The Joy of College Sports

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Why the NCAA's Efforts to Preserve Amateurism Are Both Lawful and in the Best Interest of College Athletics

College football has been riddled over the past year with scandals, rule violations, and the movement of teams from one conference to another. Media coverage has been quite negative, and the National Collegiate Athletic Association ("NCAA") often is cast as the villain. Well-regarded economist, Andy Schwarz, has attacked the NCAA's amateurism model.[2] Taylor Branch, a Pulitzer prize winning author, in a rigorous critique of the NCAA writes that while college athletes "are not slaves," in taking a close look at college athletics one would "catch an unmistakable whiff of the plantation."[3] Strong stuff, indeed.

In legal terms, critics such as Branch and Schwarz claim that the NCAA is an illegal cartel that artificially depresses the compensation that college athletes may receive from universities.[4] In other words, they contend that the problems we see in

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[2] Andy Schwarz, *Excuses, Not Reasons: 13 Myths about (Not) Paying College Athletes*, Selected Proceedings of the Santa Clara Sports Law Symposium, Sept. 8, 2011, 46, 67.

[3] Taylor Branch**,** *The Shame of College Sports*, The Atlantic, October 2011, *available at* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643.

[4] *See*, *e.g.*, Matt Norlander, *Podcast: The Shame of College Sports* (Interview of Taylor Branch), CBSSports.com, Sept. 16, 2011 *available at* http://www.cbssports.com/mcc/blogs/entry/26283066/32016194.

college football are in large measure the result of NCAA antitrust violations that have resulted in college athletes not being paid. While a headline-grabbing position, as a legal matter the critics are simply wrong. The NCAA model is completely lawful under the antitrust laws. Indeed, as we explain below, the current problems in college football are primarily the result of the Supreme Court's incorrect application of the antitrust laws to college football, which has unduly restricted the NCAA's regulatory authority since 1984.

Once the legal issue is properly understood, critics are left with general policy arguments that college athletes *should* be paid, and that somehow it would cure the problems in college football and improve college athletics. These arguments are also off the mark. Rather than improving the situation, making the changes these critics urge would have effects that would severely harm student-athletes and college athletics.

Turning college sports into a pure business – as the critics effectively urge – will not fix the problems we observe with football. To the contrary, economic analysis of "pay-for-play" suggests at least two significant adverse effects on colleges and intercollegiate sports. First, many colleges likely will stop offering college football and basketball altogether, and the overall opportunities for athletes in these sports will be reduced. Second, "pay-for-play" will have a serious adverse effect on non-revenue college sports, particularly women's sports.

In short, while it might be a well-intentioned idea to pay college football and basketball players – especially those from economically disadvantaged backgrounds – it would transform intercollegiate sports, and not for the better. A look at the evolution of college football since the landmark Supreme Court decision in *NCAA v. Board of Regents of the University of Oklahoma* is a good place to begin to understand why this is so.[5]

I. The Antitrust Laws and the NCAA

A. Restraints With Respect To Sports Leagues Are Necessary to Create The "Product"

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination…or conspiracy, in restraint of trade." The literal language of § 1 is so broad as to make almost all agreements unlawful, but that was not the intent of the antitrust laws.[6] As a result, the courts have developed two general alternative types of analysis for determining whether an agreement actually violates § 1.

One type of analysis is called *per se*. This analysis is sometimes used because "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm

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[5] 468 U.S. 85 (1984).

[6] *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

they have caused or the business excuse for their use."[7] In other words, certain kinds of agreements are conclusively presumed always to be anticompetitive and, therefore, unlawful. Agreements subject to *per se* analysis are generally limited to clearly harmful economic restraints such as price fixing and output restrictions.[8]

The second type of antitrust analysis is called the rule of reason. Rule of reason analysis is much more nuanced than *per se* analysis, and most agreements are found lawful under this analysis. Under the rule of reason, only those contracts or combinations that unreasonably restrain trade violate § 1.[9] The rule of reason requires an assessment of both the competitive benefits and the anticompetitive effects of an agreement, to determine whether, on balance, the agreement is lawful under the antitrust laws. Most contracts when analyzed under rule of reason have no anticompetitive effect at all, and thus are readily found lawful under § 1.

In a 2010 case before the Supreme Court, Justice John Paul Stevens wrote the following regarding the appropriate application of the antitrust laws to the National Football League ("NFL"):

> When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason. In such instances,

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[7] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

[8] *Id.*.

[9] *Board of Trade*, 246 U.S. at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.")

> the agreement is likely to survive the Rule of Reason. And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye."[10]

In other words, when agreements are necessary to create a product at all, courts have applied rule of reason analysis to determine whether the restraints that the teams may impose on each other by agreement are anticompetitive.[11]

League sports are a classic example of when competitors must agree on restraints to create a product.[12] Almost every rule in sports is a restraint – limits on roster size, players allowed in the game, scheduling, penalties, etc. If sports competitors do not agree upon the rules of competition, the product being created would be chaotic and unappealing to potential consumers, i.e. sports fans.

