Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten Its Existence

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In January 1998, the Tenth Circuit held in Law v. National Collegiate Athletic Association *that a National Collegiate Athletic Association (NCAA) regulation limiting the salaries of some assistant basketball coaches violated the Sherman Antitrust Act; the $67 million judgment is the largest ever against the NCAA. Although the parties later settled for a somewhat smaller amount before an appeal on damages was decided, the case went a long way toward destroying a perceived wall of invulnerability the NCAA had previously enjoyed in the courts. Perhaps encouraged by the coaches' success, at least two manufacturers of athletic equipment and apparel have sued the NCAA for antitrust violations. In addition, the* Law *verdict reopens the possibility that student-athletes may begin to assert antitrust violations against the NCAA with greater success. This Note analyzes the* Law *decision and considers its future implications— both for the NCAA and for the parties with whom the organization conducts its business and athletic affairs.*

I. INTRODUCTION

When Justice Harry S. Blackmun announced that "[p]rofessional baseball is a business and it is engaged in interstate commerce,"[1] nearly thirty years ago, the concession must have seemed comical to most observers of sports and the law, as though he were the last person on earth to arrive at that obvious conclusion. Nevertheless, the outmoded view that sports are nothing more than "games" in contemporary American society has maintained its hallowed—if erroneous—place in our jurisprudence for more than seventy-five years. The National Collegiate Athletic Association (NCAA) successfully relied on the facade for decades, "elud[ing] Sherman Act challenges by virtue of its status as a nonprofit, self-regulatory organization that was primarily involved in promoting amateur athletic competition, rather than in a purely commercial activity of the type traditionally regulated by the Sherman Act."[2]

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* The Ohio State University College of Law, Class of 2000. I would like to thank my wife, Pamela, for encouraging me to take the Law School Admissions Test, and for her unending support and patience during the last three years. I also thank my family, especially my parents, Merv and Barb Krakau, and my wife's family, especially Fay Carmichael and Bob Schweitzer, and Ron Wheeler and Stephanie Tran, for their love and support. This Note is dedicated to my children, Brady and Amber, who remind me every day what is truly important in life.

[1] Flood v. Kuhn, 407 U.S. 258, 282 (1972). Justice Blackmun should not be judged too harshly; the admission was necessary because of an earlier Court's failure to own up to the truth in *Federal Baseball Club v. National League*, 259 U.S. 200, 208 (1922), the infamous case that gave professional baseball its unique exemption to federal antitrust laws. The Court's holding in *Federal Baseball Club* has never been overruled.

[2] Thomas Scully, Note, NCAA v. Board of Regents of the University of Oklahoma: *The*

In January 1998, a bombshell crumbled that facade, perhaps irreparably, when the Tenth Circuit in *Law v. National Collegiate Athletic Association* upheld a federal court ruling that an NCAA regulation limiting the annual salaries of some assistant basketball coaches to $16,000 was a violation of section one of the Sherman Act.[3] The jury's $22 million verdict was trebled pursuant to the Sherman Act; the resulting judgment of $67 million is the largest ever against the NCAA.[4] Perhaps emboldened by the success of the suit, two sports equipment manufacturers—Easton and Adidas[5]—filed their own federal antitrust suits against the NCAA in 1998. Easton, a baseball bat manufacturer, is challenging aluminum bat specifications set to become effective in spring 2000. Easton seeks damages in excess of $200 million. The Adidas suit challenges an NCAA rule that limits corporate logos on team uniforms to a size no greater than 2.25 square inches.[6] Twenty years ago, the NCAA may have viewed these lawsuits as publicity stunts posing little threat to the organization or its bank accounts. However, in the wake of *Law*, the NCAA can no longer afford to take antitrust suits lightly.

Antitrust actions against the NCAA pose special problems for the federal court system. Doctrinally, the courts' longstanding reluctance to apply the federal antitrust laws to the NCAA may now be working to the NCAA's disadvantage. Every foregone opportunity to construct a framework for the decision of NCAA antitrust cases has left a void in the law. But *Law* and other cases indicate the likelihood that the courts will not grant the NCAA any leeway in future cases on the ground that the NCAA has a settled expectation that the antitrust laws do not apply to it. Because of the risk of blackmail suits,[7] and because the *Law* verdict is

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NCAA's Television Plan Is Sacked by the Sherman Act, 34 CATH. U. L. REV. 857, 857 (1985).

[3] *See* Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998); Law v. NCAA, No. 94-2053-KHV, 1996 WL 104328 (D. Kan. Jan. 5, 1996); *see also* 15 U.S.C. § 1 (1994) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). The suit was brought as a class action by assistant basketball coaches affected by the rule. The rule, conceived by a group of university presidents, was adopted by a vote of Division I schools in 1991. *See* Chip Brown, *Members Look for Ways to Pay Judgment on Restricted Earnings*, DALLAS MORNING NEWS, January 12, 1999, at 4B.

[4] *See* Steve Rock, *NCAA Balks at Releasing $10 Million: Money Intended for Schools Is Set Aside for Judgment*, KAN. CITY STAR, Oct. 29, 1998, at A1. The NCAA initially pursued an appeal on the issue of damages but settled the case in March 1999 for $54.5 million. *See Schools React to Ruling Against NCAA*, OMAHA WORLD-HERALD, June 15, 1999, at 21.

[5] *See generally* Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275 (D. Kan. 1999).

[6] *See Adidas*, 40 F. Supp. 2d at 1279. The Adidas suit did not specify a damage amount. *See Adidas Sues NCAA Over Uniforms*, AP, Nov. 13, 1998, *available in* WESTLAW, 1998 WL 22418393 (no page number available).

[7] It is likely that the Easton suit is such an action, designed to exert pressure on the NCAA

likely to subject the NCAA to a large volume of antitrust suits in the future, it is important that this area of the law achieve a higher degree of certainty than it currently has attained. At the same time, the courts must strike a balance that allows the NCAA or any successor organization[8] a fair amount of room to operate and make reasonable regulations for member institutions.

To that end, Part II of this Note examines the analytical framework courts employ in assessing antitrust challenges to NCAA rules and regulations. As an initial matter, it will discuss which types of regulations are subject to antitrust scrutiny and which types may be insulated from such scrutiny because of their noncommercial character. Part II will then review the three-prong rule of reason test, which is likely to be used in any antitrust suit facing the NCAA.[9] Next, Part II will analyze the holding in *Law* that plaintiffs had satisfied the first prong and that the NCAA had failed to satisfy the second prong. Finally, Part II will examine the third prong—which the court in *Law* found unnecessary to reach because of its disposition of the case—and will propose a workable model for the decision of cases that will reduce uncertainty and provide redress for those victimized by the NCAA's anticompetitive practices, while concurrently protecting procompetitive and noncommercial regulations from haphazard invalidation.

Part III of this Note will evaluate the claims of Easton and Adidas and assess the companies' chances for success. The discussion will include an assessment of how a better articulated third prong of the rule of reason analysis could operate in practice, especially as to Adidas' claim, which is a more likely case to reach the third prong.

Part IV will consider the past and present litigation against the NCAA to

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(1) to settle, and (2) to postpone implementation of the rule. If that was Easton's intention, the company has already been successful to some degree. A few days after the lawsuit was filed, the NCAA Executive Committee decided to delay implementation of the rule for one year. It is now scheduled to go into effect in the spring of 2000. In response, Easton amended its suit, reducing the damage claim by $30 million. *See* Steve Rock, *Bat Manufacturer Amends Complaint Against NCAA*, KAN. CITY STAR, Sept. 11, 1998, at D6.

[8] There has been some talk of a rebellion, whereby some universities with major athletic programs would break away from the NCAA and form their own organization. *See* Bob Gilbert, *Judgment Could Endanger NCAA's Future*, THE KNOXVILLE NEWS-SENTINEL, Oct. 18, 1998, at BC7 (noting that "NCAA officials, fearing an internal rebellion that might threaten its very existence, have reminded Division I presidents the vote approving restricted-earnings coaches was almost unanimous"). *But see* Rock, *supra* note 4 (stating that "[t]he NCAA is not under threat of revolt"). However, there is some precedent for at least a limited revolt. In 1979, five major conferences and some major independent universities, displeased with the NCAA's handling of college football, broke away and formed the College Football Association (CFA). The NCAA's attempted retaliation against the CFA led directly to *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

[9] *See Board of Regents*, 468 U.S. at 100–01 (choosing to apply rule of reason analysis rather than per se rule of invalidity because the case "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all").

determine what the future may have in store for the NCAA and intercollegiate athletics. Part IV will then consider other NCAA rules susceptible to invalidation under the Sherman Act, including restrictions on the number of games teams are allowed to play in each sport, restrictions on the number of paid coaches, and restrictions on job and compensation restrictions of athletes. Part IV also will consider how the decision in *Law* will affect the NCAA with respect to other federal laws, including Title IX and other civil rights legislation, Occupational Safety and Health Act (OSHA), and workers' compensation laws. Part IV also will ask whether the NCAA can remain a viable organization in the face of increased legal pressures imposed by *Law* and other recent court developments, and will attempt to: (1) identify mistakes the NCAA has made in defending recent lawsuits against it; (2) define when the NCAA may prudently draw its battle lines; and (3) suggest areas in which the NCAA may be better advised to change its rules and policies to avoid antitrust and other litigation. Finally, Part IV will assess the possibility of a rebellion by NCAA member schools and what effect such a threat will and should have as the NCAA adapts to the ever-changing legal landscape with which it must comply.

II. RULE OF REASON GIVES NCAA A CHANCE TO JUSTIFY RESTRAINTS OF TRADE

Although the *Law* decision has been interpreted—correctly—as an ill omen for the NCAA,[10] two judicially imposed safeguards protect the organization from

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[10] *See* Welch Suggs & John Lombardo, *NCAA Struggles with Antitrust Battles*, CIN. BUS. COURIER, Oct. 2, 1998, at 11B (quoting Tulane University law professor Gary Roberts: "Once you start down the road of cherry-picking rules, the NCAA is just one gigantic mess of antitrust violations.... What happens when a kid wants to go to Notre Dame, they don't have a scholarship and he sues the NCAA over restricting his ability to play football?"). The likely answer to Professor Roberts' Notre Dame hypothetical is: The "kid" loses. In *Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975), the court noted that "[a]ny limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals." While the issue in *Jones* pertained to the NCAA's promulgation of eligibility rules, the language is equally applicable to limitations on the number of scholarships. From a policy standpoint, to hold otherwise would be to open the floodgates for every spurned high school letter winner to sue her favorite university when her school of choice declined to offer a scholarship. *See* Smith v. NCAA, 139 F.3d 180, 186 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (holding that the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements). The *Smith* case possibly could be read to deny standing to athletes because they are not individuals "injured in [their] business or property by reason of anything forbidden in the antitrust laws," and thus have no federally sanctioned cause of action. 15 U.S.C. § 15(a) (1994). The Supreme Court granted certiorari in the *Smith* case, but solely on the issue of whether the NCAA is subject to the Title IX ban on sex discrimination by recipients of federal financial assistance. The Court did not consider the issue of whether the Third Circuit properly rejected Smith's antitrust claim. *See* Recent Case, 20 (5) ENT. L. REP. 20, Oct. 1998.

antitrust suits: (1) a threshold consideration of whether the Sherman Act is applicable to certain NCAA regulations;[11] and (2) the use of a rule of reason analysis even in cases of horizontal price restraints like the one struck down in *Law*. Such restraints in other contexts generally lead to a per se rule of invalidity.[12] In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court evaluated the NCAA's plan for televising football games under the rule of reason, even though the plan restrained price and output.[13] The Court concluded that the rule of reason was appropriate because the case "involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all."[14]

This Part will (1) consider whether and to what extent NCAA regulations should be free from Sherman Act challenge altogether; (2) set out the three-pronged analytical framework for rule of reason cases; (3) discuss in some detail why the NCAA was unable to meet the second prong of the test; and (4) construct a more concrete mode of analysis for the third prong than has so far been articulated.[15]

A. *The Thorny Problem of "Commercial Objectives"*

Before confronting the rule of reason in all its complexity and inscrutability, a plaintiff must first clear an initial hurdle to bring an antitrust action; it must convince the trial court that federal antitrust law applies to the defendant's challenged conduct.[16] The Supreme Court has stated that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."[17] Because some of the NCAA's objectives are noncommercial, some Supreme Court precedent suggests that regulations designed to achieve those noncommercial objectives are immune from application of the antitrust laws.[18]

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[11] *See Smith*, 139 F.3d at 186.

[12] *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984). However, in cases involving price restraints, such as the restricted-earnings coaches rule at issue in *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), a rule of reason analysis may be a little more forgiving than the per se rule. This point will be further explored. *See infra* Part II.B.

[13] *See id.* at 103.

[14] *Id.* at 101.

[15] Because the NCAA failed in carrying its burden of proof as to the second prong, it was unnecessary for the court in *Law* to address the third. *See Law*, 134 F.3d at 1024 n.16.

[16] *See generally* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[17] Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (quoting *Klor's*, 359 U.S. at 213 n.7); *see also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940).

[18] *Compare* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) *with* Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998). The Tenth Circuit in *Law* never addressed the threshold question

For example, the Third Circuit pointed out the "noncommercial" character of athletic eligibility rules to find that such rules were not subject to antitrust analysis in *Smith v. NCAA*.[19] A federal district court recently employed the same rationale

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whether the restricted-earnings coaches rule involved the type of "commercial activity" that would bring the rule within the ambit of the antitrust laws. However, because the rule was an example of horizontal price-fixing, the commercial character of the rule was evident. In *Smith*, the Third Circuit held that NCAA eligibility standards are not susceptible to antitrust analysis because "eligibility rules are not related to the NCAA's commercial or business activities." *Smith*, 139 F.3d at 185. The court in *Smith* distinguished *Law* by pointing out that "[t]he bylaw at issue in *Law* concerned a restriction on the business activities of the institutions, whereas the [bylaw at issue in *Smith*] does not." *Id.* at 186 n.4. In support of its decision, the Third Circuit cited *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). The issue was whether a labor strike could be considered a restraint of trade in violation of the Sherman Act. In his majority opinion finding for the union, Justice Stone described the purpose of the Sherman Act:

> The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 493 (citing legislative history of the Sherman Act). Under this view, the Sherman Act injury in *Law* was not to the restricted-earnings coaches, but to consumers—the ticket-buying and television-watching public—who were viewing a product inferior to what they would have seen if the market had been allowed to dictate coaches' salaries. For a somewhat more sophisticated description of this "consumer welfare" concept, see Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2637 (1996). It is section four of the Clayton Act that provided the plaintiffs in *Law* with their cause of action. *See* 15 U.S.C. § 15 (1994).

