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A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act

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A SHORT TREATISE ON AMATEURISM AND ANTITRUST LAW: WHY THE NCAA'S NO-PAY RULES VIOLATE SECTION 1 OF THE SHERMAN ACT

Marc Edelman[†]

ABSTRACT

The National Collegiate Athletic Association (NCAA) oversees nearly every aspect of the \$11 billion college sports industry. Its powers include scheduling championship events, determining eligibility rules, entering into commercial contracts, and punishing members that refuse to follow its authority. In recent years, some NCAA members have become increasingly wealthy—grossing annual revenues upwards of \$100 million per year. Yet the NCAA's rules still deprive these members of the opportunity to share their wealth with student-athletes.

This Article explains why the NCAA's "no-pay" rules violate section 1 of the Sherman Act. Part I introduces the NCAA, its principle of amateurism, and its traditional enforcement mechanisms. Part II provides a brief overview of section 1 of the Sherman Act—the "comprehensive charter of economic liberty" in American trade. Part III explains why the NCAA's no-pay rules constitute both an illegal form of wage fixing and an illegal group boycott. Part IV then explores eight lower court decisions that incorrectly held the NCAA's eligibility rules were noncommercial and thus exempt from antitrust scrutiny. Meanwhile, Part V analyzes four additional lower court decisions that misconstrued the NCAA's eligibility rules as procompetitive under a rule of reason analysis. Finally, Part VI concludes that even if a court were to find that competitive balance is a reasonable basis for upholding certain no-pay rules, such rules still should not be promulgated by the NCAA, but rather by individual conferences.

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INTRODUCTION

The National Collegiate Athletic Association (NCAA) oversees nearly every aspect of the \$11 billion college sports industry.¹ Its powers include scheduling championship events, determining eligibility rules, entering into commercial contracts, and punishing members that refuse to follow its authority.² In recent years, some NCAA members have become increasingly wealthy—grossing annual revenues upwards of \$100 million per year.³ Yet the NCAA's rules deprive these members of the opportunity to share their wealth with student-athletes.⁴ Instead, the NCAA and its leaders hide behind a “veil of amateurism” that maintains the wealth of college sports “in the hands of a select few administrators, athletic directors, and coaches.”⁵

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1. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984) (explaining that, since the NCAA's inception in 1905, the NCAA has “adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs”); *see also* *Where Does the Money Go?*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one (accessed by entering the URL in the Internet Archive index) (stating that “[o]verall annual revenue for college athletics programs for 2008–09 was estimated at about \$10.6 billion”).
 2. *See infra* Part I.A–B.
 3. *See* *College Athletics Revenues and Expenses*, ESPN.COM, <http://espn.go.com/ncaa/revenue> (last visited Sept. 27, 2013) (showing that, in 2008, five NCAA member schools grossed revenue in excess of \$100 million per year and several others were close to that threshold).
 4. *See* 2013–14 NCAA DIVISION I MANUAL § 12.1.2, at 59 (2013) [hereinafter 2013–14 DIVISION I MANUAL], *available at* <http://www.ncaapublications.com/p-4322-2013-2014-ncaa-division-i-manual.aspx> (prohibiting, as part of the criteria for amateur status, individuals from receiving various forms of “pay” in return for “athletics skill or participation”); *see also* David Wharton, *Plan Is on the Money to Some: Conferences Will Have Option of Giving Student-Athletes an Extra \$2,000 a Year*, L.A. TIMES, Nov. 17, 2011, at C1 (quoting Boise State University President Robert Kustra's position that, even though student-athletes are unpaid, they “have it pretty good”); *NCAA Office of the President*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/NCAA+President+Mark+Emmert> (last visited Sept. 27, 2013) (quoting NCAA president Mark Emmert's declaration that “[a]s long as [he is] president of the NCAA, [it] will not pay student-athletes to play sports”).
 5. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008) (arguing that college sports hide behind a “veil of amateurism” because “[t]he idea that major college sports are amateur is demonstrably

Although the NCAA rulebook has long evaded legal scrutiny, courts are finally beginning to overturn certain aspects of the NCAA's rules that are deemed to be anticompetitive. For example, courts have struck down the NCAA's nationwide limits on televised football broadcasts and its caps on assistant coaches' salaries.⁶ Nevertheless, the need to reform the college athletics industry extends far beyond these areas. It is not just the outer fringes of the NCAA rules that violate antitrust law: *it is the whole shebang*.

This Article explains why the NCAA's no-pay rules violate section 1 of the Sherman Act. Part I introduces the NCAA, its principle of amateurism, and its traditional enforcement mechanisms. Part II provides a brief overview of section 1 of the Sherman Act—the “comprehensive charter of economic liberty” in American trade.⁷ Part III, applying precedent from the Supreme Court and the Tenth Circuit, explains why the NCAA no-pay rules constitute both an illegal form of wage fixing and an illegal group boycott. Part IV then explores eight lower court decisions that incorrectly held the NCAA eligibility rules were noncommercial and thus exempt from antitrust scrutiny. Meanwhile, Part V analyzes four additional lower court decisions that misconstrued the NCAA eligibility rules as procompetitive under a rule of reason review. Finally, Part VI concludes that even if a court were to find that competitive balance is a reasonable basis for upholding certain no-pay rules, such rules still should not be promulgated by the NCAA, but rather by the individual conferences.

I. THE NCAA, ITS PRINCIPLE OF AMATEURISM, AND ITS INTERNAL ENFORCEMENT MECHANISMS

A. *The NCAA*

The NCAA is the “dominant trade association” of American colleges that compete in intercollegiate sports.⁸ It comprises

false”); Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 864 (2002).

6. See *Bd. of Regents*, 468 U.S. at 88 (overturning the NCAA's limits on televised football broadcasts); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (holding that a salary cap on “restricted-earnings” coaches is illegal).
7. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). See also *Reitner v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (describing how the Sherman Act economically protects people as individuals).
8. *Banks v. NCAA*, 746 F. Supp. 850, 852 (N.D. Ind. 1990), *aff'd*, 977 F.2d 1081 (7th Cir. 1992); see also *Coll. Athletic Placement Serv., Inc. v. NCAA*, No. 74-1144, 1974 WL 998, at *2 (D.N.J. Aug. 22, 1974) (describing the NCAA as “the largest and most prestigious association of colleges and athletic conferences in the United States”).

approximately twelve hundred member schools that participate in ninety-five different active athletic conferences.⁹ Its mission is to promulgate playing rules, host championship events, enforce standards of academic eligibility, and promote the general growth of college athletics.¹⁰

The NCAA was first chartered in 1905 by trustees of sixty-two colleges as a forum to discuss health risks in college sports.¹¹ But by the end of World War II, the NCAA had expanded its reach into hosting sporting events and setting eligibility rules.¹² In 1948, the NCAA introduced its first written code to govern members' recruiting practices and financial aid payouts.¹³ Then, four years later, the NCAA replaced that code with a broader set of rules to govern membership, infractions, and punishment.¹⁴

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9. *See* *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 957 (6th Cir. 2004) (noting that the NCAA's membership includes more than twelve hundred colleges); *About the NCAA: Membership*, NAT'L COLLEGIATE ATHLETIC ASS'N <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last updated Aug. 13, 2012) (stating that there are a total of 95 active NCAA conferences in Division I, Division II, and Division III sports); *see also* *Bd. of Regents*, 468 U.S. at 99 (1984) (defining the NCAA as "an association of schools which compete against each other to attract television revenues, not to mention fans and athletes").
 10. *See* *Worldwide Basketball*, 388 F.3d at 957 (explaining that the NCAA "promulgates rules and regulations" pertaining to college sports); *see also* *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1153 (10th Cir. 1983) (describing the NCAA as "essentially an integration of the rulemaking and rule-enforcing activities of its member institutions"), *aff'd*, 468 U.S. 85 (1984); *Banks*, 746 F. Supp. at 852 (explaining that according to the NCAA's constitution, its purpose is to maintain amateur athletics "as an integral part of the educational program and the athlete as an integral part of the student body and by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports").
 11. *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History> (last updated Aug. 13, 2012).
 12. *See* *Enforcement*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://web.archive.org/web/20130310042307/http://ncaa.org/wps/wcm/connect/public/ncaa/enforcement/resources/chronology+of+enforcement> (last updated Jan. 21, 2013) (accessed using the Internet Archive index) (noting the NCAA's 1948 adoption of strict regulations and the establishment of an investigative committee).
 13. *See id.* (describing the "Sanity Code" as "the first set of regulations with teeth").
 14. *See id.* (explaining the creation and scope of authority of the Membership Committee and its Subcommittee on Infractions).

Today, the NCAA operates pursuant to a formal constitution and bylaws that are voted upon by its members.¹⁵ In addition, NCAA members vote annually on committee members to “direct policy between [annual] conventions.”¹⁶ As a condition of membership, all NCAA colleges must agree to abide by the association’s written rules, as well as by its committees’ decisions.¹⁷ Members do not have the chance to opt out of rules based on their financial preference, nor do they have the right to opt out on moral grounds.¹⁸

B. The NCAA’s Principle of Amateurism and Its Enforcement

One area in which the NCAA establishes rules pertains to the amateur status of student-athletes. The NCAA’s principle of amateurism, as drafted and approved by its membership, states that “student-athletes shall be amateurs in intercollegiate sport, and their participation shall be motivated by education and by the physical, mental and social benefits to be derived.”¹⁹ As such, the NCAA bylaws limit the quantity of student-athletes’ financial aid to an amount “set by the Association’s membership.”²⁰ In addition, NCAA bylaws prohibit student-athletes from accepting remuneration in any form based on their status as athletes.²¹

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15. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984); *see also Worldwide Basketball*, 388 F.3d at 957 (noting that the NCAA “adopts bylaws formulated by a legislative body drawn from the Association’s membership”).
 16. Warner Amex Cable Commc’ns v. Am. Broad. Cos., 499 F. Supp. 537, 540 n.2 (S.D. Ohio 1980); *see also Smith v. NCAA*, 139 F.3d 180, 183 (1998) (explaining that NCAA “member institutions agree to abide by and enforce [association] rules”).
 17. *See Worldwide Basketball*, 388 F.3d at 957.
 18. *E.g.*, 2013–14 DIVISION I MANUAL, *supra* note 4, §§ 2.8, 3.1.1, 3.2.1.2, 3.2.4.1, at 4, 8–9 (setting forth the principle of rules compliance and unequivocally requiring all members to adhere to the rules and principles set forth in the NCAA constitution, bylaws, and legislation).
 19. *Id.* § 2.9, at 4 (setting forth the principle of amateurism); *see also Marc Edelman, Closing the “Free Speech” Loophole: Protecting College Athletes’ Publicity Rights in Commercial Videogames*, 65 FLA. L. REV. 553, 557 (2013) (quoting the principle of amateurism); *cf.* Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 9 (1991) (“The payment of money to amateur athletes has traditionally been viewed to be contrary to the very essence of the true meaning of amateurism.”).
 20. 2013–14 DIVISION I MANUAL, *supra* note 4, § 12.01.4, at 57.
 21. Edelman, *supra* note 19, at 577 (citing 2011–12 DIVISION I MANUAL, § 12.1.2, at 62 (2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf>). NCAA no-pay rules were originally intended to preserve the scarce number of college athletic opportunities for members of the general student body. *See Jennifer A. Mueller, The*

