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PROPOSITION 48 AND THE BUSINESS OF INTERCOLLEGIATE ATHLETICS: POTENTIAL ANTITRUST RAMIFICATIONS UNDER THE SHERMAN ACT

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I. INTRODUCTION

Intercollegiate athletics have been extensively criticized for failing to establish and adhere to satisfactory academic standards for student athletes.[1] In response to such pressure, the National Collegiate Athletic Association ("NCAA") Division I and II institutions have adopted certain academic requirements which must be met by incoming freshman athletes in order for the athletes to be eligible to participate in intercollegiate athletics. These requirements, referred to in the vernacular as "Proposition 48," were first introduced in 1987. The effect of Proposition 48 is to limit the Division I and II universities' ability to permit the athletes who do not meet the requirements to participate in intercollegiate athletics, during the athletes' freshman year, although the students may attend a Division I or II university on scholarship or may participate athletically at a junior college or a non-Division I or II school.[2] Thus,

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1. The General Accounting Office, the investigative arm of Congress, recently conducted an examination of NCAA statistics on graduation rates of football and basketball players, at the request of Senator Edward M. Kennedy, one of the sponsors of the Student Athlete Right To Know Act. *Many Athlete Graduation Rates Below 20%*, N.Y. Times, Sept. 10, 1989, at 1, col. 2. The study is divided into a section covering the 103 schools classified as Division 1-A in football and another section covering the 97 of those 103 schools that also had basketball programs. *Id.* Data was collected from September 1982 to September 1987 and the graduation rate was based on the completion of degree requirements within five years. *Id.* at 18, col. 1.

A draft of the report shows that 35 of the 97 schools surveyed for basketball had graduation rates of 0 to 20 percent among players; that 33 colleges had graduation rates of 21 to 40 percent; 11 had graduation rates of 41 to 60 percent; 10 had graduation rates of 61 to 80 percent; and 8 had graduation rates of 81 to 100 percent. *Id.* at 18.

For example, Deion Sanders, former defensive back for Florida State University, helped lead his team to a victory in the 1989 Sugar Bowl, despite the fact that he had stopped attending classes months earlier, had taken no exams and had passed no courses. Sanders was able to compete because he had enrolled in classes for the semester preceding the Sugar Bowl. *The Old College Lie: Slavery, Hypocrisy and The Campus Athlete*, Philadelphia Enquirer, Oct. 15, 1989, (Magazine), at 36.

2. A college's decision to admit a student is independent of any restrictions Proposition 48 may place on the student's ability to participate in athletics. "[Proposition 48]

Proposition 48 has the effect of limiting the athlete's ability to compete in his or her sport for one year.[3]

Recent developments suggest that the application of the federal antitrust laws to institutions such as colleges and universities may be appropriate.[4] The Justice Department is investigating whether certain colleges and universities, by setting similar levels of tuition and financial aid, are in violation of the antitrust laws.[5] This article will focus on a potential antitrust challenge to the NCAA's Proposition 48 under federal antitrust laws by a male college basketball player who is ineligible to compete under Proposition 48. Do the presumably "good motives" of the NCAA in adopting Proposition 48 pass antitrust muster, or are the anticompetitive implications of Proposition 48 too broad to withstand scrutiny? It should be noted that the type of analysis contained herein may be applicable to other arguably anticompetitive restrictions imposed by the NCAA.

For the purposes of determining athletic eligibility, the 1989-90 NCAA Manual divides entering freshmen into three categories: Qualifiers, partial qualifiers and nonqualifiers. Under Section 14.3.1.1 of the NCAA Manual a qualifier is defined as:

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establishes a minimum standard only for athletics eligibility; it is not a guide to a student's qualifications for admission to the institution. Under NCAA legislation, a student's admission is governed by the regularly published entrance requirements of each member institution." GUIDE TO THE COLLEGE FRESHMAN ELIGIBILITY SC REQUIREMENTS FOR NCAA DIVISION I AND II INSTITUTIONS 11 (1989).

3. *See* McKenna, *A Proposition With a Powerful Punch: The Legality and Constitutionality of NCAA Proposition 48*, 26 DUQ. L. REV. 43, 68-78 (1987), for a comprehensive statistical analysis of the effect of Proposition 48 on various conferences and schools.

4. A Wesleyan University student, Roger Kingsepp, has filed a class action suit in federal district court in New York against Wesleyan and 11 other private universities and colleges. Kingsepp v. Wesleyan University, Civil Action No. 89-6121 (S.D.N.Y. Nov. 6, 1989). *See also Student Sues Wesleyan on Tuition-Fixing*, N.Y. Times, Sept. 20, 1989, at 21, col. 4. Kingsepp contends that the colleges "engaged in a conspiracy to fix or artificially inflate the price of tuition and financial aid." *Id.* On behalf of all students affected by the practice, Mr. Kingsepp seeks treble damages under section one of the Sherman Act.

5. The Justice Department has sent formal requests for information to "about 20" schools to determine if those colleges and universities fixed prices in violation of the Sherman Act. *U.S. Investigates Prestigious Universities, Colleges for Possible Antitrust Violations*, Wall St. J., Aug. 10, 1989, at B4, col. 3. John Burness, a vice president of Cornell University, one of the schools under investigation, stated that:

> [H]igher education is the only industry that has as its fundamental purpose the open exchange of information. From accreditation reviews to curriculum and the publishing of research results, we openly share information with institutions with which we compete for faculty and students. Our admissions publications, for example, state clearly that we discuss financial aid policies and practices. We believe these policies and practices are legal.

Suit Charges Tuition-Fixing, Cornell Alumni News, Nov., 1989, at 12-13.

According to a recent account, "at least 57 of the nations' most prestigious private colleges and universities are the subject of the inquiry." *Like Fall Applicants Colleges Await Fate*, Wash. Post, April 7, 1990, at 1, col. 4.

The Justice Department's New York office has reportedly begun an inquiry into activities of United States Swimming, the national governing body for that sport. *Inquiry Into Antitrust Allegations*, N.Y. Times, Aug. 25, 1989, at 41, col. 4. The inquiry is based on allegations that United States Swimming interfered with an attempt by the New York Amateur Sports Alliance to sponsor a swim meet. There are also allegations that United States Swimming operates as a monopoly. *Id.*

one who is a high school graduate and who presented the following academic qualifications:

(a) A minimum cumulative grade-point average of 2.000 (based on a maximum of 4.000) in a successfully completed core curriculum[6] of at least 11 academic courses, including at least three years in English, two years in mathematics, two years in social science, and two years in natural or physical science (including at least one laboratory class, if offered by the high school).[7]

(b) A minimum 700 combined score on the Scholastic Aptitude Test (SAT), verbal and math sections, or a minimum 15 composite score on the American College Test (ACT). The required SAT or ACT score must be achieved under normal testing conditions.[8]

A qualifier is eligible to receive financial aid and participate in intercollegiate athletics in his of her first academic year.

A partial qualifier is a student who does not meet the requirements for a qualifier, but who presents a cumulative grade-point average of at

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6. Core curriculum requirements for Division I schools must be met as of the time of graduation from high school. For division II schools, core curriculum requirements must be fulfilled prior to initial enrollment at a collegiate institution. *See* NCAA MANUAL § 14.3.1.1.2.1(a) and § 14.3.1.1.2.1(b) (1989-90), respectively.

7. The record of the above courses and course grades must be certified on the high school transcript or by official correspondence. *See* NCAA MANUAL § 14.3.1.1(a) (1989-90).

8. In addition to § 14.3.1.1 (Proposition 48), the NCAA has also introduced for consideration what has become known as Proposition 42. Proposition 42 states in part that:

> (2) An entering freshman with no previous college attendance who matriculated as a nonqualifier in a Division I institution and whose matriculation was solicited per § O.I.100 shall not be eligible for financial aid, regular-season competition and practice during the first academic year in residence, *except that a high school graduate who presents an overall accumulative minimum grade-point average of 2.000 but who fails to present the required grade-point average in the core curriculum and achieve the required test score may receive financial aid based upon institutional and conference regulations.* A nonqualifier or *partial qualifier* shall be entitled to three seasons of eligibility per Bylaw 5-1-(d) subsequent to the initial year of residence at the certifying institution. (Emphasis in original).

This restriction applies to Division I schools only. Proposition 42 also states that:

> (3) An entering freshman with no previous college attendance who matriculated as a nonqualifier in a Division I institution and whose matriculation was solicited per § O.I.100 shall not be eligible for regular-season competition and practice during the first academic year in residence; however, such a student whose admission and financial aid were granted without regard in any degree to athletic ability shall be eligible for nonathletic financial aid, provided there is on file in the office of the director of athletics certification by the faculty representative, the admissions officer and the chair of the financial aid committee that admission and financial aid were so granted. A nonqualifier *or partial qualifier* shall be entitled to three seasons of eligibility per Bylaw 5-1-(d) subsequent to the initial year of residence at the certifying institution.

At the NCAA annual convention in January, 1990, the NCAA voted 258-66-1 to adopt a new regulation, Proposition 26, in lieu of Proposition 42. *N.C.A.A. Eases Its Restrictions on Aid to Athletes*, N.Y. Times, Jan. 9, 1990, at 1, cols. 3-4. The new regulation would still prevent incoming freshmen who fail to achieve minimum college-entrance exam scores or a 2.0 grade-point average from receiving athletic scholarships and from participating in sports for one year. Proposition 26 does, however, allow these student-athletes to receive financial aid based on their family income. *Id.*

This article does not address the legality of or the issues involved in either Proposition 42 or Proposition 26.

least 2.000, based on a 4.000 scale, at the time of graduation from high school.[9] A partial qualifier may receive financial aid from the institution, but may not practice or compete during his or her first academic year.[10]

A non-qualifier is a student who either has not graduated from high school, or who presented neither the core curriculum grade-point average and SAT/ACT score required for a qualifier, nor the grade-point average required for a partial qualifier.[11] A non-qualifier is not eligible for competition or practice during his or her first academic year.[12] The above requirements apply to Division I[13] and Division II[14] institutions, but do not currently apply to Division III[15] schools. Although the regulations establish a minimum standard for athletic eligibility, admission to the university is nevertheless governed by the entrance requirements of the member institutions.[16] Accordingly, the only possible waiver of these initial eligibility requirements for Proposition 48 students must be initiated through the member institution after the prospective student has been admitted.[17] The waiver must be "based on objective evi-

9. *See* NCAA MANUAL § 14.02.9.2 (1989-90) (defines partial qualifier).

10. *Id.* at § 14.3.2.1.

11. *Id.* at § 14.02.9.3 (defining non-qualifier).

12. *Id.* at § 14.3.2.2.

13. Division I membership requirements are delineated in the NCAA MANUAL § 20.9 (1989-90). These requirements include a minimum of six varsity intercollegiate sports, including at least two team sports, involving all male teams or mixed teams of males and females, and a minimum of six varsity intercollegiate sports, including at least two team sports involving all-female teams. NCAA MANUAL § 20.9.3.3 sets out the minimum number of contests required for team sports and individual sports. Section 20.9.4 lists the requirements for Division I in basketball scheduling.

14. Division II requirements are set out in NCAA MANUAL § 20.10 (1989-90). A Division II school must sponsor four varsity intercollegiate sports, including at least two team sports, for both male and female teams. Section 20.10.3.5 lists the minimum contests and participants necessary for qualification as a Division II institution.

15. Division III membership is defined in § 20.11. A school must sponsor four varsity intercollegiate sports, including at least two team sports, for both males and females. Section 20.11.3.2 sets out the minimum contests and participation requirements.

16. In a survey of 2348 college presidents, deans and admissions officers, conducted by U.S. News and World Report, almost one of every four respondents admitted, "the issue of separate admission standards for athletes had created conflict or controversy" at their institutions. *A New Era on Campus*, U.S. NEWS AND WORLD REPORT, Oct. 16, 1989, at 56-57.

17. Under NCAA regulations, a student does not possess an independent right to appeal an ineligibility determination under Proposition 48. *See* GUIDE TO THE COLLEGE FRESHMAN ELIGIBILITY REQUIREMENTS FOR NCAA DIVISIONS I AND II INSTITUTIONS, Mar. 1989, at 10-11. The waiver requirements provide that:

> [T]he NCAA Council Subcommittee on Initial-Eligibility Exceptions may grant exceptions to the initial-eligibility requirements of this legislation based on objective evidence that demonstrates circumstances in which a student's overall academic record warrants the waiver of the normal application of this regulation. All appeals under this regulation must be initiated through a member institution that has officially accepted the prospect for enrollment as a regular student. Prospective student-athletes should contact the involved member institution for more information concerning this waiver process.
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> An exception also may be granted for a student who left high school after completion of the junior year or during the senior year to enter a Division I or II member institution under an early admissions program solely on the basis of outstanding academic performance and promise. An exempted student must have maintained an accumulative 3.500 grade-point average and must have ranked in the top 20 percent of the class for the last four semesters completed in high

dence" demonstrating circumstances warranting such a waiver.[18] Though there would seem to be several bases on which a student-athlete could challenge Proposition 48, a recent Supreme Court case has significantly weakened the likelihood of a successful constitutional challenge to this legislation. In ruling on the constitutional issue involved in *NCAA v. Tarkanian*,[19] the Supreme Court seemed to have resolved the issue in favor of the NCAA. The Supreme Court rejected the argument that the NCAA is a state actor for constitutional purposes, which appears to dramatically limit the opportunity for an athlete to challenge Proposition 48 on constitutional grounds.[20] In *Tarkanian*, the issue was whether the NCAA's participation in the events leading to Jerry Tarkanian's suspension as basketball coach at the University of Nevada Las Vegas ("UNLV") constituted state action as prohibited by the due process clause of the fourteenth amendment[21] and were performed under color of state law within the meaning of Section 1983.[22] The *Tarkanian* Court noted the dichotomy between state action under the fourteenth amendment and private conduct.[23]

The Court found that the NCAA was an organization independent

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school. In addition, all requirements of a qualifier (core curriculum and test scores) must be met except graduation from high school.

Id.