[19] 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999). The presence of noncommercial objectives could also be a key first line of defense for the NCAA in a number of other foreseeable antitrust suits. The presence of noncommercial objective would at least arguably be applicable to rules governing: (1) the athletic contests themselves; (2) the recruiting procedure; (3) the conduct of coaches and other university athletic department personnel; and (4) the preservation of the amateur status of the athletes. Rules limiting production, inputs, and outputs are less likely to find refuge in this doctrine—which I will call the "noncommercial objective defense"—because they are clearly of a commercial nature. It should also be noted that the noncommercial objective defense may not be available outside the Third Circuit. The court in *Smith* noted that it was aware of no other federal court of appeals that had addressed the issue of whether antitrust laws apply to NCAA eligibility rules. However, the court pointed to several federal district court cases which have held that antitrust laws not applicable to various NCAA rules. *See Smith*, 139 F.3d at 185 (citing Gaines v. NCAA, 746 F. Supp. 738, 744–46 (M.D. Tenn. 1990) (holding antitrust laws inappropriate as a vehicle for invalidating eligibility rules); Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975) (same); College Athletic Placement Serv., Inc. v. NCAA, CA 74-1144, 1974 WL 998, at *2–*3 (D.N.J. Aug. 22, 1974) (holding that NCAA rule adopted for the purpose of preserving the educational standards of its members is not subject to antitrust analysis). Other courts seem more willing to bypass this threshold inquiry and advance directly to a rule of reason analysis. *See, e.g.*, Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996) (analyzing

in denying Adidas a preliminary injunction in its case against the NCAA.[20] Such an argument may also be available to the NCAA if the Easton lawsuit goes to trial.[21] It almost certainly would not be available to ward off challenges to NCAA rules that limit output or fix prices.[22]

However these issues are decided, they are by-products of two underlying questions, the answers to which should not be assumed: (1) Should the antitrust laws apply to the NCAA as a matter of statutory construction or public policy?; and (2) Should at least some categories of NCAA rules be exempt from antitrust scrutiny? On one hand, the NCAA is a nonprofit organization and was created for a wholly noncommercial reason—to decrease the number of deaths that were occurring at an alarming rate in college football games.[23] It is perhaps for this reason that courts initially refused to view the NCAA as an appropriate target for antitrust scrutiny.[24] On the other hand, intercollegiate athletics—primarily

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Pac-10 Conference's imposition of sanctions on the University of Washington for recruiting violations under the rule of reason). In *Hairston*, the district court had granted the Pac-10 summary judgment as to some plaintiffs on the ground that they lacked standing. The Ninth Circuit rejected that argument, affirming on the ground that no antitrust violation had occurred: "An increasing number of courts, unfortunately, deny standing when they really mean that no violation has occurred." *Id.* at 1318 (quoting 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 360f, at 202–03 (rev. ed. 1995)). Because the Third Circuit in *Smith* referred not to standing (which would be judged with reference to the plaintiff) but to the nature of the rule (in terms of the NCAA's noncommercial objectives in promulgating it), it is unclear whether these cases are in direct tension.

[20] *See* Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275, 1277, 1281 (D. Kan. 1999).

[21] This possibility will be considered more fully in Part II.A. *See infra* notes 22–30 and accompanying text.

[22] This is because such rules are highly likely to have been implemented for commercial purposes. The NCAA basically conceded the existence of a commercial purpose behind the restricted-earnings coaches rule at issue in *Law* by arguing that cost-cutting was one of the rule's procompetitive benefits. *See Law*, 134 F.3d at 1022. The NCAA likely will not make the same mistake in future cases. Even if cost containment was a motivating factor behind promulgation of a particular rule, the NCAA should know better than to say so.

[23] *See* 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, 545 & n.1 (discussing the "legend" that President Theodore Roosevelt summoned the leaders of 62 universities to the White House after a "particularly brutal game between Harvard and Yale"); *cf.* Ronald J. Thompson, Comment, *Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?*, 41 UCLA L. REV. 1651, 1652 (1994). According to Thompson, Roosevelt met only with the chancellor of New York University, and 62 colleges and universities subsequently "formed a rule-making body that would later become the NCAA. The original purpose of the organization was to prevent 'commercialism, excessive physical injury to student athletes, and cheating by some participating schools.'" *Id.* (citing GEORGE W. SCHUBERT ET AL., SPORTS LAW 1–2 (1986); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656 (1978)).

[24] *See* Scully, *supra* note 2, at 857 (noting inapplicability of antitrust laws to any sports organization until *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242

Division I football and men's basketball—generate millions of dollars annually, for member schools and for the NCAA itself.[25] Moreover, a cursory reading of the Sherman Act suggests that the NCAA as an organization falls squarely within the Act's parameters. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[26] The Supreme Court in *Board of Regents* pointed to the "sweeping language" of section one of the Sherman Act as an indication that it applies to nonprofit entities.[27] In addition, the Court suggested that the NCAA may be a "nonprofit" organization in name only:

> [T]he economic significance of the NCAA's nonprofit character is questionable at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize revenues . . . it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity.[28]

The application of antitrust laws to the NCAA not only comports with the plain language of the Sherman Act and recognizes the revenue-maximizing goals of the NCAA, but also provides a key check on the organization's power, which would otherwise be effectively limitless. The Due Process Clause of the Fourteenth Amendment[29] does not apply to the NCAA because the Supreme Court has held that the NCAA is not a state actor.[30] Not only that, but in 1992 a

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(1959)).

[25] The NCAA recently signed a $6 billion, 11-year deal with CBS giving the network the right to broadcast the NCAA's men's basketball tournament starting in 2003. *See* David Cisneros, *NCAA Earns Billions, but What About Its Athletes?*, DAILY TROJAN, June 12, 2000. ABC currently pays the NCAA $78.6 million a year for the rights to broadcast college football games. *See* Lee Barfknecht, *ESPN Playoff View, 'Hypocrites' Remark Upset NU's Byrne*, OMAHA WORLD-HERALD, June 7, 2000, at 21. For the 1998–1999 school year, the 11 schools in the Big 10 Athletic Conference generated record revenues of $415.6 million. *See* Fred Girard, *Women's Sports a Costly Venture: Losses, Construction Costs Counteract Men's Sports Revenue*, DETROIT NEWS, Dec. 19, 1999, at D1. Of that figure, $172 million came from football (with a $93 million net profit), and $71 million came from men's basketball (with a $25 million net profit). Big 10 schools also "took in $139 million in endorsements, royalties, donations and other types of revenue . . . ." *Id.* Women's basketball lost $9 million, all other women's sports lost $38 million, and all other men's sports lost $18 million. *See id.*

[26] 15 U.S.C. § 1 (1994).

[27] NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.22 (1984).

[28] *Id.* (internal citation omitted).

[29] "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[30] *See* NCAA v. Tarkanian, 488 U.S. 179, 179 (1988). Tarkanian was the head men's basketball coach at the University of Nevada-Las Vegas (UNLV). The NCAA basically forced UNLV to strip Tarkanian of his coaching position or risk being ejected from the NCAA. When UNLV announced it was demoting Tarkanian to tenured professor of physical education,

federal district court held that a Nevada state law requiring the NCAA to comply with the Due Process Clause was itself unconstitutional.[31] The ruling was something of a confirmation of former UNLV and current Fresno State men's basketball coach Jerry Tarkanian's statement: "Sometimes I feel the NCAA is the only organization that's above the law."[32] The NCAA's Due Process Clause immunity is all the more reason to hold the organization accountable under federal antitrust law.[33]

There is some sentiment for aggressive enforcement of antitrust laws in "business" situations like those in *Board of Regents* and *Law* but for deference to the NCAA rules governing amateurism. The district court in *Law* relied in part on such a distinction in finding the restricted-earnings coaches (REC) rule to be in violation of the Sherman Act.[34] However, it is difficult to view this as a principled distinction. As Professor Roberts says: "[I]t is very questionable whether antitrust or public policy is served by, in effect, giving substantially greater economic 'free

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Tarkanian sued the NCAA. *See id.* at 181. The Supreme Court, Justice Stevens writing for the majority, held 5–4 that the NCAA was a private actor and thus not bound by the strictures of the Fourteenth Amendment. *See id.* at 179. "Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards governing athlete recruitment, eligibility, and academic performance." *Id.* at 195. Justice White wrote a strong dissent, noting:

> By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body . . . and it was for that reason that UNLV suspended Tarkanian, despite concluding that many of those findings were wrong. In short, it was the NCAA's findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Tarkanian's suspension by UNLV. On these facts, the NCAA was "jointly engaged with [UNLV] officials in the challenged action," and there was a state actor.

Id. at 201–02 (White, J., dissenting) (citing Dennis v. Sparks, 449 U.S. 24, 27–28 (1980)). The author of this Note believes Justice White has the better view, but is cognizant of Ohio State Law Professor Howard P. Fink's unassailable mathematical theory of Supreme Court jurisprudence: "Five is greater than four." Professor Howard P. Fink, Civil Procedure Class Lectures at The Ohio State University College of Law (Fall 1997-Spring 1998).

[31] *See* NCAA v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993) (holding that statutes violate the Commerce Clause); Thompson, *supra* note 23, at 1652 (citing Danny Robbins, *Court Voids Nevada Law*, L.A. TIMES, June 6, 1992, at C1).

[32] Thompson, *supra* note 23, at 1652 (citing William F. Reed, *Rebel Reprieve: In a Turnaround, the NCAA Lets UNLV Defend Its Title*, SPORTS ILLUSTRATED, Dec. 10, 1990, at 46, 49).

[33] *See* Carstensen & Olszowka, *supra* note 23, at 546 (arguing that antitrust law is a better vehicle for judicial oversight of the NCAA than constitutional law would be).

[34] *See* Law v. NCAA, 902 F. Supp. 1394, 1410 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

market' protection to sports fans who watch NCAA sports and to coaches than to the young (and relatively politically powerless) athletes who produce these sports products."[35]

B. *The Analytical Framework: The Three-Pronged Model of the Rule of Reason*

The rationale for the rule of reason was stated succinctly by former Judge Bork: "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."[36] The rule of reason operates not as a true balancing test but as a shifting of the burden of proof from plaintiff to defendant and back to the plaintiff. Thus, the plaintiff must make an initial showing that an agreement has a "substantially adverse effect on competition."[37] If the plaintiff meets this burden, the defendant must "come forward with evidence of the procompetitive virtues of the alleged wrongful conduct."[38] If the defendant successfully demonstrates such procompetitive effects, the burden of proof returns to the plaintiff, who must show that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives "can be achieved in a substantially less restrictive manner."[39] The following will examine each prong of the test in turn.

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[35] Roberts, *supra* note 18, at 2645; *see also* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 257 (1990) ("Major college programs have themselves commercialized amateur athletics, usually at the expense of educational values .... Application of the antitrust laws to the NCAA's amateurism restrictions would end this hypocrisy.").

[36] NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984) (quoting ROBERT BORK, THE ANTITRUST PARADOX 278 (1978)).

[37] *Law*, 134 F.3d at 1019.

[38] *Id.*

[39] *Id.* The rule of reason test is derived from language in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918). The Court wrote:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

1. *The Plaintiff's Initial Burden of Demonstrating Anticompetitive Effects*

The Supreme Court in *Board of Regents* acknowledged that "every contract is a restraint of trade," but that "the Sherman Act was intended to prohibit only unreasonable restraints of trade."[40] Thus, as a safeguard to ensure that not every contract is adjudged to be in violation of the Sherman Act, the courts look for evidence that the anticompetitive effects are significant before finding that the plaintiff has met her initial burden of proof.[41] In cases of horizontal restraints on price or output—like the ones at issue in *Law* and *Board of Regents*—a finding of anticompetitive effects is a near certainty. "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[42] In such a case, the primary benefit to the NCAA of a rule of reason analysis is to allow the NCAA the opportunity to justify the restraint with a showing of procompetitive benefits. However, cases which do not involve horizontal restraints on price or output present plaintiffs with a substantial burden in demonstrating *significant* anticompetitive effects.[43]

2. *The Defendant's Burden of Demonstrating Procompetitive Effects*

If the plaintiff succeeds in making a prima facie case for an antitrust violation, the defendant must demonstrate that the alleged illegal conduct actually

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[40] NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984).

[41] This may be true even in cases in which the per se rule is sought to be applied. *See id.* at 103–04 & n.26 ("Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.").

[42] *Id.* at 107–08. The Court in *Board of Regents* also noted:

> The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'"

Id. at 106–07 (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)). In the NCAA context, the consumer welfare aspects of the federal antitrust laws operate primarily to narrow the scope of permissible conduct with respect to the number of contests a team is allowed to play and financial arrangements for television contracts and the like. For a more detailed discussion of other NCAA rules subject to invalidation under this rationale, see *infra* Part IV.A. Regulations like the restricted-earnings coaches rule struck down in *Law* can be viewed as harms against "person[s] . . . injured in [their] business or property by reason of anything forbidden in the antitrust laws," as forbidden by section four of the Clayton Act. 15 U.S.C. § 15(a) (1994).

[43] This is a major obstacle that Easton must clear in its lawsuit against the NCAA to avoid a grant of summary judgment for the defendant. *See infra* Part III.A.

promotes competition in some way. The classic example of procompetitive effects saving an otherwise significantly anticompetitive agreement occurred in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[44] in which the Court upheld a joint selling agreement for song rights.[45] In the context of antitrust actions against the NCAA, the organization's strongest claim as to procompetitive benefits is its interest in maintaining a competitive balance among amateur athletic teams, a justification that the Supreme Court explicitly blessed in *Board of Regents*.[46] As the Court said in that case:

> Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. It 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.[47]

If the NCAA cannot show that a challenged regulation maintains such a competitive balance, it may come forward with other justifications. However, as the NCAA found out in *Law*, courts may be less receptive to such secondary arguments.[48]

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[44] 441 U.S. 1 (1979) (involving the legality of American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) copyright licensing fees).