In modern times, the NCAA works tirelessly to enforce its principle of amateurism.²² One way that the NCAA enforces this principle is by levying penalties against members that provide student-athletes with benefits beyond the NCAA-permitted amount. Such penalties may include fines, the loss of television appearances, or revocation of the opportunity to compete in postseason games.²³ In addition, the NCAA's most severe penalty—colloquially known as the “death penalty”—empowers the association to shut down any repeat violator's athletic program during regular-season competition.²⁴

Since the NCAA first established its death penalty in June 1985, the association has only enforced the sanction once, against Southern Methodist University's football team during the 1987 athletic season.²⁵ This sanction resulted in Southern Methodist University's dramatic

Best Defense Is a Good Offense: Student-Athlete Amateurism Should Not Become a Fantasy, 2009 U. ILL. J.L. TECH. & POL'Y 527, 534–35 (2009) (explaining how the NCAA's principle of amateurism was originally intended to “maintain intercollegiate athletics as an integral part of the student body”).

22. See Steve Ellis, *University Officials Approve Get-Tough Measures*, ORLANDO SENTINEL, June 22, 1985, at C1 (explaining why the NCAA passed measures that called for “tougher penalties for cheaters and greater institutional responsibility”).
23. 2013–14 DIVISION I MANUAL, *supra* note 4, §§ 19.9.5.1–2, 10.9.7(h), at 322–23.
24. *Id.* §§ 19.9.3, 19.9.7(a), at 321–23 (authorizing the disciplinary panel ban “specified competition in the sport during the regular season” and enumerating aggravating factors, such as repeat violations, that would justify such a penalty); see also Ellis, *supra* note 22 (describing the death penalty as a “two-year ban on scholarships, recruiting, and intercollegiate competition”); *S.M.U. Awaits Decision*, N.Y. TIMES, Feb. 21, 1987, at 51 (describing the NCAA's adoption of the death penalty); NCAA COMMITTEE ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT 2 (Feb. 25, 1987) [hereinafter SMU INFRACTIONS REPORT] (“At the June 1985 special Convention, the NCAA membership enacted a series of mandatory penalties applicable to member institutions found guilty of repeat major violations.”).
25. See SMU INFRACTIONS REPORT, *supra* note 24, at 2 (“During the period September 1985 through December 1986, monthly payments ranging from \$50 to \$725 were made to numerous student-athletes in the sport of football from funds provided by an outside representative of the university's athletics interests.”). The report also found that “[thirteen] football team members received payments during the 1985–86 academic year that totaled approximately \$47,000, and eight student-athletes continued to receive payments from September through December 1986 that totaled approximately \$14,000.” *Id.* See also *Time to Bench S.M.U.?*, N.Y. TIMES, Dec. 6, 1986, at 26 (noting that SMU was accused specifically of paying one student-athlete \$25,000 to sign a national letter of intent and arranging with another alumnus to provide free housing for a student-athlete).

loss of football-related revenues, not only for that particular season but also for many years that followed.²⁶ The economic annihilation of Southern Methodist University's football program continues to serve as a powerful deterrent against other colleges paying their student-athletes.²⁷

C. *How Fear of the "Death Penalty" Has Chilled Student-Athlete Pay and Destroyed the Free Market for College Athletics to the Detriment of Consumers*

In recent years, most NCAA members have fully abided by the NCAA's principle of amateurism, even though it has meant that college athletic directors and coaches earn millions of dollars while their student-athletes continue to live below the poverty line.²⁸ Even in the cases in which a particular athletic director or coach has wanted to improve his athletes' standard of living, the NCAA

26. See Michael Goodwin, *N.C.A.A. Bans Football at S.M.U. for '87 Season*, N.Y. TIMES, Feb. 26, 1987, at A1 (noting that shortly after the NCAA sought to impose its death penalty, it seemed the sanction was intended primarily to ensure that a school would be denied "important sources of revenue").

27. See Ellis, *supra* note 22 (quoting Clemson University's Bill Atchley, who described the sanction as a "deterrent"); see also SMU INFRACTIONS REPORT, *supra* note 24, at 2-6 (noting that the sanction in which an NCAA member loses its ability to compete in a given sport is referred to as the death penalty and is intended to have a "deterrent value for others who might be tempted" to violate the NCAA rules, which held true in the SMU case because, once the threat of such sanction became recognized, there was "evidence of actions by the university to obtain full compliance with NCAA regulations"); *N.C.A.A. Acts Against Kansas*, N.Y. TIMES, Nov. 2, 1988, at B9 (explaining that the NCAA's threat to give the University of Kansas basketball team such a sanction led the university to cut ties with three boosters who were purportedly paying the school's athletes). See generally Joe Drape, *Penalties Upheld for Alabama and Kentucky*, N.Y. TIMES, Sept. 18, 2002, at D6 (quoting the chairman of the NCAA Appeals Committee, Terry Don Phillips, as saying that "[t]he death penalty would have likely been imposed" against the University of Alabama's football team if it were not for "institutional cooperation" to stop the payments from boosters to college athletes).

28. See Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES, Jan. 1, 2012, 32 (Magazine) (noting that premier college coaches can earn "as much or more than a professional coach" and that, specifically, Ohio State University football coach Urban Meyer makes an estimated \$4 million per year); see also Fred Frommer, *Advocacy Group Says Top College Athletes Worth Six Figures*, ESPN.COM, Sept. 12, 2011, http://espn.go.com/college-sports/story/_/id/6962151/advocacy-group-says-top-college-athletes-worth-six-figures (discussing a survey that found even student-athletes that received the maximum amount of financial aid permitted under the NCAA's bylaws are often left "below the poverty line").

amateurism bylaws serve as an impediment.²⁹ For example, in June 2011, seven Southeastern Conference football coaches proposed designating a share of their multimillion-dollar salaries to establish stipends of \$300 per game for their student-athletes.³⁰ However, superiors at each school nixed the stipend plan in fear of the NCAA's rebuke.³¹

The NCAA's continued failure to allow colleges to make independent business decisions about student-athlete pay hurts not only the student-athletes but also the college football consumers.³² For example, if the seven Southeastern Conference colleges had not quashed their coaches' stipend plan, those colleges would have been able to use the stipends to recruit better players—producing a stronger on-field football product and thus leading to greater fan satisfaction.³³ Nevertheless, by complying with a zero salary cap, these colleges succumbed to the will of the majority and surrendered the opportunity to compete most effectively both on and off the field.³⁴

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29. For further information on the NCAA amateurism bylaws and the enforcement of these bylaws, see *supra* Part I.B.
 30. See *Spurrier Proposes Paying Players*, PITTSBURGH POST-GAZETTE, June 5, 2011, at D9 (describing how Spurrier, head coach of the South Carolina Gamecocks, proposed a plan to pay football players \$300 per game out of his own salary).
 31. See generally *NCAA Shelves \$2,000 Athlete Stipend*, ESPN.COM, (Dec. 16, 2011), http://espn.go.com/college-sports/story/_/id/7357868/ncaaputs-2000-stipend-athletes-hold (expressing concern that paying stipends to student-athletes would “violate the NCAA’s philosophy on amateur sports”).
 32. *Cf.* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984) (holding that “[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with . . . antitrust law”).
 33. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 211 (1990) (noting that if an individual NCAA member provides greater compensation to student-athletes than the NCAA-permitted amount, “it may attract better athletes, larger attendance, more lucrative television contracts, and greater national publicity”). *But cf.* Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2651 (1996) (“The extent to which a system of free-market bidding for players [in college athletics] would thus reshuffle the allocation of players among colleges is hard to determine, and it would be even harder to ascertain the extent to which the reshuffled deck would provide a better quality product for consumers.”).
 34. *Cf.* Goldman, *supra* note 33, at 226–27 (recognizing that a cap on college athlete compensation prevents schools from competing for student-athletes in a free market based on their internal resources).

II. AN INTRODUCTION TO SECTION 1 OF THE SHERMAN ACT

The NCAA's principle of amateurism is long embedded in the history of college athletics; however, its concerted effort to destroy the free market for recruiting student-athletes is subject to scrutiny under section 1 of the Sherman Act.³⁵ Indeed, the principle's no-pay rules can reasonably be interpreted as the very antithesis to the type of competitive markets envisioned by drafters of the Sherman Act.³⁶

A. Overview

Section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination[,] . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal.”³⁷ This section of antitrust law provides “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”³⁸ It rests on the basic belief that “unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.”³⁹

Read literally, section 1 of the Sherman Act would seem to prohibit all commercial contracts.⁴⁰ However, courts have interpreted the act, in conjunction with preexisting common law, to prohibit only

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35. See Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 84 (explaining that the NCAA has attempted to enshrine amateur ideals into collegiate sports since its inception); see also *Bd. of Regents*, 468 U.S. at 99 (1984) (“By participating in an association which prevents member institutions from competing against each other . . . the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.”).
36. See discussion *infra* Part III.
37. Sherman Act §§ 1–7, 15 U.S.C. §§ 1–7 (2006).
38. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342–43 (1979).
39. *Northern Pacific*, 356 U.S. at 4; see also *Baum Research & Dev. Co. v. Hillerich & Bradsby Co.*, 31 F. Supp. 2d 1016, 1021 (E.D. Mich. 1998) (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978)) (internal quotation marks omitted)).
40. *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1304 (W.D. Okla. 1982) *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984); see also *Law v. NCAA*, 902 F. Supp. 1394, 1402 (D. Kan. 1995).

those contracts that “unreasonably” restrain trade.⁴¹ To determine whether a restraint “unreasonably” restrains trade, a court will apply a two-part test.⁴² First, the court will determine whether the restraint involves “concerted action between two legally distinct economic entities” in a manner that affects “trade or commerce among the several states” (“threshold requirements”).⁴³ If these threshold requirements are met, the court will then determine whether the alleged restraint unduly suppresses competition within any relevant market (“competitive effects test”).⁴⁴

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41. *Bd. of Regents*, 546 F. Supp. at 1304 (citing *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 31 (1911)); *see also* *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (“Because nearly every contract that binds the parties to an agreed course of conduct is a ‘restraint of trade’ of some sort, the Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’” (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984))); *Coll. Athletic Placement Serv., Inc. v. NCAA*, No. 74-1144, 1974 WL 998, at *3 (D.N.J. Aug. 22, 1974) (reaching the same conclusion regarding “unreasonable” restraints of trade).
42. *See Law*, 134 F.3d at 1016 (describing this two-step test); *cf.* Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009) (describing a similar three-part test involving threshold issues, an analysis of competitive effects, and finally the analysis of preemption and other non-competition-based affirmative defenses).
43. *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993)); *see also* *Sherman Act §1*, 15 U.S.C. § 1 (2006) (requiring that, to be illegal, the contract, combination, or conspiracy must be “in restraint of trade or commerce among the several States”); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971) (“Before a concerted refusal to deal can be illegal under Section 1 of the Sherman Act, two threshold elements must be present: (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.’”).
44. *See* Edelman, *supra* note 42, at 646 (explaining that the court will find a net anticompetitive effect “where the anticompetitive effects of a particular agreement are greater than their pro-competitive benefits”); *see also* *Banks v. NCAA*, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (“Whether a particular arrangement violates the Sherman Act depends upon the arrangement’s effect upon competition in the relevant marketplace.”).

