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# A Modest Proposal for Taming the Antitrust Beast

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# A Modest Proposal for Taming the Antitrust Beast

Prof. Gabe Feldman

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## I. INTRODUCTION

For nearly a century, the sports industry has been intellectual kryptonite for antitrust jurisprudence. Although sports leagues have not been granted blanket antitrust immunity,<sup>1</sup> courts have afforded them often-puzzling deference under the law. The most bizarre manifestation of this deference was Major League Baseball’s anomalous antitrust exemption.<sup>2</sup> Not far

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1. See *Am. Needle, Inc. v. NFL*, 560 U.S. 183 (2010) (holding that the NFL’s licensing activities are “not categorically beyond the coverage of [antitrust laws]”).

2. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (“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. . . . [T]he aberration is an established one . . . . It is . . . fully entitled to the benefit of *stare decisis* . . . .”); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922). The current scope or existence of that exemption is still up for debate. See generally Nathaniel Grow, *Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557 (2010). Courts have also afforded antitrust deference because of the unique interdependent nature of the teams in a league. See e.g., *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1408 (9th Cir. 1984). Given that teams need to reach agreements for the product to exist, courts have been willing to analyze most league restraints—even those that appear to be per se illegal in other industries—under the Rule of Reason. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100–20 (1984); *L.A. Mem’l*, 726 F.2d at 1386–87 (citing *Standard Oil of N.J. v. United*

behind the much-ridiculed baseball trilogy, however, is the muddled, incoherent deference to the NCAA under section 1 of the Sherman Act.<sup>3</sup>

Commentators have long derided the stubborn “myth of amateurism,” noting that the NCAA has morphed into a profit-seeking machine that serves the decidedly professional and economic function of regulating college sports.<sup>4</sup> That criticism has only amplified over the last decade with the birth of billion dollar television deals, expanding tournament fields, and, of course, conference realignment.<sup>5</sup>

Yet the amateurism beast lives on, both in limiting the benefits afforded college athletes and in providing the NCAA an antitrust defense for those limitations. The Supreme Court’s landmark opinion in *NCAA v. Board of Regents of the University of Oklahoma*<sup>6</sup> spawned the amateurism defense—an anomaly in antitrust law.<sup>7</sup> It allows the NCAA to argue that the social benefits of amateurism outweigh the anticompetitive effects of its amateurism restraints.<sup>8</sup> Amateurism provides the NCAA with special treatment under the Sherman Act but gives courts no framework for applying the special treatment.<sup>9</sup> With no guidance, courts have created a hodgepodge of standards that are divorced from the basic purpose of antitrust law.<sup>10</sup>

Absent an antitrust exemption, and assuming the continuing vitality of

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States, 221 U.S. 1, 31 (1911)). Courts have also acknowledged that “competitive balance” is a legitimate pro-competitive benefit for purposes of balancing economic effects under the Rule of Reason. *See Bd. of Regents*, 468 U.S. at 119–20 (1984).

3. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (2012); *see also infra* Parts II–III.

4. *See* Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008).

5. *See generally, e.g.*, Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80, available at [www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/).

6. 468 U.S. 85 (1984).

7. *See id.*

8. *See, e.g., id.* at 120 (noting, *inter alia*, that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports” to such an extent that “[t]here can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act”).

9. *See infra* Part II.

10. *See infra* Parts II–III.

the amateurism beast, the goal of this short piece is modest—to suggest the creation of a test that provides a coherent mechanism for setting limits on the ability of the NCAA to restrict competition for student-athletes. The current models simply do not work.<sup>11</sup> Among other things, they lead to ad hoc (and intellectually unsatisfying) partial exemptions or presumptions that restraints are legal merely because they contribute to amateurism.<sup>12</sup> Rather than continue the charade of analyzing the social effects of amateurism under the traditional Rule of Reason analysis, this piece suggests that courts may be better off applying a nontraditional antitrust test to govern NCAA conduct.<sup>13</sup> Two possible solutions are *Addyston Pipe*'s less restrictive alternative inquiry<sup>14</sup> or the globally accepted proportionality analysis.<sup>15</sup>

## II. THE NCAA ANTITRUST BEAST

The genesis of the NCAA's special treatment can be traced to the Supreme Court's decision in *Board of Regents*, which invalidated NCAA restrictions on the broadcast of college football games.<sup>16</sup> *Board of Regents* spawned a two-headed amateurism defense<sup>17</sup> for the NCAA that has managed to survive decades of ridicule and criticism.<sup>18</sup> This amateurism Orthros<sup>19</sup> has enabled the NCAA and its member institutions to agree on a variety of restrictions that prevent student-athletes from receiving compensation or other benefits.<sup>20</sup>

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11. See *infra* Parts II–III.

