary reading of *Jones and Board of Regents*. In *Banks v. NCAA*, a case that challenged the very same NCAA rules, the Indiana court held that antitrust laws do apply to eligibility rules, but that the plaintiff had failed to show the likelihood of success required to receive a preliminary injunction.⁸⁵ Banks amended his complaint to permanently enjoin the NCAA from enforcing its "no-draft" and "no-agent" rules, but to no avail. The Seventh Circuit eventually held Banks lacked standing to bring the class action since his eligibility

77. Prior to receiving the "death penalty" by the NCAA, SMU had established itself as a national powerhouse with nine straight winning seasons, including an undefeated 11-0-1 campaign in the 1982 season. Since its suspension, and the voluntary cancellation of the 1988 season, SMU football has produced just one winning season, in 1997. In the fourteen years since the school resumed gridiron play, the program has a combined record of 43-83-2 for a .344 winning percentage. In the fourteen years prior to suspension, including losing seasons from 1973 through 1975, the program had a combined record of 93-61-4, a winning percentage of .601.

78. *McCormack v. NCAA*, 845 F.2d 1338, 1340, 1343 (5th Cir. 1988).

79. *Id.* at 1340.

80. *Gaines v. NCAA*, 746 F. Supp. 738, 740, 478 (M.D. Tenn. 1990).

81. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 12.2.4.2.

82. *Id.* § 12.3.1.

83. *Gaines*, 746 F. Supp. at 740-41.

84. *Gaines*, 746 F. Supp. at 744-45.

85. *Banks v. NCAA*, 746 F. Supp. 850, 857, 863 (N.D. Ind. 1990).

had run out under the NCAA's "five years to play four" rule and he had failed to state a claim for which relief could be granted.⁸⁶

In 1998, the Third Circuit held that the NCAA's "Post-baccalaureate Bylaw" is not the "type of action to which the Sherman Act was meant to be applied."⁸⁷ A former volleyball player at St. Bonaventure University challenged the NCAA's rule forbidding a student-athlete who has graduated, but not exhausted her eligibility, from competing as a graduate student at any institution other than her undergraduate institution. Although the NCAA is not immune from antitrust prosecution, "eligibility rules are not related to the NCAA's commercial or business activities" and, thus, not subject to the Sherman Act.⁸⁸

Of special note is the Third Circuit's effort in footnote four to distinguish its holding from a recent decision by the Tenth Circuit in *Law v. NCAA*, which concerned a challenge of a NCAA bylaw restricting the salaries of entry-level basketball coaches. A class of "restricted-earnings" coaches sued the NCAA, alleging that the bylaw was a horizontal price restraint and a violation of the Sherman Act. The Tenth Circuit affirmed the district court's decision to grant summary judgment for the plaintiffs and issue a permanent injunction enjoining the NCAA from "enforcing or attempting to enforce any restricted earnings coach salary limitations."⁸⁹ In *Smith*, the Third Circuit noted that the restricted earnings bylaw in *Law* "concerned a restriction on the business activities of the institution, whereas the Post-baccalaureate does not."⁹⁰

While only a semblance of a rule emerges when all of these cases are considered together, it does seem clear that courts are comfortable with separating the commercial from the non-commercial activities of the NCAA and applying antitrust liability only to the former. Unfortunately, business activity as a definition for commercial activity does little more than beg the question. Adding to the confusion is the particular conduct at issue in this comment—a change in the NCAA's classification requirements. While certainly there is an element of protecting the "Athenian concept of a complete education derived from fostering full growth of both mind and body,"⁹¹ it is impossible to deny the financial ramifications of a decision that opens or closes the door to substantial financial rewards for so many member institutions. If rules regarding the eligibility of individual student-athletes do not fall under the purview of the Sherman Act, why are "eligibility" requirements for institutions subject to its authority?

A workable test comes from the U.S. District Court for the District of Kansas in a suit by the Adidas Corporation to challenge an NCAA bylaw

86. *Banks*, 977 F.2d at 1084, 1085-86, 1094.

87. *Smith v. NCAA*, 139 F.3d 180, 185 (3rd Cir. 1998).

88. *Id.* at 183-86.

89. 134 F.3d 1015, 1024 (10th Cir. 2998). In July of 2000, after eight years of litigation, the class was awarded \$74.5 million in damages, attorney's fees and costs.

90. *Smith*, 139 F.3d at 186.