B. Threshold Requirements

In assessing the threshold requirements of an antitrust challenge, a court will often consider each requirement separately.⁴⁵ To determine whether a restraint involves the first threshold requirement—“concerted action between two legally distinct economic entities”⁴⁶—a court will consider whether there is evidence of an agreement, either written or implied, between entities that lack a common objective.⁴⁷ This requirement compels plaintiffs to show the presence of an agreement that “deprives the marketplace of independent centers of decisionmaking . . . and thus of actual and potential competition.”⁴⁸

Similarly, to ascertain whether a restraint affects the other threshold requirement—“trade or commerce among the several States”⁴⁹—a court will determine whether the restraint involves “the exchange or buying and selling of commodities especially on a large scale involving transportation from place to place.”⁵⁰ Under a modern

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45. See generally Edelman, *supra* note 42, at 642 (explaining that a reviewing court begins “its analysis by determining whether [the] two threshold issues are met”).
46. *Primetime*, 219 F.3d at 103 (quoting *Capital Imaging Assocs.*, 996 F.2d at 542).
47. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2212 (2010) (“The relevant inquiry, therefore, is whether there is a ‘contract, combination . . . or conspiracy’ amongst ‘separate economic actors pursuing separate economic interests’” (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984))); see also *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (finding that “[t]here is no question that all NCAA member schools have agreed to abide by the Bylaws,” so “the first showing of an agreement or contract is therefore not at issue in this case”); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (finding that an agreement among all of the colleges in the Pac-10 conference “fulfills the ‘contract, combination, and conspiracy’ prong” (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984))).
48. *American Needle*, 130 S. Ct. at 2212.
49. Sherman Act §1, 15 U.S.C. § 1 (2006).
50. WEBSTER’S THIRD INT’L DICTIONARY 456 (3d ed. 1986); see also *Agnew*, 683 F.3d at 338 (finding a commercial transaction to occur between a student-athlete and his college where “the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic or academic education, room, and board”); *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (finding a rule inhibiting NCAA member schools from hiring coaches that had been previously sanctioned by the NCAA to be “anti-commercial”); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (implying that certain trade-association rules may be deemed noncommercial if they are not based on business motives); *Hairston*, 101 F.3d at 1319 (agreeing with the parties that the “agreement affects interstate commerce”).

view, the actual amount of interstate activity, as compared to intrastate activity, is irrelevant so long as “it is not insubstantial.”⁵¹ Thus, “almost every activity from which [an] actor anticipates economic gain” will be found to affect interstate commerce.⁵²

C. *Competitive Effects Analysis*

Presuming that both threshold requirements are met, a court will next review the restraint’s competitive effects by applying one of three sanctioned tests: (1) per se, (2) rule of reason, or (3) quick-look. On one end of the spectrum, if a restraint is “so nefarious” that there is high probability that it lacks any redeeming value, a court will apply the per se test.⁵³ The per se test presumes that a restraint suppresses competition without engaging in any further inquiry.⁵⁴ Thus, a court will declare the restraint to be illegal unless a special antitrust exemption applies.⁵⁵

On the other end of the spectrum, if a court, upon first impression, believes that a restraint is likely to have some competitive benefit, it will instead apply the rule of reason test.⁵⁶ The rule of

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51. *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977) (citing *United States v. Yellow Cab Co.*, 332 U.S. 218, 225–26 (1947)).
 52. IA PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 260b, at 250 (2d ed. 2000).
 53. Marc Edelman, *Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat’l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 197 (2011); see also *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.”); *Geneva Pharms. Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 506 (2d Cir. 2004) (explaining that conduct is per se illegal if it falls within “the narrow range of behavior that is considered so plainly anti-competitive and so lacking in redeeming pro-competitive value that it is ‘presumed illegal without any further examination’” (quoting *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979))).
 54. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984) (“It is only when the plaintiff adequately states a per se violation of § 1 of the Sherman Act that an allegation of anticompetitive effects is not required.”).
 55. Cf. Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L L. & BUS. 403, 415 (2009) (“In the context of professional sports . . . the two most applicable defenses or exemptions to Section 1 of the Sherman Act are the statutory labor exemption and the non-statutory labor exemption.”).
 56. *See Edelman, supra* note 53, at 198 (noting that the rule of reason test is applied when courts believe an arrangement is likely to have redeeming benefits).

reason test “distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”⁵⁷ It requires investigating every aspect of a restraint, including whether the parties to the restraint had the power to control any relevant market (“market power”), whether the restraint encourages or suppresses competition, and whether the restraint caused the marketplace “antitrust harm.”⁵⁸

Finally, in the third set of circumstances, a court may elect to perform an “abbreviated or quick-look rule of reason analysis.”⁵⁹ Under this third test, a court will probe into certain aspects of a restraint while relying on its initial presumptions about others.⁶⁰ Most courts that apply the quick-look test do so in favor of the plaintiff based on a preliminary finding of anticompetitive effects, relieving the burden of establishing market power and shifting the burden to the defendant to provide justification.⁶¹ Nevertheless, two recent antitrust

57. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

58. *See* Edelman, *supra* note 53, at 198–99; *see also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing the rule of reason as “an inquiry into market power and market structure”); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (explaining that “[u]nder the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of produces significant anticompetitive effects within the relevant product and geographic markets” (quoting *NHL Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003))); *cf.* *Banks v. NCAA*, 977 F.2d 1081, 1087–88 (7th Cir. 1991) (noting that, with respect to the requirement of showing antitrust harm, “[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition” and “not only an injury to [one]self” (quoting *Car Carriers*, 745 F.2d at 1107–08)).

59. *See* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 757 (1999) (defining the abbreviated or “quick look” rule of reason test as one that should be used “when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets”); *see also* Edelman, *supra* note 53, at 197 (“In the middle of the spectrum, where an arrangement seems less nefarious, a court may instead apply the ‘quick look’ test . . .”).

60. *See* *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008) (upholding the district court’s finding that a quick-look analysis—which could have relieved the evidentiary burden for establishing the issues of market power and actual adverse effect on competition—did not apply).

61. *See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109–13 (1984) (holding that while market power was evident as a matter of fact without extensive analysis, as a matter of law, no such market analysis was required because the anticompetitive effects were clearly

decisions have found that courts may also adopt the quick-look test in favor of defendants if the alleged restraint is “essential if the product is to be available at all.”⁶²

III. ANALYZING THE NCAA’S NO-PAY RULES UNDER SECTION 1 OF THE SHERMAN ACT

There are two formidable ways by which a plaintiff could challenge the NCAA’s no-pay rules under section 1 of the Sherman Act. The first is to contend that the no-pay rules represent a form of wage fixing that harms not only the market for student-athlete services but also the quality of college sports’ on-field product. The second is to argue that the NCAA rules constitute an illegal group boycott of those colleges that would otherwise compete in a free market to recruit student-athletes.

Under both legal theories, courts would likely review the NCAA’s no-pay rules under the full rule of reason test because NCAA members “share an interest in making the entire league successful and profitable” and thus collectively benefit from cooperating on “the production and scheduling of games.”⁶³ Under the wage-fixing theory, student-athletes would be the ideal plaintiffs to challenge the NCAA’s restraints; meanwhile, under the group-boycott theory, the ideal plaintiff would be an NCAA member.

demonstrated and thus required “some competitive justification” from the defendant); *see also* *Law v. NCAA*, 902 F. Supp. 1394, 1405 (D. Kan. 1995) (“[B]ecause adverse effects on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant’s proffered competitive justifications for the restraint.”), *aff’d*, 134 F.3d 1010 (10th Cir. 1998).

62. *Laumann v. NHL*, 907 F. Supp. 2d 465, 479 (S.D.N.Y. 2012) (quoting *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201 (2010); *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (explaining that certain joint venture conduct that is necessary for the joint venture to exist in the first place is “presumptively procompetitive”).
63. *American Needle*, 130 S. Ct. 2201, 2216 (2010); *see also* *Texaco, Inc. v. Dagher*, 547 U.S. 1, 1, 5 (2006) (“It is not *per se* illegal under § 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products.”); *Justice v. NCAA*, 577 F. Supp. 356, 380 (D. Ariz. 1983) (noting that “[a] clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott *per se* analysis”). *But see* *Bd. of Regents*, 468 U.S. at 108 (1984) (applying the quick-look test to review of the NCAA’s television broadcast practices).

A. *Challenging the NCAA's No-Pay Rules As Illegal
Wage-Fixing Restraints*

The argument that the NCAA's no-pay rules constitute illegal wage fixing is best supported by precedent from the Supreme Court and the Tenth Circuit. As cases in these courts explain, wage fixing involves any agreement by two or more employers to set the compensation rate of workers at a pre-specified amount.⁶⁴ Generally, courts find wage fixing to be illegal not only because it harms workers but also because it injures the competitive marketplace by driving workers away from their current line of employment and into another field where their work product is less valuable to society.⁶⁵ Furthermore, courts generally recognize that an agreement to fix employee wages outside the scope of a collective bargaining agreement illegally “restrain[s] mobility on the part of employees who would otherwise have the opportunity, in a competitive market for services, to transfer to higher paid opportunities [that otherwise would be] offered by others.”⁶⁶

Applying these well-established principles, the Tenth Circuit held in *Law v. NCAA*⁶⁷ that the NCAA's attempt to cap assistant coaches' salaries was illegal because it depressed coaches' compensation without promoting any legitimate antitrust goal.⁶⁸ The court concluded that it was irrelevant whether the NCAA salary restraint opened up coaching opportunities for newer coaches because this rationale related entirely to social preferences that are divorced from

64. John H. Johnson, Jess David & Paul A. Torelli, *Empirical Evidence and Class Certification in Labor Market Antitrust Cases*, 25 ANTITRUST 60, 63 (2010).