18. For example, Eric Manuel, once a player at the University of Kentucky, was ruled ineligible to compete in intercollegiate basketball by the NCAA for having allegedly cheated on his ACT entrance exam. Under NCAA regulations, Manuel had no right to appeal the NCAA ruling, even though he denied the allegation of cheating. He was therefore forced to transfer to Hiwasse College, a two-year institution. Manuel must now wait for an NCAA member institution to sign him and initiate an appeal process to attempt to restore his NCAA basketball eligibility. *Banished Player Yearns for Rescue*, N.Y. Times, Nov. 27, 1989, at 35.

19. 488 U.S. 179 (1988).

20. *See Id.* The NCAA's Committee on Infractions found 38 violations of its recruiting practices by the University of Nevada Las Vegas, and 10 violations by Tarkanian. The NCAA imposed sanctions against UNLV; UNLV suspended Tarkanian. Tarkanian sued UNLV and the NCAA in Nevada state court, alleging a violation of his fourteenth amendment due process rights in violation of 42 U.S.C. § 1983 (1988). Tarkanian received injunctive relief and attorneys' fees from the state court. The court concluded that the NCAA's conduct constituted state action for jurisdictional and constitutional purposes and that its decision was arbitrary and capricious. The NCAA appealed to the Supreme Court.

21. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST., amend XIV, cl. 1.

22. 42 U.S.C. § 1983 (1988) provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Tarkanian, 109 S. Ct. at 461-63 n.14 (citing 42 U.S.C. § 1983 (1988)).

23. The protections of the fourteenth amendment do not extend to "private conduct abridging individual rights." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). The pertinent inquiry, in Justice Stevens' view in *Tarkanian*, was whether the "[s]tate provided a mantle of authority that enhanced the power of the harm-causing individual actor." *Tarkanian*, 109 S. Ct. at 463-65. *See also* Jackson v. Metropolitan Edison, 419 U.S. 345 (1974). "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

of any state.[24] In the Court's view, UNLV retained the authority to withdraw from the NCAA and establish its own standards.[25] Further, the Court held that "[t]he NCAA is properly viewed as a private actor at odds with the State . . . ."[26] Thus, since the NCAA enjoyed no governmental powers,[27] it was to be considered a private entity. In addition, the NCAA's function of fostering amateur athletics at the collegiate level was not a traditional, exclusive state function.[28]

Given the limitations that Proposition 48 places on certain athletes and the apparent status, after *Tarkanian*, of the NCAA as a private, nongovernmental entity, the question becomes: On what grounds might an athlete challenge Proposition 48? *Tarkanian* seems to decrease the likelihood of a successful constitutional challenge. This article will examine the ability of a Proposition 48 student-athlete to challenge Proposition 48 under the antitrust laws, specifically section one of the Sherman Act.[29] In particular, this article will address the Proposition 48 restriction as it pertains to men's college basketball.

In college basketball, member institutions of the NCAA earn mil-

24. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988). "[W]hatever de facto authority the [private standard setting] Association enjoys, no official authority has been conferred on it by any government . . . ." *Id.*

25. *Tarkanian*, 109 S. Ct. at 461.

26. *Id.* at 462.

27. The NCAA did not have subpoena power, power to impose contempt sanctions or to assert sovereign authority over any one individual. *Id.* at 461-62.

28. *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987). "Neither the conduct nor the coordination of amateur sports has been a traditional government function." *Id.* at 545.

29. There are several other possible challenges to Proposition 48. There may be a cause of action for the tort of interference with contract, or interference with prospective business relationship or business advantage. Another possible challenge to Proposition 48 may lie in its racially discriminatory impact upon blacks. Thus, Proposition 48 may be subject to an attack on its discriminatory impact or effect under the equal protection clause, or under a civil rights statute. The Presidents Commission of the National Collegiate Athletic Association has commissioned a report on the effects of participation in intercollegiate athletics on student-athletes who are black. *See Report No. 3: The Experiences of Black Intercollegiate Athletes at NCAA Division I Institutions*, Center for the Study of Athletics, American Institutes for Research, March 1989. Among the findings of the study was that 58% of black football and basketball players, 19% of nonblack football and basketball players, 35% of other black student-athletes, and 27% of black extracurricular students score in the lowest quartile on the SAT (752 or below). *Id.* at 2. One educator has written that "[t]hese 'objective' tests are certainly economically, if not racially biased, and their use as a litmus test disproportionately affects black youngsters." Healy, *John Thompson's Protest: The Academic Background*, GEORGETOWN, Winter 1989, at 7. Georgetown University recently traced the college grades of 224 high risk students over seven years. These students had SAT scores of 900 or lower. Eighty-nine percent of these students have graduated from Georgetown and the remaining eleven percent are currently enrolled at Georgetown. *Id.* These statistics may have some bearing on the alleged discriminatory impact of the SAT tests and therefore on Proposition 48.

According to the NCAA, more than 90% of the 242 basketball and football players who lost their eligibility in the first year of Proposition 48 were black. P. HOOSE, NECESSITIES, RACIAL BARRIERS IN AMERICAN SPORTS, at 157 (1989). University of Nebraska football coach Tom Osborne, holder of a Ph.D. in educational psychology, stated "[d]uring the time I was doing my graduate work and my field teaching I came in contact with much data that showed there's about a 100 point cultural bias on the SAT test . . . . Because of this, I think that many minority students are at a disadvantage when taking these examinations." T. Osborne, *Three Views on Proposition 48*, NEW PERSPECTIVES, Winter 1988, at 6.

lions of dollars from NCAA sanctioned regular season games and from the NCAA tournament.[30] Since the one-year ban on eligibility imposed by Proposition 48 prevents a player from receiving significant exposure and training which may be instrumental in preparing him for a possible professional career, such an athlete may be sufficiently harmed by Proposition 48 to challenge its validity under the antitrust laws.[31]

II. AMENABILITY TO SUIT

The first issue to be addressed when considering a legal challenge to Proposition 48 concerns the amenability of the NCAA to a suit on antitrust grounds. Charles Grantham, Executive Director of the National Basketball Players Association ("NBPA"), has stated that Proposition 48 "is not an academic issue, but is, in fact, an economic issue."[32] The most likely vehicle for a plaintiff challenging Proposition 48 on antitrust grounds would be a suit alleging a violation of section one of the Sherman Act. The NCAA possesses all of the classic elements of a cartel in that the members establish the terms and conditions under which they compete or do not compete with one another.[33]

Section one of the Sherman Act provides that "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 . . . ."[34] The express language of the Sherman Act seems broad enough to proscribe nearly all agreements between businessmen.[35] However, the Supreme Court has held that only those agreements which "unreasonably" restrain trade are barred by the act.[36] In *Northern Pacific Railway v. United States,* Justice Black wrote that, "[a]lthough this prohibition is literally all-encompassing, the courts have

30. In 1988, the NCAA basketball tournament grossed $68.2 million. The four schools which advanced to the final round each received $1.2 million, most of which goes to the athletic departments of their respective universities. Gup, *Foul!*, TIME, April 3, 1989, at 55. The NCAA recently signed a seven-year, one billion dollar television contract with CBS giving that network the exclusive right to televise all NCAA tournament games starting with the 1990-91 NCAA season. *CBS Lands Sole Rights to NCAA*, Binghamton Press and Sun Bull., Nov. 22, 1989, § C, col. 2.

31. Although millions of dollars are generated by the commercial aspects of college athletics, the athletes themselves are governed by the NCAA's "Principle of Amateurism." *See* NCAA MANUAL, § 2.6 (1989-90) The Principle of Amateurism, which states:

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

32. Remarks by Charles Grantham, Executive Director, National Basketball Players Association, Sports Careers Conference '89, Phoenix, Arizona (May 13, 1989).

33. *See* McCormick & Meiners, *Sacred Cows, Competition, and Racial Discrimination*, NEW PERSPECTIVES, Winter 1988. "The NCAA is a price fixing cartel . . ." and "is immune to the general disdain afforded most cartels." *Id.* at 47.

34. 15 U.S.C. § 1 (1988).

35. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Id.* at 238.

36. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); *Chicago Bd. of Trade*, 246 U.S. at 231; Standard Oil Co. v. United States, 221 U.S. 1 (1911).

construed it as precluding only those contracts or combinations which unreasonably restrain competition."[37]

The purpose of the Sherman Act has been to foster economic competition. The Supreme Court has stated that the "[a]pplicability of the antitrust laws . . . rests on the need for vindication of their positive aim of insuring competitive freedom."[38] In the sports law context, recent caselaw establishes that the NCAA is amenable to a cause of action alleging violations of the Sherman Act. Thus, the argument that the NCAA should enjoy an exemption from the antitrust laws, as does major league baseball,[39] has been refuted.

In *NCAA v. Board of Regents*,[40] for example, Justice White, in dissent, wrote that "the NCAA does not enjoy blanket immunity from the antitrust laws . . . ."[41] Similarly, in *Goldfarb v. Virginia State Bar*,[42] in arguing that the learned professions should not be excluded from antitrust regulation, the Court stated that, "Congress intended to strike as broadly as it could in section one of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose."[43]

In *Mackey v. National Football League*,[44] an action was brought challenging the National Football League's ("NFL") rule allowing the league commissioner to require a club acquiring a free agent to compensate the free agent's former club. The NFL asserted that the restriction of competition for players' services is not a type of restraint proscribed by the Sherman Act,[45] since the NFL restraints constituted a labor market to which the antitrust laws did not apply.[46] The *Mackey* court dis-

37. 356 U.S. at 5.

38. Silver v. New York Stock Exch., 373 U.S. 341, 360 (1963).

39. Baseball's antitrust exemption is a historical anomaly. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972) calling baseball's antitrust exemption an aberration, but noting that the "aberration is an established one . . . entitled to the benefit of *stare decisis*." *But see* Radovich v. NFL, 352 U.S. 445, 450-52 (1957)(limiting the rule exempting baseball from the antitrust laws to the business of organized professional baseball); United States v. International Boxing Club, 348 U.S. 236, 243 (1955)(implying in dicta that not all professional sports are outside the scope of the antitrust laws).

40. 468 U.S. 85 (1984).

41. *Id.* at 133.

42. 421 U.S. 773, 787 (1975). *Goldfarb* involved the claim that the minimum fee schedule of a state bar association constituted price fixing in violation of section one of the Sherman Act. The Supreme Court held the fee schedule to be in violation of the Sherman Act.

43. *See* United States v. Southeastern Underwriters Ass'n, 322 U.S. 533 (1944). "That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any, doubt." *Id.* at 558.

44. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

45. *Id.* at 616.

46. In *Mackey*, the NFL cited section six of the Clayton Act, 15 U.S.C. § 17 (1988), and Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). Section six of the Clayton Act provides that "[t]he labor of a human being is not a commodity or article of commerce." The *Apex Hosiery* Court observed that "[r]estraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." *Apex Hosiery*, 310 U.S. at 503. The *Mackey* court analyzed the Clayton Act in light of the intent of the Act to exempt certain union activities from the antitrust laws. *Mackey*, 543 F.2d at 617. The *Mackey* court also distinguished *Apex Hosiery* since it involved restrictions

agreed, writing: "We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act."[47]

The *Mackey* court cited other professional sports cases which applied the Sherman Act to owner-imposed restraints on competition for players' services.[48] It could be argued that Proposition 48 is akin to an owner-imposed restraint on competition, since, although it is imposed by the NCAA, it was voted upon by the member institutions and is administered through the member institutions.

In another recent case, *Hennessey v. NCAA*,[49] the court acknowledged the business aspect of the NCAA, both in terms of providing coaches and athletic events for the public. In *Hennessey*, the court held that the NCAA was not entitled to a blanket exclusion from antitrust regulations.[50] The court noted that the NCAA and its member institutions, in "presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises."[51] In addition, "[t]he NCAA has a multi-million dollar annual budget . . ." and "negotiates and administers for itself or its members television contracts exceeding, for all sports, over $20,000,000 a year."[52] These money-making characteristics of the NCAA put it into what can be labeled "big business"[53]

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on competition for employee services imposed by the employees themselves, not by employers. *Id.*

47. *Mackey*, 543 F.2d at 618.

48. *Mackey*, 543 F.2d at 617. *See also* Radovich v. NFL, 352 U.S. 445 (1957); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Smith v. Pro-Football, 593 F.2d 1173 (D.C. Cir. 1978); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), *stay vacated*, 401 U.S. 1204 (1971).

49. 564 F.2d 1136, 1149 (5th Cir. 1977).

50. *Id.* at 1148-49.

51. *Hennessey*, 564 F.2d at 1149 n.14. Collegiate athletic departments have budgets of millions of dollars per year. For example, the current University of Iowa budget is $14.2 million for 1989 and is exceeded in the Big Ten Conference by both the University of Michigan at $18.5 million and Ohio State University at $21.3 million. *See Winning Warms Up "Climate For Giving," Boosts Enrollment*, Cedar Rapids Gazette, May 2, 1989, at 7A. In 1988-89, men's athletics at the University of Iowa had a total of $12,800,000 in revenue. Of that total amount, $2,420,000 came from men's basketball, $1,2000,000 from televised Conference play and $1,300,000 from local television. *Id.*

52. *Hennessey*, 564 F.2d at 1149 n.14. *See also* Johnson, *Three Views on Proposition 48*, NEW PERSPECTIVES (Winter 1988).

> I believe that athletes should be given more money . . . . [I]t's almost ludicrous to have kids bringing in all that money and not benefitting from the proceeds. I'm not advocating giving them a contract, but there are restrictions under the rules of the NCAA that prevent these kids from receiving even minor expenses. That's just ridiculous, because these athletes are bringing in millions of dollars. The Rose Bowl probably brings in close to eight or ten million dollars for the various schools.

Johnson, at 12.