12. See *infra* Parts II–III.

13. See *infra* Part IV.

14. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). See *infra* Part IV.

15. See *infra* Part IV.

16. 468 U.S. 85 (1984).

17. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 338–40 (2007).

18. See generally, e.g., Branch, *supra* note 5.

19. Orthros is a two-headed dog from Greek mythology. See Aaron J. Atsma, *Kyon Orthros*, THE THEOI PROJECT: GREEK MYTHOLOGY, [www.theoi.com/Ther/KuonOrthros.html](http://www.theoi.com/Ther/KuonOrthros.html) (last visited Sept. 24, 2013). The two-headed amateurism defense has proved to be more durable than Orthros. See *id.*

20. The Supreme Court has also recognized the promotion of “competitive balance” as a legitimate procompetitive benefit of restraints by the NCAA and professional sports leagues. See *Bd. of Regents*, 468 U.S. at 119–20. Recognizing the competitive imbalance inherent in college

The first prong of the amateurism defense holds that the maintenance and promotion of amateurism and academic ideals are legitimate procompetitive benefits for purposes of analysis under section 1 of the Sherman Act.<sup>21</sup> As the *Board of Regents* Court explained:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.<sup>22</sup>

The second prong attempts to couch amateurism as an economic

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sports, the NCAA has recently changed the focus of its rules away from the promotion of competitive balance. Cf. Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2665, 2667 (1996) (recognizing that “the totality of NCAA rules appear to do a very poor job of promoting . . . competitive balance” and questioning whether “any one of the NCAA’s rules, or even the rules as a whole, significantly enhance ‘competitive balance,’” especially in light of the “large disparities in playing ability and little relative movement in rankings among NCAA members under the status quo, and the NCAA’s seeming lack of concern over this apparent competitive imbalance today”). The de-emphasis on providing a level playing field vitiates the competitive balance antitrust defense for the NCAA and leaves it only with its anomalous amateurism argument.

21. See *Bd. of Regents*, 468 U.S. at 120.

22. *Id.* The Court added the following:

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete . . . . And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

*Id.* at 101–02; see also *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (“Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.”).

justification for NCAA restraints, holding that the NCAA's amateurism restrictions are necessary for the unique product of college football to exist.<sup>23</sup> As the *Board of Regents* Court further observed:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.<sup>24</sup>

Both of these prongs fly in the face of the foundational notion of antitrust law that “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources.”<sup>25</sup> The first head of the NCAA's amateurism beast essentially stands for the proposition that antitrust law should protect amateurism for the sake of protecting amateurism; that is, antitrust law should allow the NCAA to restrict student-athlete compensation because of the social value inherent in maintaining their amateur (i.e., unpaid) status.<sup>26</sup>

This justification is problematic for a number of reasons.<sup>27</sup> Perhaps most significantly, the Supreme Court has consistently rejected social

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23. *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (“We agree with these courts that, in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field.”); *see also, e.g., McCormack v. NCAA*, 845 F.2d 1338, 1344–45 (5th Cir. 1988).

24. 468 U.S. at 101–02.

25. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). For a thorough discussion of the shortcomings of the NCAA's antitrust defenses, see Lazaroff, *supra* note 17.

26. *See generally* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206 (1990) (arguing that the NCAA's amateurism restrictions are illegal, are not necessary to advance any legitimate interest, and that student-athletes should, therefore, receive compensation).