65. *See, e.g., Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061–62 (D.C. Cir. 1995) (explaining that “[a]thletic prowess is, of course, a unique and highly specialized resource, of precisely the genre vulnerable to monopsony manipulation” and if sports “team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch profitably to other lines of work,” thus creating a “labor market for professional athletes’ services . . . where there is real potential for anticompetitive monopsonistic practices”); *cf.* Michael G. Langan, Comment, *Why a Fixed Salary for Developmental Squad Players Does Not Hurt the Game: Defending the Decision Not to Argue Consumer Injury in Brown v. Pro Football*, 5 GEO. MASON L. REV. 559, 560 (1997) (discussing an argument by Penn State Law School sports and antitrust law professor Stephen F. Ross that explains why a wage-fixing restraint in the context of a sports injury can lead to widespread consumer harm).

66. *See Cordova v. Bache & Co.*, 321 F. Supp. 600, 606–07 (S.D.N.Y. 1970).

67. 134 F.3d 1010 (10th Cir. 1998).

68. *Id.* at 1020.

the notion of an open, competitive marketplace.⁶⁹ Likewise, the court rejected the argument that a salary cap was beneficial to the free market because it would cut all NCAA members' costs: "cost-cutting by itself is not a valid procompetitive justification" and "[i]f it were, any group of competing buyers [would then be allowed to] agree on maximum prices."⁷⁰

There is, of course, one important distinction between the court's holding in *Law* and a theoretical antitrust challenge posited against the NCAA's student-athlete no-pay rules: unlike assistant coaches, student-athletes have not traditionally been defined as employees, so the collective determination of their pay has not traditionally been construed as wage fixing.⁷¹ Nevertheless, any empirical observation of student-athletes' daily activities shows that student-athletes are closely akin in practice to traditional workers.⁷² For example, "a self-study performed by the NCAA in 2011" found that "Division I [college] football players [devoted] an average of 43.3 hours per week to their sport"—more time than they spent on academic activities, and more than a typical U.S. worker spends on his profession.⁷³ In addition, student-athletes seem to meet the Internal Revenue Service's multifactor test for employment because NCAA coaching staffs exercise year-round behavioral controls over student-athletes and impose strict limits on their outside financial activities.⁷⁴ Furthermore, in the context of workers' compensation law, at least

69. *Id.* at 1021–22 (“While opening up coaching positions for younger people may have social value apart from its affect [sic] on competition, we may not consider such values unless they impact upon competition.”).

70. *Id.* at 1022 (explaining further that setting maximum prices generally “reduces the incentive among suppliers to improve their products” in the context of college basketball coaches, and it would similarly create “less incentive to improve their performance if their salaries are capped”). Also, the court rejected the argument that the cap on certain coaches' salaries was needed to maintain competitive balance among teams because, “[w]hile the REC [Restricted Earnings Coach] Rule [would] equalize the salaries paid to entry-level Division I coaches, it is not clear the REC Rule [would] equalize the experience level of such coaches” nor level the cost structure overall of operating college sport. *Id.* at 1024.

71. *See generally* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 129 (2006) (highlighting the argument made by some that student-athletes cannot be victims of wage fixing because they are not employees).

72. *Id.*

73. Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1099 (2012).

74. *Id.* at 1094–95.

one court has issued an award to a student-athlete—thus treating him as a de facto employee.⁷⁵

All of these factors combine to significantly rebut the longstanding legal fiction advanced by the NCAA that student-athletes are foremost students and not workers. Indeed, there is even some evidence that this legal fiction was created by the NCAA for the specific purpose of trying to avoid antitrust scrutiny.⁷⁶ Thus, it would be the most bizarre of loopholes to allow the NCAA to evade antitrust scrutiny simply by applying a dubious label to their business practices.⁷⁷

B. Challenging the NCAA's No-Pay Rules As an Illegal Group Boycott

There is also a strong argument that the NCAA's no-pay rules constitute an illegal group boycott against colleges that would otherwise seek to pay their student-athletes.⁷⁸ In contrast to the wage-fixing argument, the group-boycott argument is strongest if brought by an NCAA member, given the well-established precedent that members of private associations have antitrust standing to sue their associations.⁷⁹

75. See *id.* at 1103 (citing *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953)) (holding that a student-athlete's award of worker's compensation benefits was proper because the injuries to his back sustained during football practice arose out of and in the course of employment).

76. See McCormick & McCormick, *supra* note 71, at 74 (arguing that the NCAA self-coined the term "student-athlete" to perpetuate a myth of amateurism and "obtain the astonishing pecuniary gain and related benefits of the athletes' talents, time, and energy").

77. See *generally* *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2213 (2010) ("An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.").

78. Cf. *Edelman*, *supra* note 5, at 871 ("[R]ules limiting student-athlete wages operate as a restraint of trade on a relevant commercial market.").

79. The added challenge for a student-athlete bringing a group boycott claim against the NCAA is based on the issue of standing—the requirement that a plaintiff suffer a loss or prospective loss that is related to one's business or property. In *Justice v. NCAA*, the District of Arizona found that a group of college football players could not state an antitrust claim against the NCAA for its rendering of the University of Arizona ineligible for postseason competition because "there are simply too many factors other than the NCAA sanctions and the alleged injury for [the court] to find that a proximate relationship exists." *Justice v. NCAA*, 577 F. Supp. 356, 378 (D. Ariz. 1983). But a similar group boycott claim would not be nearly as difficult if brought by an NCAA member because the threat of sanction by the NCAA would cause a nearly certain loss of sports-related revenues. See, e.g., *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (finding for the plaintiffs in a group boycott claim brought by two members of the NCAA).

1. *The Seminal Case: NCAA v. Board of Regents*

The case most directly on point for finding the NCAA's no-pay rules to function as an illegal group boycott is the Supreme Court's 1984 decision, *NCAA v. Board of Regents of the University of Oklahoma*.⁸⁰ There, the Court held that limiting the number of games that an NCAA member may broadcast on television violated section 1 of the Sherman Act because it "eliminate[d] competitors from the [broadcast television] market."⁸¹ The Court further implied that any attempt to ban an NCAA member for refusing to comply with its television bylaws was tantamount to an illegal group boycott because it prevented NCAA membership for those colleges seeking to compete in the free market for broadcast revenues.⁸²

The litigation in *Board of Regents* was long and complex, lasting for more than three years. At the district court level, the court held that the NCAA's television bylaws represented an illegal restraint on output, and that the NCAA, in its allocation of television rights, illegally "maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas."⁸³ The Tenth Circuit affirmed, concurring that "[t]he television plan at issue . . . restrict[ed] the plaintiffs' revenues, market share, and output,"⁸⁴ and further noting that "the television [plan's] . . . threat of expulsion and boycott [are] sanctions which clearly have anticompetitive

80. 468 U.S. 85 (1984).

81. *Id.* at 108. Along those same lines, the Supreme Court found that the NCAA television policy had no offsetting procompetitive benefit because it neither increased the output of televised games nor reduced the price of televised games. *Id.* at 113.

82. *See id.* at 106 (explaining that "as a practical matter all member institutions need NCAA approval" to function).

83. *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1301 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). Furthermore, the district court found each of the other elements required under a full rule of reason analysis were also met. It concluded that the Universities of Oklahoma and Georgia suffered "antitrust harm" because they were able to show the likelihood of lost revenues due to the television broadcast restraints. *See id.* at 1301-02 (concluding that such injuries are "direct and substantial, and not indirect or derivative of injury alleged to have been suffered by the public at large"). Meanwhile, it held that the NCAA exercised "market power" in both a relevant market for college football television broadcasts and the competition in college sports because, "[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program." *See id.* at 1288.

84. *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1151 (10th Cir. 1983).

potential.”⁸⁵ Thus, even if the NCAA restraint had not affected output, the appellate court still would have found the threat of expelling noncomplying members to require careful scrutiny under a full rule of reason analysis.⁸⁶

Thereafter, the Supreme Court similarly ruled that the NCAA’s television plan was illegal because it “eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete.”⁸⁷ In addition, the Court explained that “when there is an agreement in terms of price or output, ‘no elaborate industry analysis is needed to demonstrate the anticompetitive characteristics of such agreement.’”⁸⁸

2. *Other Instructive Supreme Court Opinions*

Although the Supreme Court’s ruling in *Board of Regents* focused mostly on output restraints, several other Supreme Court decisions unrelated to college sports touch more directly on the conclusion that trade associations may not serve as “extra-judicial tribunals.”⁸⁹ For instance, in *Fashion Originators Guild of America v. Federal Trade Commission*,⁹⁰ the Supreme Court affirmed a Federal Trade Commission decree that enjoined members of a fashion trade association from combining “among themselves to combat and . . . destroy all competition from the sale of garments which are copies of their ‘original creators.’”⁹¹ In finding the trade association’s self-governance to be illegal, the Court explained that members of a trade association may not collectively agree to boycott other members for failing to follow association rules, nor may they issue “heavy fines”

85. *Id.* at 1161 (finding that plaintiffs’ claim of an output restraint was per se illegal, and their group boycott claim was subject to the full rule of reason inquiry).

86. *See id.*

87. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 108 (1984). Although the Supreme Court believed the restraint could not be deemed illegal under a mere per se test, it found the district court sufficiently analyzed the restraint under its “quick look” review. *Id.*

88. *Id.* at 109 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

89. *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1941) (discussing how such internal self-governance impermissibly “trenches upon the power of the national legislature and violates the statute” (quoting *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899))).

90. 312 U.S. 457 (1941).