[45] *Id.* at 24.

[46] 468 U.S. at 117.

[47] *Id.*; *see also* Roberts, *supra* note 18, at 2654:

> The alleged procompetitive benefits of virtually every NCAA rule . . . are of two general types. First is the preservation of *amateurism*, which is procompetitive only because, as the Supreme Court noted in Board of Regents, amateurism is the essence of the NCAA members' athletic competition product . . . . Second is the promotion of *competitive balance* among the teams of the member schools, thereby enhancing the quality of the athletic competition product.

Id. However, the NCAA and its attorneys would be prudent to take heed of a caveat that appears later in Professor Roberts' Note, namely that the Supreme Court's dictum surmising that most NCAA regulations are justifiable "should not be treated with 'papal infallibility' since it does nothing but presume the outcome of factual inquiries that have never been made in the context of a legal test that has never been clearly articulated." *Id.* at 2657.

[48] *See* Law v. NCAA, 134 F.3d 1010, 1021 (10th Cir. 1998) (retaining of entry-level coaching positions, reducing costs, and maintaining competitive equity as justifications for the restricted-earnings coaches rule). These justifications will be considered in more detail. *See infra* Part II.C.

3. *Plaintiff's Burden of Presenting a Substantially Less Restrictive Alternative*

The third prong of the rule of reason presents the highest degree of unpredictability for the decision of future cases. As articulated so far, the test is vague.[49] This is due in no small part to the fact that the issue was not addressed in *Board of Regents* or *Law*. Professor Roberts has recognized that the "least restrictive alternative" (LRA) analysis is potentially devastating to the NCAA.[50] However, because the test actually requires a plaintiff to demonstrate a *substantially* less restrictive alternative, a properly conceived LRA analysis can go a long way toward securing an adequate amount of autonomy for the NCAA to promulgate rules and regulations. The greatest difficulty in defining such a test is making it sufficiently clear to serve as a guide to the NCAA about the permissible scope of its regulations.[51] Part II.C. will attempt to do just that.

C. *Fatality of the Second Prong to the NCAA in* Law

In *Law v. NCAA*, the plaintiffs—college basketball coaches affected by the restricted-earnings coaches rule—met their initial burden of showing that the rule had significant anticompetitive effects.[52] This was an easy burden for the coaches to bear, considering the nature of the restriction. As the court in *Law* pointed out, the coaches could have met their burden of establishing anticomptetitve effect either (1) "indirectly by proving that the defendant possessed the requisite market power within a defined market,"[53] or (2) "directly by showing actual anticompetitive effects, such as control over output or price."[54] Because the rule

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[49] "If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." *Law*, 134 F.3d at 1019.

[50] *See* Roberts, *supra* note 18, at 2669 ("[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule.").

[51] As noted *supra* at note 7 and accompanying text, the danger of blackmail lawsuits is very real, especially as the sharks pick up the scent of blood in the water left by *Law*. An unclear test increases the odds that plaintiffs can extract a settlement from the NCAA, which may be justifiably unwilling to run the risk of another large verdict and the prospect of treble damages.

[52] *See Law*, 134 F.3d at 1019–21. The coaches argued unsuccessfully that the court should find the restricted-earnings rule illegal per se as a horizontal price restraint. *See id.* at 1017. In this effort, the coaches tried to distinguish *Board of Regents* on the grounds that (1) the hiring of coaches involved an input rather than an output like the one at issue in *Board of Regents*; and (2) the price-fixing at issue did not involve "joint buying" because each school hired its own coaches independently. *See id.* at 1018. The Tenth Circuit rejected both of these arguments.

[53] *Id.* at 1019.

[54] *Law*, 134 F.3d, at 1019.

was a bald price restriction, the coaches were able to use the second option, making the NCAA's argument that the relevant market in the case was the entire market for men's basketball coaching services—including coaching positions in junior highs, high schools, NCAA Divisions II and III, and professional teams—irrelevant.[55] Some of the coaches whose salaries were limited to $16,000 by the rule had been paid $60,000 to $70,000 before the rule went into effect.[56]

The NCAA attempted to analogize the case to *Hennessey v. NCAA*,[57] which upheld an NCAA bylaw limiting the number of assistant coaches member institutions could employ in a particular sport. The court in *Law* rejected the analogy, noting first that the *Hennessey* case did not involve horizontal price restraints, second that the plaintiffs in *Hennessey* could not demonstrate anticompetitive effects because the rule had been too recently implemented, third that *Hennessey* predated the Supreme Court's opinion in *Board of Regents*, and fourth that *Hennessey* was a Fifth Circuit case and thus not binding on the Tenth Circuit.[58]

Because the significant anticompetitive effect of the rule was so plain, the burden quickly shifted to the NCAA to justify the rule with procompetitive benefits. The NCAA offered three such benefits: retaining of entry-level positions, reducing cost, and maintaining competitiveness. Before considering these justifications, the Tenth Circuit, professing to follow the mandate of *Board of Regents*, said, "[T]he only legitimate rationales we will recognize in support of the REC Rule are those necessary to produce competitive intercollegiate

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[55] *See id.* at 1019–20 & n.12. As the court in *Law* noted, the Supreme Court rejected a nearly identical argument from the NCAA in *Board of Regents*. *See id.* at 1020 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984)).

[56] *See* Recent Case, 20 (3) ENT. L. REP. 14, *available in* WESTLAW.

[57] 564 F.2d 1136 (5th Cir. 1977) (per curiam).

[58] *See Law*, 134 F.3d at 1020–21. The third point (that *Hennessey* predated *Board of Regents*) is probably the most significant. The restraints in both *Law* and *Hennessey* were horizontal restraints on input; the only difference was that restrictions on the number of coaches did not constitute price-fixing. Although the plaintiffs in *Law* did not challenge NCAA restrictions on the number of coaches, the validity of such restrictions would seem to be in doubt after *Law*, unless the courts draw a definitive line between price-fixing (which would remain a violation of the antitrust laws) and other nonprice restraints on inputs and outputs (which would remain within the NCAA's power to enact and enforce). Those possibilities will be discussed. *See infra* Part IV.

sports."[59] It was under this formulation that the Tenth Circuit evaluated the NCAA's offered justifications.

The court found the "retention of entry-level positions" justification lacking for several reasons, not the least of which was that the NCAA could not produce any facts to show that the restricted-earnings rule operated to provide such positions. The court noted that some universities had relegated coaches with many years of experience to the role of restricted-earnings coach. For a coach who made $60,000 before the rule took effect, a reduction in salary to $16,000 represents a pay cut of nearly 75 percent. Because the evidence showed that some coaches were in fact faced with that situation, the court recognized that the NCAA's rationale that the REC rule would prevent some teams from hiring four experienced coaches instead of three was disingenuous.[60] As an added ground for rejecting the rationale, the court noted that the REC rule did not "foster[ ] the amateurism that serves as the hallmark of NCAA competition."[61] Finally, the court held that even if the REC rule did in fact allow younger, inexperienced coaches to obtain otherwise unattainable entry-level coaching positions in Division I programs, that argument was not legally cognizable unless the opening of such positions had an impact on competition.[62]

The NCAA's second proffered justification for the rule was that it would cut costs for financially strapped athletic programs.[63] The fatal flaw of this argument is that it assumes free competition for coaches will have a detrimental effect upon the quality of the product—in this case college basketball—a line of reasoning foreclosed by the existence of the Sherman Act itself.[64] Additionally, the NCAA argued that reducing costs could be considered procompetitive because cost

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[59] *Law*, 134 F.3d at 1021 (citing *Board of Regents*, 468 U.S. at 117). Phrased as it was, the passage suggests that this standard of *necessity* will be a demanding one for the NCAA to meet. However, as noted previously, Justice Stevens' opinion in *Board of Regents* stated explicitly (again, in dicta) that "most of the regulatory controls of the NCAA are *justifiable* means of fostering competition...." *Board of Regents*, 468 U.S. at 117 (emphasis added). This dichotomy between what is *reasonable* and what is *justifiable* is one of the oldest debates in the nation's history, going back at least to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–15 (1819) (interpreting the meaning of the "necessary and proper clause," U.S. CONST. Art. I § 8 cl.17). As Justice Marshall said in that famous opinion, "Let the end be legitimate... and all means which are appropriate... are constitutional." *Id.* at 421. The analogy to NCAA regulations as they relate to the antitrust laws is not perfect, but some similarly expanded version of the term "necessary" must be adopted, unless nearly every NCAA regulation is to be invalidated, an outcome clearly not contemplated by the Supreme Court in *Board of Regents*.

[60] *See Law*, 134 F.3d at 1022.

[61] *Id.* at 1022 n.14.

[62] *See id.* at 1021–22.

[63] *See id.* at 1022.

[64] *See id.* at 1022–23 ("[T]he NCAA cannot argue that competition for coaches is an evil because the Sherman Act 'precludes inquiry into the question whether competition is good or bad.'") (quoting National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978)).

reduction was "necessary to maintain the existence of competitive intercollegiate sports."[65] As support for this argument, the NCAA again relied on *Hennessey*, and again the pre-*Board of Regents* Fifth Circuit case failed to persuade the Tenth Circuit, which parried the thrust of this argument with more language from *Board of Regents*:

> [T]he REC Rule does not equalize the overall amount of money Division I schools are permitted to spend on their basketball programs. There is no reason to think that the money saved by a school on the salary of a restricted-earnings coach will not be put into another aspect of the school's basketball program, such as equipment or even another coach's salary, thereby increasing inequity in that area.[66]

Finally, the court addressed the NCAA's argument that the REC rule would foster competitive balance among Division I basketball programs by "preventing wealthier schools from placing a more experienced, higher-priced coach in the position of restricted-earnings coach."[67] The court rejected this argument as well, suggesting that even experienced coaches would accept a restricted-earnings coach position at a powerhouse school like Duke or North Carolina because of the "national prominence" of the basketball programs of those schools.[68] The fact

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[65] Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998).

[66] *Id.* at 1023 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 118–19 (1984)). The court in *Law* quoted Professor Roberts' cogent criticism of this rationale: "If holding down costs by the exercise of market power over suppliers . . . is a procompetitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law." *Id.* (quoting Roberts, *supra* note 18, at 2643).

[67] *Id.* at 1024.

[68] *See id.* at 1024 n.15. Perhaps an even more important factor than the prominence of the school is the reputation of the particular head coach under whom the assistant serves. For example, the coach at Duke University, Mike Krzyzewski, is well-known as a protégé of venerable Indiana coach Bob Knight. Because of the "good ol' boy network" that tends to be used to fill head coaching vacancies when they arise—and because of the staggering number of potential applicants for every position—service under a patriarch like Knight or former North Carolina coach Dean Smith can mean the difference between attaining that first head coaching job and toiling for years or decades more as an assistant. *See, e.g.*, Tom Verducci et al., *Scorecard*, SPORTS ILLUSTRATED, Dec. 7, 1998, at 29:

> Citing [Miami Dolphins head football coach] Jimmy Johnson's five former assistants who became head coaches for NFL or college teams, the Dolphins' media guide trumpets Johnson as "Coach to Coaches." But the records of his pupils . . . aren't nearly as immaculate as their master's mane [Johnson is renowned for his helmet-like hairstyle, which appears at all times to be impervious to wind, rain, and blunt objects]. No one should confuse Johnson with, say, Bill Walsh, whose proteges have a .554 winning percentage in the NFL.

Id.

that the language of the NCAA rule did not require restricted-earnings coaches to be young or inexperienced led in part to the court's conclusion that "the REC Rule is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance."[69]

D. *The Road Not Traveled: The Third Prong and Its Inherent Uncertainty*

Because of the Tenth Circuit's holding that the NCAA had not met its burden as to the second prong of the rule of reason test for antitrust violations, the court found it unnecessary to advance to the third prong, which requires the plaintiff to "prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."[70] This prong could be problematic for the NCAA because it is a vague and unsettled area in the law, creating the potential for stunningly broad liability (which is of course trebled under the antitrust laws) regarding an array of NCAA rules and regulations.[71] However, for good or ill, tests like these are prevalent in the law,[72] and their reasonable degree of workability in other contexts suggests that they may be able to provide sufficient clarity in this context as well.[73]

Although this example includes professional football coaches, Johnson had a long and distinguished career as a college football coach before entering the coaching ranks in the National Football League, and two of his protégés—John Blake and Butch Davis—took over the reins of college programs. In any event, it is illustrative of the fact that the cognoscenti of the sports world keep track of these minutiae.

[69] *Law*, 134 F.3d at 1024.

[70] *Id.* at 1019.

[71] *See* Roberts, *supra* note 18, at 2670 ("The content of the LRA doctrine today is so hollow that it can be used in almost any case to strike down otherwise procompetitive rules.").

[72] It has been suggested that the proliferation of balancing tests is due to the increasingly central role of timid law clerks in drafting Supreme Court opinions. *See* Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY, Mar. 13, 1998, at 1A (noting that "an increasing number of scholars say that in the last decade, because of the clerks, the court's opinions have become more timid and turgid, lengthier and full of partial concurrences and complex balancing tests"). Whether or not this is true (and the ancillary question of whether this is a good or bad thing) are issues well beyond the scope of this Note. Suffice it to say that the balancing tests exist, and it is incumbent upon the courts to solidify these doctrines to the extent possible and upon entities like the NCAA to anticipate the outcomes of future cases based on the available case law.