27. *See, e.g.,* Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 86 (2006) (“[A]uthorizing lower courts to recognize non-economic justifications opens the door to an infinite variety of potential arguments that will de-stabilize antitrust laws, increasing the costs to parties as they grapple with unclear expectations.”).

welfare justifications in antitrust analysis.<sup>28</sup> In *National Society of Professional Engineers v. United States*, the defendants argued that a ban on competitive bidding was necessary to protect public health and safety.<sup>29</sup> The Court rejected these non-economic justifications, holding that “the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable”<sup>30</sup> or that, “because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.”<sup>31</sup> The Court explained that the Rule of Reason analysis “is confined to a consideration of impact on competitive conditions” and that any argument that social goals should be considered “is properly addressed to Congress.”<sup>32</sup>

Moreover, this “myth of amateurism”<sup>33</sup> ignores the fact that the NCAA

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28. See, e.g., *id.* at 85 (“The Supreme Court has never accepted a non-economic justification for anticompetitive conduct . . .”).

29. 435 U.S. 679, 681 (1978). The defendant’s theory was that competitive bidding would drive prices so low that the winning bidder would be forced to sacrifice quality and safety. *Id.* at 684–85.

30. *Id.* at 696.

31. *Id.* at 689.

32. *Id.* at 689–90. The Court echoed this reasoning in *FTC v. Indiana Federation of Dentists*, holding that an argument that free competition “will lead [consumers] to make unwise and even dangerous choices” is, in reality, “nothing less than a frontal assault on the basic policy of the Sherman Act.” 476 U.S. 447, 463 (1986) (quoting *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 695); see also *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990) (“The social justifications proffered for respondents’ restraint of trade thus do not make it any less unlawful.”); *Law v. NCAA*, 134 F.3d 1010, 1021–22 (10th Cir. 1998) (“While opening up coaching positions for younger people may have social value apart from its [e]ffect on competition, we may not consider such values unless they impact upon competition.”); Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of the Sherman Act*, 13 YALE L. & POL’Y REV. 137, 161 (1995) (“Competition is the talisman, and the Court will not countenance any argument premised on the undesirability of competition in a particular market.”). But see *Goldfarb v. Va. State Bar*, 421 U.S. 773, 788–89 n.17 (1975) (“The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.”); Goldman, *supra*, at 146–47 (“A strong argument exists that social welfare justifications should be permitted to offset anticompetitive effects, at least when the benefits from the challenged conduct are clear and the harm is relatively benign. Competitors are often in the best position to identify and respond to market failures. At a time when the political process appears incapable of responding to the many social problems crippling society, one may believe that the law should not discourage, much less penalize, socially responsible behavior by private parties.”).

33. See McCormick & McCormick, *supra* note 4, at 496.

has become a profit-seeking enterprise that governs multi-billion dollar entertainment products.<sup>34</sup> That criticism has only grown over the last decade with bigger tournament fields, billion-dollar television contracts, and, most recently, conference realignment.<sup>35</sup> At this point, there is no question that the NCAA's focus on the *student-athlete* is harder to stomach than it was thirty years ago, at least with respect to the top one percent of men's football and basketball. The amateurism-for-the-sake-of-amateurism prong therefore suffers from two potential flaws: it either affords too much credit to a notion that may be a pretextual shield for the NCAA's economic goals, or it credits a defense that is irrelevant under antitrust law.

The quasi-economic second prong of the amateurism defense—that college football cannot exist without amateurism—fares no better for a number of reasons. First, while it is hard to argue with the conclusion that a college football game cannot exist without an agreement between two different football teams,<sup>36</sup> there is no empirical evidence to support the conclusion that college football cannot exist without “amateurism” restrictions on its players.<sup>37</sup> It is an open question whether the demand for college sports can be sustained if the student-athletes receive compensation.<sup>38</sup>

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34. See, e.g., *id.* at 505–20 (discussing and listing, *inter alia*, annual revenue for the NCAA); see also *Banks v. NCAA*, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (noting that the view of the NCAA's eligibility rules as noncommercial was “an outmoded image of intercollegiate sports that no longer jibes with reality”).

35. See generally, e.g., Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371 (2012).

36. Of course, even this conclusion is flawed. Any college can play an intra-squad game. A game between two different schools may be a more attractive product, but a “game” can exist without an agreement between two teams.

37. See, e.g., Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports*, 14 ANTITRUST 51, 51 (2000) (“From the point of view of antitrust economics, the NCAA's claims ultimately rest on an unproven assumption: fans['] preference for amateurism is a sine qua non of college sports.”).