91. *Id.* at 461.

on those competitors that are unwilling to go along with the majority's view.⁹²

Similarly, in *Anderson v. Shipowners' Association of Pacific Coast*,⁹³ the Supreme Court held it was illegal for a trade association that owned and operated almost all of the American merchant vessels along the Pacific Coast to "surrender[] . . . freedom of action in the matter of employing seamen and agree[] to abide by the will of the associations."⁹⁴ There, the Court presumed that any combination among competitors to govern the terms of employment for an entire industry violated the Sherman Act.⁹⁵

The guiding principles of both *Fashion Originators* and *Anderson* further call into doubt the NCAA's attempt to impose a self-regulatory regime that mandates members not pay their student-athletes. This is because, much like the earlier self-governance regimes that the Supreme Court rejected as illegal, the NCAA controls nearly all of the businesses in its trade—making a member's ban from the association a significant hardship.⁹⁶ In addition, as one district court opinion has explained, "it is clear from the evidence that an institution which withdraws or is expelled from the NCAA could no longer operate a fully-rounded intercollegiate athletic program."⁹⁷ Because "[n]on-member institutions could not compete in the prestigious NCAA championship events . . . [t]hey would therefore be unable to recruit quality athletes into their programs."⁹⁸ Thus, "[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program."⁹⁹

Another line of Supreme Court decisions outlaws trade associations from enforcing "absolute ban[s] on competitive bidding"—an additional aspect of the NCAA's group boycott.¹⁰⁰ For

92. *Id.* at 463–65.

93. 272 U.S. 359 (1926).

94. *Id.* at 364–65.

95. *See id.* at 362–65.

96. *See generally* Jeffrey L. Kessler, *Tournament Has Become March Monopoly Madness*, N.Y. TIMES, Mar. 28, 2004, at 9 (comparing the NCAA's control of the college basketball market to "a 7-foot center playing in a fixed game in which no one else is allowed to be taller than 6 feet").

97. *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

98. *Id.*

99. *Id.* (emphasis added).

100. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692–93 (1978) (adopting the district court's finding that such a ban "impedes

example, in *National Society of Professional Engineers v. United States*,¹⁰¹ the Supreme Court nullified an engineering trade association's canon of ethics that prevented members from securing contracts by offering a lower price than their competitors for a given job.¹⁰² Noting that “[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services,” the Court explained that any attempts to prevent companies from competing on the attribute of price was unreasonable.¹⁰³ Moreover, the Court found it entirely irrelevant that the engineering firms were still able to compete on other factors given that only one important factor (price) had been removed.¹⁰⁴

This conclusion, expressed so cogently by the Supreme Court in *Professional Engineers*, would lead to the same inevitable conclusion regarding the NCAA's principle of amateurism: that it is illegal because it prevents its members from engaging in competitive “bidding” to recruit student-athletes.¹⁰⁵ Furthermore, the fact that *Professional Engineers* involved the *selling* of services—compared to the NCAA's no-pay rules, which affect the *purchase* of services—makes no difference under the law because, from an economic perspective, monopoly and monopsony markets lead to similar risks of consumer harm.¹⁰⁶

the ordinary give and take of the market place' and . . . deprives . . . customer[s] of 'the ability to utilize and compare prices in selecting engineering services'" (quoting 404 F. Supp. 457, 460 (D.D.C. 1975)).

101. 435 U.S. 679 (1978).

102. *Id.* at 692–93.

103. *Id.* at 695.

104. *See id.* at 684, 693 (noting that the society's preference to have customers hire engineers on the basis of background and reputation, not price, was nothing more than restraint in violation of § 1).

105. *Id.* (rejecting the canon of ethics prohibiting competitive bidding because it was not justified under the Sherman Act).

106. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 (2007) (“The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.”); *see also* *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1061–62 (D.C. Cir. 1995) (discussing the harms of wage fixing in a monopsony market as being much the same as price fixing in a monopoly market); *cf.* Leroy, *supra* note 73, at 1087 (explaining that “[w]hile monopoly controls pricing by limiting competition to sell a product or a service, a monopsony controls pricing by limiting purchasing competition”).

IV. WHY LOWER COURT DECISIONS FINDING THE NCAA'S ELIGIBILITY RULES TO BE NONCOMMERCIAL ARE EITHER INAPPOSITE OR WRONGLY DECIDED

Despite the favorable Supreme Court and Tenth Circuit precedent discussed in Part III, not all of today's case law clearly supports finding the NCAA's no-pay rules illegal. Indeed, eight lower courts within the First, Third, and Sixth Circuits have contrarily held that the NCAA's "eligibility" rules are exempt from antitrust scrutiny because these rules do not affect "trade or commerce" and thus fail to meet one of the threshold requirements for antitrust scrutiny.¹⁰⁷ These decisions, however, rely on inaccurate factual presumptions about the NCAA and outdated interpretations of antitrust law that have since been rejected by the Supreme Court. Thus, although these decisions survive as a deviant strain of precedent within three federal circuits, they cannot survive the Supreme Court's current antitrust jurisprudence.

A. *A Brief Discussion of the Eight Lower Court Decisions Finding the NCAA Eligibility Rules to Be Noncommercial*

The first lower court to hold the NCAA's eligibility rules noncommercial and thus exempt from antitrust scrutiny was the District of New Jersey in its 1974 ruling, *College Athletic Placement Service, Inc. v. NCAA*.¹⁰⁸ There, the plaintiff—a company that helped young athletes find college scholarships—brought suit to enjoin the NCAA from enforcing an amateurism bylaw that prevented student-athletes from paying companies that assisted with the finding of scholarship opportunities.¹⁰⁹ Without ruling directly on the competitive merits, the court held that the legal challenge presented in the case did not come within the purview of the Sherman Act because it served merely to "preserv[e] the educational standards in its member institutions."¹¹⁰ The court relied primarily on an earlier decision from the First Circuit—*Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges*¹¹¹—which held that a college's failure to obtain accreditation from a nonprofit association

107. Sherman Act §§ 1–7, 15 U.S.C. §§ 1–7 (2006). Specifically, "[e]very contract, combination in form of trust or otherwise, or conspiracy, *in restraint of trade or commerce . . . is declared illegal.*" *Id.* at § 3 (emphasis added).

108. No. 74-1144, 1974 WL 998 (D.N.J. Aug. 22, 1974).

109. *Id.* at *1.

110. *Id.* at *4.

111. 432 F.2d 650 (1st Cir. 1970).

did not give rise to antitrust harm because “denial of accreditation [was] not tantamount to exclusion . . . from operating successfully.”¹¹²

The following year, the District of Massachusetts decided a similar case, *Jones v. NCAA*,¹¹³ also citing *Marjorie Webster* to support finding an NCAA bylaw exempt from antitrust scrutiny.¹¹⁴ The dispute in *Jones* related to whether the NCAA could deem a college hockey player ineligible for competition based on the player’s previous receipt of an athletic stipend.¹¹⁵ The court concluded that the plaintiff could not challenge the NCAA’s rule banning such a player because the plaintiff did not show how “the actions of the [NCAA] in setting eligibility guidelines ha[d] any nexus to commercial or business activities in which the defendant might engage.”¹¹⁶ In addition, the court noted that even if the claim was not barred on noncommercial grounds, the NCAA still did not act with sufficient “scienter” to violate antitrust law.¹¹⁷

Thereafter in *Gaines v. NCAA*,¹¹⁸ the Middle District of Tennessee similarly held that a plaintiff wishing to return to college football after entering the NFL draft could not bring an antitrust challenge against the NCAA.¹¹⁹ The *Gaines* decision was reached six years after the Supreme Court ruled favorably for the plaintiffs in *Board of Regents*.¹²⁰ Nevertheless, the court differentiated the case by noting a legal difference “between the NCAA’s efforts to restrict the

112. *Id.* at 656. Nevertheless, the proposition relied on in *Marjorie Webster Junior College* was decidedly different from that in *College Athletic Placement Service*, as the latter restraint did far more than just cause the plaintiffs to suffer social stigma; it entirely precluded the plaintiffs from maintaining their business relationships. *See Coll. Athletic Placement Serv.*, 1974 WL 998, at *2 (describing a letter from the NCAA to the College Athletic Placement Service indicating the intent to declare any student-athlete ineligible based on their parents’ decision to contract with the College Athletic Placement Service).

113. 392 F. Supp. 295 (D. Mass. 1975).

114. *Id.* at 303.

115. *See id.* at 296–98.

116. *Id.* at 303.

117. *Id.* at 304.

118. 746 F. Supp. 738 (M.D. Tenn. 1990).

119. *Id.* at 740 (discussing Vanderbilt University football player Bradford L. Gaines’s challenge to an NCAA bylaw that revokes an athlete’s amateur status when he enters a professional draft or enters into an agreement with an agent to negotiate a professional contract). Perhaps due to poor lawyering, Gaines’s antitrust challenge to the NCAA bylaws was brought exclusively under section 2 of the Sherman Act, which relates to monopolization, rather than under section 1 of the Sherman Act, which relates to collusion. *See id.* at 741.

120. *Id.*; *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism."¹²¹ Thus, the court adopted a bifurcated test to determine whether NCAA conduct affects interstate commerce, placing "business rules" (such as the television policy) on one side of an imaginary line and "eligibility rules" (such as those related to amateurism) on the other side.¹²²

Then in 1998, the Third Circuit formally adopted *Gaines's* bifurcated test for NCAA commerciality in another case, *Smith v. NCAA*.¹²³ *Smith* involved a plaintiff's challenge to an NCAA bylaw that prohibited a student-athlete from participating in intercollegiate athletics while attending a graduate school different from the one where she attended college.¹²⁴ Citing *College Athletic Placement Services*, *Jones*, and *Gaines*, the court found this particular bylaw immune from competitive scrutiny because "many district courts have [already] held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements."¹²⁵

After *Smith*, "[t]he parade marched on" with two other Third Circuit rulings that found the NCAA's eligibility rules to be noncommercial and thus exempt from review.¹²⁶ In *Bowers v. NCAA*,¹²⁷ the District of New Jersey held that the NCAA bylaws that determine academic eligibility lie outside the Sherman Act's reach because Third Circuit precedent indicated that those bylaws are "not

121. *Gaines*, 746 F. Supp. at 743. The court further proclaimed that, even though the Supreme Court never explicitly stated in *Board of Regents* that eligibility rules were noncommercial, its limited citation to *Jones v. NCAA* was reason enough for courts to continue treating *Jones* as good law. *Id.* ("Although the U.S. Supreme Court did not state that eligibility rules were not subject to antitrust scrutiny, it cited a case with approval, *Jones v. NCAA*, . . . which stated exactly that.") (citation omitted).

122. *See id.* at 747 ("The Supreme Court distinguished the NCAA television restrictions, which it invalidated under § 1, from 'most of the regulatory controls of the NCAA [which] are justifiable means of fostering competition among amateur teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.'" (alteration in original) (citing *Bd. of Regents*, 468 U.S. at 117 (1984))).

123. *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998) (agreeing with the *Gaines* court and others "that the eligibility rules are not related to the NCAA's commercial or business activities"), *vacated and remanded on different grounds*, 525 U.S. 459 (1999).