53. Perhaps application of the antitrust laws to the business of college athletics is long overdue.

> [O]nly childlike innocence or willful blindness need prevent American colleges from seeing that the rules which aim to maintain athletics on what is called an 'amateur' basis, by forbidding players to receive pay in money, are worse than

and thus, within the ambit of the antitrust laws.[54]

In *Hennessey*, the NCAA asserted that it was outside the purview of the antitrust laws.[55] The NCAA cited earlier cases which discussed the limitations of the Sherman Act to purely commercial objectives.[56] For example, in *Marjorie Webster Junior College v. Middle States Association*,[57] the court of appeals stated that:

> [T]he proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspect of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.[58]

The Supreme Court has reiterated the view that the primary focus of the Sherman Act is on combinations having commercial objectives and is only applied to a limited extent to organizations having other objectives.[59] Similarly, in *Eastern Railway Presidents Conference v. Noerr Motor Freight, Inc.*,[60] the Court ruled against the extension of the Sherman Act to areas outside the business world.[61]

The more recent Supreme Court cases of *Goldfarb* and *Board of Regents*, however, support the view that the NCAA is not entitled to a blanket exclusion from the antitrust laws. For example, in *Board of Regents*, the paramount question concerning the Court was not whether the Sherman Act applied to the NCAA at all, but rather whether the particular restraint violated the Sherman Act.[62] In *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*,[63] the court of appeals stated that the recent decisions of the Supreme Court refuted appellants' contention that the Sherman Act only applied to commercial boycotts. Thus, the weight of recent caselaw suggests that the NCAA is subject to the

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useless because, while failing to prevent men from playing for pay, they breed deceit and hypocrisy.

R. TELANDER, THE HUNDRED YARD LIE 43 (1989) (citing an article from 1915 in THE ATLANTIC MONTHLY by William T. Foster).

54. *Hennessey*, 564 F.2d at 1149.

55. *Id.* at 1148. The NCAA cited *Apex Hosiery*, 310 U.S. at 493, for the proposition that, "[t]he end sought [by these laws] was the prevention of the restraints to free competition in businesses and commercial transactions . . . ."

56. *Id.* at 1148.

57. 432 F.2d 650, 654 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

58. *Id.* (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1969)).

59. *See* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 213 n.7 (1959).

60. 365 U.S. 127 (1961).

61. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political area . . . all of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact . . . .

Eastern R.R., 365 U.S. at 141.

62. The Court in NCAA v. Board of Regents, 468 U.S. 85, 100 n.22 (1984) determined that the non-economic nature of the NCAA's self-regulation was relevant in determining whether the restraint in question violated the Sherman Act. It was not relevant in applying the Sherman Act to the NCAA.

63. 356 F.2d 371, 376 (9th Cir. 1966).

reach of section one of the Sherman Act. Indeed, the recent Justice Department inquiry into the practices of some private colleges and universities in fixing tuition and financial aid levels for students further supports the contention that the NCAA's actions would fall within the ambit of the antitrust laws.[64]

III. STANDARDS OF JUDICIAL REVIEW

Since it appears well-established that the NCAA is amenable to suit under the antitrust laws, the question becomes how the rather vague mandate of section one of the Sherman Act would be enforced against the NCAA.[65] Two tests have traditionally been used by courts to evaluate restraints of trade under section one of the Sherman Act: The per se test[66] and the rule of reason test.[67] Additionally, although per se language is used in some cases[68] the court may have in reality utilized an unarticulated rule of reason analysis.[69] This article will proceed to eval-

64. Justice Department officials said that educational institutions are exempt from some provisions of the antitrust laws, but not from laws against price fixing. *Price-Fixing Inquiry at 20 Elite Colleges*, N.Y. Times, Aug. 10, 1989, at 1, col. 3. Irving Scher, a New York attorney who heads the American Bar Association's antitrust section, is quoted as saying that evidence of schools agreeing to financial aid packages or fixing tuition increases "would be a traditional antitrust violation." *U.S. Investigates Prestigious Universities, Colleges for Possible Antitrust Violations*, Wall St. J., Aug. 10, 1989, at B4, col. 4.

An earlier Wall Street Journal report called the schools "part of a price-fixing system that OPEC might envy." *Do Colleges Collude on Financial Aid?*, Wall St. J., May 2, 1989, at B1, col. 3. The fact that the Justice Department is investigating how prices are set in a field not usually viewed as commercial may signal a more vigorous approach to antitrust enforcement. Although colleges and universities are not normally the sort of businesses regulated by antitrust laws, they "are to some extent selling a product-education-with a price-tuition," said Phillip Areeda, an antitrust professor at Harvard Law School. Wall St. J., Aug. 10, 1989, at B4.

Questions have also been raised as to whether agreements to fix financial aid payments complied with the "Principles of Good Practice" of the National Association of College Admissions Counselors, a self-regulatory group to which most of the 23 schools being investigated belong. *Do Colleges Collude on Financial Aid?*, Wall St. J., May 2, 1989, at B1, col. 3. Members of the group of 23 colleges have acknowledged that they have met annually for the past 35 years to share information on applicants seeking financial aid. Barrett and Chipello, at B4, col. 3. By comparison, the NCAA has much more of an appearance of a classic cartel. The NCAA has existed since 1906, meets annually and has established elaborate written rules and requirements by which its members must abide, under the penalty of serious sanctions. *NCAA Guide for the College-Bound Student-Athlete* 1 (1989-90).

65. For an analysis of the application of antitrust laws to challenged restraints in general, *see* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 343-44.

66. *See infra* notes 70-77 and accompanying text.

67. *See infra* notes 78-98 and accompanying text.

68. This absence of a rigid delineation between per se and rule of reason analysis will be addressed in the context of group boycotts, *infra* notes 112-135 and accompanying text. However, according to a recent commentary on Preferred Provider Organizations, the "selection of the legal standard [per se or rule of reason] to be applied to a group boycott is likely to determine the outcome of the controversy." Youle and Daw, *Preferred Provider Organizations: An Antitrust Perspective*, 29 ANTITRUST BULL. 301, 343 (1984).

69. One commentator has noted that, "[t]here are cases where one can weigh the harms, benefits, and alternatives and conclude almost instantaneously that conduct is unlawful; one decides the particular case so rapidly that he may express his result in 'per se' language." P. AREEDA, ANTITRUST ANALYSIS § 391(b)(2d ed. 1974).

uate the Proposition 48 regulation under both a per se and a rule of reason analysis.

A. *Per se Analysis*

Certain types of agreements have been identified as being so unreasonable that they may be deemed illegal per se, without further inquiry into their justification. One commentator has noted that "[b]ehavior is illegal per se when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense."[70] In *Northern Pacific Railway v. United States*,[71] the Court stated:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[72]

Justice Black, in *Northern Pacific*, noted that per se unreasonableness avoids the necessity for "an incredibly complicated and prolonged economic investigation" into the history of the industry involved.[73]

Several practices have been identified by the courts as meriting per se analysis. Among the practices which the courts have deemed per se illegal are price fixing,[74] division of markets,[75] group boycotts,[76] and tying arrangements.[77]

B. *Rule of Reason Analysis*

In *Standard Oil v. United States*,[78] Justice White set forth what has become known as the "rule of reason." He wrote, "[t]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason

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70. R. BORK, THE ANTITRUST PARADOX, at 18 (1978).

71. 356 U.S. 1 (1958).

72. *Id.* at 5. *See also* Worthen Bank & Trust v. National BankAmericard, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

73. 356 U.S. at 5.

74. *See* United States v. Socony-Vacuum Co., 310 U.S. 150 (1940). "Under the Sherman Act a combination formed . . . with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*." *Id* at 223; United States v. Trenton Potteries Co., 273 U.S. 392 (1927). "Agreements which create such potential power may well be held to be . . . unreasonable or unlawful restraints, without the necessity of minute inquiry into whether a particular price is . . . unreasonable . . . ." *Id.* at 397. *See also* Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982); Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc., 340 U.S. 211 (1951).

75. United States v. Topco Assoc., 405 U.S. 596 (1972); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

76. *See infra* notes 112-135 and accompanying text.

77. *See* Standard Oil v. United States, 337 U.S. 293, 305-06 (1949). "[T]ying agreements serve hardly any purpose beyond the suppression of competition." *Id.* at 305-06; Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953); International Salt Co., Inc. v. United States, 332 U.S. 392 (1947).

78. 221 U.S. 1 (1911).

. . . ."[79] Justice White also utilized the rule of reason analysis in *United States v. American Tobacco Co.*,[80] where he defined a restraint of trade as a restraint which, "[o]nly embraced acts or contracts or agreements or combinations which operated . . . by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade."[81]

In *Chicago Board of Trade v. United States*,[82] the rule of reason standard was further delineated. Justice Brandeis 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."[83] The factors to be considered when applying the rule of reason analysis are: 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, the history of the restraint, and the reason for adopting the remedy.[84] Thus, the rule of reason standard is a malleable concept which courts must mold to conform to each individual fact situation. More recently, the focus of the courts in rule of reason cases has been on the procompetitive effects of the restraint. In *National Society of Professional Engineers v. United States*,[85] the Court cited the test espoused in *Standard Oil*, which asked whether the challenged agreements or acts "were unreasonably restrictive of competitive decisions."[86] Unreasonableness could be based on either the nature or character of the agreements or on the surrounding circumstances.[87] Thus, the inquiry focused on the impact of the restraint on competitive conditions.

In *Professional Engineers*, the Court stated that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[88] Therefore, the competitive effect of an agreement is evaluated by "analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[89] Thus, the Court will balance the anticompetitive effects of the restraint against any procompetitive benefits associated therewith. In recent years, however, there seems to have

79. *Id.* at 62.
80. 221 U.S. 106 (1911).
81. *Id.* at 179.
82. 246 U.S. 231 (1918).
83. *Id.* at 238.
84. *See* Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 615 (1953), which states that the factors to be considered should include "the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize."
85. 435 U.S. 679 (1978).
86. *Id.*
87. *Id.*
88. *Id.* at 691. *See also* Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir. 1966). "The pertinent inquiry . . . is whether an association intends to use that power in a manner which tends to suppress or destroy competition." *Id.* at 171.
89. 435 U.S. at 692.

been a blurring of the clear, bright line distinctions between the per se and rule of reason tests. In *Professional Engineers*, the Supreme Court noted that the purpose of either a per se or rule of reason analysis is "to form a judgment about the competitive significance of the restraint."[90]

In another industry heavily dependent upon agreements among would-be competitors, a rule of reason analysis was deemed appropriate by the Supreme Court. In *Broadcast Music, Inc. v. CBS, Inc.*,[91] the plaintiff, CBS, sought a license on a per-use basis from two organizations[92] which acted as clearinghouses for their members. When the organizations refused the license CBS sued, alleging price-fixing under the Sherman Act. The sole issue before the Court was whether the blanket license arrangement of the two organizations was properly within the per se category,[93] as held by the court of appeals.[94]

The Supreme Court ruled that the blanket license was not a "naked restraint of trade with no purpose except stifling of competition."[95] Even though the "per se rule is a valid and useful tool of antitrust policy and enforcement,"[96] the licensing arrangement "should be subjected to a more discriminating examination under the rule of reason."[97] In explaining its decision to apply a rule of reason analysis, the Court noted that "[t]here are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws . . . ."[98]

C. *Sports Cases*

In *NCAA v. Board of Regents*,[99] the Supreme Court discussed what would be considered "procompetitive" for the purpose of applying the test espoused in *Professional Engineers*.[100] Justice Stevens found that the NCAA may be viewed as procompetitive since its role of preserving the quality of amateur athletics widens consumer choice. Similarly, in *Smith v. Pro Football, Inc.*,[101] the court of appeals noted that "under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect."[102] If the restraint is found

90. *Id.*
91. 441 U.S. 1 (1979).
92. The organizations involved were the American Society of Composers, Authors and Publishers ("ASCAP"), and Broadcast Music, Inc., ("BMI").
93. *Broadcast Music*, 441 U.S. at 4.
94. CBS, Inc. v. American Soc'y of Composers, 562 F.2d 130 (2d Cir. 1977).
95. *Broadcast Music*, 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).
96. *Broadcast Music*, 441 U.S. at 8.
97. *Id.* at 24.
98. *Id.* at 14 (quoting Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in K-91, Inc. v. Gershwin Publishing Corp., O.T. 1967, No. 147, at 10-11) (citing Associated Press v. United States, 326 U.S. 1 (1945); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); United States v. St. Louis Terminal, 224 U.S. 383 (1912)).
99. 468 U.S. 85 (1984).
100. *See supra* notes 85-90 and accompanying text.
101. 593 F.2d 1173 (D.C. Cir. 1978).
102. *Id.* at 1183.

to have "legitimate business purposes" which promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues."[103]

From the Proposition 48 challenger's perspective, there would be several advantages of a per se analysis over a rule of reason analysis. First, the per se test is a bright line test which judges can apply. Conversely, the rule of reason test requires a certain amount of judicial discretion in determining reasonableness, which may result in consideration of a myriad of differing factors as to what restraints are reasonable. In *Denver Rockets v. All-Pro Management, Inc.*,[104] Judge Ferguson wrote, "the Supreme Court has on numerous occasions recognized these difficulties and has declared that with regard to certain practices the problems of making adequate economic determinations and setting appropriate guidelines are so complex that they simply outweigh the very limited benefits deriving from those practices . . . ."[105] Second, from the Proposition 48 challenger's perspective, there is an economy and efficiency justification for applying a per se test when warranted by the facts and circumstances of a given case. Time problems, court costs and burdens on the judicial system are minimized with a per se analysis. The *Denver Rockets* court stated that "[t]he primary disadvantages of the rule of reason are that it requires difficult and lengthy factual inquiries and very subjective policy decisions which are in many ways essentially legislative and ill-suited to the judicial process."[106]

In the case of a Proposition 48 player who would lose one year of eligibility under the rule, application of the per se test would be necessary for the player to obtain a quick and meaningful remedy. The time required by a rule of reason analysis would effectively eliminate the Proposition 48 player's ability to overturn the regulation in the one year time period during which he is barred from competition. In *Denver Rockets*, player Spencer Haywood challenged the National Basketball Association's ("NBA") restriction which purportedly made Haywood ineligible to enter the NBA until four years after his high school class graduation. Haywood sought to enter the NBA after his second year of college basketball, and eventually received partial summary judgment to permit him to do so, with the court acknowledging the extreme time delay of an extended rule of reason analysis.[107] The time delays involved in a challenge to Proposition 48 under a rule of reason analysis would militate strongly in favor of a per se analysis; time is of the essence to the Proposition 48 challenger.