38. Cf. Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 606–07 (2008) (discussing the idea of potential student-athlete compensation in the context of antitrust law and explaining that “[a] competitive market could result in lower prices but the opposite has occurred in part because the peculiar economic structure of colleges and universities continues to drive demand”); Henry H. Perritt, Jr., *Competitive Entertainment: Implications of the NFL Lockout Litigation for Sports, Theatre, Music, and Video Entertainment*, 35 HASTINGS COMM. & ENT. L.J.



It may be that college sports are popular because the athletes play for a particular school, regardless of whether that school pays them to play.<sup>39</sup> Commentators also point to the Olympics and other sporting competitions that successfully transitioned from an “amateur” to a “professional” model without destroying their product.<sup>40</sup> Similarly, one can argue that the NCAA’s amateurism rules have not actually created a distinct product—that is, college sports are “professional,” they are just professional sports played where the athletes receive no direct compensation.<sup>41</sup>

The second prong also fails as a matter of law because it simply proves too much. The NCAA’s argument is essentially that the product of college football is defined by players who are unpaid.<sup>42</sup> Therefore, the product cannot exist unless colleges agree not to pay the players. But that argument would allow any group of competitors to justify their restraints of trade on the basis that their products are defined by the result of their restrictions. Under that theory, the NFL could justify a hard salary cap by arguing that the NFL product is a game of football where team salaries are capped. And a professional society of engineers could justify a ban on competitive bidding on the basis that their product is engineering based on quality, not price. Yet, these justifications are clearly not permitted under antitrust law.<sup>43</sup>

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93, 120 (2012) (noting, just before a discussion about antitrust jurisprudence in the realm of college sports, that “[l]abor costs must be reflected in the prices for products and services, and so better employment terms tend to reduce demand in product markets”).

39. Cf. Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 307 (1998) (“Year after year, fans of collegiate athletics flock to stadiums across the country to pay reverence to their respective athletic teams. These teams not only provide their supporters with a steady source of entertainment, but their performance also helps bring notoriety and pride to the universities they represent.”).

40. Rascher & Schwarz, *supra* note 37, at 54 (discussing the continued popularity of the Olympics and tennis tournaments after their transition to a professional model).

41. See, e.g., *id.* at 53; Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 77 (1995) (noting that “[i]n many ways, college sports, particularly high-caliber football and basketball programs, are more similar to professional sports than amateur sports at the high school and youth levels”).

42. See *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

43. In *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, the Court accepted Broadcasting Music, Inc.’s (BMI) argument that its blanket license created a new product, but this only allowed BMI to avoid per se illegality. 441 U.S. 1, 20, 22 (1979). Ironically, critics who point to the hypocrisy of the schools making millions off of the students who get paid nothing are not necessarily helping the antitrust case against the NCAA. The NCAA’s argument is that they are able to make millions

## III. ANOMALOUS TREATMENT OF THE NCAA UNDER ANTITRUST LAW

The shaky antitrust foundation of amateurism has put lower courts in the impossible position of evaluating the legality of NCAA restraints based on concepts that are incompatible with the basic premise of antitrust law.<sup>44</sup> Recognition of amateurism as a legitimate procompetitive benefit asks courts to balance the anticompetitive *economic* effects of restrictions on student-athletes with the *social* benefits of amateurism to college sports. This type of balancing is anathema to antitrust law.<sup>45</sup> The goal of section 1 of the Sherman Act is to ferret out anticompetitive conduct.<sup>46</sup> The Rule of Reason thus asks courts to balance the *economic* effects of a restraint.<sup>47</sup> If the restraint is net procompetitive—that is, if its procompetitive benefits outweigh its anticompetitive effects—it is legal.<sup>48</sup> If it is net anticompetitive—if the anticompetitive effects outweigh the procompetitive benefits—it is illegal.<sup>49</sup> The promotion of amateurism, or any other social goals, has no place in the equation and has no impact on the legality of a restraint.<sup>50</sup>

Even if a social goal like amateurism were relevant to the analysis, the Rule of Reason is simply not equipped or designed to balance social welfare

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*because* the athletes are not paid—not because they do not have to pay the athletes millions of dollars, but because not paying the athletes makes their product popular. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 (1984) (“[T]he NCAA seeks to market a particular brand of football—college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”). And if they paid anything more than a token fee, they would just be seen as an inferior (and cheap) minor league that would not be attractive to fans. See *id.* at 117.