124. *Id.* at 183.

125. *Id.* at 185.

126. *Flood v. Kuhn*, 407 U.S. 258, 278 (1972).

127. 9 F. Supp. 2d 460 (D.N.J. 1998).

related to the NCAA's commercial or business activities."¹²⁸ Likewise, the Eastern District of Pennsylvania held in *Pocono Invitational Sports Camps v. NCAA*¹²⁹ that an NCAA bylaw allowing Division I coaches to evaluate high school basketball players only at certified camps did not violate antitrust law because "[t]he plaintiff [did not] show that the challenged restraint involved 'trade or commerce.'"¹³⁰

Finally and most recently in *Bassett v. NCAA*,¹³¹ the Sixth Circuit followed the Third Circuit's lead when it adopted a bifurcated test for evaluating whether NCAA conduct is sufficiently commercial to fall within the scope of the Sherman Act.¹³² The dispute in *Bassett* specifically involved the legality of an NCAA mandate requiring that any college wishing to hire a coach who previously engaged in recruiting violations to first receive permission from the NCAA Committee on Infractions.¹³³ Ultimately, the court found the rule was noncommercial, even though the court acknowledged that the NCAA itself was a commercial actor.¹³⁴ The court proceeded to describe the NCAA coaching restraint as "anti-commercial" because, if not for the rule, any NCAA member that wanted to hire a coach who had engaged in previous NCAA recruiting infractions could obtain "a decided competitive advantage in recruiting and retaining highly prized student athletes."¹³⁵

B. Why Each of These Eight Cases Was Wrongly Decided

In a vacuum, each of these eight decisions seems to present a strong basis for finding the NCAA's no-pay rules to be noncommercial (or, as *Bassett* would argue, anti-commercial) and thus valid under section 1 of the Sherman Act. Nevertheless, each of these decisions suffers from at least one, if not multiple, defects in its analysis.

The first major defect with the above decisions arises from the premise first adopted in *College Athletic Placement Service* that the NCAA is noncommercial based on its status as an association

128. *Id.* at 497 (quoting *Smith*, 139 F.3d at 185–86) (internal quotation marks omitted).

129. 317 F. Supp. 2d 569 (E.D. Penn. 2004).

130. *Id.* at 580.

131. 528 F.3d 426 (6th Cir. 2008).

132. *See id.* at 435 (noting that the restraint alleged in the case involved the group boycott of *Bassett* arising from NCAA-imposed sanctions).

133. *Id.* at 429.

134. *See id.* at 433.

135. *See id.*

involved in higher education.¹³⁶ However, at the time *College Athletic Placement Service* was decided, this issue was not well settled.¹³⁷

Indeed, it was not until the very next year that the Supreme Court held in *Goldfarb v. Virginia State Bar*¹³⁸ that “[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.”¹³⁹ Thus, the Court’s decision in *Goldfarb* implicitly overruled *College Athletic Placement Service* by confirming that “the exchange of [a] service for money is [always] ‘commerce’ in the most common usage of that word”—even if the service involved a learned profession.¹⁴⁰ Thereafter in *Board of Regents*, the Supreme Court identified the NCAA’s restraint on television broadcasts as being commercial without even addressing the issue, seemingly bringing further closure to any argument that these associations involved in higher education are innately noncommercial.¹⁴¹

Another notable defect with many of these rulings is that they cite *Jones v. NCAA*¹⁴²—a case in which the court not only ruled in favor of the NCAA based on the rejected educational exception but also based on the NCAA’s purported lack of “scienter.”¹⁴³ Nevertheless, the Supreme Court has never found lack of “scienter” to be a factor precluding an antitrust inquiry on the merits. To the contrary, the Supreme Court has long endorsed the principle that “[n]either the fact that [a] conspiracy may be intended to promote the

136. *Coll. Athletic Placement Serv., Inc. v. NCAA*, No. 74-1144, 1974 WL 998, at *4 (D.N.J. Aug. 22, 1974).

137. *Cf. id.* at *5 (“It is possible to conceive of restrictions on eligibility for accreditation that could have little other than a commercial motive; and as such, antitrust policy would presumably be applicable.”).

138. 421 U.S. 773 (1975).

139. *Id.* at 787 (citing *Associated Press v. United States*, 326 U.S. 1, 7 (1945)).

140. *Id.*; see also *Hennessey v. NCAA*, 564 F.2d 1136, 1148–49 (5th Cir. 1997) (explaining that a close reading of *Goldfarb* negates the finding that the NCAA is somehow exempt from antitrust law under a special educational exception). As one appellate court has since explained, although *Goldfarb* specifically rejected the claim that lawyers were exempt from antitrust law as a special “learned profession,” the Court’s holding would logically extend to the other purported learned professions in which profits are made, such as college sports. *Id.* at 1149 n.14 (citing *Goldfarb*, 421 U.S. at 788).

141. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984).

142. 392 F. Supp. 295 (D. Mass. 1975).

143. *See id.* at 303–04.

public welfare, or that of the industry . . . is sufficient [grounds] to avoid the penalties of the Sherman Act.”¹⁴⁴

A third defect with many of these cases is that they interpret the threshold issue of “interstate commerce” based on a particular bylaw rather than the NCAA’s overall business activities. However, the Supreme Court explained in *McLain v. Real Estate Board of New Orleans, Inc.*¹⁴⁵ that the only thing a plaintiff must demonstrate to meet the threshold issue of “interstate commerce” is a “substantial effect on interstate commerce generated by [a defendant’s general business activities].”¹⁴⁶ Thus, the bylaw-specific evaluation of the NCAA’s conduct has been flatly rejected.¹⁴⁷

Moreover, from a factual perspective, many of these cases rely on faulty presumptions about the NCAA. For example, many of the aforementioned decisions imply that college athletics operate just like other educational programs.¹⁴⁸ But contrary to all other educational programs, “intercollegiate athletics in its management is clearly business, and big business at that.”¹⁴⁹ For example, in 2010, a twelve-team athletic conference collected more than \$1 billion in athletic receipts.¹⁵⁰ That same year, CBS paid more than \$750 million to

144. *Am. Med. Ass’n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942) (citations omitted), *aff’d*, 317 U.S. 519 (1943); *see also* *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695–96 (1978).

145. 444 U.S. 232 (1980).

146. *See id.* at 242–43 (holding with regard to “respondents’ brokerage activity” and rejecting the contention that the plaintiffs were required to make a “more particularized showing” as to “the alleged conspiracy to fix commission rates, or . . . other aspects of respondents’ activity”) While the disputed issue in *McLain* primarily related to the “interstate” aspect rather than the “commerce” aspect of “interstate commerce,” the inquiry was nevertheless performed together, leading to the logical result that the court intended a review of both components in the gestalt rather than based on just a single bylaw. *See id.*

147. *Id.* (“If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases.”).

148. *See, e.g., Jones v. NCAA*, 392 F. Supp. 295, 303–04 (D. Mass. 1977) (describing intercollegiate hockey as an educational program in a major university).

149. *Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977); *see also* *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1288–89 (W.D. Okla. 1982) (“[I]t is cavil to suggest that college football, or indeed higher education itself, is not a business.”), *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984).

150. *See* Branch, *supra* note 35, at 82 (explaining that in 2010, the “football-crazed” Southeastern Conference became the first college athletic conference to collect more than \$1 billion in revenues, and the Big Ten Conference trailed closely behind at \$905 million).

purchase the television broadcast rights to the NCAA men's basketball tournament.¹⁵¹ Meanwhile, an increasing number of college athletic departments receive millions of dollars per year from selling their stadium advertising rights, selling advertising space on players' equipment, and using players' names in licensed videogames.¹⁵² All of these factors clearly indicate that college athletics has become "big business" and, by all accounts, a commercial actor.¹⁵³

Finally, also as a factual matter, many of the rulings that have found the NCAA to be noncommercial turn for support to language in the NCAA's own bylaws denoting the association's purported amateur status. However, any reliance on the NCAA's own bylaws leads to a misleading result. As the Supreme Court has previously noted, "[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label."¹⁵⁴ If the opposite were true, all trade associations would simply define their activities as amateurism as a way to circumvent the antitrust laws.

V. WHY LOWER COURT DECISIONS HOLDING THE NCAA ELIGIBILITY RULES TO BE PROCOMPETITIVE ARE SIMILARLY MISGUIDED

In addition to the aforementioned cases, four lower court decisions have upheld NCAA rules related to eligibility under the rule of reason based on their purported procompetitive benefits.¹⁵⁵ And much like the eight lower court decisions that found the NCAA to be

151. *Id.* at 93.

152. *See id.* at 86, 94 (discussing several of these types of agreements, including a \$10.6 million deal between Auburn University and Under Armour); *see also* Edelman, *supra* note 19 (discussing the payment of royalties from the videogame maker Electronic Arts to the NCAA for use of the NCAA names, marks, and perhaps even player identities in their game).

153. *Hennessey*, 564 F.2d at 1150 ("[The NCAA and its members] are significantly involved in interstate commerce in the conduct of the athletic programs.").

154. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2213 (2010).

155. A number of other cases not discussed in this section have also found NCAA rules to survive the rule of reason based on the plaintiff's failure to meet his burden with respect to showing either market power or antitrust harm. *See, e.g.*, *Warrior Sports, Inc. v. NCAA*, 623 F.3d 281 (6th Cir. 2010) (holding that a rule changing the acceptable size of the heads of lacrosse sticks did not unreasonably restrain trade or commerce in violation of the Sherman Act); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001) (holding that a rule that discouraged a student-athlete from transferring colleges within a single conference did not have significant anticompetitive effects within any relevant antitrust market).

noncommercial, each of these four additional decisions suffers from one or more legal defects.

A. *Cases Finding the NCAA Eligibility Rules Are Procompetitive*

The first decision to find an NCAA eligibility rule, although commercial, to be procompetitive was the Fifth Circuit's 1977 ruling in *Hennessey v. NCAA*.¹⁵⁶ There, the court held that a challenge to the NCAA's limit on the number of coaches per team "come[s] close, but fall[s] short" under a rule of reason analysis.¹⁵⁷ In finding the limit on coaches to be procompetitive, the court explained that the rule had a reasonable "motive" of assisting colleges with less funding to "preserve and foster competition" on equal terms.¹⁵⁸ Thus, the court expressed fear that if it did not uphold the NCAA's bylaw, a war of attrition would ensue, resulting in some colleges devoting all of their resources to college athletics.¹⁵⁹

Six years later in *Justice v. NCAA*,¹⁶⁰ the District of Arizona upheld an NCAA bylaw that had disqualified the University of Arizona football team from competing in postseason play after its players accepted prohibited benefits such as free transportation and lodging.¹⁶¹ In upholding the team's ban from postseason play, the *Justice* court explained that the NCAA postseason eligibility rules were procompetitive because they "have been shown to lack an anticompetitive purpose and to be directly related to the NCAA objectives of preserving amateurism and promoting fair competition."¹⁶² In addition, the court noted that "NCAA regulations designed to preserve amateurism and fair competition have previously been upheld as reasonable restraints [of trade] under the rule of reason"—citing *Hennessey*, *Jones*, and even *Athletic Placement Service, Inc.*¹⁶³

Thereafter, the Fifth Circuit held in its 1988 decision *McCormack v. NCAA*¹⁶⁴ that a college football player's challenge to the NCAA death penalty failed under the rule of reason.¹⁶⁵ In rejecting the

156. 564 F.2d 1136 (5th Cir. 1977).