91. *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

governing the use of commercial logos on student uniforms.⁹² In determining whether a NCAA bylaw is commercial, a court should “look to the underlying purposes of the bylaw. . .and whether the bylaw confers a direct economic benefit on the NCAA.”⁹³ The court considered the NCAA’s multiple non-commercial purposes in regulating advertising on student-athlete’s uniforms including: (1) “protecting student-athletes from commercial exploitation;” (2) preserving the integrity and uniqueness of intercollegiate athletics by preventing student-athletes from becoming walking billboards; and (3) avoiding interference with the basic function of an athlete’s uniform—to identify the player and team.⁹⁴ Under the second prong of the test, the court concluded that the NCAA did not receive any “direct economic or competitive benefit from the enforcement” of the logo bylaw because neither the NCAA nor its member institutions are competitors of Adidas (despite the fact that an NCAA logo often competes for space on a student-athlete’s jersey).⁹⁵

Using the *Adidas* court’s paradigm as a guide, the first step in determining whether the creation of NCAA Division standards are an appropriate subject of antitrust law is to analyze the purposes behind such conduct. It is necessary to distinguish a general inquiry into the purpose of creating Division I-A requirements as opposed to the more specific inquiry into the purposes of changing those requirements. The former is appropriate to determine if it is proper for a court to take up the matter, the latter is better left for an analysis of the reasonableness of the restraint. Without an affirmative answer to the first question, there would not be a need to take up the second question.

The NCAA’s Constitution lists the fundamental purpose of the organization as maintaining “intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports.”⁹⁶ Article 2 requires NCAA legislation to advance one or more of its basic principles including: (1) institutional control and responsibility; (2) student-athlete welfare; (3) gender equity; (4) sportsmanship and ethical conduct; (5) sound academic standards; (6) nondiscrimination; (7) diversity within governance structures; (8) compliance; (9) amateurism; (10) competitive equity; (11) recruiting; (12) eligibility; (13) financial aid; (14) playing and practice seasons; (15) postseason competitions and contests sponsored by non-collegiate associations; and (16) the economy of athletics program operation.⁹⁷ In addition, the NCAA’s website states that the four goals of the organization are to: (1) promote student-athletes and college sports through public awareness; (2) protect student-athletes through standards

92. *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1277 (D. Kan. 1999).

93. *Id.* at 1285.

94. *Id.* at 1286.

95. *Id.*

96. NCAA CONST. § 1.3.1.

97. NCAA CONST. §§ 2.1-2.16.

of fairness and integrity; (3) prepare student-athletes for lifetime leadership; and (4) provide student-athletes and college sports with the funding to help meet these goals.⁹⁸ While the promulgation of Division requirements certainly creates an organizational structure that promotes the realization of this exhaustive list of generally non-commercial purposes and goals, the economic realities of collegiate football cannot be ignored. Division I-A football is a cash-cow and a primary source of exposure for the NCAA and many of its member institutions. Standards that include ticket sales or actual attendance, stadium size, and scheduling size are based on desires to maximize the earning potential of the college football market, not, for example, concerns for sound academic standards and diversity within governance structure. The tendency to attach a negative connotation to the NCAA's pursuit of financial success should be resisted. It is not hypocrisy, but a natural consequence of the dual purposes, commercial and non-commercial, served by the NCAA's rules for classification.

The second prong of the *Adidas* test prompts the question whether the NCAA or its member institutions receive a "direct economic or competitive benefit" from the promulgation of minimum requirements for it Division I-A membership. Two financial benefits come immediately to mind. First, member institutions with top-tier football programs are directly profiting through television rights fees and bowl revenue. Second, by limiting the number of Division I-AA teams a Division I-A team can play in a season, the NCAA ensures that institutions at the bottom of Division I-A receive coveted invitations to be early season fodder for the powerhouse teams. The embarrassment of being badly beaten is usually alleviated by a hefty financial guarantee by the home team, a practice that often allows financially strapped schools to more properly fund their "non-revenue" sports. These "guarantee games" have great value for institutions trying to move up to Division I-A and institutions trying to hang on to their current Division I-A classification.

The competitive purposes and the widespread economic benefits of the NCAA's decision to create minimum requirements for Division I-A football programs seem to place the requirements within the purview of the Sherman Act. Although the NCAA realized some economic and competitive benefits from its restriction on the size and number of logos permitted on student-athlete uniforms, the *Adidas* court correctly recognized that gain as an "incidental by-product of the NCAA's legitimate attempt to maintain the amateurism and integrity of college sports."⁹⁹ In the case of Division I-A requirements, the bylaws require an enormous financial, facility, and personnel commitment to participate in the NCAA's highest revenue producing endeavor. The requirements identify and limit the group of institutions that will receive "direct economic and competitive benefits" from participation in Division I-A football. While the general

98. *The Purposes of the NCAA*, at <http://www.ncaa.org/about/purposes.html>.

99. *Adidas*, 40 F. Supp. 2d at 1286.

exemption of eligibility requirements from the Sherman Act raise a question as to whether Division requirements are subject to antitrust law, ultimately, the Supreme Court's consideration of the NCAA's television rights plan in *Board of Regents*, the Tenth Circuit's consideration of a bylaw creating a maximum salary for entry-level coaches in *Law*, and commercial nature of the endeavor, as seen through the rule articulated in *Adidas*, counsel for inclusion of the NCAA's Division I-A requirements as an appropriate subject for antitrust review.