44. See generally Mitten, *supra* note 41 (detailing the nuances of this issue and discussing how lower courts have approached it).

45. See, e.g., *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 371 (1963) (noting that balancing economic and non-economic effects is “beyond the ordinary limits of judicial competence”).

46. Sherman Antitrust Act, 15 U.S.C. § 1 (2012).

47. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911); Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 572 (2009).

48. See Feldman, *supra* note 47, at 572.

49. *Id.*

50. See, e.g., Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 117 (2007).

with economic effects.<sup>51</sup> Of course, there is general skepticism about the ability of judges to balance different competitive economic effects with any real accuracy or consistency.<sup>52</sup> But these problems are amplified if courts are asked to balance economic effects with non-economic effects.<sup>53</sup> How can we quantify a concept like the preservation of amateurism?<sup>54</sup> How much weight should it be afforded compared to the economic harms caused by lack of compensation? And before we even try to quantify the effect, how can we distinguish acceptable social goals like amateurism from unacceptable ones?

If asking a court to balance the economic effects of a restraint is the equivalent of “judging whether a particular line is longer than a particular rock is heavy,”<sup>55</sup> then asking a court to compare economic effects and social welfare is the equivalent of judging whether a particular line is longer than a particular joke is funny. Incorporating a social goal into traditional antitrust analysis sets courts up for failure. Not surprisingly, courts have largely failed, providing a wildly diverse and incoherent application of the Sherman Act to the NCAA’s student-athlete restrictions.<sup>56</sup>

For example, one line of cases has held that the Sherman Act simply does not apply to NCAA rules regarding eligibility standards and amateurism.<sup>57</sup> The Sixth Circuit gave the most recent exposition of this distinction in *Bassett v. NCAA*, where a college coach brought a Sherman

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51. See *Phila Nat’l Bank*, 374 U.S. at 371.

52. See *Feldman*, *supra* note 47, at 574–75.

53. See *Kreher*, *supra* note 27, at 86.

54. See *id.* (“Economic justifications have the advantage of at least being theoretically quantifiable. When faced with a clear deadweight loss, how much should preserving amateurism . . . or furthering educational goals count?”).

55. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

56. See generally, *Lazaroff*, *supra* note 17, at 329–30 (discussing the varied treatment of the NCAA under antitrust law). In some cases, courts have found that the NCAA’s restrictions do not actually promote amateurism. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 116–19 (1984) (holding that the NCAA’s limit on the number of college football games its member schools may televise was not justified on the basis of procompetitive effect); *Law v. NCAA* 134 F.3d 1010, 1021–24 (10th Cir. 1998) (holding that the NCAA’s limit on coaches’ annual compensation was an unlawful restraint of trade under the Rule of Reason analysis). In those cases, the antitrust analysis was simple because there were no real procompetitive benefits to offset the anticompetitive effects of the restraints. *Bd. of Regents*, 468 U.S. at 116–19; *Law*, 134 F.3d at 1021–24.

57. See *infra* notes 58–71 and accompanying text.

Act claim after he was terminated for violating NCAA recruiting rules.<sup>58</sup> The Sixth Circuit recognized that the NCAA engages in commercial activity that brings in significant revenue, but emphasized that the appropriate inquiry for purposes of the Sherman Act was “whether the rule itself is commercial, not whether the entity promulgating the rule is commercial.”<sup>59</sup> The court explained that the NCAA’s rules prevent coaches and athletes from violating the “spirit of amateur athletics by providing remuneration to athletes in exchange for their commitments to play for the violator’s football program” and from “harm[ing] the student-athlete academically when coaches and assistants complete coursework on behalf of the student-athlete.”<sup>60</sup> The Sixth Circuit then concluded that the NCAA’s rules preventing improper inducements of athletes in recruiting, like eligibility rules, “are all explicitly non-commercial.”<sup>61</sup> The court even went so far as to deem such rules “*anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools.”<sup>62</sup> And enforcement of the rules, like the rules themselves, is a non-commercial activity outside the scope of the Sherman Act.<sup>63</sup>

Similarly, in *Jones v. NCAA*, the court ruled that the Sherman Act did not reach the NCAA’s decision to declare a college hockey player ineligible because “[t]he proscriptions of the Act were ‘tailored for the business world,’ not as a mechanism for the resolution of controversies in the liberal arts or in the learned professions.”<sup>64</sup> The student-athlete was “not a businessman in the traditional sense, and certainly not a ‘competitor’ within

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58. 528 F.3d 426, 428 (6th Cir. 2008).