[73] One example of an often-used balancing test occurs in the analysis of dormant Commerce Clause cases. The leading case is *Pike v. Bruce Church*, 397 U.S. 137 (1970). In that case, a unanimous Court held: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. By contrast, facially discriminatory laws lead to

Perhaps the most instructive analogy in an effort to provide tangible and substantive content to the "substantially less restrictive alternative" prong of the rule of reason is a line of cases dealing with government regulation of commercial speech. In *Central Hudson Gas v. Public Service Commission*,[74] the Supreme Court held that the government may regulate commercial speech if, inter alia, the regulation is "not more extensive than is necessary to serve [a substantial government] interest."[75] The "not more extensive than is necessary" language rightly raised the specter of a judicial test that would be virtually impossible for a government entity to meet in its attempts to justify a restriction on commercial speech.[76] In 1989 the Court substantially quelled these fears by clarifying the test in *Board of Trustees, State University of New York v. Fox*.[77] Justice Scalia, writing for the majority, expressly held that the *Central Hudson* test did not require the government to use the "least restrictive alternative," but required only "a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable . . . that employs . . . a means narrowly tailored to achieve the desired objective."[78]

The third prong of an effective rule of reason analysis of antitrust laws should seek out a golden mean between a true "least restrictive alternative" test and the glorified rational basis test that Justice Scalia put forth in *Fox*.[79] The reasons are

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a rule of per se invalidation. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978). The analogy to antitrust cases is thus a strong one, in that price-fixing is normally deemed a per se violation of the Sherman Act (absent special circumstances), and closer cases are adjudicated under the rule of reason, with its shifting burdens of proof and ultimate balancing of anticompetitive effects and procompetitive benefits.

74 447 U.S. 557 (1980).

75 *Id.* at 566.

76 In the commercial speech context contemplated by *Central Hudson*, the burden remains on the government to demonstrate that no other course of action would be less restrictive. *See id.* at 564. The fact that under rule of reason analysis the burden rests with the plaintiff to demonstrate that an alternative would be "substantially less restrictive," appears to provide a greater degree of protection to defendants in antitrust actions.

77 492 U.S. 469 (1989).

78 *Id.* at 480 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

79 Justice Scalia's attempt to pass off Justice Powell's strongly worded statement in *Central Hudson* that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive" as "dicta" is singularly unconvincing. *Fox*, 492 U.S. at 476. His characterization of the rule he created in *Fox* as "far different" from the rational basis test employed in the context of the Equal Protection Clause of the Fourteenth Amendment is only slightly more persuasive. *See id.* at 480. "Slightly distinguishable" would have been a more accurate description. All this is not to say that Justice Scalia did not have valid reasons for limiting the *Central Hudson* test in a manner highly favorable to state government. After all, in *Central Hudson* and in *Fox*, the Supreme Court was exercising its much-maligned power of judicial review—a power the Court has always used cautiously, even sheepishly. Perhaps even 200 years later, the Court still harbors doubts about the doctrinal validity of the famous case that imbued the Court with the power to review

simple. Literally construed, the least restrictive alternative test could conceivably lead to the downfall of every NCAA rule and regulation,[80] while a test requiring only a "reasonable fit," or a "means narrowly tailored" to achieve a legitimate purpose would provide a safe harbor for any NCAA regulation that could meet the second prong of the rule of reason. This middle-of-the-road approach would bolster the clarity of the test, and provide redress for victims of unjustified anticompetitive practices by the NCAA without destroying the organization piecemeal, one bylaw at a time.[81]

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legislation for compliance with the Constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The difference between a case like *Central Hudson* and one like *Law* is that, in the latter situation, the Court is enforcing (in this case federal) law rather than considering whether to invalidate it. The only thing in danger of being struck down is a rule or bylaw approved by a private unincorporated association. Unlike statutes passed by a publicly elected body of representatives, NCAA rules—especially those concerned with commercial activity—are not entitled to the presumption of validity that state and federal legislation enjoy. As a result, it is proper for courts to construct a somewhat more strenuous "least restrictive alternative" test in the antitrust context than in cases in which state or federal laws are challenged on constitutional grounds. To put it another way, a court finding that an agreement among members of an unincorporated association is a "combination . . . in restraint of trade or commerce" cannot give rise to concerns of "Lochnerism," the pejorative term widely used to describe excessive judicial scrutiny of duly enacted legislation—especially economic legislation. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down a New York state law limiting the working hours of bakery employees to 10 hours per day and 60 hours per week).

[80] *See* Roberts, *supra* note 18, at 2669 ("[T]he LRA doctrine would likely be the death knell for virtually every NCAA rule."). There are three answers to this apocalyptic forecast: (1) there is a strong possibility that some classes of NCAA regulations will be held not subject to antitrust scrutiny; (2) it is likely that some (if not many) NCAA regulations would be able to withstand the first prong analysis—in other words, plaintiffs in many cases may be unable to demonstrate *significant* anticompetitive effects; and (3) the "least restrictive alternative" language that has been used in the cases likely will be softened when the third prong is called into practice.

[81] The need for antitrust laws to apply to the NCAA cannot be underestimated, in light of the organization's hard-nosed tactics. For example, when member schools of the CFA signed an independent deal with NBC in 1981 for broadcast rights to games, the NCAA publicly threatened disciplinary action against any CFA member school that complied with the contract. *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 94–95 (1984). "The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well." *Id.* at 95. Remember, also, that an NCAA decision to punish say, The Ohio State University's basketball teams for the actions of the football team would be immune from any Due Process challenge. *See supra* note 30 and accompanying text. If the NCAA could evade scrutiny under the antitrust laws, consumers, universities, and athletes would be at the mercy of an autonomous organization accountable to no one. On the other hand, a clearly defined rule of reason test could ensure that unworthy plaintiffs do not coerce the NCAA into blackmail settlements by allowing the NCAA to be more certain as to what kinds of rules and regulations they may legally promulgate.

The question of what constitutes a "substantially less restrictive manner" of regulation is admittedly a thorny one.[82] However, the problem is not intractable. Most cases of price-fixing will never reach the third prong because the NCAA faces a formidable barrier in justifying such restraints under the second prong.[83] Rules of competition and requirements for eligibility appear to be relatively safe from invalidation, the former because the NCAA must set parameters for the size of the field, number of players, and types of equipment allowed to be used in order for the contests to commence at all,[84] and the latter because of the NCAA's unique position as the promoter of amateur athletic competition, a quality it uses to differentiate itself from professional sports.[85]

Therefore, only the truly borderline cases will ever reach the third prong. In those instances, it is better for individual judges to have some doctrinal leeway to weigh the equities of the case and arrive at the proper result. Professor Roberts predicts that "we are probably doomed to a future where random challenges to NCAA rules will succeed or fail based largely on the appeal of the plaintiffs and the personal predilections of the judge, and where the legal doctrine is so vague and malleable that any result is possible."[86] To a certain extent, that probably has

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[82] Indeed, Professor Roberts seems to suggest the problem is insurmountable. *See* Roberts, *supra* note 18, at 2669–71 (asking thoughtful questions as to what type of showing plaintiffs will be required to make to satisfy the third prong of the rule of reason).

[83] At the same time, there must be some hypothetical case in which a restraint on output could be justified, or there would be no point in giving the NCAA a chance to try. The rule of reason analysis would revert to a per se rule of invalidity, an approach the Supreme Court considered carefully and expressly rejected in *NCAA v. Board of Regents*. It is possible that certain restraints on inputs and outputs—especially those that do not amount to price-fixing—could survive rule of reason scrutiny, e.g., limits on the number of games teams are allowed to play each season and limits on the number of coaches NCAA member schools can employ in each sport. Those situations will be considered. *See infra* Part IV.

[84] This appears to be the classic example of a "horizontal restraint on competition" that is "essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. Therefore, it is unlikely that Easton can prevail in its antitrust action against the NCAA, a topic that will be fully discussed. *See infra* Part III.

[85] It is relatively common knowledge that many, if not most, Division I caliber athletes select their institution of higher learning based primarily on the coach or school for whom they want to play, although Justice White failed to recognize this in his dissenting opinion in *Board of Regents*: "[T]he television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice . . . ." *Board of Regents*, 468 U.S. at 136 (White, J., dissenting). While this may have been true when the "Whizzer" chose to attend the University of Colorado, where he starred in football and basketball, it would be difficult to say that it is true today. Nevertheless, the NCAA continues to provide amateur competition, and any rule that tends to preserve the amateur status of the athletes or govern the academic standards for their admission or eligibility is necessary (or at least justifiable) for maintaining a system of amateur athletics.

[86] Roberts, *supra* note 18, at 2674. It is worth noting that Professor Roberts followed the above sentence with this one to conclude his Note: "But perhaps that is not so unusual for our

always been true in certain areas of the law and probably will continue to be so. However, because of the strong reasons for applying antitrust laws to the NCAA,[87] and because a properly conceived rule of reason can alleviate these concerns to a great extent,[88] the problem is not insurmountable.

III. THE RULE OF REASON APPLIED TO THE EASTON AND ADIDAS SUITS

In the aftermath of the *Law* verdict, at least two major antitrust suits have been filed against the NCAA, both by athletic equipment companies. Easton, a baseball bat producer, claims that NCAA regulations set to go into effect in the year 2000, which will require aluminum bats to perform more like wooden ones will render obsolete the line of aluminum bats Easton currently sells. Adidas, a shoe company, is challenging NCAA Rule 12.5.5, which limits the size of corporate logos on team uniforms to 2.25 square inches. Adidas claims its corporate logo will not fit into so small a space, and that the rule, therefore, is an unlawful restraint of trade in violation of the Sherman Act. This Part of this Note will consider these lawsuits in turn, to consider their validity and potential impact upon the way the NCAA regulates intercollegiate athletic competition. An analysis under the rule of reason leaves very little chance for Easton to succeed in its lawsuit, and Adidas' case is only slightly stronger.[89]

A. *No Joy in Mudville*[90]

The NCAA's new bat specifications for college baseball are scheduled to take effect in spring 2000. The regulations are designed to make the aluminum bats NCAA teams will use in games perform more like wooden ones, making the game "safer and less offensive-minded."[91] Easton contends that it will suffer $79

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legal system." *Id.* The very nature of antitrust law—and indeed all types of business law—is bound to be more vague and amorphous than, e.g., most street crime. Murder is illegal; everyone knows it and almost anyone could define it with a reasonable degree of accuracy. But ask 100 lay people (or 100 lawyers, for that matter) to define a combination or contract that is an unreasonable restraint of trade and one is bound to receive 100 different answers—or at least 50 different answers and 50 blank stares.

87 *See supra* notes 23–35 and accompanying text.

88 The proposed third prong will be applied to various NCAA rules. *See infra* Parts III, IV.

89 This is true even though Adidas has already lost on a motion for a preliminary injunction. *See* Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275, 1277 (D. Kan. 1999). Adidas also lost round two when the district court granted the NCAA's motion for judgment on the pleadings. *See* Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097 (D. Kan. 1999). The Easton case is set to go to trial in June 2000, and Easton also apparently has sought a preliminary injunction. *See* Paul Marino, *Aluminum Foil/NCAA: New Rules on Bats Will Correct the Overkill*, NEWSDAY, Apr. 4, 1999, at C13.

90 *See generally* ERNEST LAURENCE THAYER, CASEY AT THE BAT (1964).

91 Rock, *supra* note 7.

million in damages due to implementation of the new specifications and seeks a judgment for that amount threefold. According to one newspaper report describing the amended complaint, Easton alleges that:

> [It will] lose substantial sales during the 1999 season because many players will not wish to buy bats which will shortly become obsolete.... Easton will also suffer a significant loss of market position because its current market position is based substantially on its competitive advantage in innovation and production of high-quality bats, an advantage that will disappear once these bats are banned.[92]

Considered under the rule of reason, as it certainly would be, this case presents formidable problems for Easton. In fact, it is difficult to imagine this lawsuit surviving a motion for summary judgment. As an initial matter, Easton bears the burden of demonstrating that the new rules produce *unreasonable* anticompetitive effects.[93] The Supreme Court in *Board of Regents* offered a strong clue that challenges to NCAA rules of contest are not the type of regulations subject to invalidation under the Sherman Act:

> [T]he NCAA and its member institutions market... 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.[94]

It seems clear that a rule defining specifications for baseball bats tracks

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[92] *Id.* (quoting Easton's amended complaint).

[93] *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984) (noting that the Sherman Act prohibits only "unreasonable" restraints of trade). Moreover, in the Third Circuit (or in any other court that has adopted the Third Circuit rule), courts likely would consider the threshold question whether federal antitrust laws are applicable to NCAA rules of contest. *See* Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); *see also supra* notes 19–24 and accompanying text (discussing the "noncommercial objective defense"). Because the objective of such rules is to regulate the athletic contests themselves—creating a "level playing field" perhaps even in a literal sense—there may be strong reasons not to subject such rules to antitrust scrutiny. The NCAA's objective in passing the baseball bat regulation was noncommercial, in stark contrast to the restricted-earnings coach rule. In *Law*, the NCAA asserted "cost reduction" as a justification for the restricted-earnings coach rule. *See* Law v. NCAA, 134 F.3d 1010, 1022–23 (10th Cir. 1998). This assertion, while candid, was devastating to the NCAA's case; it basically served as an admission that the organization employed illegal means of reducing costs under federal antitrust law.

[94] *Id.* at 101. As noted previously, this passage is dicta. However, its prominence within the opinion and the strength of the terms in which the passage is stated suggest that it would take a substantial amount of judicial backtracking to avoid the impact of such strong language.

closely the Supreme Court language concerning "rules on which the competitors [have] agreed to create and define the competition to be marketed,"[95] and is highly analogous to "the size of the field"[96] and "the number of players on a team."[97] As a practical matter, a holding that the bat regulation opposed by Easton is an "unreasonable restraint of trade"[98] forbidden by the Sherman Act would open wide the courthouse door for any number of spurious legal challenges to NCAA rules that must be established before there can be any product, i.e., athletic competition, at all.[99] The baseball bat regulation is a restraint of trade only in the technical sense that every contract is a restraint of trade; it is not the type of trade restraint the antitrust laws were enacted to prevent.[100]

Even assuming, arguendo, that Easton could meet its initial burden of demonstrating significant anticompetitive effects—an unlikely proposition—the

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See* 15 U.S.C. § 1 (1994).