The Proposition 48 challenger would most likely seek an injunction, thus allowing the athlete to compete during that school year. Injunctive relief or summary judgment is preferable for the athlete challenging

103. *Id.* at 1183. *See also* Kapp v. NFL, 390 F. Supp. 73, 82 (N.D. Cal. 1974).
104. 325 F. Supp. 1049 (C.D. Cal. 1971).
105. *Id.* at 1063.
106. *Id.*
107. *Id.* at 1058-59.

Proposition 48 because money damages for the loss of one year of competition may ultimately be difficult to ascertain. Commenting on the difficulty of computing damages in antitrust cases, the Supreme Court has observed that "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."[108] A federal appeals court in a sports case has noted the "Alice-in-Wonderland" quality of the computation of antitrust damages.[109] Therefore, because of the substantial delays involved in a rule of reason analysis and the inherent difficulty in ascertaining money damages for a player prohibited from competing under Proposition 48, application of the per se standard and injunctive relief are preferred remedies from the Proposition 48 challenger's perspective.

Judge Ferguson in *Denver Rockets* applied the following traditional criteria to determine that granting an injunction was appropriate given the defendants' illegal per se conduct:[110]

> A preliminary injunction in this type of action should be granted where the plaintiff shows that: (1) the conduct to be enjoined is in furtherance of the alleged violation of the antitrust laws; (2) there is a substantial likelihood the allegations of the complaint will be sustained at the trial of the cause; (3) that irreparable harm to the plaintiff will result if the injunction pendente lite is denied; and (4) that there is no conduct by the plaintiff which would bar the granting of equitable relief.[111]

Under a *Denver Rockets* analysis, a Proposition 48 challenger would have to meet all of the above criteria to be granted an injunction to strike down Proposition 48 and to be permitted to compete.

IV. GROUP BOYCOTTS

A. *Generally*

The NCAA's establishment of Proposition 48 restrictions is susceptible to Sherman Act attack as a group boycott. A group boycott, also known as a concerted refusal to deal,[112] is a situation where commercial entities agree to refuse to deal with another entity in order to influence improperly the latter's business practices. Classic group boycotts have historically been susceptible to a per se analysis.[113] Although there may

108. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

109. Smith v. Pro Football Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978).

110. *Denver Rockets*, 325 F. Supp. at 1061. Judge Ferguson noted that, "[s]ummary judgments have been frequently used by courts in group boycott cases." *See, e.g.*, Silver v. New York Stock Exch., 373 U.S. 341 (1963).

111. *Denver Rockets*, 325 F. Supp. at 1058.

112. W. HOLMES, ANTITRUST LAW - HANDBOOK, (1987). "The term group boycott generally connotes a refusal to deal or an inducement of others not to deal or have business relations . . . ." *Id.* at 101. *See* Mackey v. NFL, 543 F.2d 606, 618 (1976) (citing Kalinowski, *The Per-Se Doctrine - An Emerging Philosophy of Antitrust Law*, 2 UCLA L. REV. 569, 580 n.49 (1964)).

113. "[C]ases adopting a per se rule typically involve a "classic group boycott," i.e., a "concerted attempt by competitors at one level to protect themselves from non-group members who seek to compete at that level." Youle and Daw, *Preferred Provider Organizations: An Antitrust Perspective*, 29 ANTITRUST BULL. 301, 345 (1984). *See* Klor's, Inc. v. Broad-

be a blurring of the distinction between the per se and rule of reason tests, in general, where the boycott is "manifestly anticompetitive" or a "naked restraint" of trade,[114] an application of a per se test may still be appropriate. These concerted refusals to deal involve attempts to gain market power at the expense of other competitors.[115] However, one commentator has noted that certain refusals to deal, primarily in areas such as scheduling, are necessary in certain circumstances involving sports leagues.[116]

In *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Commission*,[117] the court identified three categories of per se illegal group boycotts. The first group consisted of horizontal combinations among traders at one level of distribution whose purpose was to exclude direct competitors from the market.[118] The second group consisted of vertical combinations among traders at different levels who excluded direct competitors from the market.[119] The third group was comprised of combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors.[120]

Several cases established that the per se test was appropriate in the group boycott area. In *Klor's, Inc. v. Broadway-Hale Stores*,[121] Klor's alleged that Broadway-Hale and other manufacturers had agreed not to

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way-Hale Stores, 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

114. Careful scrutiny of the facts and circumstances surrounding a particular refusal to deal is helpful in predicting the legal standards that will be applied. Where a refusal to deal is used to implement an illegal restraint of trade which itself would be subjected to per se analysis, the arrangement is also likely to be judged by the per se standard. Thus, a refusal to deal designed to promote a price-fixing scheme, eliminate discounting competitors, allocate markets dealing contracts, or create monopoly power will be struck down without inquiry as to its effect upon competition in the relevant market.

Youle and Daw, at 344.

115. *But see* Business Elecs. Corp., v. Sharp Elecs. Corp., 108 S. Ct. 1515 (1988)(holding that a vertical restraint was not per se illegal unless it included some agreement on price or price levels); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986)(discussing the Court's reluctance to extend per se analysis where the economic impact of the restraint is not immediately obvious). *See also* Northwest Wholesale Stationer's, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985)(where the Supreme Court held that it was not per se illegal for a group of retailers to expel a competing retailer because the plaintiff had failed to show that the defendant possessed market power or control of a vital service or product needed to compete effectively).

116. Agreements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports from the Ivy League to the National Football League . . . rest entirely upon the right to boycott . . . . Members of the league agree not to play with nonmembers or to limit the number of games with nonmembers. Were leagues denied the power to enforce such agreements . . . the league would be destroyed.

R. BORK, THE ANTITRUST PARADOX 322 (1978).

117. 467 F.2d 178, 186 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

118. *See* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

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

120. *See* Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941). *See also* Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973). *See infra* notes 172-82 and accompanying text, in which the *Blalock* case is analogized to the third category of group boycotts, as exemplified in *Fashion Originators'*.

121. 359 U.S. 207, 209 (1959).

sell to Klor's or to sell to Klor's only on unfavorable terms. The Supreme Court held that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden [per se] category."[122] In *Klor's*, the Court found a wide combination of manufacturers, distributors, and a retailer which took away from Klor's its freedom to operate in an open, competitive market, and thus interfered with the natural flow of commerce.[123]

The Supreme Court did not accept the defendants' argument that the boycott should be tolerated because the victim's business was so small as to make little difference to the economy.[124] In the case of a prospective college student-athlete challenging Proposition 48, it is plausible that the NCAA would argue that the Proposition 48 student's non-participation in athletics for a one year period would have little effect on the overall economy. However, if one follows the *Klor's* approach, this makes no difference. It is the "nature," "character," and "monopolistic tendency" of the interface with interstate commerce which matter.[125] Similarly, in another group boycott case, *Fashion Originators' Guild of America v. FTC*,[126] the Supreme Court refused to hear evidence of the reasonableness of the methods used by the defendants. The Court ruled that the Fashion Originators' Guild's plan to sell only to retailers who would not deal in copied garments was an unreasonable restraint of trade. The plan narrowed the outlets to which manufacturers could sell and from which retailers could buy; it subjected all retailers and manufacturers who decline to comply with the plan to an organized boycott; it stripped members of freedom of action, and it had as its "purpose and effect the direct suppression of competition."[127]

It was not required that a complete monopoly be achieved, because "it is sufficient if it really tends to that end and to deprive[s] the public of the advantages which flow from free competition."[128] The purpose and object of the combination, its potential power, its tendency toward monopoly, and the coercion it practiced upon a rival method of competition, all brought the combination within the proscriptions of the Sherman . . . Act."[129] The Court refused to hear evidence offered of reasonableness.[130]

In drawing an analogy between *Fashion Originators'* and Proposition 48, it is apparent that Proposition 48 also narrows the pool from which

122. *Klor's Inc.*, 359 U.S. at 212. *See also* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 214 (1951); Binderup v. Pathe Exch., Inc., 263 U.S. 291 (1923); Eastern States Retail Lumber Dealer's Ass'n v. United States, 234 U.S. 600 (1914).

123. *Klor's*, 359 U.S. at 213.

124. *Id.*

125. *Id.*

126. 312 U.S. 457, 468 (1941).

127. *Id.* at 465.

128. *Id.* at 466 (quoting United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

129. *Id.* at 467-68.

130. *Id.* at 468.

Division I and II colleges can recruit athletically eligible freshmen and it narrows the choice of schools which those students may attend if they wish to participate in intercollegiate athletics during their first year. The plan subjects all students who fail to qualify under Propositin 48 to an organized group boycott by all NCAA Division I and II schools with regard to the student's participation in intercollegiate athletics during the first year, and it restrains the universities' ability to place on their intercollegiate teams certain students already admitted to the school under the school's independent admission standards. Overall, the plan has the purpose and effect of direct suppression of competition. It suppresses both the student's freedom to attend and to compete athletically at the school to which he or she has been admitted, and the school's freedom to allow its students to compete. Furthermore, the NCAA's Proposition 48 exclusively affects athletes. A non-athlete student who has not met the Proposition 48 standards could still participate in other school-sponsored activities, but the student-athlete who has not met the Proposition 48 standards is prevented from athletic participation by the NCAA rule.[131]

An exception to the rule of per se analysis for group boycotts was enunciated in *Silver v. New York Stock Exchange.*[132] The *Silver* Court held that the concerted action of the New York Stock Exchange constituted a group boycott which was per se illegal, but because of the other statutory scheme at issue, the Securities and Exchange Act, the Court did not end the inquiry there.[133] Instead, the Court created an exception to the per se rule of group boycotts when a statutory scheme of self-regulation is involved. When such a scheme exists, it will result in a rule of reason inquiry.[134] The Court reasoned that certain organizations need to develop internal guidelines to promote safety rules and rules to ensure the integrity of competition and to provide for orderly execution. However, *Silver* may have limited applicability in the sports law context since sports cases may not fall within the *Silver* exception.[135]

B. *Sports Cases*

A body of caselaw has developed pertaining to the application of

131. William V. Muse, the president of the University of Akron, advocates requiring that each school treat athletes the same way it treats other students as to admission and retention standards and eligibility for participation in extracurricular activities. He has written that, "[w]e should not prohibit freshmen from competing in athletics unless we are also willing to prohibit them from playing in the band, holding office in student government, pledging a fraternity or holding a part-time job." Muse, in a letter to the editor printed in SPORTS ILLUSTRATED, Dec. 18, 1989, at 5, col. 3.

132. 373 U.S. 341 (1963). *Silver* involved the question of whether and to what extent the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934. *Id.* at 342. The antitrust claim in *Silver* alleged that the New York Stock Exchange had conspired with its member firms to deprive petitioners of their private wire connections and stock ticker service in violation of sections one and two of the Sherman Act. *Id.* at 345-46.

133. *Id.* at 347-49.

134. *Id.* at 360-61.

135. 373 U.S. 341 (1963).

per se and rule of reason analysis to sports cases. We will analyze the Proposition 48 restriction under both guidelines.[136]

1. Per Se Illegality

Several sports cases have applied the per se standard to group boycotts. In *Denver Rockets v. All-Pro Management, Inc.*,[137] the court ruled that the NBA's bylaws prohibiting a player from negotiation with an NBA team until four years after his high school class graduation constituted a group boycott which was illegal per se.

Spencer Haywood was an accomplished high school All-American basketball player. After two years of college basketball, Haywood entered into a contract under which he later refused to perform with the Denver Rockets of the American Basketball Association ("ABA").[138] Haywood next entered into a contract with the Seattle Supersonics of the NBA. However, NBA Bylaw 2.05[139] made a player ineligible to compete in the NBA until four years after his high school class had graduated.[140] Haywood contended that Bylaw 2.05 constituted an unlawful restraint of trade in violation of sections one and two of the Sherman Act.[141]

The *Denver Rockets* court identified two threshold elements which must be present before a concerted refusal to deal can be illegal under section one of the Sherman Act:

> (1) There must be some effect on "trade or commerce among the several States," and
>
> (2) there must be sufficient agreement to constitute a "contract, combination . . . or conspiracy."[142]

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136. *See generally* Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 344-51.

137. 325 F. Supp. at 1053.

138. Haywood alleged that the Denver Rockets made fraudulent misrepresentations to him. *Id.* at 1054.

139. A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player [in the NBA] until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights to the services of such person at any time thereafter.

NBA BYLAWS § 2.05 *reprinted in Denver Rockets*, 325 F. Supp. at 1055.

140. In 1958, this restriction precluded Wilt Chamberlain from entering the NBA draft after his junior year of college, when he chose not to play during his senior year at the University of Kansas. Because of the NBA's restriction, Chamberlain could not enter the NBA in 1958. He toured, instead, that season with the Harlem Globetrotters. *See* W. CHAMBERLAIN & D. SHAW, WILT 93 (1973).

141. This article will deal with only the section one allegations made in Denver Rockets v. All-Pro Management, 325 F. Supp. 1049 (C.D. Cal. 1971).

142. *Denver Rockets*, 325 F. Supp. at 1062. The NCAA has been called a "price fixing cartel that limits payments to athletes." McCormick & Meiners, *Sacred Cows, Competition, and Racial Discrimination*, NEW PERSPECTIVES 47 (Winter 1988).

It was uncontested in *Denver Rockets* that both of these elements were present. Likewise, the elements are present in the case of the NCAA and Proposition 48. The NCAA schedules games in various states and receives television and radio revenue from the nationwide broadcasting of those games, thus constituting interstate commerce. Also, through the application of Proposition 48, the member institutions of the NCAA have agreed not to permit the students affected by Proposition 48 to compete.