59. *Id.* at 433 (quoting *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004)) (internal quotation marks omitted). Notably, the Sixth Circuit concluded that the rule in question in *Worldwide Basketball*, the “Two in Four rule,” had “commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters” and therefore was subject to scrutiny under the Sherman Act. 388 F.3d at 959.

60. *Bassett*, 528 F.3d at 433.

61. *Id.*

62. *Id.*

63. *Id.* at 433–34.

64. 392 F. Supp. 295, 303 (D. Mass. 1975) (citing *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)); *see also* *Coll. Athletic Placement Serv. v. NCCA*, No. 74-1144, 1974 WL 998, at \*6 (D.N.J. Aug. 22, 1974) (holding that NCAA rule furthered a noncommercial objective and, therefore, did not fall under the coverage of the Sherman Act).

the contemplation of the antitrust laws.”<sup>65</sup> The court added that the plaintiff had “not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.”<sup>66</sup>

In *Gaines v. NCAA*, the court held that the Sherman Act did not apply to the NCAA’s amateurism rules because “[e]ven in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.”<sup>67</sup> The court added that “[t]he overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between ‘student-athletes’” and thus rejected “the notion that such Rules may be judged or struck down by federal antitrust law.”<sup>68</sup>

The Third Circuit reached a similar conclusion in *Smith v. NCAA*, holding that the Sherman Act does not apply to the NCAA’s eligibility requirements because they are “not related to the NCAA’s commercial or business activities.”<sup>69</sup> Indeed, the court explained that “[r]ather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.”<sup>70</sup> And in *Pocono Invitational Sports Camp, Inc. v. NCAA*, the Eastern District of Pennsylvania held that NCAA rules regarding recruiting at summer camps are non-commercial and, therefore, not subject to scrutiny under the Sherman Act because the rules were “promulgated . . . in a paternalistic capacity to promote amateurism and education.”<sup>71</sup>

Recently, some courts have rejected the commercial/non-commercial distinction and held that the Sherman Act applies to all NCAA rules, including those designed to protect the amateur and academic aspects of

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65. *Jones*, 392 F. Supp. at 303.

66. *Id.*

67. 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

68. *Id.*

69. 139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

70. *Id.* The court explained further that even if the Sherman Act did apply to the restraints in question, they were not anticompetitive. *Id.* at 186.

71. 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004).

college sports.<sup>72</sup> In *Agnew v. NCAA*, the Seventh Circuit held that the Sherman Act applies to *all* NCAA rules, remarking that “[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.”<sup>73</sup> And, “[i]t follows that the NCAA’s bylaws can have an anticompetitive or a procompetitive effect on collegiate athletics generally and the national college football recruiting market specifically, and those effects can have an economic component.”<sup>74</sup> Although acknowledging that the NCAA is not immune from antitrust law,<sup>75</sup> these courts have avoided any substantive analysis of the law by concluding that the plaintiff failed to prove a relevant market.<sup>76</sup>

The inevitable consequence of the anomalous antitrust deference

72. See *infra* notes 73–76 and accompanying text.

73. 683 F.3d 328, 340 (7th Cir. 2012); see *Smith*, 139 F.3d at 187 (“We agree with these courts that, in general, the NCAA’s eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field.”); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (“The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.”); *Pocono*, 317 F. Supp. 2d at 584 (“The evidence further shows that these justifications are in keeping with the NCAA principles of amateurism and recruiting that aim to promote education and keep student athletics separate from professional sports.”); *Justice v. NCAA*, 577 F. Supp. 356, 378–79 (D. Ariz. 1983) (holding that the NCAA’s sanctions had not violated antitrust law given that the sanctions reasonably related to the NCAA’s goals of promoting fair competition and preservation of amateurism).

74. *Agnew*, 683 F.3d at 341.