[99] If the NCAA may not regulate the type of bats to be used in baseball and softball games, then why should it be allowed to limit the size of a basketball court? If Easton were to prevail on its antitrust suit, there would be nothing to prevent hardwood basketball floor manufacturers from winning an antitrust verdict against the NCAA based on the theory that such a limitation is an "unreasonable restraint of trade," and that without the limitation they would have been able to achieve greater sales and profits. Such a result would be inconsistent with Supreme Court jurisprudence which has consistently read the word "unreasonable" into the Sherman Act to prevent literally every contract from becoming a violation. *See Board of Regents*, 468 U.S. at 98 & n.17 (noting that the Sherman Act was designed to prohibit "only unreasonable restraints of trade" and citing Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342–43 (1982); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978); Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918)). *Board of Trade of Chicago* is the seminal case. Justice Brandeis wrote the opinion in the 8–0 decision (Justice McReynolds did not participate):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade . . . restrains . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Board of Trade of Chicago, 246 U.S. at 238.

[100] Even Professor Roberts, whose general forecast predicted the susceptibility of large portions of the NCAA rules, noted: "It would require an active imagination to claim that any of the rules [of contest] violate the rule of reason." *See* Roberts, *supra* note 18, at 2648. Professor Roberts divided all NCAA rules into six categories: structural/operational, amateurism, academic eligibility, staff conduct, production and output, and contest. *See id.* at 2647–48. The Adidas case, discussed in *infra* Part III.B., does not fit neatly into any of these categories, but implicates amateurism, staff conduct, and production and output, all categories of rules which Professor Roberts contends possess "significant anticompetitive effects." *Id.* at 2648.

procompetitive benefits of the rule are likely to be sufficient for the NCAA to carry its burden under the second prong. This is true even though the nature of the primary procompetitive benefit is the somewhat intangible improvement to the quality of the actual competition between NCAA baseball teams on the field of play. When one considers that the University of Southern California defeated Arizona State in the 1998 NCAA College World Series championship game 21–14, in a game that saw nine home runs hit by eight different players,[101] the concern that high-tech aluminum bats have made the game too offensive-minded appear to be legitimate.[102] There is an additional safety justification for the bat changes. The metal alloy bats currently in use can send the ball back toward the pitcher at speeds of up to 113 miles per hour.[103] The new bat specifications are designed to limit that speed to 93 miles per hour,[104] and it is hoped that the difference will result in fewer injuries, especially to pitchers.[105]

B. *All Day I Dream About Suing*

Whether the anticompetitive effects of NCAA Rule 12.5.5 are unreasonable in the Adidas case is a closer question than in the Easton suit, and potentially more pivotal, because if Adidas succeeds on the first prong, it will be much more difficult for the NCAA to demonstrate procompetitive benefits of the restriction limiting corporate logos on team uniforms to 2.25 square inches. The district

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[101] *See* Al Toby, *NCAA Set to Swing at Metal Bats*, CHI. TRIB., Aug. 12, 1998, at 1 (posing the question whether "improved equipment jeopardize[s] the 'integrity' of the game").

[102] *See, e.g.*, *ISU, IWU Coaches Like NCAA Bat Rule: Metal Alloy Bats to Perform More Like Wood Bats Beginning in August, 1999*, THE PANTAGRAPH (Bloomington, Ill.), Aug. 13, 1998, at B3. This article described the reaction to the game of Illinois Wesleyan baseball coach Dennis Martel, who called the game "disgraceful," and Illinois State coach Jeff Stewart, who saw the score flash across his television screen, but assumed it was "an old football score." *See id.* (internal quotation marks omitted).

[103] *See id.*

[104] *See id.*; *see also* John T. Dauner, *Bat Maker Is Suing NCAA: Proposed Design Change Is Considered Unfair*, KAN. CITY STAR, Aug. 11, 1998, at C7.

[105] *See id.* (quoting NCAA general counsel Elsa Cole as saying, "Scientists tell us pitchers need .4 seconds to react to the ball .... The ball today [reaches] the pitcher's mound in .32 seconds.") (internal quotation marks omitted); *see also* Alan Schmadtke, *Going Batty*, ORLANDO SENTINEL, Feb. 14, 1999, at C13. This article pointed to these incidents as evidence of the dangerousness of the high-tech baseball bats:

> Arizona State's Ryan Mills had his jaw broken by a line drive in his first career start in 1996 .... Also in '96, Houston pitcher Danny Crawford needed 62 stitches to close a gash in his face. He lost five teeth; one was found near the shortstop's area a few days later .... Last year, two Japanese high school pitchers were killed after being struck in the head by line drives off American-made bats ....

Id. (citations omitted).

court never reached this question when it considered Adidas' motion for a preliminary injunction; the court denied relief to Adidas based on the noncommercial objective defense.[106] Because the theoretical basis for this judicially created exemption from antitrust scrutiny is questionable,[107] this Part will proceed to analyze the regulation under the rule of reason.

Adidas argued in its motion for preliminary relief that the NCAA "unreasonably restrained trade and engaged in a group boycott . . . and . . . attempted to monopolize."[108] Perhaps a stronger argument is that Rule 12.5.5 will lead to a misallocation of resources[109] in that Adidas' advertising budget will not be spent as efficiently as it would be without the rule.[110] Adidas must make a prima facie showing of this type of anticompetitive

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[106] *See* Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275, 1285 (D. Kan. 1999) (stating that Bylaw 12.5.5 would not be scrutinized for compliance with the Sherman Act "because the bylaw, like the eligibility rules, has neither the purpose nor the effect of giving the NCAA or its member institutions an advantage in any commercial transaction"). The district court dismissed Adidas' claims on the merits based on its inadequate definition of the relevant product market. *See* Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999). Because market definition is not the focus of this Note, the discussion of the Adidas suit assumes a narrowly drawn market definition. Nevertheless, the importance of market definition in rule of reason antitrust cases cannot be overemphasized, and lawyers on both sides of an antitrust suit must give the issue due consideration and care.

[107] *See supra* note 18 and accompanying text (questioning whether sports fans should be granted greater antitrust protection than college athletes).

[108] *Adidas*, 40 F. Supp. 2d at 1282–83. This is essentially a transfer of wealth argument.

[109] As noted previously, misallocation of resources is the primary evil that section one of the Sherman Act is designed to prevent.

[110] Transfers of wealth are also widely regarded as antitrust evils. However, as Professor Roberts points out, this proposition is not universally accepted, especially among economists. *See* Roberts, *supra* note 18, at 2650 & n.47 ("'Although the economist is generally unwilling to say that this redistribution of wealth results in a welfare loss to society, this is probably the most prominent reason that the public and perhaps Congress have condemned monopoly power. From the economist's viewpoint, the greatest evil of monopoly is wasted resources.'") (quoting E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 67 (3d ed. 1994)). In the classic monopoly situation, wealth is transferred from consumers to producers through the use of contracts or combinations in restraint of trade, i.e., price fixing, output quotas, etc. *See* Roberts, *supra* note 18, at 2650 (noting that "typical" wealth transfers are from consumers to producers). This can readily occur when there is essentially one seller of a product or service—a monopoly. *Law* represents a case in which the NCAA wielded monopsony power; monopsony is "a condition of the market in which there is but one buyer for a particular commodity." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990); *see also* Roberts, *supra* note 18, at 2643 (defining monopsony power). Thus, in *Law* wealth was transferred from producers (the coaches) to consumers (member institutions of the NCAA). As Professor Roberts notes, such a situation could actually lead to lower prices for the ultimate consumer, the college sports fan. *See id.* However, Professor Roberts agues that "monopsony power is still harmful overall to consumer welfare due to its effect of misallocating society's resources and thus diminishing consumer choice." *Id.* This issue will be reconsidered briefly. *See infra* Part IV, when restrictions on the number of coaches for each sport are examined.

effect before the burden would shift to the NCAA to justify the rule by demonstrating its procompetitive benefits.

The first prong inquiry under the rule of reason in a case like the Adidas suit would be much more complex than the analyses of this issue in *Board of Regents* or *Law*. Because those cases involved horizontal restraints on output (*Board of Regents*) and price (*Law*), the Supreme Court and the Tenth Circuit applied a "quick look" rule of reason analysis to find that the rules produced significant anticompetitive effects.[111] In the absence of such clearly anticompetitive conduct, the court must engage in a searching and often tedious factual examination of market power,[112] which the Supreme Court in *Board of Regents* defined as "the ability to raise prices above those that would be charged in a competitive market."[113] That such an inquiry will almost certainly be required if the Adidas case reaches trial, places the NCAA in a much stronger position than it was in either *Board of Regents* or *Law*.[114] While it is impossible to predict accurately the

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[111] *See* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984): "[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" (quoting National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)); *see also* Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998):

> A plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price. A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis.

Id. (citations omitted).

Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces.

[112] To assess market power, the court first must determine what is the "relevant market." Normally, the court will define a "relevant product market" and a "relevant geographic market." *See, e.g.*, Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996).

[113] NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984) (citations omitted). Of course, in monopsony situations like the one at issue in *Law* (and discussed *supra* note 110), the relevant inquiry is whether the defendant's market power allowed the defendant to lower prices below what they would have been in a competitive market.

[114] Because courts are likely to employ the "quick look" analysis in cases involving price-fixing and restraints on output—which leads to a virtually automatic finding of anticompetitive effects—it may not be readily apparent what benefit the NCAA gains from having such regulations analyzed under the rule of reason. The major difference between a per se rule of invalidity and the "quick look" rule of reason approach is that the latter affords the defendant the opportunity to put forth procompetitive benefits of the restraint, while the former does not.

outcome of such an inquiry without carefully considering the facts that would be put in issue in this case, the NCAA's position that Rule 12.5.5 creates no significant anticompetitive effects is certainly defensible under the first prong of the rule of reason.[115]

However, if Adidas prevails under the first prong, it will be difficult for the NCAA to counter the anticompetitive effects of the rule with procompetitive benefits. Based on comments made by NCAA general counsel with regard to the Adidas suit,[116] it is likely that the asserted procompetitive benefit of the rule would be preservation of the amateurism of the college athlete.[117] The problem with this rationale is that the NCAA has already "crossed the Rubicon"[118] by

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See AREEDA & HOVENKAMP, *supra* note 19, ¶ 320b, at 50; Jay P. Yancey, Comment, *Is the Quick Look too Quick?: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. KAN. L. REV. 671, 677 (1996) (noting that "[t]he per se rule does not consider justifications or reasonableness of challenged conduct").

[115] The NCAA has a plausible argument that the "relevant product market" for determination of whether the NCAA wields market power is the advertising market for athletic shoes and apparel. Indeed, as noted *supra* note 89, the district court dismissed the case on market definition grounds. This is in stark contrast to the situations that existed in *Board of Regents* and *Law*, in which the courts basically inferred market power from the fact that the NCAA had placed numerical limits on outputs and prices. *See* Roberts, *supra* note 18, at 2638–39. While the issue of whether the NCAA wields market power in the athletic shoes and apparel market cannot be settled within the pages of this Note, the fact that the court will not presume the issue against the NCAA works in the defendant's favor.

[116] "Our position is that higher education doesn't want athletes to become billboards for commercial purposes." SEATTLE TIMES, Nov. 14, 1998, at B2 (quoting NCAA general counsel Elsa Cole).

[117] The Supreme Court in *Board of Regents* gave this justification its blessing:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.

NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101–02 (1984). Because the rule struck down in *Board of Regents* did not implicate amateurism concerns, this passage is dicta. It appears to have been written to provide assurance that the Court's holding would not lead to the invalidation of all NCAA rules. The NCAA presumably would expect the amateurism justification to do some heavy lifting in future cases challenging NCAA rules limiting compensation for athletes, as well as eligibility rules.

[118] In 49 B.C., Julius Caesar led his army from his province of Cisalpine Gaul across the Rubicon, a small river in northwest Italy marking the boundary between the two provinces. Because it was a violation of Roman law for a general to march out of his province with his army in tow, Caesar's action made war with Pompey and the Roman Senate inevitable. *See* OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 1261 (3d ed. 1996). "Thus, to 'cross the Rubicon' is to commit oneself irrevocably to a course of action." *Id.*

allowing corporations to advertise on team jerseys at all.[119] If the NCAA were truly interested in preserving the amateur character of its product, one might expect that it would ban corporate logos completely from the uniforms of college sports teams.[120] In addition, Adidas officials have pointed out that the NCAA markets "everything from Final Four seat cushions to commemorative key chains," making its claims of purity "disingenuous."[121] Finally, it must be noted that corporate sponsorship of college football bowl games is pervasive, damaging any NCAA claim that it seeks to protect its athletes from serving—at least indirectly—as corporate spokespeople.[122]

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[119] For example, the Ohio State football team advertises Nike with a "swoosh"—the shoe company's trademark symbol—on the front of its jerseys. NCAA regulations impose a limit of one logo per uniform. *See* Steve Rock & John T. Dauner, *Shoemaker Adidas Latest to Sue NCAA*, KAN. CITY STAR, Nov. 13, 1998, at D1. However, in addition to the Nike shoes themselves, many players also wear Nike gloves and wrist bands, all of which also display the swoosh logo conspicuously. This may go undetected by fans who attend the games, but those who are watching on television or reading about their favorite teams in a newspaper or magazine are apt to be assaulted by swooshes. It is not uncommon to see still photographs of a single player displaying five swooshes.

[120] Such a no-logo policy would advance not only the presumably valid procompetitive effect of promoting amateurism, but might also promote "competitive equity between member institutions in order to produce a marketable product...." Law v. NCAA, 134 F.3d 1010, 1023–24 (10th Cir. 1998). The court's implicit recognition that fostering competitive equilibrium is an acceptable procompetitive benefit of an otherwise anticompetitive restraint follows from the Supreme Court's language in *Board of Regents* agreeing that "the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important...." *Board of Regents*, 468 U.S. at 117. As former NCAA President Gene Corrigin has said: "Everything the NCAA has done is to create a level playing field so the Notre Dames and Michigans and [North Carolinas] don't win everything every year." Suggs & Lombardo, *supra* note 10. Of course, allowing universities to sell advertising space on their jerseys only serves to exacerbate the disparity between the "haves" and "have-nots." The three primary companies currently buying such advertising space—Nike, Reebok, and Adidas—are more likely to seek out high-profile schools whose athletic teams appear on television often. Even if shoe companies were to make similar deals with less prolific schools, those schools would not be able to command the same dollar amounts that the Michigans and Notre Dames of the world collect. In short, it appears that the only procompetitive benefit the NCAA could claim for the restriction is that of preserving amateurism, a flimsy argument to the extent that in order to believe it, one must believe that the allowance of one small corporate logo protects the amateurism of college athletes, but that allowing more than one logo or a larger single logo would not.