C. WHAT STANDARD IS APPROPRIATE?

Once a court decides that the Division I-A requirements are a proper matter for consideration under the Sherman Act, the next step is to identify what type of antitrust activity is possibly implicated by the changes in these requirements and determine under which standard such conduct will be judged. It is immediately apparent that this is a horizontal restraint of trade through an agreement by competitors. The NCAA is not a single entity, but an association of over a thousand colleges and universities that compete with one another, on and off the field, who have combined to create market power and stability in the market of college athletics. A subset of these institutions has agreed to fix new minimum expenditures and set performance standards for the right to participate in Division I-A football and receive the benefits involved with such participation. In other words, the requirements are a conspiracy that excludes competitors from the market, constituting the quintessential concerted refusal to deal or boycott. The question remains, however, is it an illegal conspiracy?

Generally, if the purpose of the agreement between the boycotters is to limit or exclude competitors and the boycotters possess market power or exclusive access to a critical competitive element, a court will apply the *per se* rule and find the agreement in violation of the Sherman Act.¹⁰⁰ Boycotts among competitors without significant market power may receive a "quick look" or truncated rule of reason analysis to determine if the agreement has procompetitive justifications that outweigh its probable anticompetitive effects.¹⁰¹ Nevertheless, naked price restraints or output restrictions are generally considered *per se* illegal, even in the absence of market power, because of the high probability that they are anticompetitive.¹⁰²

Although the Supreme Court did not describe the agreement in *Board of Regents* as a group boycott,¹⁰³ its application of the rule of reason to a

100. *Klor's, Inc. v. Broadway-Hale Stoves, Inc.*, 359 U.S. 207, 211 (1959).

101. *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1996).

102. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 100, 110 (1984).

103. The District Court for the Western District of Oklahoma originally held that the plan was a *per se* illegal boycott. The Tenth Circuit found no boycott because of the vertical, rather than horizontal, relationship between the NCAA and the television networks. The Supreme Court ignored the issue in describing the rights plan simply as a horizontal price and output restriction. See ANDERSON & ROGERS, *supra* note 60, at 397.

horizontal price-fixing arrangement is a watershed moment in American antitrust jurisprudence and paves the way for an analysis of the NCAA's possible liability in a challenge to the new Division I-A requirements. The Court's decision to apply the rule of reason was based on its view that, in the college football market, horizontal restraints were essential if the product is to be available at all:¹⁰⁴

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.¹⁰⁵

The Court invited a discussion of procompetitive rationale, but rejected the NCAA's assertion that proof of market power in the relevant market is required before anticompetitive effect can be found. In adopting a "quick look" rule of reason, the court stated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."¹⁰⁶ The anticompetitive consequences of some agreements are so readily apparent that "no elaborate industry analysis" is necessary.¹⁰⁷

Following *Board of Regents*, it seems likely that any modern court would be hesitant to classify an NCAA promulgated rule as a *per se* illegal boycott, despite the NCAA's apparent control over the Division I-A football market. Because market power is generally indicative of the likely success of a boycott, however, the NCAA's control over the Division I-A college football market impacts any discussion of the boycott's reasonableness.¹⁰⁸ Instead of a dispositive issue, though, market power merely serves as one factor among many in the rule of reason analysis.¹⁰⁹

On the other end of the spectrum, boycotts involving conspirators with no significant market power and no anticompetitive purpose are usually subject to a full blown rule of reason analysis, placing a burden on the plaintiff to establish anticompetitive effect in a relevant market.¹¹⁰ The agreement to change the Division I-A requirements is not such a situa-

104. *Bd. of Regents*, 668 U.S. at 100-01.

105. *Id.* at 101.

106. *Id.* at 110; *see also NBA*, 961 F.2d at 674.

107. *Id.* at 109 (quoting *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 692 (1978)). Although no in depth market analysis was necessary, the Court covered all of its bases in finding that, "[a]s a factual matter, it is evident that petitioner does possess market power" in the college football telecasts market. *Id.* at 111-12.

108. *See Fashion Originator's Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457, 467 (1941).

109. *See Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

110. *See N.W. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296-98 (1985).

tion. Excluding competitors and limiting competition is the fundamental nature of the Division I-A requirements. A change that works to exclude even more institutions is patently anticompetitive and aptly falls under the intermediate “quick look” rule used by the Supreme Court in *Board of Regents*.