The *Denver Rockets* court ruled that "[t]here is a substantial probability . . . that NBA By-law 2.05 constitutes a group boycott as defined in *Klor's v. Broadway-Hale Stores, Inc.* . . . ."[143] But for the by-law provision, Haywood would have been eligible to play in the NBA.[144] Similarly, the college student barred by Proposition 48 would be eligible, but for the NCAA rule, to play collegiate athletics for a Division I or II school to which admission had been granted. The *Denver Rockets* court considered By-law 2.05 to be a "restraint upon free trade in interstate commerce (in the form of an arbitrary and unreasonable restriction of the ability of qualified basketball players to bargain freely in a competitive market). . . ." [145]

The court labeled the NBA rule "a 'primary' concerted refusal to deal wherein the actors at one level of a trade pattern (NBA team members) refuse to deal with an actor at another level (those ineligible [for the NBA draft under the] rule)."[146] In the case of Proposition 48, the refusal to deal is between actors at one level, NCAA Division I and II schools, and actors at another level, college students. Thus, a court examining Proposition 48, citing the analysis in *Denver Rockets*, could also find a primary concerted refusal to deal.[147]

The *Denver Rockets* court identified three instances of harm resulting from such a boycott. First, the victim is injured by being unable to enter the market he seeks. Second, competition in the market in which the victim attempts to enter is injured. Third, the individual members of the NBA have established their own private government by pooling their

143. *Denver Rockets*, 325 F. Supp. at 1056.

144. *Id.*

145. *Id.* at 1057.

146. *Id.* at 1061.

147. Even prior to the *Denver Rockets* case, a suit was filed against the NBA, alleging a group boycott for the League's failure to permit a player to compete. *See* Hawkins v. NBA, 288 F. Supp. 614 (W.D. Pa. 1968)(civil antitrust action); Hawkins v. NBA, 295 F. Supp. 103 (W.D. Pa. 1969)(private antitrust action). In 1966, attorneys for basketball player, Connie Hawkins, filed an antitrust suit against the NBA, claiming that, as the only major league in professional basketball, the NBA possessed a monopoly on all jobs in the field. D. WOLF, FOUL! 302 (1972). Hawkins alleged that the NBA teams and the League, through the Commissioner, had conspired to blacklist Hawkins in restraint of trade and in violation of Federal antitrust laws. *Id.* at 302-03. Until that time, "no one had ever applied the principal of group boycott to a sports case." D. WOLF, FOUL! 303 (quoting Roslyn Litman, attorney for Connie Hawkins).

Hawkins v. NBA was eventually settled before it reached trial. Hawkins was admitted into the NBA, and he received a substantial monetary settlement. D. WOLF, FOUL! at 344-45.

economic power. [148] With Proposition 48, all three instances of harm are present. The college student is injured by being unable to play his sport for a Division I or II school for the period specified by Proposition 48. Overall competition in college athletics is hurt because of the absence of Proposition 48 players. Finally, the individual members of the NCAA have, in effect, established their own private government which allows them to exclude players at will. It is noteworthy that the court ruled as it did in *Denver Rockets* even though the employment option of the ABA was open to Spencer Haywood,[149] just as the option of attending a non-Division I or non-Division II school is available to the Proposition 48 student.[150]

The argument that the *Silver* exception[151] should be extended to professional sports was rejected in *Denver Rockets*.[152] The court ruled that the case did not fall within the rule of reason exception provided by *Silver*, since the NBA by-laws contained no provision for a hearing before the provision in question was applied to exclude an individual player. Since there was also no provision for a player to petition for an appeal, the court concluded that the NBA rules in question "fall outside the *Silver* exception and are subject to the per se rule normally applicable to group boycotts."[153] Similarly, the same argument could be made for the Proposition 48 student who has no individual right to seek an exception to the application of Proposition 48 to him;[154] there are no provisions for a hearing or an appeal contained in Proposition 48, so, therefore, the *Silver* exception would not apply.

Some similarities to the *Denver Rockets* case can also be seen in *Gardella v. Chandler*,[155] where the plaintiff, a professional baseball player, violated the terms of the reserve clause of his major league baseball contract by playing professional baseball in Mexico while under contract to the New York Giants. He sought to return to major league baseball, was subsequently banned from organized league baseball in the United States for five years, and was thus "deprived pro tanto of his means of livelihood."[156] Gardella filed an antitrust suit under the Sherman and Clayton Acts.[157] The case was dismissed by the district court.[158]

148. *Denver Rockets*, 325 F. Supp. at 1061.

149. The ABA had no counterpart to By-law 2.05 of the NBA.

150. While it is true that Division III and junior colleges are available alternatives for Proposition 48 students, they do not offer the same level of exposure and competition for the athlete. The money spent on athletics and the media exposure a player receives at a non-Division I school are not comparable to that of a Division I school.

151. *See supra* notes 132-35 and accompanying text.

152. *Denver Rockets*, 325 F. Supp. at 1066.

153. *Id.*

154. Any application for a waiver of the applicability of Proposition 48 to a particular student must be made by the institution, and only after the student has already enrolled at the institution.

155. 172 F.2d 402 (2d Cir. 1949).

156. *Id.* at 403.

157. A major portion of the opinion in Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948) was devoted to an analysis of whether baseball constituted interstate commerce. That issue is no longer in question. The inapplicability of the Sherman Act was enunciated in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Base-

In a two-to-one decision remanding the case,[159] Judge Frank referred to the "involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country."[160] Likewise, in the case of Proposition 48, the member institutions of the NCAA control the labor, albeit noncompensatory labor,[161] of virtually all of the prospective professional basketball players in the country.[162]

In *Gardella,* Judge Frank also wrote that:

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ball Clubs, 259 U.S. 200 (1922); *see also* Toolson v. New York Yankees, 346 U.S. 356 (1953). In Flood v. Kuhn, 407 U.S. 258, 282 (1972), the Court found that "professional baseball is a business and it is engaged in interstate commerce . . . . With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Flood,* 407 U.S. at 282. We cite *Gardella* for the limited purpose of showing how a person, such as the Major League Baseball Commissioner, or a group, such as the NCAA, can illegally inhibit and restrain a player's right to compete.

158. *See* Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948).

159. The Court of Appeals for the Second Circuit sent the case back to the district court for a trial on the merits of the complaint, but the case was settled and Gardella was reinstated before the trial. L. SOBEL, PROFESSIONAL SPORTS AND THE LAW, 18-19 (1977).

160. *Gardella,* 172 F.2d at 410.

161. William Gerberding, president of the University of Washington, has questioned the wisdom and necessity of the existing regulatory structure which prohibits college athletes from receiving compensation.

> At the core of the existing regulatory structure is the idea that having college athletes 'play for pay' is obviously wrong for society and wrong for them. I'm less and less sure about such matters, and I'm even less sure as I contemplate the obvious facts that so many of the most gifted athletes are economically and educationally disadvantaged blacks. I have become increasingly uncomfortable about the defensibility of a largely white establishment's maintaining an elaborate system of rules that deprive black students athletes of adequate financial support in the name of 'the ideals of amateurism'. . . Why should a talented flute player be able to receive a music scholarship and also be able to help make his or her way through college by playing in jazz and classical groups for pay, while a person whose gifts are athletic and whose gifts help sustain expensive intercollegiate programs school should not be able to model T-shirts or sell cars on play his or her sport in the summer for money or -perish the thought - join a national union of collegiate players who bargain collectively with universities regarding their financial support?

College Sports: Maybe They Should Play For Pay, Wash. Post, Sept. 5, 1989, at A19, col. 1.

162. *See* Frank Deford, Remarks at the House Education and Labor Subcommittee hearing (May 18, 1989), *quoted in End Athletic Scholarships, Shorten Seasons, Educator Urges,* Detroit News, May 18, 1989, at 1A. "[B]ig-time college athletics has always been a scandal and always will be, unless major changes are made. It is a professional game that poses as amateur; a big business that uses free labor". College coaches, on the other hand, seem to be rewarded very handsomely for their involvement with their athletic programs. In accordance with the 1989-90 NCAA Manual, coaches may be compensated for endorsing products and may receive "direct cash payment in recognition of a specific and extraordinary achievement (e.g., . . . winning a conference or national championship.)." NCAA MANUAL § 11.3.2.3. (1989-90).

It is estimated that Tom Davis, head basketball coach at the University of Iowa, receives an overall income package of at least $250,000. *Salaries Just Part of Package,* Cedar Rapids Gazette, May 3, 1989 at 7A, cols. 1-4. Lute Olson, head basketball coach at the University of Arizona, has reportedly signed a new contract package worth at least $400,000 per year. *Id.* Bill Frieder, head basketball coach at Arizona State University, is reportedly receiving $700,000 per year guaranteed income. *College Coaches' Brief Encounters,* N.Y. Times, Nov. 12, 1989, at A31, col. 3. Rick Pitino recently left the New York Knicks of the NBA to accept the head coaching job at the University of Kentucky, a school which is on NCAA probation, for a reported $5 million over seven years. *Pitino Feels at Home in Kentucky,* N.Y. Times, June 2, 1989, at B12, col. 1.

> [T]he most extreme of these penalties is the blacklisting [for violation of the reserve clause] of the player so that no club in organized baseball will hire him . . . [t]he right to play with organized baseball is indispensable to the career of a professional baseball player. The violator may perhaps become . . . a bartender or a streetsweeper, but his chances of ever again playing baseball are exceedingly slim.[163]

Similarly, Proposition 48 is a form of blacklisting for college basketball players. They are declared ineligible for one year and forever branded with the Proposition 48 label. Indeed, the "right to play" organized Division I or II college basketball is the normal course of preparation for the athlete seeking a career in professional basketball. It is quite possible that substantial harm could be inflicted upon an athlete's professional career by virtue of the one year ban Proposition 48. The clubs of the NBA, after *Denver Rockets*, may draft or sign a player after his high school class has graduated or after any year of collegiate play.[164] Even the NFL has now allowed undergraduates in the draft.[165] If a player is prevented from competing during his freshman year, he may lose certain leverage and marketability in the highly competitive market for professional basketball players.[166] Also, the specter of injury looms large; a

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163. *Gardella*, 172 F.2d at 410.

164. The NBA rule is as follows: "A person whose high school class has graduated shall become eligible to be selected in a College Draft if he renounces his intercollegiate basketball eligibility by written notice to the NBA at least forty-five (45) days prior to such draft." 1988 Collective Bargaining Agreement between the National Basketball Association and the National Basketball Players Association, Art. IV, § 1 (h) (Nov. 1988).

For example, Ralph Sampson, a former player for the University of Virginia, was a much sought-after player after his freshman, sophomore and junior years of college and was eventually drafted after his senior year. Michael Jordan, a former player for the University of North Carolina, was drafted after his junior year, before his college eligibility expired. In his freshman year, Jordan's game winning shot helped the University of North Carolina defeat Georgetown for the National championship. Indeed, after *Denver Rockets*, several players, such as Moses Malone and Darryl Dawkins, entered professional basketball directly from high school. In 1989, Jay Edwards of Indiana University, J.R. Reid of the University of North Carolina, and Nick Anderson of the University of Illinois were among those who entered the NBA draft before they had completed four years of collegiate basketball.

165. The NFL recently allowed 1988 Heisman Trophy winner Barry Sanders of Oklahoma State to be eligible for the 1989 NFL draft, even though he had collegiate eligibility remaining. The NFL ostensibly carved out an exception for Sanders, based on a statement by NFL spokesman Joe Browne. He stated that:

> We've always believed it best for both professional and college football that the NFL's eligibility rules not work to disrupt college programs or players' educational opportunities. But when an underclassman whose program is under NCAA sanctions decides to turn pro with the full support of his college coach and athletic director and when he has lost any remaining college football eligibility in the process, we have no realistic choice but to accept him.

Indianapolis Star, April 5, 1989, at 3, col. 1.

The NFL has revised eligibility procedures for the 1990 college draft. College players may now enter the draft, if three years have elapsed since their high school graduation. *Big TV Deals will be at Top of Agenda when N.F.L. Owners Meet Sunday*, N.Y. Times, Mar. 9, 1990, at 13B, col. 2.

166. However, some athletes who have lost a year of eligibility to Proposition 48 feel that they have benefitted academically and personally. Terry Mills, of the University of Michigan basketball team, is quoted as stating that losing his freshman year of eligibility under Proposition 48 has helped him adjust to college life and has placed him on track to

longer college career heightens the prospects of a career-threatening or career-ending injury.[167]

The per se rule has been applied elsewhere in the sports law context. In *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*, the court invalidated a regulatory plan by the Bowling Proprietors Association by applying a per se rule.[168] In doing so, the court reiterated that "group boycotts are per se violations of the Sherman Act."[169] The court also specifically rejected the notion that only commercial boycotts receive the per se standard.[170] In response to the defense that the association's restrictions were intended to promote the sport, a defense the NCAA would be likely to make in defending Proposition 48 from antitrust challenge, the court held that "[s]uch circumstances do not justify a private association passing regulations to deal with the problem when their effect is to restrain or regulate interstate commerce."[171]

Another sports case has also applied a per se rule to professional athletics. In *Blalock v. Ladies Professional Golf Association*,[172] Blalock, a professional golfer, filed an antitrust action against the defendant organization alleging a violation of section one of the Sherman Act. By decision of the executive board of the Ladies Professional Golf Association, composed of Blalock's fellow competitors, Blalock was fined and suspended for cheating. The court first determined that the two threshold elements discussed in *Denver Rockets*[173] were also present in the *Blalock* case.[174] Interstate commerce was present and the defendants had an agreement to refuse to deal with the plaintiff.[175]

The *Blalock* court cited *E.A. McQuade Tours, Inc. v. Consolidated Air Tour, Manufacturing Co.*,[176] for the proposition that there are three types of per se illegal group boycotts.[177] The *McQuade* court concluded that the "touchstone of per se illegality has been the purpose and effect of the arrangement in question."[178] The per se rule has been applied

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graduate in four years. *Mills: From Prop 48 to Hometown Hero*, Detroit Free Press, Nov. 22, 1989, at 7D, col. 2.

167. Witness Danny Manning, who considered but rejected turning professional after his junior year at the University of Kansas, only to suffer a severe knee injury in his first year of professional basketball. In the words of the poet Robert Herrick, "Gather ye rosebuds while ye may." Herrick, *To The Virgins, To Make Much of Time*.