[121] Jeff Manning, *Adidas Sues the NCAA to Keep Its Three Stripes on Uniforms*, PORTLAND OREGONIAN, Nov. 13, 1998, at B1. "This notion that they've got their finger in the dike against a flood of commercialism... it's sort of tough for us to listen to that with a straight face." *Id.* (quoting Adidas lawyer Susheela Jayapal).

[122] The Rose Bowl is the only major bowl game that has never had a corporate sponsor. For a full listing of corporate sponsorship of bowl games, see the 1998 ESPN INFORMATION PLEASE SPORTS ALMANAC 181–87 (1997): Fiesta Bowl (Sunkist Citrus Growers (1986–1991), IBM OS/2 (1993–1995), Frito-Lay Tostitos chips (since 1996)); Sugar Bowl (USF&G

Adidas' claim is novel in that most of the opinions considering alleged antitrust violations by the NCAA dealt with claims brought by athletes or coaches.[123] For that reason alone, the outcome of the case is difficult to predict. But careful examination of rule of reason jurisprudence as it relates to claims against the NCAA suggests: (1) that it will be more difficult for the plaintiff to carry its initial burden of making out a prima facie case of significant anticompetitive effects;[124] and (2) that if Adidas can meet this burden, it will be difficult for the NCAA to fulfill the second prong of the test by demonstrating procompetitive benefits.[125] It is therefore unlikely in my view that the Adidas case—should it go to trial—would reach the third prong. However—assuming for the sake of argument that both the plaintiff and the defendant could meet their initial burdens—some of the facts of the dispute make it an appropriate vehicle for exploring how the case might be analyzed under the third prong of the rule of reason.

The Third Circuit defined the third prong of the rule of reason in *United States v. Brown University*.[126] If the defendant meets its burden of showing that the anticompetitive effects of challenged conduct are countered by the promotion of a procompetitive objective, "the plaintiff must demonstrate that the restraint is

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Financial Services (1987–1995), Nokia cellular phones (since 1995)); Orange Bowl (Federal Express (since 1989)); Cotton Bowl (Mobil Corporation (1988–1995)); Florida Citrus Bowl (Florida Department of Citrus (since 1983), CompUSA (since 1992)); Gator Bowl (Mazda Motors of America, Inc. (1986–1991), Outback Steakhouse, Inc. (1992–1994), Toyota Motor Co. (since 1995)); Holiday Bowl (Sea World (1986–1990), Thrifty Car Rental (1991–1994), Chrysler-Plymouth Division of Chrysler Corp. (since 1995)); Outback Bowl (Outback Steakhouse, Inc. (since 1995)); Sun Bowl (John Hancock Financial Services (1986–1993)); Aloha Bowl (Jeep Eagle Division of Chrysler (since 1987)); Copper Bowl (Domino's Pizza (1990–91), Weiser Lock (since 1992)); Liberty Bowl (St. Jude's Hospital (since 1993)); Carquest Bowl (Blockbuster Video (1990–1993) (game was then called the Blockbuster Bowl), Carquest Auto Parts (since 1993)); Independence Bowl (Poulan/Weed Eater (since 1990)); Peach Bowl (Chick-fil-A (since 1998)). The Las Vegas Bowl is a minor bowl game that never has had corporate sponsorship. Nevertheless, from the above it is apparent that it is the exception rather than the rule.

123 *See* NCAA v. Tarkanian, 488 U.S. 179 (1988) (coach brought suit); NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (two member universities); Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998) (volleyball player); Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (coaches); Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996) (football players); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1991) (football player); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988) (alumni, football players, and cheerleaders); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (coaches); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990) (football player); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983) (football players); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975) (hockey player).

124 *See supra* notes 111–15 and accompanying text.

125 *See supra* notes 116–22 and accompanying text.

126 5 F.3d 658 (3d Cir. 1993).

not reasonably necessary to achieve the stated objective."[127] In considering whether a restraint is "reasonably necessary," the court must "examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative."[128]

The limiting word "substantially" in the just-quoted formula is the key to the analysis. Without it, the plaintiff's burden becomes ethereal, easily cast aside by any of an infinite number of hypothetical alternatives that are marginally less restrictive than the rule at issue. For example, Adidas could suggest that the NCAA adjust its size limitation for corporate logos from 2.25 square inches to 12 square inches—or whatever size is large enough to accommodate Adidas' design—and that the NCAA increase the number of allowable corporate marks per uniform from 1 to 2.[129] If the third prong literally required the "least restrictive alternative" that would achieve the procompetitive benefit successfully asserted by the defendant in the second prong,[130] the line-drawing problem in a case like this—in which the NCAA has precisely chosen a size limit on corporate marks—becomes insurmountable, and the plaintiff is virtually assured of

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[127] *Id.* at 669.

[128] *Id.* at 679. The Tenth Circuit in *Law* incorporated nearly identical language into its opinion. *See Law*, 134 F.3d at 1019 (citing Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997)); *Hairston*, 101 F.3d at 1319; Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996); *Brown*, 5 F.3d at 669). The cases generally are not illuminating. In *Brown*, the Third Circuit offered a modicum of further guidance, restating the third prong issue as: "[W]hether the Antitrust Division has shown, by a preponderance of the evidence, that another viable option, perhaps the free market, can achieve the same benefits . . . ." *Brown*, 5 F.3d at 679. The Ninth Circuit in *Hairston* reached the third prong of the rule of reason test, but the court rejected the plaintiffs' argument in one paragraph. *See Hairston*, 101 F.3d at 1319. The plaintiffs were University of Washington football players who sued the Pacific 10 athletic conference for antitrust violations after the conference levied sanctions against the school for recruiting violations. The sanctions included a ban on bowl games. The plaintiffs sought damages for "the cost of air fare, lodging, meals, and expenses related to a trip to play in a post-season bowl game." *Id.* at 1317.

> The athletes claim that the Pac-10's penalties were grossly disproportionate to [Washington's] violations. However, they do not offer even the thinnest reed of support for this proposition . . . . Robert Aronson, a law professor . . . testified that the penalties were within the range of appropriate penalties.

Id. at 1319.

[129] Adidas has two readily recognizable trademarks: a three-stripe logo and a smaller pyramid-shaped mark. *See* Manning, *supra* note 121. According to the NCAA, the shoe company has designed team uniforms that use both the smaller mark and the three-stripe insignia, the latter of which is draped over a shirt sleeve or pant leg. *See id.* Thus, the Adidas uniforms violate both the 1 logo per uniform policy and the 2.25-inch size limitation.

[130] In this case, that procompetitive benefit would necessarily be preservation of amateurism. *See supra* note 117 and accompanying text.

winning.[131] Although it is impossible to articulate an entirely unambiguous standard, it seems that the mere allowance of a slightly larger logo or an additional logo would not be "substantially less restrictive," and arguably would in any event incrementally reduce the scope of the procompetitive benefit proven by the defendant in the second prong of the rule of reason analysis.[132]

IV. THE NCAA, LIKE THE TRAVELER, MUST BE READY FOR THE MORROW[133]

In the wake of the NCAA's $54.5 million settlement with former restricted-earnings coaches after the *Law* verdict, the venerable organization finds itself surveying a threatening legal horizon. The *Easton* and *Adidas* lawsuits could signal the beginning of a broad wave of antitrust actions challenging nearly every regulation in the NCAA Manual.[134] In addition, the NCAA increasingly is being hauled into court to defend against other federal claims in connection with the Occupational Safety and Health Act (OSHA), workers' compensation, Title IX, and federal civil rights legislation.[135] This darkening legal landscape raises two questions: (1) Can the NCAA survive?, and (2) If not, should anyone mourn its demise?

A. *How Many More Plaintiffs Want to Play "Monopoly"?*

As noted previously, the NCAA enjoyed a judicial cloak of immunity from federal antitrust law for decades.[136] Now that the restricted-earnings coaches have drawn first blood, it would not be surprising to see an intense volley of new antitrust lawsuits being filed against the NCAA. The pool of potential plaintiffs includes coaches, universities, student-athletes, and—as evidenced by the Adidas and Easton suits—even corporations whose products are used by the participants

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[131] Conversely, if courts apply the analysis similar to Justice Scalia's rational basis-like least restrictive alternative test in *Board of Trustees, State University of New York v. Fox*, 492 U.S. 469 (1989), the NCAA is likely to win every time. *See supra* notes 77–79 and accompanying text.

[132] For an example of an NCAA regulation that could be found invalid under the third prong, see *infra* Part IV.B., considering NCAA limits on the number of games per season in particular sports.

[133] "The law, like the traveler, must be ready for the morrow." BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 20 (1924).

[134] *See, e.g.*, Suggs & Lombardo, *supra* note 10. "'It [the *Law* verdict] will make people think about using the antitrust argument against the NCAA, and it could have serious implications and a negative impact on the NCAA.'" *Id.* (quoting Glenn Wong, an attorney and director of the sports management program at the University of Massachusetts-Amherst).

[135] For a brief examination of these developments, see *infra* Part IV.B.

[136] *See supra* note 2 and accompanying text.

in collegiate sports. If the NCAA is to survive such an onslaught, it must objectively evaluate its existing rules for antitrust violations and exercise extreme caution in promulgating new regulations.

1. *Restrictions on the Number of Games Teams May Play Each Season*

The strong language in *Board of Regents* and *Law* condemning price and output restrictions makes NCAA limits on the number of games teams can play in a season[137] a prime target for antitrust attack. In all likelihood, this "naked restriction on . . . output"[138] is itself enough for a plaintiff challenging the regulation to meet its burden of proof as to the first prong of the rule of reason.[139] As to the second prong, the NCAA likely would assert the promotion of amateurism as a procompetitive benefit justifying the restraint.[140] Assuming this is a valid benefit,[141] the NCAA would be required to show at least that the rule "enhances competition"[142] or at most that it is "necessary to produce competitive intercollegiate sports."[143]

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[137] *See* NCAA CONST. art.17.01.1, fig.17-1, *reprinted in* NCAA, 1999-00 NCAA DIVISION I MANUAL (Vanessa L. Abell ed., 1999) (defining maximum number of games a team may play in each sport and setting season starting and ending dates) (cited in Roberts, *supra* note 18, at 2652 n.50).

[138] NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984).

[139] *See id.* (noting that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of an agreement not to compete in terms of output) (citations omitted).

[140] The NCAA could also argue that the restriction enhances competitive balance among teams by preventing some schools from scheduling extra games, while teams from other schools may be unable to do so. This argument could be valid to the extent that the "powerhouse" schools scheduled games only amongst themselves. However, highly ranked schools with dominant programs in football and men's basketball often schedule weaker teams early in the season, and those weaker teams share in the gate receipts. The practice has earned some smaller Division I football programs reputations as "mercenaries," notably the University of Akron, which more than once has played sacrificial lamb to mighty Nebraska in exchange for an infusion of cash. Samuel Chi, *National Championship Picture Refuses to Become Crystal Clear*, S.F. EXAMINER, Oct. 14, 1996, at D2.

[141] This assumption has been questioned. *See, e.g.*, Roberts, *supra* note 18, at 2662 (noting that "if the public really did prefer college football played by students who only have to play eleven or twelve games a year, instead of fourteen games, or twenty games, there would be no need for a rule").

[142] *Board of Regents*, 468 U.S. at 104.

[143] Law v. NCAA, 134 F.3d 1010, 1021 (10th Cir. 1998). The seemingly less strenuous requirement in *Board of Regents* that the defendant merely show that the restraint "enhances competition" seems preferable. The way the test was phrased in *Law*, the second prong is subsumed by the third. This is unfair to the defendant in an antitrust action because it is ultimately the plaintiff's burden under the third prong to prove that a restraint is not reasonably necessary. To use an analogy to Equal Protection Clause jurisprudence, the Supreme Court in

At this point in the analysis, judicial inertia favors the NCAA. A blanket declaration that the preservation of the amateur character of college athletes is not a sufficient procompetitive benefit to justify *some* restrictions as to the length of college athletic seasons would effectively annihilate the NCAA as a governing body. Regardless of how sound the theoretical underpinnings of such a decision might be,[144] it is an unlikely scenario—at least in the near future. However, even assuming that *some* limitations on the length of athletic seasons may be upheld, it may be that not *all* such limitations will be valid under the third prong of the rule of reason. A fact-based analysis leads one to the conclusion that a limit on the number of games may be permissible as to sports like basketball, which require mid-week travel and a high volume of games over the course of a five-month season, while such a limit may be impermissible as to a sport like football, in which all games are played on Saturdays during a roughly three-month season.[145]

Board of Regents seems to have prescribed intermediate scrutiny, while the tenth Circuit in *Law* appears to be applying strict scrutiny. The difference between the two approaches could easily be dispositive. On the other hand, the court in *Law* at least devoted lip service to the notion that "courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics." *Id.* at 1022 n.14 (citation omitted).

[144] *See, e.g.*, Goldman, *supra* note 35, at 260–61:

> It is time that we recognize the NCAA's amateur rules for what they are: a direct restraint on price competition. The NCAA rules do not require amateurism, they require a limitation on pay. They are a cost savings device. The NCAA invokes the shibboleth of amateurism and the public and judiciary bob their heads. This is nonsense.
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> ....
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> Everyone cherishes the athletes of the world who, like Ernie Banks, would love nothing more than to "play two." We prefer to believe athletes play for the love of the game. There is something pure about that. No one really believes this is true in major college athletics anymore. But there is a feeling that if we pretend it is true, if we believe hard enough, we can make it true.

Id.