In applying the “quick look” rule of reason to the restricted earnings bylaw in *Law*, the Tenth Circuit articulated the elements of the “quick look” process as it has evolved from *Board of Regents*. The first step in any rule of reason analysis is to identify an anticompetitive effect within a relevant market. Under the “quick look” rule, anticompetitive effect is established without determining the relevant market if the plaintiff shows that a horizontal agreement exists, that “the agreement is effective” and that the effect of the agreement “is more favorable to the defendant” than what would have occurred naturally in the market without the restraint.¹¹¹ Because only unreasonable restraints violate the Sherman Act,¹¹² the defendant has an opportunity to offer procompetitive justifications for the anticompetitive effects. But, these are considered only “to the extent that they tend to show that, on balance, ‘the challenged restraint enhances competition.’”¹¹³ However, *Board of Regents*’s holding that horizontal restraints are essential to the existence of college athletics, and college football in particular, necessitates a limitation on the acceptable procompetitive justifications. “[T]he only legitimate rationales that we will recognize in support of the . . . [r]ule are those necessary to produce competitive intercollegiate sports.”¹¹⁴

The application of the “quick look” rule of reason in *Board of Regents* and its progeny represents a mixed bag of advantages and disadvantages for the NCAA. Although the NCAA certainly prefers the application of the rule of reason—even the “quick look” rule of reason—to a *per se* rule, it was unable to convince any court that all of its activities were non-commercial and exempt from the scope of the Sherman Act. In both *Board of Regents* and *Law*, despite the deference given to NCAA legislation, the courts found that the procompetitive justifications offered by the NCAA did not outweigh the anticompetitive impact. If a future court is to do the same for the Division I-A requirement changes, it will likely follow the “quick look” rule of reason as described in *Law* by identifying and balancing the benefits of each amendment against its negative impact on the market for Division I-A football.

IV. FOURTH DOWN: APPLYING THE RULE

On April 25, 2002, the NCAA Division I membership approved new criteria for classification as a Division I-A member that will become ef-

111. *Law*, 134 F.3d at 1020.

112. See *supra* text accompanying note 55.

113. *Law*, 134 F.3d at 1021 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

114. *Id.*

fective on August 1, 2004. Thus, Division I-A schools that wish to remain at that level and Division I-AA schools who hope to move up must meet these new set of expectations. One article reports that at least thirty current Division I-A schools “fall short of some aspect of the new criteria” and are in danger of being demoted to Division I-AA.¹¹⁵

The new criteria streamline the previous “Division I-A Football Requirements” in Article 20.9.6 of the Division I Bylaws. When they become effective, the bylaws will require a Division I-A program to (1) “provide an average of at least ninety-percent of the permissible maximum number” of football scholarships “over a rolling two-year period;” (2) play five regular season home football games against Division I-A opponents; (3) “sponsor a minimum of 16 varsity sports,” including a minimum of six sports for men and a minimum of eight sports for women; (4) offer 200 athletics grants-in-aid or distribute at least four million dollars in athletics scholarships per year; (5) and average 15,000 in actual attendance for all home football games.¹¹⁶ In addition to the above requirements, the amendments were also intended to eliminate all waivers present in the current criteria.¹¹⁷

In considering these rationales, the magnitude of scrutiny must be narrowed from the broad discussion of a change in criteria to a focus on the individual amendments passed by the NCAA. Applying the “quick look” rule of reason, it is necessary to identify the procompetitive justification for each new rule to determine if it outweighs the presumed anticompetitive effect of the boycott.¹¹⁸ Various statements by the NCAA give clues to possible justifications it might offer. Division I Bylaw 20.9, which was not amended in the recent changes, provides a list of eight statements that represent the philosophies endorsed by Division I member institutions. While the list may be overinclusive in that it represents the philosophy of all Division I schools, including those that do not participate in Division I-A football, its level of detail offers insight into the possible procompetitive justifications to be offered by the NCAA for its Division I-A criteria change. The legislative history of the amendments also provides rationale for the NCAA’s decision to make the changes:

The current football classification criteria for Division I-A was [sic] adopted in 1978, with some revisions to the standards being made in 1981. The Division I-A classification is intended to represent the highest level of football competition within the NCAA, and as such, membership requirements should establish standards consistent with those expectations. This proposal will ensure that Division I-A members exhibit similarities in the following areas: (a) level of competition (b) resource allocation and (c) public support. The pro-

115. *New NCAA Rules Big Hurt on Small Schools*, at <http://stacks.msnbc.com/news/761452.asp>.

116. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

117. *Id.*

118. See *supra* text accompanying notes 111-12.

posed standards will enhance the Division I-A subdivision while affording deserving institutions the opportunity to participate at the highest level of Division I-A competition.¹¹⁹

Last, the NCAA website lists the four goals of the institution: (1) “promote student-athletes and college sports through public awareness;” (2) “protects student-athletes through standards of fairness and integrity;” (3) “prepare student athletes for lifetime leadership;” and (4) “provide student athletes and college sports with funding to help meet these goals.”¹²⁰

The process should be guided by the Tenth Circuit’s distinction in *Law* that only those rules “necessary to produce competitive intercollegiate sports” are permissible as pro-competitive justifications.¹²¹ It would be unwise, however, to take the Tenth Circuit’s statement too literally. In truth, very little is “necessary to produce” college sports other than a field (a court, a track, a pool, a course), sometimes a ball, the athletes, and maybe a bus to get the players from place to place. Certainly, the court had more in mind than these minimum rudiments; otherwise, most of the NCAA’s manual would have to be jettisoned. There is an implicit approval of more than just what is “necessary” to create a “Athenian” system of amateur athletics, but also college sports in its modern, coach-screaming, fan-face-painting, Title IX complying, ESPN Sportscenter highlighting, in-your-face form. Most importantly, the courts implicitly accept the NCAA’s decision to divide its member institutions into separate categories with unequal benefits available to each group. Consequently, any court that considers this issue will likely consider procompetitive justifications offered by the NCAA that were “necessary” to protect Division I-A football as the highest profile, highest revenue-generator, and highest level of football competition within the NCAA, balanced against the association’s obligation to student-athletes and institutions that do not participate in the sport.