157. *Id.* at 1154.

158. *Id.* at 1153.

159. *Id.* ("Financial pressures upon many members, not merely to 'catch up', but to 'keep up', were beginning to threaten both the competitive, and amateur, nature of the programs . . .").

160. 577 F. Supp. 356 (D. Ariz. 1983).

161. *See id.* at 383.

162. *Id.* at 382.

163. *Id.*

164. 845 F.2d 1338 (5th Cir. 1988).

165. *Id.* at 1344.

football player's challenge, the court differentiated its holding from that of *Board of Regents* by quoting that case for the proposition that, unlike rules that govern television broadcast markets, rules that determine who is eligible to compete in college football games "enhance public interest in intercollegiate athletics" and support an "academic tradition" that lies at the core of the unique character of college athletics.¹⁶⁶ The court further quoted *Board of Regents* for the proposition that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition," and that one of the NCAA rules that can be viewed as procompetitive is "athletes must get paid."¹⁶⁷

Finally, the Seventh Circuit held in *Banks v. NCAA*¹⁶⁸ that the NCAA bylaws that prevent student-athletes from exploring professional opportunities were procompetitive based on the same *Board of Regents* language that was cited by *McCormack*.¹⁶⁹ *Banks* further described the plaintiff's antitrust claim as "absurd" because, in the court's opinion, "the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."¹⁷⁰

B. Why Each of These Four Cases Was Wrongly Decided

Much like the eight decisions that found the NCAA to be noncommercial, these four decisions finding NCAA eligibility rules to be procompetitive are easily rebutted based on their substantial analytical errors. For example, the very first decision to find an NCAA eligibility rule to be procompetitive, *Hennessey v. NCAA*,¹⁷¹ ruled in this manner primarily because the NCAA rule kept member costs down.¹⁷² But this holding contradicts longstanding antitrust doctrine embedded within many Supreme Court decisions. Indeed, as

166. *Id.*

167. *Id.* (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

168. 977 F.2d 1081 (7th Cir. 1992).

169. *Id.* at 1089.

170. *See id.* at 1089–90. In this vein, the appellate court noted that "[t]he no-draft rule has no more impact on the market for college football players than other NCAA eligibility requirements such as grades, semester hours carried, or requiring a high school diploma." *See id.* at 1087–88.

171. 564 F.2d 1136 (5th Cir. 1977).

172. *Id.* at 1153 ("[The NCAA bylaw] was . . . intended to be an 'economy measure'. . . by curtailing . . . potentially monopolistic practices by the more powerful [schools] . . . and to reorient the programs into their traditional role as amateur sports operating as part of the educational process.").

far back as the 1897 decision *United States v. Trans-Missouri Freight Association*,¹⁷³ the Supreme Court has held that keeping costs down is not a relevant procompetitive benefit under a rule of reason inquiry.¹⁷⁴ Meanwhile, the Court explained in *United States v. Socony-Vacuum Oil Co.*¹⁷⁵ that if businesses were allowed to restrain trade simply as a way of saving money, “the Sherman Act would . . . be emasculated” because this defense would apply to most, if not all, combinations.¹⁷⁶

Another defect with the *Hennessey* decision is that, much like *Jones*, *Hennessey* focused extensively on the NCAA’s “motive” of allowing colleges, irrespective of their athletic funding, to compete on equal terms.¹⁷⁷ Although such analysis at one time may have been within the bounds of an acceptable rule of reason inquiry, the Supreme Court clarified in *Professional Engineers* that any proper rule of reason analysis must turn on the competitive significance of the restraint rather than whether the restraint is “in the interest of the members of [the] industry.”¹⁷⁸ Thus, even a positive, noneconomic motive can no longer save an otherwise illegal restraint.

The court’s analysis in *Justice* made the similar error of relying on social benefits rather than procompetitive effects.¹⁷⁹ There, the plaintiffs on appeal suggested that recognizing such benefits

173. 166 U.S. 290 (1897).

174. *Id.* at 304, 341 (applying the Sherman Act to a railroad price-fixing agreement—which defendants claimed benefited “patrons of the railway line . . . and the public at large”—and stating that an agreement’s “violation of law [cannot] be made valid by allegation of good intention or of desire to simply maintain reasonable rates”). Furthermore, the court held that intent is not an element that requires proof in an antitrust case. *Id.* (“[T]he intent alleged . . . is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely: Does the agreement restrain trade or commerce in any way so as to be a violation of the act?”); see also *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 350 n.22 (1982) (citing *Trans-Missouri* for the proposition that “in the first price-fixing case arising under the Sherman Act, the Court was required to pass on the sufficiency of the defendants’ plea that they had established rates that were actually beneficial to the consumers”).

175. 310 U.S. 150 (1940).

176. *Id.* at 221.

177. *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977).

178. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

179. See *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983) (“The sanctions imposed by the NCAA in this case are reasonably related to the legitimate goals of preserving amateurism and promoting fair competition”); see also *Hennessey*, 564 F.2d at 1153 (noting that the NCAA “is endowed with certain benefits to society”).

contradicted the Supreme Court's ruling in *Professional Engineers*.¹⁸⁰ Nevertheless, the court in *Justice* discarded these concerns with a mere footnote, stating that "[t]he plaintiffs' contention is belied by a number of cases decided subsequent to *Professional Engineers* which have upheld comparable self-regulatory actions of sports organizations under the rule of reason."¹⁸¹ The court never even analyzed the four cases cited in support of its conclusion—each of which was arguably inapposite to both *Professional Engineers* and the case at hand.¹⁸²

180. See *Justice*, 577 F. Supp. at 382 n.17 ("The plaintiffs argue that the rationale of *Hennessey* and *Jones* is no longer applicable in light of *National Society of Professional Engineers v. United States* and that the NCAA cannot justify actions which exclude a competition by assessing a 'social' purpose such as promoting amateurism or 'fair competition' under the rule of reason." (citation omitted)).

181. See *id.* Upon review of these four cases, there is a strong argument that three of them do not support a trade association's right to self-regulate on the basis of purely social benefits, notwithstanding a limited carve-out for safety and industry-wide liability mentioned by a footnote in *Professional Engineers*. 435 U.S. at 696 n.22.

Far from a purely social benefit, the first case upheld a rule based on the market's ability to respond. *Gunter Harz Sports, Inc. v. U.S.T.A.*, 665 F.2d 222, 223 (8th Cir. 1981) (upholding a tennis association's rule that allowed only single-strung rackets in competition, recognizing that competition rules pertaining to the type of eligible playing equipment do not cause "antitrust harm" in the conventional sense because all equipment manufacturers can alter their product to conform with the association's equipment rules); *accord Warrior Sports, Inc. v. NCAA*, 623 F.3d 281, 285 (6th Cir. 2010) (upholding a lacrosse league's equipment rules for a similar reason).

The second case fits squarely within the safety-industry liability exception mentioned in *Professional Engineers*. *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979) (upholding an NHL bylaw that precluded a player with just one eye from competition because the primary purpose of the rule was safety and avoiding league-wide liability); *Professional Engineers*, 435 U.S. at 696 n.22; see also Edelman, *supra* note 42, at 653 (explaining how the *Professional Engineers* carve-out applies to *Neeld*).

The third case can be interpreted as applying the safety-industry liability exception to horses. See *Cooney v. Am. Horse Shows Ass'n*, 496 F. Supp. 424, 427, 430–32 (S.D.N.Y. 1980) (upholding a bylaw that subjects a trainer to possible suspension based on the presence of drugs in a horse for which the trainer was responsible). *Cooney* may constitute a ruling based implicitly on the safety-liability standard (as applied to horses) because the court stated that the trainer, "more than anyone else, was in a position to know exactly who administered the drug." *Id.* at 433.

The fourth case presents a far closer call because the plaintiff failed to present "a patently anticompetitive purpose" behind the World Boxing Association's suspension rule. See *Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir. 1981).

182. *Justice*, 577 F. Supp. at 382 n.17.

McCormack presented a very different type of problem for the courts, as the factual background in that case was somewhat bizarre.¹⁸³ The party most directly harmed by the NCAA's death penalty sanction—Southern Methodist University—had previously agreed to accept the sanction and thus was not a party to the case.¹⁸⁴ Meanwhile, the original plaintiff was merely an alumnus of the school and his claim was rejected due to lack of standing.¹⁸⁵ As a result, the court was left to grapple with the claims of the football player plaintiffs, who were initially joined to the case by *McCormack* solely as a way to try to preserve his standing.¹⁸⁶

In addressing the football players' claims, the *McCormack* court properly turned to *Board of Regents* as the most appropriate precedent.¹⁸⁷ However—perhaps troubled by the bizarre posture of the case—the court gerrymandered the language in *Board of Regents* to rule in favor of the NCAA.¹⁸⁸ For example, the language quoted by *McCormack* to support its finding that the NCAA's death-penalty sanction was procompetitive actually came from a section of *Board of Regents* that explained why NCAA conduct should be reviewed under the full rule of reason rather than the per se test.¹⁸⁹ Even more troublesome, the exact language from that case actually states that the NCAA's amateurism rules should be analyzed under the full rule of reason by a court because they “*can* be viewed as procompetitive.”¹⁹⁰ By using the word “*can*” rather than “*must*” and using it in the context of determining the proper test for reviewing NCAA conduct, it is not clear that the *Board of Regents* court concluded the NCAA's no-pay rules were procompetitive.¹⁹¹ Thus, the

183. See *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1998) (noting the plaintiffs' allegations that the NCAA's actions “deprived [alumni] and others of ‘their right to associate together in support of the University by attendance at the football games of the University,’ while the football players have been ‘forced to discontinue their athlete-academic duties’ at SMU and the cheerleaders have lost the opportunity to lead cheers at football games”).