168. 356 F.2d 371, 376 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966). In *Denver Rockets*, 325 F. Supp. 1049, 1065 (C.D. Cal. 1971), the court distinguishes the per se violation in Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) from the ruling of no violation in Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966). The explanation given for the differing results reached in the two cases involved the hearing and procedural safeguards present in *Deesen* but not present in *Washington State Bowling*.

169. *Washington State Bowling*, 356 F.2d at 376.

170. *Id.*

171. *Id.*

172. 359 F. Supp. 1260 (N.D. Ga. 1973).

173. *See supra* notes 104-111 and accompanying text.

174. *Blalock*, 359 F. Supp. at 1263.

175. *Id.*

176. 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

177. *Blalock*, 359 F. Supp. at 1264.

178. *E.A. McQuade Tours*, 467 F.2d at 187.

to exclusionary or coercive conduct which is a "naked restraint of trade."[179] Using this as a basis, the *Blalock* court concluded that the purpose and effect of the defendants' agreement to suspend the plaintiff for one year was to exclude the plaintiff from the market and was therefore a "naked restraint of trade" and "tantamount to total exclusion from the market."[180]

Given the willingness of some courts to apply a per se analysis to group boycotts in certain situations, the group boycott as exemplified by Proposition 48 might also receive per se treatment and/or summary judgment. Summary judgments "have been frequently used by the courts in group boycott cases."[181] Also, "[s]ummary judgment for violations of the antitrust laws is proper where less restrictive means than those used could have been employed."[182] Following prior caselaw, the per se test may be appropriate for Proposition 48.

2. Rule of Reason

If, however, the per se test is not applied, a rule of reason test would likely be used.[183] Under the rule of reason test, the Proposition 48 athlete would seem to have a substantial chance of prevailing. Since the Proposition 48 athlete is denied the opportunity to compete, it is highly unlikely that such a practice could be deemed by a court to be "procompetitive." In *National Society of Professional Engineers v. United States*,[184] the Society's rules prohibited its members from submitting competitive bids for engineering services. The Society argued that in attempting to set fees it was preventing the public harm which unrestrained competition would produce.[185] The Supreme Court applied the rule of reason in analyzing the restraint.

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179. *See* R. BORK, THE ANTITRUST PARADOX, 334 (1978). "Since the naked boycott is a form of predatory behavior, there is little doubt that it should be a per se violation of the Sherman Act."

180. *Blalock*, 359 F. Supp. at 1265. The court cited the "completely unfettered, subjective discretion" of the defendants and the fact that the suspension was imposed by competitors of the plaintiff as reasons for its decision. *Id. But cf.* Molinas v. NBA, 190 F. Supp. 2411 (S.D.N.Y. 1961). Defendant sued the NBA and its member teams for damages for alleged violations of the antitrust laws after Molinas had been indefinitely suspended by the league for gambling. The court held that the suspension of Molinas was proper and not an unreasonable restraint of trade because Molinas was suspended pursuant to both a clause in his contract and a league rule prohibiting gambling.

181. *See Denver Rockets*, 325 F. Supp 1049, 1061 (C.D. Cal. 1971) which noted that group boycotts were specifically mentioned by the Supreme Court as one type of case which was appropriate for resolution without trial, and that partial summary judgment is appropriate in antitrust cases. *See also* White Motor Co. v. United States, 372 U.S. 253, 260 (1963); United States v. Bausch & Lomb Optical Co., 3 F.R.D. 331 (S.D.N.Y. 1943); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973).

182. *Denver Rockets*, 325 F. Supp. at 1066. *See also* International Salt Co. v. United States, 332 U.S. 392, 397-98 (1947); International Business Machines Corp. v. United States, 298 U.S. 131, 139-40 (1936).

183. *But see Denver Rockets*, 325 F. Supp. at 1066, which ruled that the case did not fall within the rule of reason exception provided by *Silver*, *supra* notes 132-35 and accompanying text.

184. 435 U.S. 679 (1978).

185. *Id.* at 687.

The *Professional Engineers* Court cited the test set out in *Standard Oil Co. v. United States*,[186] asking whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness could be based on either the nature or character of the contracts or on the surrounding circumstances.[187] Thus, the inquiry focused on the impact of the restraint on competitive conditions.

In *Professional Engineers*, the Court wrote that "[t]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[188] In *NCAA v. Board of Regents*, the Supreme Court discussed what would be considered "procompetitive" for the purpose of applying the *Professional Engineers* test. In *Board of Regents*, the plaintiff universities objected to the NCAA's limitations on the number of football games broadcast on television and on the number of appearances by any one team. The Court determined that "it would be inappropriate to apply a per se rule to this case" because the Court believed that horizontal restraints on competition were essential if the product was to be available at all.[189]

However, the Court noted that "[o]ur analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry."[190] Although the Court declined to apply a strict per se test, it did not require a detailed market analysis and proof of market power.[191] The *Board of Regents* Court quoted *Professional Engineers* for the view that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[192]

In *Board of Regents*, the Court stated that certain restrictions of the NCAA can be viewed as procompetitive.[193] However, the Court rejected both of the NCAA's justifications supporting its restraints on television rights. In rejecting these arguments, the Supreme Court cited *Professional Engineers* for the proposition that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[194] The Court also rejected the NCAA argument that its interest in maintaining competitive balance justified the regulation.[195] Therefore, Proposition 48 is unlikely to be labeled as "procompetitive"

186. 221 U.S. 1 (1911).

187. *Id.* at 58.

188. *Professional Eng'rs*, 435 U.S. at 691. *See also* Deesen v. Professional Golfer's Ass'n of America, 358 F.2d 165 (9th Cir. 1966). "The pertinent inquiry . . . is whether an association intends to use that power in a manner which tends to suppress or destroy competition."*Id.* at 171.

189. NCAA v. Board Regents, 468 U.S. 85, 100-01 (1984).

190. *Id.* at 103.

191. *Id.* at 109.

192. NCAA v. Board of Regents, 468 U.S. 85, 109 (1984) (quoting *Professional Engineers*, 435 U.S. at 692).

193. *Board of Regents*, 468 U.S. at 102. The Court, however, also discussed the "anticompetitive consequences" of the NCAA television arrangement and noted that "[i]ndividual competitors lose their freedom to compete." *Id.* at 106.

194. *Id.* at 117 (quoting *Professional Engineers*, 435 U.S. at 696).

195. *Board of Regents*, 468 U.S. at 117. *See* R. McCormick and R. Meiners, *Sacred Cows, Competition, and Racial Discrimination*, NEW PERSPECTIVES, Winter 1988. "To allow athletic conferences and independent schools to set their own standards for admission for athletes,

under the *Professional Engineers* test.[196]

In *Smith v. Pro Football, Inc.*,[197] the court of appeals declined to apply a per se rule to the NFL draft. The court noted that the hallmark of the group boycott is the effort of competitors to "barricade themselves from competition at their own level."[198] The court differentiated the NFL draft from the classic group boycott for two reasons. First, the court said that the NFL clubs were not competitors in any economic sense,[199] because the clubs operate as a joint venture in the production of an entertainment product, football games and telecasts.[200] No NFL team can produce this product without "agreements and joint action with every other team."[201]

Second, the court held that the NFL clubs had not combined to exclude competitors or potential competitors from the market.[202] Smith, as a football player, was never seeking to compete with the NFL clubs and no decrease in competition for providing football entertainment to the public resulted.

The *Smith* court noted that "[w]hen confronted with concerted refusals to deal that do not fit the classic 'group boycott' pattern, the courts almost without exception have held the per se rule inapplicable."[203] In the case of sanctioning organizations, which oversee sports, the rule of reason has been frequently applied.[204] In addition, the *Smith* court held that the per se rule should not be applied to "concerted refusals that are not designed to drive out competitors but to achieve some other goal."[205] The courts have refused to invoke the per se rule where the "need for cooperation among participants necessitated some

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as they do for all other students, and to determine the number and value of athletic scholarships would enhance competition rather than destroy it." *Id.* at 47, 51.

196. Defenders of the NCAA contend that the regulations it imposes on college athletics enhance amateur competition. There is little doubt that many of the NCAA rules, particularly the rules of play, are useful. However, the blanket mandate of uniform academic standards and scholarship limitations for all NCAA schools does not enhance competition.

McCormick & Meiners, *supra* note 190, at 49.

197. 593 F.2d 1173, 1178 (D.C. Cir. 1987).

198. Smith v. Pro Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1977)(quoting L.A. SULLIVAN, ANTITRUST, at 245 (1977)).

199. *Smith*, 593 F.2d at 1179.

200. *See also* Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Levin v. NBA, 385 F. Supp. 149, 152 (S.D.N.Y. 1974); San Francisco Seals v. NHL, 379 F. Supp. 966, 969 (C.D. Cal. 1974); R. BORK, THE ANTITRUST PARADOX (1978), (citing the joint venture characteristics of, respectively, the NFL, the NBA and the NHL). *But see* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984), upholding directed verdict issued by district court holding the NFL not to be a single entity.

201. *Smith*, 593 F.2d at 1179.

202. *Id.*

203. *Id.* at 1179 n.22.

204. *See* United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 787 (7th Cir. 1981); AIAW v. NCAA, 558 F. Supp. 487 (D.C.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984); Justice v. NCAA, 577 F. Supp. 356 (D. Ariz. 1983); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 511 F. Supp. 1103 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

205. *Smith*, 593 F.2d at 1180.

type of concerted refusal to deal . . . ." [206]

The court reasoned that since it could not be said that the draft had "no purpose except stifling of competition" or that it is without "any redeeming virtue," it should not receive per se analysis.

The court analyzed that the draft forces each seller of football services to deal with only one buyer, thus robbing the seller of any real bargaining power. The *Smith* court then stated:

> NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost.[207]

The anticompetitive evils of the draft could not be balanced against its procompetitive virtues.[208] The *Smith* court assessed the procompetitive effects of the draft as "nil."[209]

The *Smith* definition of competition as competition for players, not competition on the playing field, is contrary to a potential NCAA argument that Proposition 48 is procompetitive because of what it accomplishes on the playing field. The court in *Smith* labeled the draft anticompetitive because of its "effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers."[210] A court attempting to balance the procompetitive virtues of Proposition 48 against its anticompetitive evils under the *Smith* analysis could well conclude that Proposition 48 is not procompetitive.

The *Smith* court referred to *Professional Engineers* for the proposition that the purpose of antitrust analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.[211]

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206. *Id. See also* Hatley v. American Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977). "[I]n an industry which necessarily requires some interdependence and cooperation, the per se rule should not be applied indiscriminately." *Id.* at 652-53. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979). *See supra* notes 91-97 and accompanying text.

207. *Smith*, 593 F.2d at 1186.

208. It should be noted that player drafts and other restrictions are permissible under the non-statutory labor exemption when they are negotiated with a union. *See* McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Powell v. NFL, 690 F. Supp. 812 (D. Minn. 1988), *rev'd*, 888 F.2d 559 (8th Cir. 1989). For an analysis of the development of the non-statutory labor exemption, *see* Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. REV. 341 (1983). In *Smith*, the union had not agreed to the restriction in question. In the Proposition 48 case, there is no union involved in representing college athletes. Therefore, it cannot be argued that the decision to adopt Proposition 48 should receive the same type of protection from the antitrust laws as is afforded collectively bargained restraints.

209. *Smith*, 593 F.2d at 1186.

210. *Id.*

211. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978). *See also* Denver Rockets v. All-Pro Management, 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

The *Smith* court cited less anticompetitive alternatives. With Proposition 48, there may also be less restrictive alternatives which have not been explored by the NCAA.[212] A restraint will survive scrutiny "only if it is demonstrated to have positive, economically procompetitive benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is insubstantial."[213]

In *Board of Regents*, the Court stated, "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same whether or not the challenged restraint enhances competition."[214] Furthermore, the Court observed that "there is often no bright line separating per se from rule of reason analysis."[215] Thus, even though a court may decline to apply a per se test,[216] the rule of reason test may not always require the kind of detailed analysis that has been required in the past.[217] Nevertheless, whatever test the Court chooses to apply, the sine qua non of the inquiry remains the procompetitive aspects of the restraint.

V. CONCLUSION

In a Sherman Act challenge to Proposition 48, it is presumed that the NCAA would raise the justification that Proposition 48 is intended to promote the athlete's pursuit of an education. In the 1989-90 NCAA Manual, the NCAA sets forth certain principles governing eligibility. The Manual states that "[e]ligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student

212. University of Iowa President Hunter Rawlings proposed in April of 1989 that the University of Iowa limit all freshman participation in intercollegiate athletics. *Freshman Eligibility Shows Mixed Results*, Cedar Rapids Gazette, May 1, 1989, at 10A, Col. 2. In addition, Charles Reed, Chancellor of the Florida State University system, has proposed to ban freshman eligibility and to delay the start of the basketball season until mid-December at Florida's nine publicly financed universities. *Cuts at 9 Florida Schools Asked*, N.Y. Times, Oct. 21, 1989, at 34, col. 1.

According to a recent survey conducted by the NCAA's Committee on Basketball Issues, Division I Coaches and Athletic Directors voted 207-56 and 99-97, respectively, to recommend declaring freshmen ineligible for Division I men's basketball if they are allowed four subsequent years of eligibility. *Freshman Ineligibility A Real Possibility*, USA Today, Sept. 22, 1989, at 9C, col. 2. The committee also endorsed a proposal to limit athletes to three years of eligibility, with a fourth "conditioned upon . . . being within 24 semester or 36 quarter hours of graduation." *Id.*

213. *Smith*, 593 F.2d at 1189.

214. *NCAA v. Board of Regents*, 468 U.S. 84, 104 (1984).

215. *Id.* at 104 n.26.

216. *See, e.g.*, Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (holding that the more discriminating examination under the rule of reason may be appropriate in situations where competitors operate with some form of joint agreements).