A. NINETY-PERCENT OF THE MAXIMUM FOOTBALL SCHOLARSHIPS

Although paying players is against the rules in amateur sports, athletic departments do not receive a free ride with their institution when it comes to their student-athletes. Athletic departments are generally required to pay their institutions for the scholarships they grant in any given year.¹²² This transaction is often more than just moving numbers to different places on the balance sheet, as many departments are either partially or fully self-supported. At many schools, scholarships are the largest expenses for an athletic department. Football, with eighty-five

119. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

120. *The Purposes of the NCAA*, at <http://www.ncaa.org/about/purposes.html>.

121. See *supra* text accompanying note 114.

122. See Roger G. Noll, *The Business of College Sports and the High Cost of Winning*, THE MILLIKEN INSTITUTE REVIEW 24, 28 (Third Quarter 1999).

available scholarships, but only eleven players on the field at any one time, is an attractive place to save money by cutting back scholarships offered.

The requirement that institutions hand out ninety-percent of the eighty-five football scholarships permitted in any given season¹²³ reflects the membership's desire for consistency in the level of competition and, particularly, resource allocation.¹²⁴ The level of competition is served by the rule change because higher quality players will naturally take the opportunity to earn scholarship money over paying tuition. It logically follows that as more scholarships are offered, a lower-tier Division I-A program will attract more talented players for the bottom half of its roster than it might have if it only offered, for example, half of the maximum scholarships allowed. While it is true that only eleven players for each team are allowed on the field at one time, the violence created by today's bigger, stronger and faster players requires a modern title contender to have quality back-ups and a deeper roster.

The desire for consistency in resource allocation is served by limiting an institutions' football scholarship deficit to within ten percent of the maximum. Such a requirement demands an equivalent financial allocation by every institution and prevents a "price-cutter" from offering fewer scholarships, but riding the coattails of fully funded programs through splits in television and bowl revenue or by acting as hired punching bags in "guarantee" games.

The football scholarship minimum also recognizes the "dual objective" of college athletics to serve the university or college community and the general public.¹²⁵ The success of a college football team has value to more than just the student-athletes or coaches participating, but also to its local, regional, and national fan base. The minimum scholarship requirement serves as a proxy for the expectations of those fans who could rarely have a direct economic impact on the program. The NCAA's interest in maintaining the competitive integrity of Division I-A for the campus community and the general fan base, as well as recent courts' deference to NCAA eligibility rules,¹²⁶ counsel against the assignment of antitrust liability to a minimum football scholarship requirement.

B. TWO HUNDRED ATHLETIC SCHOLARSHIPS OR FOUR MILLION IN SCHOLARSHIP AID

The new requirement that Division I-A institutions annually offer a minimum of two hundred athletic scholarships or distribute four million dollars in athletic scholarship aid is an important complement to the foot-

123. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

124. See *supra* text accompanying note 119.

125. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9(c).

126. See *Law v. NCAA*, 134 F.3d 1010, 1017-18 (10th Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081, 1090 (7th Cir. 1992).

ball scholarship minimum. Currently, all Division I programs are required to provide at least half of the maximum allowable scholarships in each sport. On its face, the new minimum is the classic example of a group boycott. Schools that do not spend the lesser of four million dollars or two hundred grants-in-aid, in addition to the other expenses required to field a full athletic program, are excluded from the market of Division I-A football. In reality, it directly addresses the NCAA's mission of protecting amateur athletics.

With the addition of a football scholarship minimum the Division I membership's desire for consistency in resource allocation among its Division I-A colleagues and its belief in offering "extensive opportunities for participation in varsity intercollegiate athletics for both men and women"¹²⁷ is best served by preventing lower-tier schools from making up the difference by cutting scholarship funding to less-high-profile sports. Without such a provision, there would be fewer opportunities for student-athletes to participate in sports such as soccer, tennis, softball and baseball that do not usually generate high revenues at the collegiate level. An across the board scholarship minimum is an important complement to the football scholarship minimum because it prevents abuses by a cost-conscious athletic program at the expense of student-athletes.