184. See *id.* at 1341 (explaining that Southern Methodist University did not appeal the NCAA's decision).

185. *Id.*

186. See *id.* at 1340 (noting that *McCormack* amended his complaint to include football players after the first complaint was dismissed for failure to state a claim for which relief could be granted).

187. *Id.* at 1343.

188. *Id.* at 1344.

189. *Id.* at 1343–44.

190. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984) (emphasis added).

191. *Id.* (emphasis added).

actual language in *Board of Regents* never truly supported *McCormack's* conclusion.¹⁹²

Finally, the Seventh Circuit's decision in *Banks* likewise misconstrued the language in *Board of Regents* to reach a conclusion starkly different from the Supreme Court's inference in that case.¹⁹³ This error was pointed out by Judge Joel Flaum in a vigorous dissent, in which he concluded that "the market at issue here is the college football labor market" and "[i]f the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft . . . would be more attractive to athletes than colleges that declined to offer the same opportunity."¹⁹⁴ Thereafter, Justice Harry Blackmun, in reviewing a bench memorandum assessing whether to grant certiorari in *Banks*, opined by hand on his memo that "CA7 got this one dead wrong."¹⁹⁵ Nevertheless, the Supreme Court ultimately declined certiorari—preventing Justice Blackmun from coining an opinion that would have potentially overturned *Banks* and its progeny.¹⁹⁶

VI. WHY CLOSER GAME SCORES CANNOT SAVE THE NCAA NO-PAY RULES BUT MAY SUPPORT PRESERVING SUCH RULES ON A CONFERENCE-BY-CONFERENCE BASIS

Finally, even beyond the above decisions that have granted unusually broad deference to the NCAA rules, numerous other sources, including law review articles and newspaper editorials, argue in favor of the NCAA no-pay rules for yet another reason—they improve the quality of college sports contests by keeping game scores

192. *Id.*; see also *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1998).

193. See *Banks v. NCAA*, 977 F.2d 1081, 1089 (7th Cir. 1992) (quoting and subsequently misapplying the following language from *Board of Regents*: "most of the regulatory controls of the NCAA [are] a justifiable means of fostering competition among the amateur athletic teams and therefore are procompetitive because they enhance public interest in intercollegiate athletics" (quoting *Board of Regents*, 468 U.S. at 104)).

194. *Id.* at 1081, 1095 (Flaum, J., dissenting).

195. See Preliminary Memorandum to Justice Blackmun on *Banks v. Nat'l Collegiate Athletic Ass'n* (May 14, 1993), available at <http://epstein.usc.edu/research/blackmunMemos/1992/92Memo-pdf/92-1466.pdf>; see also Geoffrey Rapp, *Banks v. NCAA Cert Pool Memo: "Seventh Circuit Dead Wrong,"* SPORTS LAW BLOG, (Sept. 28, 2007, 1:04 PM), <http://sports-law.blogspot.com/2007/09/banks-v-ncaa-cert-pool-memo-seventh.html> (describing Supreme Court bench memo on *Banks* petition with Justice Blackmun's handwritten comments).

196. See *Banks*, 508 U.S. at 908.

closer together.¹⁹⁷ Currently, antitrust law is in flux as to whether equalizing on-field competition serves as a relevant procompetitive benefit. On the one hand, past decisions such as *Smith v. Pro Football, Inc.*¹⁹⁸ and *Mackey v. NFL*¹⁹⁹ have held that closer scores can never offset an otherwise anticompetitive labor restraint.²⁰⁰ But on the other hand, dictum in the Supreme Court's recent *American Needle, Inc. v. NFL*²⁰¹ decision notes that “‘the interest in maintaining competitive balance’ among ‘athletic teams is legitimate and important.’”²⁰²

Without going into the competitive merits of a restraint that helps to equalize game results (a topic perhaps worthy of an entirely separate article), that argument does little to save the NCAA's no-pay rules because there are other, less restrictive ways that colleges can level the sports playing field short of imposing a national, industry-wide bar on student-athlete compensation. For example, colleges could just as easily implement salary caps at the conference level rather than at the league level.²⁰³ Given that most college sporting events are played by teams from within a single conference, a conference-wide salary cap would have much the same effect of

197. See LeRoy, *supra* note 73, at 1093 (explaining that labor restraints on college sports markets have procompetitive effects by “spreading, and preserving in place, the supply of talented players and making games more interesting”); see also David Brooks, *The Amateur Ideal*, N.Y. TIMES, Sept. 23, 2011, at A35 (commenting that no-pay rules force an “obsessively competitive group, to pay homage to academic pursuits” and that “college basketball is more thrilling than pro basketball because the game is still animated by amateur passions, not coldly calculating professional interests”).

198. 593 F.2d 1173 (D.C. Cir. 1978).

199. 543 F.2d 606 (8th Cir. 1976).

200. See *Smith*, 593 F.2d at 1186 (finding the NFL draft's “alleged[] ‘procompetitive’ . . . effect on the playing field” to be “nil”); *Mackey*, 543 F.2d at 621 (“[T]he possibility of resulting decline in the quality of play would not justify the Rozelle Rule.”).

201. 130 S. Ct. 2201 (2010).

202. *Id.* at 2217 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

203. See Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: “Amateurism” in Big-Time College Sports*, ANTITRUST, Spring 2010, at 51, 54–55 (2000) (arguing that a reasonable alternative under antitrust law would be to “devolve power from the NCAA to the various collegiate conferences” and allow the conferences to compete against one another for student-athletes). See generally James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 22 (1985) (discussing how the NCAA has already made a “clear attempt to group together members who have similar revenues, costs, and output characteristics”).

equalizing game scores without having the same ubiquitous, anticompetitive effect on college sports labor markets as do the NCAA's current no-pay rules.²⁰⁴

Indeed, rules governing student-athlete pay at the conference level, as a matter of antitrust law, would likely be far less restrictive to student-athletes, colleges, and consumers because individual conferences lack sufficient "market power" within any relevant market to illegally restrain trade.²⁰⁵ Thus, each individual sports conference represents just a small share of the overall college sports marketplace.²⁰⁶

Furthermore, as a practical matter, conference-wide salary caps on student-athlete pay are unlikely to lead to a ubiquitous ban on student-athlete compensation. This is because some conferences would likely opt to allow student-athletes to receive money as a means to compete most effectively for student-athlete labor on an inter-conference basis.²⁰⁷ Meanwhile, other conferences might opt to allow student-athlete pay after recognizing that taking the moral high ground may make some consumers more interested in purchasing

204. See generally Eric Thieme, Note, *You Can't Win 'Em All: How the NCAA's Dominance of the College Basketball Postseason Reveals There Will Never Be an NCAA Football Playoff*, 40 IND. L. REV. 453 (2007) (discussing how the distribution of revenue evenly to conferences by the BCS promotes parity in those conferences).

205. See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (finding the market for college athletes' labor to be "national in scope"); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (explaining that a relevant market is defined by "the interchangeability of use or the cross-elasticity of demand between the product and substitutes for it"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 958–59 (6th Cir. 2004) (explaining that a "relevant market encompasses notions of geography as well as product use, quality and description" and that "reasonable interchangeability" is the standard for determining the limits of a given relevant market) (citations omitted); cf. *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319–20 (9th Cir. 1996) (finding that the enforcement of a rule created at the conference level that prevents colleges from paying their athletes was permissible under the rule of reason).

206. See *Tanaka*, 252 F.3d at 1063–64 (suggesting that an athlete unhappy with the Pacific 10 Conference's rules against intra-conference transfers should simply join a college team that participates in a different conference); cf. Marc Edelman, *Does the NBA Still Have "Market Power?" Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. 549, 583–84 (calling into doubt whether the court's holding in *Tanaka* makes sense from a workers' rights perspective given that it required a student-athlete to move away from her home market to avoid the effects of a collusive agreement).

207. See generally *Tanaka*, 252 F.3d at 1064 (noting that athletic conferences "compete in the recruiting of student-athletes").

game tickets, apparel, and other paraphernalia from those particular conferences.²⁰⁸

CONCLUSION

Over the past century, NCAA members have enjoyed immense profits by enforcing a principle of amateurism that keeps the revenues of college athletics away from student-athletes.²⁰⁹ But even though this principle of amateurism has become well embedded in the NCAA's identity, it does not comport with traditional principles of antitrust law and free trade. To the contrary, the NCAA's principle of amateurism likely violates section 1 of the Sherman Act by artificially prohibiting student-athlete pay and by eliminating from the college sports marketplace those colleges that wish to recruit top student-athletes.

Although eight lower courts have found the NCAA's eligibility rules to be noncommercial and thus exempt from the Sherman Act, each of these decisions is wrongly decided. Many of these decisions ignore Supreme Court precedent explaining that competitive restraints in educational markets are to be viewed identically to competitive restraints in all other markets. Meanwhile, many other decisions disregard persuasive factual evidence indicating that college sports today have become a multibillion-dollar enterprise that engages in "interstate commerce."

Furthermore, four lower courts have held that the NCAA eligibility rules survive under the rule of reason inquiry based on these rules' purported procompetitive benefits. Nevertheless, these decisions are similarly flawed. Most of these decisions that find NCAA eligibility rules to be procompetitive focus on the rules' original intent, impact on member costs, and social policy goals—all factors that the Supreme Court has found to be irrelevant to a proper antitrust analysis. Moreover, some of these rulings have been expressly called into doubt by Judge Blackmun's handwritten comments in *Banks*—leaving open the possibility that the Supreme Court does not agree with that case's outcome.

Of course, a proper antitrust analysis does not necessarily prohibit all agreements among colleges with respect to student-athlete

208. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest materials progress . . .").

209. See Edelman, *supra* note 5, at 864–65 (noting that the wealth generated by college athletics remains in the hands of a select few administrators, athletic directors, and coaches because student-athletes are prevented from profiting based upon their athletic abilities).

compensation. But a proper analysis would certainly prohibit those agreements where the parties agreeing to the restraint have “market power.” Thus, as a practical matter, overturning the NCAA no-pay rules would simply shift governance of student-athlete compensation to the discretion of individual athletic conferences. Such a shift would be advantageous to student-athletes, colleges, and consumers.

For all of these reasons, it is likely a mere matter of time before a court enjoins the NCAA’s enforcement of its principle of amateurism. Until then, the NCAA has a choice—it can either proactively rewrite its rulebook in a manner that complies with the spirit of U.S. antitrust law, or it can wait until a court mandates such changes. Either way, however, it seems inevitable that the NCAA’s longstanding practice of profiting from the work product of student-athletes is about to change. Simply stated, antitrust law does not permit the NCAA to impose rules that ubiquitously prevent student-athlete pay.