217. For example, in *Board of Regents*, the Court first determined that the restriction in question "on its face constitutes a restraint upon the operation of a free market." 468 U.S. at 113. The burden then shifts to the petitioner (defendant) to establish an affirmative defense which "competitively justifies" the deviation from the operations of a free market. After disposing of the petitioner's two proffered justifications, the Court deemed the restraint illegal under the rule of reason. *Id.*

athletes."[218]

In *Denver Rockets*, the NBA similarly asserted that its regulation was necessary to guarantee that each prospective basketball player had the opportunity to complete four years of college.[219] The court noted that:

> However commendable this desire may be, this court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws. If such a determination is to be made, it must be made by Congress and not the courts.[220]

Furthermore, the argument that Proposition 48 is necessary to promote an athlete's pursuit of educational goals is flawed by studies which indicate that only 27% of NBA players actually obtain college degrees.[221] Obviously, the vast majority of the players who do compete for the full four years and later enter the NBA do not receive a college degree.[222] This data shows the fallacy in assuming that attending college for four years necessarily leads the NBA bound college basketball player to a college degree.

The view that many athletes do not attend college primarily to receive an education has been amplified in a recent case. In *Hall v. University of Minnesota*,[223] the court set forth an "economic reality" test, taking the position that the student-athlete is not in college merely for an edu-

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218. *See* NCAA MANUAL § 2.9 (1989-90) The Principle Governing Eligibility. The manual also contains § 2.11, The Principle Governing Playing and Practice Seasons, which states, "[t]he time required of student-athletes for participation in intercollegiate athletics shall be regulated to minimize interference with their opportunities for acquiring a quality education in a manner consistent with that afforded the general student body." *But see* REPORT NO. 3: THE EXPERIENCES OF BLACK INTERCOLLEGIATE ATHLETES AT NCAA DIVISION I INSTITUTIONS, Center for the Study of Athletics, American Institutes for Research 37 (Mar. 1989) citing the same Institute's REPORT No. 1, which found that "[D]ivision I football and basketball players spend more time in their sports during the season than they spend preparing for and attending class combined." Black football and basketball players also spend more time on their sports than on their studies and the "reason probably has to do . . . with the nature of intercollegiate athletics." *Id.* at 41.

219. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

220. *Id.*

221. Quote from Keith Lee, Associate Director of the Center for Sport in Society, Jan. 24, 1990, in phone conversation with one of the authors.

222. The typical NCAA Division I basketball team plays nearly thirty games in a four-month period, running from December to early March. Usually, a team will have to travel to its opponents' site for approximately half of its games. Many teams have conference tournaments, and sixty-four teams participate in the NCAA tournament, which does not generally conclude until early April. Given the time constraints of games and practice, and the fact that the NCAA basketball season runs through the fall and spring semesters at most colleges, the low graduation rate is not surprising.

At the NCAA annual convention in January, 1990, the NCAA voted to reduce the number of regular-season basketball games from 28 to 25, move the beginning of basketball practice from October 15 to November 1, and move the opening date of the basketball season from the fourth Friday in November to December 1. *NCAA Restricts Practices, Seasons*, N.Y. Times, Jan. 10, 1990, at 46, col. 4.

223. 530 F. Supp. 104, 109 (D. Minn. 1982). Although *Hall* involved constitutional issues, its analysis of the economic aspects of collegiate athletics is also applicable to antitrust law.

cation.[224] The court, in addressing the suit of an NCAA Division I basketball player who was ostensibly ineligible, stated that "[t]he plaintiff and his fellow athletes were never recruited on the basis of scholarship . . . and are given little incentive to be scholars."[225] The court observed that "[t]he exceptionally talented student athlete is led to perceive the basketball, football, and other athletic teams as farm teams and proving grounds for professional sports leagues."[226] Placing the blame squarely on the university for having fostered the business-like aspect of collegiate athletics, the court also said that the university, not the individual, should suffer the consequences for the lack of emphasis on academics and the overemphasis on the money-making aspects of athletics.[227] The court stated that "[i]t well may be true that a good academic program for the athlete is made virtually impossible by the demands of their sport at the college level."[228] Thus, the university cannot frustrate an athlete's effort to pursue a professional career, since the athlete, according to *Hall*, is primarily at the school to compete in athletics, not to go to school.[229] Lest there be any concern that the court in *Hall* is

224. One commentator on college athletics described the role of the big-time college athletes as follows: "They're the serfs who toil in the feudal business of college sports, generating hundreds of millions of dollars in revenue, through TV rights, tickets and souvenirs - all of it going to others." Philadelphia Enquirer, Oct. 15, 1989, (Magazine), at 16, col. 3. Harry Edwards, a California sociologist who specializes in sports, describes the system as "a slave system . . . the athlete isn't receiving anything. He's just a victim of all the greed, avarice and utter exploitation that colleges resort to." *Id.* at 34, cols. 2-3.

225. *Hall*, 530 F. Supp. at 109.

226. *Id. But see* NCAA MANUAL § 12.02 (1989-90). Amateur Student Athlete, which states that "[a]n amateur student-athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and for whom participation in that sport is an avocation."

227. *See* R. Telander, *A Question of Fairness*, SPORTS ILLUSTRATED, May 1, 1989.

> The unfairness stems from the colleges' having laid most of the economic restrictions on the athletes and few on themselves. Players may not make money or sign with agents until they're through with their collegiate careers. All they receive for their efforts on the field or court are free educations, which some don't want or aren't smart or mature enough to pursue. Either way, these athletes should not be taking up space on college campuses.

Id. at 114. *See also* McCormick & Meiner, *Sacred Cows, Competition and Racial Discrimination*, NEW PERSPECTIVES (Winter 1988). "Almost no one talks about the enormous sums of money created by the play of lowly paid athletes. The situation, controlled by the NCAA and its member institutions, borders on economic peonage." *Id.* at 48.

228. *Hall*, 530 F. Supp. at 109. One of the most venerated coaches in college football history, Paul (Bear) Bryant, of the University of Alabama, expressed a similar view that academics played a secondary role to athletics in college sports. He said:

> I used to go along with the idea that football players on scholarship were 'student-athletes,' which is what the NCAA calls them. Meaning a student first, an athlete second. We were kidding ourselves, trying to make it more palatable to the academicians. We don't have to say that and we shouldn't. At the level we play, the boy is really an athlete first and a student second.

J. KIRBY, FUMBLE 77 (1977) (quoting Paul (Bear) Bryant).

229. Big Ten Commissioner James Delaney has stated that:

> I'm not comfortable with keeping a student in school only because the colleges and pros think this is where he should be. I don't think the colleges should be acting in concert with the pro leagues. We should be about education. If someone isn't interested in an education and wants to turn professional, then he should be allowed to do it.

Telander, *A Question of Fairness*, SPORTS ILLUSTRATED, May 1, 1989, at 114 (quoting Big Ten Commissioner James Delaney).

engaging in judicial hyperbole, the University of Minnesota president confirmed to the NCAA special convention in 1987: "We in Division I are in an entertainment business and we can't fool ourselves."[230]

Hall presents a very unflattering scenario in its analysis of college athletics. But the queasiness that a *Hall*-type analysis may create does not diminish the veracity of the fact that big-time collegiate athletics and academics are frequently incompatible.[231] But perhaps big-time college athletics have become such a substantial revenue generating industry that it is unrealistic to think that its continuing viability is compatible with traditional notions of amateurism.[232]

There is widespread disagreement as to the effectiveness of Proposition 48 within the academic and athletic communities.[233] John Chaney, the Temple University basketball coach and a critic of Proposition 48, says that Proposition 48 will not markedly change the quality of education. He stated, "[t]hey're not going to move in the direction of teaching the kids in these schools. They're certainly not going to do anything

230. TELANDER, THE HUNDRED YARD LIE 191 (1989) (quoting University of Minnesota President Kenneth Keller).

231. New Jersey Senator Bill Bradley, a former collegiate and professional basketball player, is sponsor of the Student-Athlete Right-To-Know Act, S. 580, 101st Cong., 1st Sess. (1989), which requires colleges and universities receiving federal financial assistance to make public detailed information with respect to the graduation rates of student athletes. Colleges and universities would report annually to the Secretary of Education the graduation rates of athletic-scholarship recipients, broken down by sport, sex and race. Schools would be required to provide this information to all high school athletes being recruited as athletic-scholarship candidates. In addition, students' national letters of intent would require the student to acknowledge that he or she has reviewed the report and discussed it with a guidance counselor or principal.

The NCAA has opposed the Student-Athlete Right to Know Act, in part because it may violate federal privacy laws which require that the academic records of individual students be kept private. Jim Marchiony, the spokesman for the NCAA, said, "[t]he opinion of the colleges and universities within the NCAA is that, while the intent of the bill is good, it is not something that should be federally legislated." N.Y. Times, Sept. 10, 1989, at 18, col. 3.

At the NCAA annual convention in January, 1990, the NCAA voted to require Division I and II schools to provide data to be published annually on graduation rates of athletes. Senator Bradley was quoted as saying, "[I] am very pleased by the NCAA's action .... The NCAA Division I and Division II schools were nearly unanimous in their support of requirements to release graduation rates to future student athletes and families. This is fully consistent with the legislation that we have sponsored." *NCAA Restricts Practices, Seasons*, N.Y. Times, Jan. 10, 1990, at 46, col. 4.

232. Representative Tom McMillen, (D-Md.), says, "[w]e'll never get the genie back in the bottle because there's too much money, too much infrastructure, too much television. But what we can do is build a fort around it to bring America back into perspective." N.Y. Times, Oct. 10, 1989, at 18, col. 1. Charles Grantham states that, "[t]he business of college basketball, like the business of professional basketball is simply about money and today money abounds in basketball because it's great entertainment and the game is played like its never been played before by an endless supply of great athletes." *It's Time to Give College Players a Cut*, N.Y. Times, Mar. 18, 1990, at 10F, col. 2.

233. There was even more disagreement when the NCAA introduced Proposition 42. Georgetown University Coach John Thompson, protesting the NCAA's adoption of Proposition 42, walked off the court in a January 14, 1989 game between his team and Boston College and did not appear for his team's January 18 game against Providence. Thompson returned to the court after NCAA officials agreed to recommend postponing enactment of Proposition 42 until the NCAA finishes a five-year study examining whether standardized test scores can predict collegiate academic success. Griffin, GEORGETOWN 7 (Winter 1989).

more because the NCAA says it. Ninety-nine-and-a-half percent of their students have nothing to do with athletics. Why should they change their curriculum?"[234] James Zumberg, President of the University of Southern California, disagrees with Chaney. He said, "[g]iven sufficient time, I believe Proposition 48 will ultimately have high schools direct more effort to academic preparation."[235]

The whole system of intercollegiate athletics has come under criticism relating to abuses within the system.[236] One commentator has noted:

> The charade of amateurism and the "student-athlete," the relentless pursuit of revenue by autonomous, self-aggrandizing athletic departments; the see-no-evil-attitude of egocentric, out-of-touch coaches; the unwritten restraint of trade collusion between the NCAA and the NFL - although that policy appears to be in tatters - prevent college players from entering the pros until they have exhausted their collegiate eligibility, while allowing the NFL to use the colleges as its minor league.[237]

Based on the foregoing analysis, it appears that a Proposition 48 student-athlete could prevail on a section one Sherman Act challenge to the NCAA restriction, either under a per se analysis or the rule of reason. A per se analysis would be more likely to benefit the individual player, while a rule of reason analysis could ultimately invalidate the restraints of Proposition 48.

If Proposition 48 did not receive per se analysis, resulting in either an injunction or summary judgment, the challenging athlete would almost certainly lose one year of eligibility. An extended rule of reason inquiry, which by its nature involves a detailed examination of the facts of the case, would consume valuable time and would probably constitute a Pyrrhic victory for the athlete who would have lost a year of eligibility while challenging the restraint.

Given the unique nature of the relationship among the members of the NCAA, it appears unlikely that a strict per se analysis would be applied. Since a certain amount of cooperation is necessary to operate a successful athletic program on a college or professional level, various rules and regulations are necessary to assure the viability of such an endeavor. This makes it unlikely that a per se analysis would be applied in the Proposition 48 situation, notwithstanding judicial predisposition towards application of per se standards in certain group boycott situa-

234. *Proposition 48 Here to Stay*, Cleveland Plain Dealer, Mar. 31, 1989, at 8C, col. 1.
235. *Id.*
236. The House Education and Labor Subcommittee held hearings on the state of collegiate athletics on May 18, 1989. William C. Friday, former President of the University of North Carolina, is vice-chairman of a commission financed by the Knight Foundation and formed to examine problems in intercollegiate athletics and to recommend reforms to the system. *Panel To Speak Reforms in Athletics*, N.Y. Times, Sept. 28, 1989, at D27, col. 1. At an interview to announce formation of the commission, Friday said, "[t]here is a place for a good intercollegiate - athletics program at every college . . . . The problem is that we are turning institutions of higher education into entertainment centers." *Id.*
237. *A Question of Fairness*, SPORTS ILLUSTRATED, May 1, 1989, at 114.

tions.[238] It appears more likely that a court would follow a rule of reason analysis, either in a traditional sense[239] or the "truncated" or "quick-look" rule of reason analysis as exemplified in *NCAA v. Board of Regents*.[240]

The NCAA's ostensible goal of promoting scholarship among student-athletes is admirable, but pursuit of such an admirable goal does not justify the NCAA's imposition of a restriction on would-be student-athletes which constitutes an illegal group boycott. The court in *Denver Rockets* recognized the "commendable" desire of the NBA to give every college basketball player the opportunity to graduate, but held that such a desire could not override the objectives of the federal antitrust laws.[241] As Judge Frank stated in upholding a major league baseball player's antitrust challenge to a ruling of the Major League Baseball Commissioner in *Gardella v. Chandler*, "[n]o court should strive ingeniously to legalize a private (even if benevolent) dictatorship."[242] In light of *Tarkanian*, the NCAA may now be akin to such a dictatorship. The desirability of the motives of Proposition 48 is not the issue. The road to illegal behavior is frequently littered with good motives. As the Supreme Court noted in *Board of Regents*, "[g]ood motives will not validate an otherwise anticompetitive practice."[243] The issue is whether Proposition 48 can withstand antitrust scrutiny, given the Supreme Court's requirement in *Professional Engineers*[244] and *Board of Regents*[245] that the conditions imposed by the restriction be procompetitive. It appears that the NCAA's Proposition 48 restriction may not be the least anticompetitive alternative and may not satisfy the Supreme Court's requirement that such a restriction be "procompetitive."