C. SIXTEEN SPORTS

Under the current guidelines, a Division I institution is required to sponsor fourteen varsity sports, at least seven of which must be women's sports,¹²⁸ unless it demonstrates to the Division I Management Council that the ratio of male to female enrollment prohibits the institution from fielding seven women's teams or a lack of student interest prohibits the institution from fielding a total of fourteen teams. Division I-A schools are also required to sponsor seven all male or mixed male and female sports, including football.¹²⁹ As of August 1, 2004, Division I-A institutions will be required to participate in sixteen varsity sports, including football, with a minimum of six all-male or mixed teams and a minimum of eight all-female teams.¹³⁰

Similar to the four million dollars or two-hundred scholarship requirement, this change also serves to moderate the effect of the new football scholarship requirement by protecting the interests of non-football student athletes at Division I-A schools. The eight-sport minimum for women as opposed to the six-sport minimum for men reflects the impact of the great number of scholarships that are required to go to one all-male sport, football. No female team requires so many athletes, often making it necessary for a school to carry more women's sports than men's sports

127. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9(d).

128. *Id.* § 20.9.1.2(a).

129. *Id.* § 20.9.6.1(a).

130. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

to comply with Title IX and the NCAA's rule gender requirements.¹³¹

While it is true that the additional sport sponsorship criteria will "further chip away at bottom lines that aren't pumped up by big TV deals and loads of postseason dough,"¹³² three points weigh in favor of a court accepting the change in sport sponsorship for Division I-A schools. First, since one of the highest costs of offering any sport is funding the scholarships, the new four million or two-hundred scholarship minimum will probably set the financial parameter a school must work within. The sixteen-sport requirement merely offers some internal structure to the distribution of the scholarship money. Second, given the diverse requirements for sport-sponsorship that already exist between Division I, Division II, and Division III, it is difficult to imagine any court objecting to another distinction between Division I and Division I-AA schools. Last, the impact of this change is likely to be minimal. Since the 1981-82 school year, Division I institutions have sponsored an average of at least seventeen sports, with the number close to nineteen sports per school in 2000-2001.¹³³ In fact, Division I schools sponsored an average of 9.0 men's sports and 9.8 women's sports in 2000-2001.¹³⁴ The sixteen-sport requirement merely recognizes the growth in athletic participation and sports sponsorship, especially among top-tier athletic programs.

D. FIVE REGULAR SEASON HOME GAMES AGAINST DIVISION I-A SCHOOLS

Under the current bylaws, a Division I-A football team is required to play at least sixty-percent of its games against other Division I-A opponents.¹³⁵ The new legislation does not eliminate that requirement, but adds an additional obligation to play at least five regular season home games against Division I-A opponents.¹³⁶ To qualify as a home contest, the school must play fifty-percent of their home games in the stadium where the game played, although an institution is permitted to count a neutral site game against a Division I-A opponent as a home contest.¹³⁷

The previous three Division I-A requirement changes focused on creating and protecting participation opportunities for student athletes, clearly within the NCAA's obligation to protect amateur athletics and similar in purpose to its eligibility rules that are protected from antitrust scrutiny.

131. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.1.2.

132. *New NCAA Rules Big Hurt on Small Schools*, at <http://stacks.msnbc.com/news/761452.asp>.

133. COREY BRAY, NCAA SPORTS SPONSORSHIP—NUMBER OF TEAMS 1982-2001 123 (NCAA 2002).

134. *Id.*

135. 2002-2003 NCAA DIVISION MANUAL, *supra* note 3, § 20.9.6.2.

136. *Adopted Membership—Division IA Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

137. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.6.2. For example, the Red River Shootout between Oklahoma and the University of Texas, played in the Cotton Bowl in Dallas, TX, counts as a home game for each university for the purposes of fulfilling this requirement.

The requirement that a football team play five home games against Division I-A opponents, like the change from paid attendance to actual attendance, is a different animal altogether. The focus of these two new rules is the “product” of Division I-A football and the institutions that choose to participate, with a somewhat indirect impact on the student-athletes participating in football and other sports.

This rule change will have the biggest impact on independent schools, those not affiliated with a conference, and schools in the lower-tier Division I-A conferences such as the WAC, MAC and the Sun Belt. In order to play the minimum number of home games, these schools may have to give up the revenue generated by playing a guarantee game against a powerhouse team—an effect that will be felt throughout their athletics programs. It will limit the ability of a program to increase its profile by “playing up” in competition since it will be difficult to convince a top-tier program to give up the revenue it generates in a non-conference home game and risk a road loss to a less prestigious program. Independent schools, other than Notre Dame, may find it difficult to convince anyone to play them at home since top-tier programs do not want to give up the revenue and lower-tier programs are trying to meet their own home game minimum. One commentator suggested that teams in the “lesser leagues” might be required to schedule cross-divisional opponents and “count them as non-conference games.”¹³⁸ Essentially, teams would add home games, probably under reciprocal agreements, against other members of their conference that they do not necessarily play every year, causing a sort of inbreeding of mediocrity.