75. See *Lazaroff*, *supra* note 17, at 343–44 (“[T]he common thread running through these decisions is that NCAA rules and regulations that have an obvious or demonstrable anticompetitive impact in legally cognizable relevant markets may be the subject of federal antitrust challenges.”).

76. See, e.g., *Agnew*, 683 F.3d at 345 (“[W]e ultimately conclude that plaintiffs’ complaint did not sufficiently identify a commercial market—an obvious necessity for Sherman Act violations . . . .”); cf. Justin M. Hannan, Case Comment, *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), 18 SUFFOLK J. TRIAL & APP. ADVOC. 345, 355 (2013) (“Student-athlete plaintiffs that . . . allege a relevant market have a strong chance to find themselves in uncharted territory: awaiting a procompetitive justification from the NCAA that falls outside those enumerated by *Board of Regents*. Plaintiffs have struggled to satisfy the market-analysis phase under Sherman Act scrutiny, but *Agnew* acknowledged the existence of market presence and moved the discussion to procompetitive versus anticompetitive justifications for the bylaw, a state that few litigants have been able to reach.”). But see *Rock v. NCAA*, No.1:12-CV-1019-JMS-DKL, 2013 WL 4479815, at \*6–7 (S.D. Ind. Aug. 16, 2013) (denying NCAA’s motion to dismiss as plaintiff identification of “the nationwide market for the labor of Division I football student athletes” was a plausible relevant market on its face).

afforded to the NCAA is a standardless body of law. The only consistent theme underlying these cases is inconsistency. The final section of this short piece thus offers a modest proposal to provide some shape and coherence to the application of antitrust law to the NCAA.

#### IV. A MODEST PROPOSAL

The two-headed amateurism beast has left us with no workable framework for section 1 scrutiny of NCAA restraints on student-athletes. Instead, courts have created a hodgepodge of standards that are divorced from the basic purpose of antitrust law. Absent an antitrust exemption, and assuming the continuing vitality of the amateurism defense, the goal of this short piece is modest—to suggest the adoption of a test that provides a coherent mechanism for setting limits on the ability of the NCAA to restrict competition for student-athletes.

This proposal suggests that the solution may rest in using a means–ends analysis. One simple option is to use the less restrictive alternative (LRA) inquiry adopted by then-Judge Taft in *Addyston Pipe*.<sup>77</sup> I have criticized the LRA test in other contexts for its underlying inconsistency with the Rule of Reason, but the treatment of the NCAA is already completely inconsistent with antitrust law.<sup>78</sup> This is not to suggest that two antitrust wrongs make a right, but the LRA inquiry can at least provide a systematic and predictable check on NCAA student-athlete restrictions. And if we are untying the NCAA from traditional antitrust law, it may be appropriate to untie the analysis from traditional antitrust law and create a more effective mechanism to govern the NCAA.

The LRA test ensures that the benefits of an agreement could not have been achieved through a less restrictive alternative.<sup>79</sup> This test relieves

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77. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

78. See generally Feldman, *supra* note 47.

79. See Feldman, *supra* note 47, at 567–68 (discussing less restrictive alternative analysis as used in *Addyston Pipe & Steel*). The test seeks to maximize Pareto-efficiency by ensuring that no alternative agreement could have achieved the same benefits without causing greater harm. See generally *id.* For a discussion on Pareto-efficiency, see Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417, 432–44 (1987).

courts of the burden of balancing the unbalanceable.<sup>80</sup> That is, courts need not compare the gains to social welfare with the harm to competition. Instead, it only requires courts to confirm that the NCAA has used the least anticompetitive means to achieve its social benefit ends.<sup>81</sup> In that sense, it only requires a court to measure the social benefits of the restraint versus the social benefits of its alternatives and the anticompetitive impact of the restraint versus the anticompetitive impact of its alternatives. Granted, this is no easy task, but it at least provides a mechanism for courts to consider both social and economic effects.