[145] In other words, the NCAA limitation on the length of the football season itself without a limitation on the number of games that could be played during that season would be substantially less restrictive without reducing the procompetitive benefit of the restriction in any way. College football teams do not "get a week off" from practice when there is no game the following Saturday. Even when college football teams have away games, they will rarely miss class because their flights will not depart until Friday afternoon. Conversely, once the regular season begins, basketball teams generally play on a week night at least once a week. Thus, any road games scheduled during the school week will generally require players to miss class. *See, e.g.*, Mark R. Whitmore, Note, *Denying Scholarship Athletes Workers Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 791 & n.184 (1991) (discussing the high number of classes basketball players miss because of road trips).

2. *Restrictions on the Number of Coaches Schools May Hire*

NCAA restrictions on the number of coaches schools can employ for each sport[146] are even more problematic for the NCAA because they are nearly indistinguishable from the restricted-earnings coaches rule struck down in *Law*. The only difference is that the REC rule was a horizontal price restraint, while NCAA restrictions on the number of coaches a school may hire are properly classified as horizontal nonprice restraints on inputs. This difference is probably insignificant in terms of antitrust analysis.[147] After all, it would be inconsistent to hold that the NCAA may not allow member schools to hire a third assistant coach subject to a $16,000 salary cap, but that it may prohibit schools from hiring a third assistant coach entirely. In short, the anticompetitive effects of the restriction are likely to be deemed significant, and the NCAA's burden of proving that the restriction bolsters competitive balance among member schools[148] will be

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[146] *See* NCAA CONST. art.11.7, *reprinted in* NCAA, 1999-00 NCAA DIVISION I MANUAL (Vanessa L. Abell ed., 1999). For example, NCAA football teams are limited to a head coach, nine assistants, and two graduate assistants. *See* Roberts, *supra* note 18, at 2652 n.51 (discussing NCAA limits on the number of coaches a school can employ in each sport).

[147] The restricted-earnings coaches in *Law* attempted to distinguish their case from *Board of Regents*—in an effort to convince the court to apply a per se rule of illegality—by arguing that *Board of Regents* involved a restraint on outputs, while the REC rule represented a restraint on inputs. *See Law*, 134 F.3d at 1018. The court rejected this contention, stating:

> *Board of Regents* does not turn on whether the agreement in question is based on input components or output products. Rather, *Board of Regents* more generally concluded that because horizontal agreements are necessary for sports competition, all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis.

Id. at 1018–19. If anything, the NCAA's argument is marginally strengthened by the absence of restraints on price or outputs in the case of limits on the number of coaches that may be employed (by comparison, the REC rule was a *price* restraint on inputs, and thus inherently anticompetitive). As the Supreme Court said in *Board of Regents*: "[T]he [NCAA television] plan is inconsistent with the Sherman Act's command that *price* and *supply* be responsive to consumer preference." NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 110 (1984) (emphasis added); *see also Law*, 134 F.3d at 1021 (noting that an NCAA rule limiting the number of coaches that could be hired in a particular sport "did not involve a naked restriction on price" and therefore could not control the decision of a case involving price restraints). Thus, whether this restraint on inputs creates substantial anticompetitive effects is a closer factual question. For an excellent explanation of the argument that it does create such anticompetitive effects, see Roberts, *supra* note 18, at 2653–54. "By not allowing a school's football program to employ fifteen coaches . . . the NCAA essentially deprives each program of the opportunity to create a team that plays at a higher level of athletic performance." *Id.* at 2653.

[148] There of course can be no argument that a restriction aimed at coaches promotes the amateur character of the athletes. In addition, one would assume the NCAA will never again be so foolish as to proffer cost reduction as a procompetitive benefit. *See Law*, 134 F.3d at 1022–

difficult to meet.[149] The NCAA should rescind its limits on the number of coaches a school may hire in particular sports before it finds itself staring down the barrel of another massive class action lawsuit.[150]

3. *Dred Scott in a Letter Jacket?*[151]

NCAA rules limiting student-athlete compensation[152] are clearly price-fixing agreements with significant anticompetitive effects.[153] However, these rules are of a decidedly different character than the ones struck down in *Board of Regents* and *Law* because, unlike the rules found illegal in those two cases, restrictions on athletes allow the NCAA to play its trump card, preservation of amateurism as a procompetitive benefit.[154] Additionally, some courts have employed the

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[149] *See, e.g., Law*, 134 F.3d at 1024 ("Nowhere does the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities."). Indeed, it is difficult to imagine how the NCAA would go about proving that a nine coach limit would enhance competition in any way. At the same time, it seems unlikely that any one team could gain a significant competitive advantage over other teams simply by hiring one more or even five more coaches. At some point incapable of precise definition, it is likely that there would be too many coaches, and the additions would be counterproductive.

[150] It should be noted that the Fifth Circuit upheld the validity of an NCAA regulation limiting the number of assistant coaches in *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977). The Tenth Circuit in *Law* declined to follow *Hennessey* for a number of reasons, including the fact that *Hennessey* predated *Board of Regents*. *See Law*, 134 F.3d at 1021. An even better reason would have been that the court in *Hennessey* appeared not to possess even a rudimentary understanding of federal antitrust law. "[The rule] was... intended to be an 'economy measure....' In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics—by curtailing... potentially monopolistic practices by the more powerful...." *Hennessey*, 564 F.2d at 1153. This blind acceptance of the NCAA's justifications for its rules and regulations was not followed by the Supreme Court in *Board of Regents*, and it certainly was not adhered to in *Law*. While *Hennessey* has not been overruled, it is highly doubtful that it remains good law.

[151] Conservative political pundit and baseball history hobbyist George F. Will has called Curt Flood—the former St. Louis Cardinals' star who took his case for free agency to the Supreme Court and lost—"Dred Scott in spikes." GEORGE F. WILL, BUNTS 276–79 (1998); *see also* Flood v. Kuhn, 407 U.S. 258 (1972).

[152] *See generally* NCAA CONST. arts. 12, 15, 16, *reprinted in* NCAA, 1999-00 NCAA DIVISION I MANUAL (Vanessa L. Abell ed., 1999) (providing rules requiring amateur status for the maintenance of eligibility, dealing with financial aid a student-athlete may receive, and limiting other compensation).

[153] *See* Roberts, *supra* note 18, at 2650 (arguing that the extent to which these rules create "wealth transfers" and "misallocations of resources" would be difficult to prove, but that the inherently anticompetitive nature of a fixed wage agreement would be enough for plaintiffs to meet their burden under the first prong of the rule of reason).

[154] This justification was not available to the NCAA in *Board of Regents* or *Law* because those cases did not involve direct regulation of the athletes themselves.

"noncommercial objective defense" to find that federal antitrust laws do not apply to NCAA eligibility and amateurism rules for student athletes.[155]

It blinks reality to suggest that NCAA rules limiting athlete compensation have as their focus "noncommercial objectives."[156] It would be more accurate to say that these rules have a noncommercial component—the preservation of the amateur status of the athletes—and a commercial component—the cost savings that are realized vis-à-vis a free market system in which each school would engage in open bidding for athletes. Because there is a significant commercial element to the athlete compensation rules, they should be subject to federal antitrust law. The rule of reason is specifically designed to weigh a particular restraint of trade's anticompetitive effects against its procompetitive benefits, and if such benefits are present, to consider whether the same benefits can be achieved in a significantly less restrictive manner.

It is of course unclear what effect, if any, the *Law* verdict will have on future antitrust suits that athletes file against the NCAA.[157] However, the availability to

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[155] *See supra* notes 17–22 and accompanying text. A federal court in Tennessee used the noncommercial objective defense to reject a Vanderbilt University football player's antitrust challenge to the NCAA's "no-draft" rule, which declares that an athlete loses his college eligibility if he enters a professional draft or hires an agent to negotiate a professional contract. *See* Gaines v. NCAA, 746 F. Supp. 738, 740 (M.D. Tenn. 1990); *see also* NCAA CONST. arts. 12.1.1(f), 12.2.4.2, 12.3.1, *reprinted in* NCAA, 1999-00 NCAA DIVISION I MANUAL (Vanessa L. Abell ed., 1999). The court purported to draw a distinction between "commercial" and "noncommercial" rules, saying:

> [O]ne type, exemplified by the rules in *Hennessey* . . . and *Jones* [v. NCAA, 392 F. Supp. 295 (D. Mass. 1975)] . . . is rooted in the NCAA's concern for protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose [citing *Board of Regents*].

Gaines, 746 F. Supp. at 743 (quoting Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983)) (internal quotation marks omitted). *Jones* involved an antitrust challenge to an NCAA rule declaring ineligible anyone who had ever been paid to play a sport. *See Jones*, 392 F. Supp. at 296–97, 299 n.4. This analysis is startlingly flaccid. There is no basis for the claim that the rule at issue in *Hennessey* concerned noncommercial objectives, other than the self-dependent assertion to that effect made by the Fifth Circuit itself in *Hennessey*. *See supra* note 150. After reaching the conclusion that antitrust laws did not apply to the "no-draft" rule, the court said the rule was not a violation of the antitrust laws even assuming those laws did apply. *See Gaines*, 746 F. Supp. at 746.

[156] The noncommercial objective defense is more plausible with regard to NCAA rules governing academic standards and grade-related eligibility regulations.

[157] This is because courts may continue to dispose of such cases on the basis of the noncommercial objective defense (a practice which should have been foreclosed by the Supreme Court's opinion in *Board of Regents*, but which remained open in part because of the Court's dicta assuming that most NCAA regulations are valid), and because it is unclear to what extent the preservation of amateurism can be claimed as a procompetitive benefit. *See* Roberts, *supra* note 18, at 2660–61.

the NCAA of the amateurism justification, and the courts' history of complicity in protecting sports organizations from the full force of antitrust law,[158] make it unlikely that the basic structure of college sports will be overturned judicially in the near future.[159] A better-defined third prong of the rule of reason, as proposed in Part II.D. of this Note, may embolden the courts to examine NCAA eligibility and amateurism rules in a principled way that will both protect student-athletes from egregious antitrust behavior and preserve NCAA rules that are necessary if there is to be intercollegiate athletic competition at all. Whatever jurisprudence develops in this area, to allow the NCAA to escape the inquiry completely—based on the legal fiction that eligibility rules have "noncommercial objectives"—amounts to an abdication of the judiciary's duty to apply and administer the laws enacted by Congress.

B. *Litigators at the Gate*

The litigious assault against the NCAA has opened on other fronts as well. Before the *Law* verdict, the greatest perceived threat to the continued existence of college sports had been Title IX—the gender equity provision of the Education Amendments of 1972.[160] As initially enacted, the statutory language did not specifically mention the applicability of Title IX to collegiate athletics.[161] Congress later adopted an amendment "requiring the Secretary of Health,

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[158] Part I of Justice Blackmun's opinion in *Flood v. Kuhn*, 407 U.S. 258 (1977), is a classic example. Blackmun wrote, "It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire." *Id.* at 260–61. Later in Part I, Blackmun listed the names of nearly 90 baseball superstars, then apologized in a footnote to other players he may have inadvertently omitted. *See id.* at 263 n.3. The opening portion of the majority opinion was so laden with nostalgia that two of the concurring Justices (White and Burger) refused to join it. *See id.* at 285 (White, J., concurring in all but Part I; Burger, C.J., concurring in all but Part I). Chief Justice Burger essentially conceded that the Court's decision was the wrong one. He explained his acquiescence by placing the onus on Congress to clean up the mess. *See id.* at 285–86.

[159] The argument that NCAA controls on student-athletes do violate the antitrust laws has been forcefully and cogently made. *See generally* Carstensen & Olszowka, *supra* note 23; Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213 (1993); Goldman, *supra* note 35; Roberts, *supra* note 18; Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299 (1992). Many of these authors' arguments are persuasive; they also are not worth much to potential plaintiffs until courts start paying attention to them.

[160] Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1994).

[161] *See* Darryl C. Wilson, *Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303, 1305 (1998).

Education and Welfare (HEW) to publish regulations implementing Title IX into intercollegiate athletics."[162] The Supreme Court first examined the applicability of Title IX to university athletic programs in *Grove City College v. Bell*.[163] One commentator summed it up by stating that "[t]he Court held that Title IX applied only to 'athletic programs' directly receiving federal assistance, and not to all athletic programs at institutions who receive federal funds."[164] The practical effect of this decision was to negate Title IX as a vehicle for increasing opportunities in college sports for women.[165]

The perceived need for women's equality in collegiate athletics has been fiercely debated, resisted, and even ridiculed.[166] However, a review of the grim facts suggests legislative action of some type was needed.[167] Congress responded to the Supreme Court's narrow construction of Title IX—at least in the athletics

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[162] *See id.* (discussing adoption of the Javits amendment). Senator John Tower of Texas, apparently sensing the negative implications the new statutory scheme would have for college football, had earlier introduced his own amendment which would have exempted money-making sports, i.e., football and men's basketball, from the coverage of the statute. *See id.* at 1305 n.14; John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POLICY 191, 216 (1996) (arguing that "[r]ejection of the Tower Amendment rather strongly implies that Congress did not embrace the notion that women's sports were entitled to *only* a contingent status").

[163] 465 U.S. 555 (1984).

[164] Wilson, *supra* note 161, at 1305.

[165] *See id.*

[166] Professor Weistart has remarked on the startling openness with which gender equity has been attacked in the high school and college sports context. Grant Teaff, former Executive Director of the American Football Coaches Association, is quoted as saying, "I have seen the enemy eyeball to eyeball, and I can tell you that they're out to get the game of football." Weistart, *supra* note 162, at 193 (quoting Ken Stephens, *Coaches Fear Title IX Lawsuits May Prove Damaging for Football*, DALLAS MORNING NEWS, Jan. 10, 1995, at 9B).

For a more outrageous statement, see *id.* at 226 n.115 (quoting Ken Burger, *Opinions: Women's Basketball*, NCAA NEWS, Dec. 11, 1995, at 4):

> A Charleston, South Carolina newspaper editor, had these comments on women's basketball: "The fact of the matter is that this is intramural stuff.... [W]atching two women post up in the paint is too closely akin to tavern mud wrestling than most of us would like to admit. Why women themselves ever thought that this was a good sport for them to play is puzzling to me.... [W]hat I've said is the truth, and behind closed doors, every athletic director in the country agrees with me."

Weistart, *supra* note 162, at 226 n.115.