The NCAA may find it difficult to offer plausible procompetitive justifications for this new requirement. The rationale provided by the NCAA that the criteria changes are intended to ensure that all Division I-A institutions are similar in level of competition, resource allocation and public support seem empty when the effect of the rule change is to make the gulf between the “haves” and the “have-nots” wider. In fact, this change increases the challenges faced by lower-tier Division I-A programs by impeding two features that make membership advantageous to them, national publicity through playing high-profile opponents and the financial windfall of guarantee games. It is difficult to imagine that this change can be defended by the NCAA’s stated goals of promoting, protecting, preparing, or providing funding for student athletes.¹³⁹ A five-Division I-A-home-game requirement does not appear to satisfy any of those goals and may, in fact, lead to less promotion and less funding. It interferes with a lower-tier Division I-A schools ability to compete and improve its position in the market of Division I-A football, but provides almost no procompetitive effects; especially for those schools it injures most.

138. *New NCAA Rules Big Hurt on Small Schools*, at <http://stacks.msnbc.com/news/761452.asp>.

139. *See supra* text accompanying note 120.

E. ACTUAL ATTENDANCE REQUIREMENT

The requirement that all Division I-A schools show an average yearly home attendance of 15,000 is the most significant and controversial, element of the new criteria. The change represents a streamlined, but more inflexible, approach to football attendance requirements. Under the current standard, a Division I-A institution is required to (1) average "more than 17,000 in paid attendance per home football game" over a rolling four-year period or (2) play its home football games in a stadium with at least 30,000 permanent seats and average 17,000 in paid attendance per home football game once in the previous four years.¹⁴⁰ A member has five waiver options available to them if they cannot meet either of these requirements. First, the 30,000 permanent seat requirement may be waived by a two-thirds vote of the Division I-A Management Council if the institution uses the stadium containing less than 30,000 permanent seats for fewer than half of its home games.¹⁴¹ Second, an institution that does not meet the home attendance requirement will automatically retain its Division I-A classification if it is a member of a conference in which at least six other conference members sponsor football and more than half of the football-playing conference members meet the attendance requirement.¹⁴² Third, an institution may retain its Division I-A status despite failing to meet the home attendance requirements if it "averages more than 20,000 in paid attendance, for all of its games," home and away, as long as it plays at least four home games during the season.¹⁴³ Fourth, the delinquent institution may receive a waiver of the attendance requirements for circumstances beyond its control by a two-thirds vote of the Division I-A Management Council.¹⁴⁴ Finally, an institution may receive a waiver of any of the Division I-A criteria by a majority vote of the entire Division I-A membership.¹⁴⁵ None of these waivers will be available when the new requirements become effective.

Of all the new criteria, this change may have the largest impact because it changes the minimum from a standard that institutions are able to exhibit some control over to a standard that may be predominately out of their control. Since programs are not required to keep actual attendance figures, it is impossible to determine exactly how many institutions will be in danger of losing their Division I-A status, but recent paid attendance figures offer some guidance. Obviously, the paid attendance figure will inevitably be higher than the actual attendance as not everyone who buys a ticket shows up at any given event. In 2000, nineteen schools reported average paid attendance figures below the current 17,000 mark and four-

140. 2002-2003 NCAA DIVISION I MANUAL, *supra* note 3, § 20.9.6.3.

141. *Id.* § 20.9.6.3.1.

142. *Id.* § 20.9.6.3.2.

143. *Id.* § 20.9.6.3.3.

144. *Id.* § 20.9.6.3.4.

145. *Id.* § 20.9.6.3.6(c).

teen of those were below 15,000.¹⁴⁶ In 2001, fifteen institutions averaged below 17,000 per home game and ten of those were below 15,000.¹⁴⁷ Not coincidentally, fourteen of the fifteen in 2001 and seventeen of the nineteen in 2000 were members of the MAC, the WAC, or the Sun Belt. These numbers, however, are a conservative guess at the schools that will be affected by the change in criteria. Using 20,000¹⁴⁸ in paid attendance as a guide to identifying those schools at risk of having a poor year that puts them in danger of losing their Division I-A status, twenty-eight schools in 2001 and twenty-six schools in 2000 fall short of that mark.

Until the new criteria become effective, all of these schools, including those below 15,000 have the opportunity to meet waiver requirements and continue to compete in Division I-A, even if fans decide to stay away in a particular season. The four-year period over which current attendance figures are judged and the waivers available for members who fall short of those goals reflect the dynamic nature of attendance figures. In 2001, Bowling Green finished the season with a won-loss record of 8-3 and sold 9,348 more tickets per home game than it did in 2000, when it finished 2-9, to give it an average of 17,812 in paid attendance. While improving its record from 6-5 in 2000 to 8-3 in 2001, Middle Tennessee State sold 7,634 more tickets per home game in 2001 for an average of 17,857. Not surprisingly, the University of Louisiana-Lafayette's ticket sales dropped 5,168 in 2001 and, its sister school, the University of Louisiana-Monroe, saw ticket sales drop 2,162 in 2001 after both schools endured one-win seasons in 2000. The University of Central Florida (UCF) perhaps best illustrates the roller-coaster nature of college football attendance. In 2000, UCF finished the season with a record of 7-4 and sold 27,279 tickets, 5,357 more than it did in 1999 when its record was 4-7. But in 2001, the program sold an average of just 19,967 tickets per home contest, a drop of 7,485, despite the fact that its season record was 6-5, just one win away from the 2000 total.