VI. SUGGESTIONS

If Proposition 48 cannot survive Section One Sherman Act scrutiny, the question then remains: How can academic eligibility standards be established for college athletes in a legal manner? One sports television industry insider believes "the key to handling the problems is the total involvement of the presidents and chancellors of the various schools. They simply have to retake control of athletic programs."[246] Under

238. *See supra* notes 70-77 and accompanying text.

239. *See supra* notes 78-111 and accompanying text.

240. 468 U.S. 85 (1984). *See supra* note 41. *See also* remarks by the Honorable Janet Steiger, Chairman, Federal Trade Commission, before the 23d New England Antitrust Conference, Cambridge, Mass., Nov. 23, 1989, (citing the approach in Massachusetts Board of Registration in Optometry, 5 Trade Reg. Rep. (CCH) ¶ 22,555 (June 21, 1988), which focuses inquiry first on whether the joint conduct by competitors is inherently suspect, then on whether any claims of efficiency justifications are plausible and factually supportable).

241. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

242. 172 F.2d 402, 415 (2d Cir. 1949).

243. 468 U.S. at 101 n.23.

244. 435 U.S. 679 (1978).

245. 468 U.S. 85 (1984).

246. J. SPENCE & D. DILES, UP CLOSE AND PERSONAL 124 (1988). Indeed, the Florida

such an approach, each individual school's academic administrators, not the NCAA, could establish the guidelines for students to compete in extracurricular activities, such as intercollegiate sports. Such a return of power to each campus would vitiate the arguably anticompetitive influence of the NCAA cartel in the Proposition 48 area,[247] by allowing individual schools, rather than the NCAA, to make decisions involving each school's athletic program.[248] One college president recently wrote that "[c]ollege and university presidents are beginning to take a more active role in the NCAA; clearly, they have the ability to bring about meaningful reforms."[249]

However, perhaps only a Pollyanna[250] would think that, in this day and age of multi-million dollar college athletic budgets[251] and an emphasis on successful, winning, college athletic programs, individual college administrators would deal with athletic eligibility issues in a reponsible manner. Indeed, the same commentator who suggested the key to handling college athletic programs is to return decision-making to college administrators[252] also questions the resolve of college presi-

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Board of Regents recently voted to put university presidents in control of athletic booster groups. This move will give the presidents both authority over executive directors of organizations that raise or spend money for the benefit of the university and approval of the budget and expenditures of the booster groups. USA Today, December 15, 1989, at 13c, col. 1.

NCAA Executive Director Dick Schultz recently expressed a similar view. He said, "[r]ight now, colleges and universities are not perceived as controlling their athletics programs . . . . You are what you are perceived to be. We need to re-style some things. Universities need to be in control of their athletic programs, and I'm not so sure they always are." *In College Sports, the Real Players Collect Millions From the Networks*, N.Y. Times, Dec. 31, 1989, at 6E, col. 2.

247. *See supra* note 30.

248. It is important to note that the viability of this approach is predicated on each school making its own eligibility decisions.

249. Muse, *Letter to the Editor*, SPORTS ILLUSTRATED, Dec. 18, 1989, at 5. It should be noted that the college adminsitrators, in taking such action, would still be participating under the NCAA cartel. Muse, President of the University of Akron, is "encouraged" by the formation of a task force, headed by the Reverend Theodore Hesburgh, President Emeritus of Notre Dame, and William Friday, President Emeritus of North Carolina, to study reforms in collegiate athletics.

President Muse recommends three changes from the current system. First, "[r]educe the economic motivations for winning" by distributing the proceeds of the NCAA men's basketball tournament to all of the Division I schools, with those schools playing in the tournament receiving set percentages and the noncompeting schools receiving an even share of the remaining funds. In addition, schools participating in football bowl games "should be required to contribute a share of their proceeds to the NCAA for equal distribution to all other schools participating in that division." Second, Muse advocates allowing football players to go to the NFL at the end of any school year, because "if it is the player's objective to participate in professional athletics, we ought to allow him to take advantage of the opportunity when it arises." Muse reasons that other students can drop out of school and go to work at any time. Third, Muse favors requiring that each school treat its athletes the same way it treats its other students with regard to admission and retention standards and to eligibility for participation in extracurricular activities. Muse, *Letter to the Editor*, SPORTS ILLUSTRATED, Dec. 18. 1989, at 5.

250. "[A]n excessively or blindly optimistic person . . . [from the name of the child heroine created by Eleanor Porter (1868-1920), American writer]." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, (2d ed. 1987).

251. *See supra* note 31.

252. J. SPENCE & D. DILES, *supra* note 245 and accompanying text.

dents and chancellors in taking matters into their own hands, when a losing athletic program may result from tightened standards.[253]

If the morass that is intercollegiate athletics is not reformed from within, there are signs that Congress may step in to regulate the intercollegiate sports industry. United States Representative Tom McMillen, a knowledgable observer of the existing situation in intercollegiate athletics and a former college and NBA basketball player, states that "[t]he NCAA is at a crossroads. The question today is: Will the colleges get back to their original mission of educating young people? A few more Lennie Bias[254] stories could open a Pandora's box that would force Congress to begin micromanaging the affairs of the NCAA."[255]

Perhaps the legal solution to the struggle between Proposition 48 and section one of the Sherman Act emanates from an unlikely source—the pot of gold generated by intercollegiate sports.[256] In the aftermath of CBS television's agreement to pay $1 billion to televise the NCAA basketball tournament from 1991 to 1997, NCAA Executive Director Dick Schultz was quoted as hinting that "major reform" to college athletics might result from the windfall. Schultz was quoted challenging NCAA committees "to come up with new ways of distributing this money . . . ," citing possibilities such as to "give the [NCAA Basketball tournament] qualifying schools substantial expense money and a small amount for winning . . ." and to "[a]ward more money to schools that give more athletic scholarships, possibly tying it to graduation rates."[257] Executive Director Schultz reportedly said that "creative" proposals to "spread the wealth"[258] would be considered by the NCAA.[259]

One "creative" proposal could "spread the wealth" where it is most deserved: to the athletes who are largely responsible for generating the revenues, and, thereby, help provide a framework to protect the NCAA from antitrust attack for its cartel-like behavior in adopting Proposition 48 and other similarly anticompetitive measures.[260]

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253. *Id.* at 125-26.

254. Len Bias was a former University of Maryland basketball player who died of a cocaine overdose, just hours after he was drafted by the Boston Celtics of the NBA. *See* L. COLE, NEVER TOO YOUNG TO DIE: THE DEATH OF LEN BIAS 7-61 (1989).

255. Krupa, *The Big Squeeze in College Athletics*, SPORTS INC., Jan. 9, 1989, at 14, col. 2.

256. Under the current arrangement, the NCAA's $56.8 million take from the 1990 NCAA Basketball tournament will be divided as follows: Forty percent ($22.7 million) to the NCAA; $274,845 to each of the 32 first-round losers; $549,689 to the 16 second-round losers; $824,534 to the 8 third-round losers; $1,099,379 to the 4 fourth-round losers; and $1,374,224 to the final four teams. *Colleges Plan to Share the CBS Billion*, N.Y. Times, Nov. 23, 1989, at 42, col. 3.

257. *Next NCAA Challenge: How to Split the Take*, USA Today, Nov. 22, 1989, at 3c, col. 1.

258. *Colleges Plan to Share the CBS Billion*, N.Y. Times, Nov. 23, 1989, at 42, col. 2.

259. To this end, the NCAA's Executive Committee agreed to create a special panel to study ways to distribute the $1 billion. It was anticipated that the special committee would make its recommendations to the NCAA budget committee in July, 1990, and a final decision was expected as soon as August, 1990. *NCAA Names Panel on TV Deal*, N.Y. Times, Dec. 5, 1989, at 45, col. 1.

260. Another creative proposal for the distribution of the new-found wealth is suggested by Neil H. Pilson, President of CBS Sports, who notes:

> In the next five years, we estimate that the entire television industry will dispense between $1.2 billion and $1.5 billion to colleges and universities. But that money

If the NCAA were to compensate, in some manner, the Division I basketball players from the proceeds generated by televising the NCAA basketball tournament, benefits could accrue to the players[261] and to the NCAA itself. The benefit to the players is obvious and fair: in return for performing the hundreds of hours of service required of them, they receive some monetary compensation out of the hundreds of millions of dollars they generate. The players' receipt of compensation for performing their athletic services could enable them to organize under the National Labor Relations Act[262] to form a union to negotiate the player/employees' terms and conditions of employment.[263]

A direct benefit could redound to the NCAA from the player/employees' ability to organize and collectively bargain the terms and conditions of their employment. The Supreme Court has held that, in order to properly accommodate congressional policy favoring free competition in business markets with congressional policy favoring collective bargaining under the National Labor Relations Act, certain union-employer agreements must be granted a limited nonstatutory exemption from antitrust sanctions.[264] The non-statutory labor exemption may thus insulate from antitrust challenge certain otherwise-illegal restrictions if such restrictions, such as Proposition 48 are collectively bargained.

In the seminal sports labor-exemption case, *Mackey v. NFL*,[265] the court fashioned a three-part test "governing the proper accommodation of the competing labor and antitrust interests involved here."[266] The test requires that: 1) the labor policy favoring collective bargaining may potentially be given preeminence over antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship, 2) federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining, and 3) the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of

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should be viewed by college administrators as a positive force and as an enormous and attractive resource for higher education. It is money the educational institutions do not have to raise from tax payers, parents, alumni and students, and it is money they can use for any purpose: to build new classrooms or dorms, to reduce tuition, or to pay coachs' salaries." *TV Cash can give Colleges High Marks*, N.Y. Times, April 1, 1990, at 10F, col. 3.

261. Charles Grantham, Executive Director of the National Basketball Players Association, has proposed the establishment of individual trust accounts for players at schools where basketball is a revenue-generating sport. *It's Time to Give College Players a Cut*, N.Y. Times, March 18, 1990, 10F, col. 5.

262. *See* National Labor Relations Act, 29 U.S.C. § 151-157 (1982).

263. *Id.* at § 157 (1982).

264. *See* Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. Local 3, Int'l. Bhd. of Elec. Workers, 325 U.S. 797 (1945).

265. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 401 (1977)..

266. *Id.* at 614.

bona fide arm's-length bargaining.[267]

It would seem that the eligibility issue unilaterally addressed by the NCAA through the adoption and implementation of Proposition 48 could be shielded from antitrust attack by the non-statutory labor exemption. If the NCAA were to earmark a share of its recent billion dollar television windfall for player compensation, thereby making the players employees, the players could unionize to negotiate terms and conditions of employment with the NCAA. It seems that the subject matter of Proposition 48, determination of player eligibility, is an area which would fall squarely under the three-pronged test of *Mackey*.[268]

It is evident that the NCAA may be subject to antitrust attack by a Proposition 48 victim or victims.[269] A successful antitrust challenge under the Sherman Act rewards the challenging plaintiff with treble damages[270] and attorneys' fees.[271] Permitting NCAA athletes to be compensated for generating hundreds of millions of dollars annually,[272] and permitting them to organize to bargain collectively would benefit the players in obvious ways. Such an arrangement could also benefit the NCAA in derivative ways, by enabling the NCAA to protect itself from antitrust liability emanating from such arguable restraints of trade as Proposition 48.[273]

Presumably, the "system" of intercollegiate athletics will also benefit. The National Labor Relations Act places paramount importance on encouraging parties to bargain collectively to establish the terms and conditions of employment in a given industry.[274] A judge in a recent sports case decision echoed this sentiment: "national labor laws establish that federal labor policy favors resolution of labor disputes through collective bargaining . . . ."[275]

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267. *Id. See also* Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988), *modified*, 690 F. Supp. 812 (D. Minn. 1988), *rev'd*, 888 F.2d 559 (8th cir. 1989); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

268. *Mackey*, 543 F.2d at 614. First, the eligibility restraint in question "primarily affects only the parties to the collective bargaining relationship," in this case the player/employees and the NCAA/employer. *Id.* Secondly, "the agreement sought to be exempted concerns a mandatory subject of bargaining," in this case, wages, hours and working conditions. *Id. See also* 29 U.S.C. § 151 (1982). Thirdly, the subject of eligibility would, presumably, be the product of "bona fide arm's-length bargaining" if it were addressed in a collective bargaining agreement between the players and the NCAA. *Mackey*, 543 F.2d at 614.

269. *See supra* at Section V.

270. 15 U.S.C. § 15 (1988).

271. *Id.*

272. This article does not purport to address any potential compensation schemes.

273. Notwithstanding Justice Marshall's dissent in Flood v. Kuhn, where he states that "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fire," it is clear from subsequent case law development that management derives substantial benefit from the non-statutory labor exemption. Flood v. Kuhn, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting) (quoting United States v. Women's Sports Wear Mfr. Ass'n, 336 U.S. 460 (1949)). *See also* Powell v. NFL, 888 F.2d 559 (8th Cir. 1989); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Kupp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974).

274. *See* National Labor Relations Act, 29 U.S.C. § 151 (1982).

275. Powell v. NFL, 690 F. Supp. 812, 818 (D. Minn. 1988).

If NCAA athletes were cloaked in employee garb, in addition to their athletic uniforms, Proposition 48 could be addressed in a collective bargaining context, and the player/employees would have a role in determining less restrictive or fairer means of determining eligibility. Granted, this is a radical idea which involves substantial deviation from the NCAA's notions of traditional amateurism,[276] but it is also an idea which may immunize NCAA policy from antitrust attack, and benefit, college athletes, in the process.

276. The NCAA MANUAL § 1.3.1 (1989-90) states, "[a] basic purpose of this Association is to . . . retain a clear line of demarcation between intercollegiate athletics and professional sports."