[167] *See id.* at 199–200. For example, at the University of Illinois, men's swimming was begun as a varsity sport in 1911; the women's swim team was added in 1982. *See id.* at 199 n.29 (citing Kelley v. Board of Trustees, 832 F. Supp. 237, 239 (C.D. Ill. 1993)). Louisiana State began intercollegiate athletic competition in 1893 with football and men's baseball; LSU had no women's sports until 1977. *See id.* (citing Pederson v. Louisiana State Univ., 912 F. Supp. 892, 901 (M.D. La. 1996)).

context—by passing the Civil Rights Restoration Act of 1987 (CRRA),[168] which essentially overruled the Court's decision in *Grove City College v. Bell*.[169] Judicial developments following passage of the CRRA have spelled "the beginning of the end of male-dominated collegiate sports."[170] This has meant hard financial times and agonizing decisions in the athletic departments of many *universities*,[171] but recently the NCAA itself has been drawn into the fray. The Supreme Court in *NCAA v. Smith* held that the NCAA's receipt of dues from member institutions which receive federal funds does not make the NCAA a recipient of federal funds within the meaning of Title IX.[172] However, the Court remanded the case for a consideration of whether the NCAA can be bound by Title IX based on (1) federal financial assistance the NCAA receives directly and indirectly through the National Youth Sports Program the NCAA administers; or (2) the theory that NCAA member institutions' ceding of controlling authority over federally funded programs to the NCAA makes the NCAA a recipient of federal funds.[173]

The Title IX controversy is only the most prominent of a number of questions the NCAA faces in terms of the applicability of federal law to the organization and its member institutions. Others include student-athlete claims for workers'

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[168] Pub. L. No. 100-259, § 908, 102 Stat. 28, 28–29 (1988) (codified as amended at 20 U.S.C. § 1687 (1999).

[169] *See* Wilson, *supra* note 161, at 1306 (noting that the Civil Rights Restoration Act of 1987 modified Title IX by adding language expressly declaring that "an institution-wide approach was the proper basis for determining if violations were present").

[170] *Id.* (citing Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd in part*, 101 F.3d 155 (1st Cir. 1996), as the leading case). Since *Cohen v. Brown*, hundreds of suits have been filed and settlements reached, with the complainant winning nearly every time. *See id.* Defendant universities have little chance of winning when "substantial proportionality" is required between the percentage of women in the student body and the percentage of women competing in sports. *See* Weistart, *supra* note 162, at 192 & n.6. That proportionality exists at only "a handful of schools." *Id.* at 192. This is due largely to the fact that Division I football teams are allowed to have 85 players on scholarship—normally all men—and no women's sport is allowed an even remotely similar number.

[171] The general assumption has been that cuts in men's sports offerings at many universities have been designed to equalize scholarships between men and women and to free up money for women's athletic teams. *See* Weistart, *supra* note 162, at 195 n.15 (noting, e.g., that the number of NCAA men's gymnastics programs fell from 138 in 1976 to 31 in 1996; that 120 schools dropped men's wrestling in 10 years; that 65 men's swimming teams have been cut since 1985) (citations omitted). However, Professor Weistart also points out that the number of collegiate wrestling teams fell from 370 to 265 from 1982–1993, "when Title IX enforcement was virtually non-existent." *Id.* Thus, it is not clear what role, if any, strict enforcement of Title IX has played in the loss of men's college athletic programs. It is undisputed that football and men's basketball are the only sports at most universities that bring in more money than they spend. *See id.* at 205, 226 n.116.

[172] *See* NCAA v. Smith, 525 U.S. 459, 930 (1999).

[173] *See id.*

compensation[174] and at least one challenge to NCAA academic admissions standards based on civil rights laws.[175] The very survival of the NCAA is contingent upon expertly navigating these legal mine fields by (1) complying with federal law as an initial matter, (2) recognizing valid claims as they arise and settling them out of court, and (3) continuing to defend against spurious claims vigorously.

C. *Can the NCAA Survive?*

All of the aforementioned external pressures currently being applied to the NCAA raise serious questions about the continuing viability of the organization.[176] However, before one gets misty-eyed for the NCAA and the good old days when the organization was basically free from any oversight from any source whatsoever, it may be useful to examine briefly a few recent instances of misguided legal strategies and unmitigated arrogance on the NCAA's part that have helped place the NCAA in its present predicament.

There is no better place to start than the *Law* case itself. Staring down a class action antitrust challenge to a rule that was a clear horizontal price-fixing arrangement, the NCAA refused to settle. According to one of the plaintiffs' lawyers, the coaches harmed by the REC rule "would have settled in the $5 million range as late as May 1995."[177] Now, the NCAA's liability—pursuant to

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[174] *See, e.g.*, University of Denver v. Nemeth, 257 P.2d 423 (Colo. Ct. App. 1953); Coleman v. Western Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983); *see generally* Whitmore, *supra* note 145, at 776–83 (discussing these cases and others involving workers' compensation claims by scholarship athletes). The author commends the NCAA for "permit[ting] schools to provide permanent disability insurance as a part of their grant-in-aid [and for] allow[ing] 'medical hardship' cases which enable universities to continue to provide athletic scholarships to those athletes who are physically unable to perform." *Id.* at 797 (footnote omitted). However, he criticizes the NCAA for not requiring member schools to provide workers' compensation or disability insurance for injuries suffered "in the course of fulfilling scholarship obligations." *Id.* at 799; *see also* Sean Alan Roberts, Comment, *College Athletes, Universities, and Workers' Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315 (1996).

[175] *See* Cureton v. NCAA, 37 F. Supp. 2d 687, 689 (E.D. Pa. 1999) (holding that the use of standardized test scores such as the ACT and SAT in determining first-year eligibility of college athletes violates Title VI of the Civil Rights Act of 1964); Steve Rock, *NCAA Lawyers Face Another Legal Battle*, KAN. CITY STAR, Oct. 13, 1998, at C3 (describing a lawsuit filed by Trial Lawyers for Public Justice).

[176] *See, e.g.*, Sean Horgan, *Storm Clouds Will Follow NCAA to New Hometown*, INDIANAPOLIS STAR, Dec. 27, 1998, at A1. "Will the organization that arrives [in Indianapolis] remain the seat of power for college athletics, or will it be stripped down and weakened by the changing landscape of college sports, a landscape that continually blurs the line between commercialism and academic mission?" *Id.*

[177] *Big Loss for the NCAA a $67 Million Blunder?*, SPORTS ILLUSTRATED, May 18, 1998, at 26 (quoting attorney Dennis Cross) (internal quotation marks omitted) [hereinafter *Big Loss*].

the settlement reached in March—is nearly $55 million.[178] Many member schools urged the NCAA to settle the case rather than pursue an appeal before the Tenth Circuit.[179] But the NCAA was slow to make a serious attempt at settlement. In the fall of 1998 the NCAA made a $44 million settlement offer[180]—roughly half of what it owed the coaches, including interest and attorneys' fees. Apparently, NCAA leaders believed the Tenth Circuit would substantially reduce the damages award.[181] Not everyone shared this optimism. Said Kansas State President Jon Wefald, "This has been an example of arrogance on the part of the NCAA.... When it comes to the law, arrogance will always get you in trouble."[182]

Such arrogance might be forgivable if the restricted-earnings coaches case were an isolated incident. It is not. One need look no further than the *Smith* case to see another glaring example. Renee Smith played intercollegiate volleyball at St. Bonaventure for two seasons. Because of a rigorous course schedule, she graduated in two and one-half years.[183] She then enrolled in an M.B.A. program at Hofstra University, where she wanted to continue to play volleyball.[184] The NCAA has a "Postbaccalaureate Bylaw," which prevents graduate students from playing college sports at any institution other than the one at which they earned their undergraduate degrees.[185] The NCAA denied requests for a waiver of the rule by Hofstra University and the University of Pittsburgh, schools Smith

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Apparently, NCAA attorneys did not advise the NCAA of the likelihood that the REC rule was an antitrust violation. *See id.* This oversight was not lost on University of Texas Athletic Director DeLoss Dodds, who said, "[The verdict] makes you wonder about the law firm who we're getting advice from." Gilbert, *supra* note 8 (quoting DeLoss Dodds) (internal quotation marks omitted).

178 *See Schools React to Ruling Against NCAA*, *supra* note 4.

179 *See, e.g.*, Jack Carey & Dick Patrick, *Supreme Court Decision May Speed NCAA Settlement*, USA TODAY, Oct. 6, 1998, at 12C (quoting University of Kansas Athletic Director Bob Frederick).

180 *See id.* The Supreme Court's denial of certiorari in the *Law* case should have removed most of the disincentive for a settlement, especially from the NCAA's perspective. Interest on the $67 million judgment is accruing at a high rate of interest. *See Judge Adds to Coaches' Award*, USA TODAY, Jan. 18, 1999, at 11C.

181 *See* Carey & Patrick, *supra* note 179 ("We have a high level of confidence in our appeal to the 10th Circuit.... We think there were mistakes made in the damages trial that had an effect on the jury's ability to hear our arguments and we think there's a good chance the court will agree that mistakes were made.") (quoting NCAA spokesperson Wally Renfro).

182 *Big Loss*, *supra* note 177 (quoting Jon Wefald) (internal quotation marks omitted); *see also* Andrew Bagnato, *NCAA Finishes Off a Moving Experience*, CHI. TRIB., July 27, 1999, at 4 (referring to the NCAA's "trademark arrogance").

183 *See High Court to Hear NCAA Sex Lawsuit*, FLA. TODAY, Jan. 18, 1999, at 9A.

184 *See id.* She then decided to go to law school at the University of Pittsburgh and wanted to play volleyball there as well. *See id.*

185 *See* Recent Case, 20 (5) ENT L. REP., October 1998, at 20.

attended after graduating from St. Bonaventure.[186] Smith sued, alleging the Postbaccalaureate Bylaw was a violation of antitrust law and Title IX.[187] The basis of Smith's Title IX claim is that she was denied a waiver because she is a woman.[188] Regardless of the merits of the suit, it is clear that the NCAA could have avoided this litigation—with its potential for the attachment of new obligations and liabilities upon the organization[189]—by simply granting Smith her waiver.

These are only two of the more egregious examples of the NCAA's institutional arrogance and its unfair treatment of coaches and athletes.[190] It appears that some NCAA member institutions are taking notice and, combined with the frustration of seeing their annual disbursements from the NCAA shrinking—in large part because of the *Law* verdict[191]—some schools apparently are contemplating a defection.[192] Indiana University English professor Murray Sperber foresees such a defection, saying, "Fifteen or 20 years from now, I could see the glamour teams of college sports leaving [the NCAA] to run their own super-conferences while the NCAA and Indianapolis will be left to host swim

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[186] *See High Court to Hear NCAA Sex Lawsuit*, *supra* note 183.

[187] *See id.*

[188] *See id.*

[189] Of course, the NCAA does not overtly claim that it should not comply with gender equity efforts. NCAA spokesperson Wally Renfro explained:

> The important legal argument here for us is not whether the NCAA should or should not comply with Title IX. We obviously believe that the NCAA should on a voluntary basis comply with Title IX.... But we do not want to acknowledge that legal argument that we are the recipient of federal funds.

Id.

[190] For more examples, see generally Ronald J. Thompson, *supra* note 30. Thompson provides some evidence—consistent with Renee Smith's allegation—that the NCAA may be systematically treating women more harshly than men. Thompson mentions the case of Tracy Graham, an Iowa State University volleyball player who was declared ineligible because she took the ACT test on a non-NCAA approved date. *See id.* at 1655–56. The NCAA Academic Requirements Committee refused to hear her appeal. Meanwhile, a University of Pittsburgh football player who accepted $2,500 from an agent was stripped of his eligibility but reinstated by the NCAA on appeal. *See id.* at 1655 (citing *Spiked*, SPORTS ILLUSTRATED, Sept. 28, 1987, at 9, 12).

[191] *See* Steve Rock, *Waste Watchers Ruling Has Effect on NCAA Budget*, KAN. CITY STAR, Aug. 19, 1998, at D1.

[192] *See, e.g.*, *Big Loss*, *supra* note 177 (noting that Ohio State University athletic director Andy Geiger has spoken of a new "super division" of college sports outside the NCAA's control). Big Ten conference commissioner Jim Delany has said, "We're poised to lead in a new direction.... We have a number of regulatory issues to address, whether we're in the old NCAA, the restructured NCAA or some other organization." *Id.* (internal quotation marks omitted).

meets."[193] Of course, the likelihood or extent of such an occurrence is impossible to predict,[194] but the threat is another obstacle the NCAA faces in preserving its authority and credibility.

V. CONCLUSION

The *Law* verdict is not necessarily a death knell for the NCAA. It can almost certainly defend the baseball bat regulation, and probably can withstand the Adidas suit as well. But the NCAA must learn to check its arrogance at the courthouse door (if not before) and choose its legal battles carefully. For example, it should drop its limits on number of games—at least in football—before it is sued in that regard and should take a hard look at its limits on the number of coaches allowed in each sport. What is required is active participation of competent counsel, who should be able to steer the NCAA through these troubled waters despite the fact that this area of law is not entirely settled. Perhaps a fresh start in a new city will help. The NCAA is in the process of moving its headquarters from suburban Kansas City to downtown Indianapolis.[195] The organization's former headquarters have been called "charmless and uninviting," an unflattering but often accurate description of the organization itself. The new building is said to have architectural charisma, and there are plans to include an interactive sports museum on the grounds.[196] With any luck, some of that personality will rub off on the new structure's owners. If it does not, and the NCAA does not prove willing to address the more obvious and blatant defects in its rules, no one should be sorry to see the organization's demise.

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[193] Horgan, *supra* note 176 (internal quotation marks omitted).

[194] NCAA executive director Cedric Dempsey has said the threat is minimal because any spinoff organization would have to install regulatory mechanisms nearly identical to the ones the NCAA already has in place. *See id.*

[195] *See* Bagnato, *supra* note 182, at 4.

[196] *See id.* NCAA officials have cited several long-term benefits of the move, including being closer to most of the organization's membership, and an estimated cost savings of $50 million over the next 22 years from owning the building rather than leasing. *See id.*