This proposed use of the LRA inquiry is also consistent with the antitrust analysis of restraints in the professional sports industry.<sup>82</sup> Under this analysis, courts look to see if the restraint in question achieves procompetitive benefits.<sup>83</sup> In the context of professional sports, these procompetitive benefits are typically the promotion or maintenance of competitive balance.<sup>84</sup> If the restraint does not achieve any procompetitive benefits it is a “naked” restraint and is illegal.<sup>85</sup> If it does achieve procompetitive benefits, the court looks to see if the restraint is reasonably necessary for achieving those procompetitive benefits.<sup>86</sup> If the restraint is not reasonably necessary—that is, if there are less restrictive alternatives available to achieve those benefits—it is illegal.<sup>87</sup> If it is reasonably

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80. See Feldman, *supra* note 47, at 628–29 (discussing proper role of LRA analysis as helping courts interpret and predict the procompetitive benefits and anticompetitive effects of a restraint.)

81. Although this would not completely eliminate balancing from the equation, it would at least allow courts to avoid comparing social and economic effects. See Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1300 (2012) [hereinafter *Balancing the Scales*].

82. See, e.g., L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1395 (9th Cir. 1984) (applying LRA inquiry).

83. See, e.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102–03 (1984).

84. See, e.g., Salil K. Mehra & T. Joel Zuercher, *Striking Out “Competitive Balance” in Sports, Antitrust, and Intellectual Property*, 21 BERKELEY TECH. L.J. 1499, 1500 (2006) (“‘Competitive balance’ has been a focus of sports antitrust cases for three decades . . .”).

85. See, e.g., Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674–77 (7th Cir. 1992) (invoking the notion of a “naked” restraint in the context of a disputed NBA television plan and affirming a lower court's finding that such plan constituted an illegal restraint that lacked a sufficient procompetitive justification).

86. See, e.g., L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984) (detailing the nuances of this analysis).

87. See Feldman, *supra* note 47, at 567–68.



necessary, it is legal.<sup>88</sup> In other words, the key question in many professional sports player restraint antitrust cases is simply whether the restraint is reasonably necessary for achieving competitive balance.<sup>89</sup>

Alternatively, courts can look for guidance from proportionality analysis (PA). PA has been adopted by virtually every judicial system in the world except the United States and offers another potential starting point for a specialized form of antitrust analysis for the NCAA.<sup>90</sup> PA operates in two stages.<sup>91</sup> The first stage is a means–ends analysis that is essentially the same as the LRA inquiry.<sup>92</sup> The second stage incorporates a traditional balancing test that compares competing values and objectives.<sup>93</sup> This stage requires that “the intensity of interference with one principle must be proportional to the extent of satisfaction of another.”<sup>94</sup>

Although this balancing stage may present difficulties similar to those inherent in the Rule of Reason balancing test, PA embeds a sliding scale that permits courts to exercise a level of discretion, or “margin of appreciation,” depending on the interests implicated by the restraint in question.<sup>95</sup> The sliding scale of deference permits a nuanced, context-sensitive analysis that may allow courts to better handle the NCAA’s anomalous amateurism defense.<sup>96</sup>

These are imperfect suggestions, but stricter adoption of a means–ends inquiry may provide some needed direction to the rudderless ship of NCAA antitrust analysis.

## V. CONCLUSION

The NCAA continues to serve as intellectual kryptonite for antitrust

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88. *Id.*

89. *See, e.g.,* *Clarett v. NFL*, 306 F. Supp. 2d 379, 410 (S.D.N.Y. 2004), *rev’d in part and vacated in part on other grounds*, 369 F.3d 124 (2d Cir. 2004).

90. *Balancing the Scales*, *supra* note 81, at 1295–1300 (2012).

91. *Id.* at 1296; *see* Julian Rivers, *Proportionality and Discretion in International and European Law*, in *TRANSNATIONAL CONSTITUTIONALISM* 107, 114 (Nicholas Tsagourias ed., 2007).

92. *Balancing the Scales*, *supra* note 81, at 1295–96.

93. *Id.*

94. Rivers, *supra* note 91, at 115.

95. *Balancing the Scales*, *supra* note 81, at 1297–98.

96. *Id.* at 1298–99.

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jurisprudence. Absent a principled method for applying the Sherman Act to the NCAA's vast array of rules, courts have struggled with ad hoc and inconsistent rulings that have further muddied the antitrust waters. This short piece does not offer a comprehensive solution for taming the NCAA antitrust beast, but provides a starting point for rethinking the antitrust approach to amateurism.

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