The change to actual attendance takes control out of the hands of the institution and puts it in the hands of the finicky fan. The factors that contribute to these low attendance figures can include low fan base, win-loss record, the success of other sports teams in the market competing for the fan's time, the prestige of opponents and the weather. A school that has made a maximum financial commitment to its football program may still have its Division I-A status stripped if it hires a poor coach, gets its star player hurt, or experiences unseasonably cold weather. The subjective nature of ticket purchasing, much less a fan's decision to show up for

146. *2000 Division I-A Home Football Attendance*, at http://www.ncaa.org/stats/football/attendance/2000ia_attendance.html (last visited February 9, 2003).

147. *2001 Division I-A Home Football Attendance*, at http://www.ncaa.org/stats/football/attendance/2001ia_attendance.html (last visited February 9, 2003).

148. Remember, 20,000 in paid attendance already puts the actual attendance somewhere below that 20,000. The difference in these two numbers can be substantial if, for example, a snowstorm makes it difficult or extremely uncomfortable for fans that have already bought tickets to attend.

the game, must be reflected in the standard the NCAA uses for evaluating a program through attendance figures. At least with ticket sales as the standard, programs are able to exhibit some control through marketing, promotions, corporate sponsorship, and ticket prices. Certainly, all of these tactics have some affect on actual attendance as well, but paid attendance as a standard at least retains some of the control in the hands of the institution.

How can the NCAA justify such a decision? It wants competitive equity but has chosen to do that by getting rid of some of the competitors. It wants consistency in public support, but ignores the volatile nature of such a standard. It wants Division I-A football to continue to represent “the highest level of football competition within the NCAA,”¹⁴⁹ but overlooks the reality that almost every program experiences feast and famine. Clearly, the NCAA has the right to set criteria for the division of its member institutions. But to change these standards, in a way that will have serious financial consequences on competing institutions in the market, the changes must be “necessary” to create the product of Division I-A football.¹⁵⁰ Whatever force a court will choose to give to the ambiguous nature of that standard, it seems possible that the creation of arbitrary criteria and the elimination of sensible waivers could fall short and be considered a violation of the Sherman Antitrust Act.

V. TOUCHDOWN: CONCLUSION

College football is about entertainment, passion, and fun. It provides a sensory overload, inspires passion and evokes images unlike any other spectator sport: the band, the student section, tailgaters, mascots, cheerleaders, and fight songs. The sports columnists and the talk shows fill up our week debating whether to have a bowl system or a playoff system, who will win the Heisman, the future of a team’s coach and a player’s possible pro draft prospects. If we go to the game, we travel hundreds of miles, paint our faces (and other body parts), and sit for hours outside in the sweltering heat, pouring rain, or frigid cold. If we stay at home, we may or may not paint our faces, but we surely organize our life around the game, and when it arrives, we cheer, scream, stomp, coach, and generally alienate those around us.¹⁵¹

College football is also about business, money and promotion. In 2002, for the second year in a row, the University of Oregon rented a gigantic billboard in Times Square to promote its football program. In 2001, the Ducks placed an 80-by-100 foot picture, with a price tag of \$250,000, of Heisman hopeful quarterback Joey Harrington. Prior to the 2002 season, the university placed a 53-by-172 foot likeness of senior wide-out Keenan Howry announcing the school’s television deal with the Yankees En-

149. *Adopted Membership—Division I-A Requirements*, at <http://www.ncaa.org/databases/legislation/2001/2001-123.htm>.

150. *Supra* text accompanying notes 114, 121.

151. The author is speaking from personal experience.

tainment and Sports Network to replay Duck games in the New York Metropolitan area during the college football season.¹⁵²

These two sides to intercollegiate athletics make it difficult to apply antitrust law, a complex area of the law by itself, to the actions of an organization that is, by its very essence, a collaboration among competitors. *Board of Regents* stands today as a watershed case in antitrust jurisprudence for softening the hard edge of the *per se* rule because the Supreme Court had to find a way to harmonize the social and business purposes of the NCAA. That deference would no doubt be reflected in any consideration of the antitrust liability stemming from the new Division I-A criteria. While such deference will likely save some of these changes, the paucity of procompetitive justifications and arbitrary nature of the new home game and actual attendance requirements, coupled with the severe financial consequences of losing Division I-A status, may require a verdict that the NCAA has violated the Sherman Antitrust Act.

152. Darren Rovell, *Oregon Returns to Times Square Bigger than Ever*, at <http://espn.go.com/ncf/s/2002/0715/1405999.html>. By the way, neither Harrington nor Howry won the Heisman trophy.

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