For example, imagine if during the 2011 Super Bowl between Green Bay and Pittsburgh, Pittsburgh decided at half time that it would send fifteen players to the field in the second half. Without agreement prior to the game that only eleven players would be permitted on a football field per team, in response Green Bay might send sixteen in an effort to gain an advantage. The inevitable disorder is why league sports create a "myriad of rules affecting such matters as the size of the field, the number of

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[10] *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010) (internal citations omitted); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful…where the agreement…is necessary to market the product at all.")

[11] *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F. 3d 462, 469 (6th Cir. 2005); *see also Am. Needle, Inc.*, 130 S. Ct. at 2216 ("Football leagues that need to cooperate are not trapped by antitrust law.").

[12] *Bd. of Regents*, 468 U.S. at 101 (citing Robert Bork, *The Antitrust Paradox* 278 (1978)).

players on a team, and the extent to which physical violence is to be encouraged or proscribed."[13] No rational critic would suggest agreements that impose these kinds of conditions violate § 1.

Now let's take these kinds of restraints a step further. Most professional sports – the notable exception being Major League Baseball ("MLB") – have some form of salary cap on players' salaries. Standing alone, a salary cap would be a *per se* antitrust violation, because it restricts unfettered competitive bidding on salaries, and accordingly tends to depress player salaries. But a primary purpose of a salary cap in a sports league such as the NFL is to create competitive equality amongst teams because it tends to disperse high-level talent more broadly. Creating competitive equality makes the product decidedly better for fans, and in that respect a salary cap is clearly procompetitive as it enhances the value of the product that the NFL offers. Thus the hoary maxum in NFL football, "on any given Sunday any team can win."

A look at the current popularity of the NFL as compared to MLB helps illuminate this point. Historically, baseball was the country's most popular sport, and became known as the National Pastime. But in the past 50 years, professional football has greatly eclipsed baseball in popularity. While there are a few reasons for this result, a significant one is that the National Football League's revenue sharing model – which includes a salary cap – creates greater competitive balance in football

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[13] *Bd. Of Regents*, 468 U.S. at 101.

than baseball. MLB is dominated largely by big market teams with the greatest revenue. Indeed, many baseball teams have literally no chance to win a world championship.[14] There is little doubt that the success of the NFL as compared to MLB in part is because the NFL's model creates better competitive balance, and thus a better product for fans. This demonstrates quite clearly the competitive benefits of revenue sharing and a salary cap.[15]

Turning to college athletics and the issue of "pay-for-play," as a business model the NCAA is a joint venture among competitors, *e.g.* colleges and conferences, which creates an amateur sports product that is comprised of players who attend college. The NCAA sets the terms on the kinds of incentives the schools can give student-athletes to play college sports at their particular school, *e.g.*, scholarships, consistent with maintaining their amateurism. While a naked agreement between colleges and universities on what they charge students to attend college may well violate the antitrust laws, collegiate sports leagues have significant economic integration, and agreements that are ancillary to that economic integration are evaluated not as naked

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[14] *See* Richard C. Levin, George J. Mitchell, Paul A. Volcker & George F. Will, "The Report of the Independent Members of the Commissioners' Blue Ribbon Panel on Baseball Economics," Major League Baseball, July 2000, at 36, *available* at http://mlb.mlb.com/mlb/downloads/blue_ribbon.pdf.

[15] Whether or not a salary cap would be legal under the antitrust laws outside a collective bargaining context has never been addressed by the courts. Nevertheless, courts have recognized that competitive balance among teams is an important procompetitive component of creating an attractive sports product. *Law v. NCAA*, 134 F. 3d 1010, 1024 (10th Cir. 1998).

restraints, but in light of the economic integration.[16] When NCAA members join together to determine whether college athletes are remunerated, it is a central component of the joint venture in creating a unique product of amateur collegiate athletics. As a result, the rules prohibiting student-athletes from being paid must be judged within the context of the entire NCAA joint venture that is designed to create a particular type of sports product, *i.e.*, college sports.[17]

B. *NCAA v. Board of Regents of the University of Oklahoma*

The foregoing legal concepts were applied in the early 1980s to an antitrust challenge to the NCAA's control over the televising of college football games. It was the outcome of this antitrust case that has led to many of the issues that we see with college football today.

1. The Supreme Court Applied Rule of Reason Analysis to NCAA Rules

In 1951, the NCAA began studying the effects of television on NCAA football, and designed a plan to utilize television in a way that would protect and enhance football games amongst NCAA members.[18] According to the plan, a team could not

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[16] Naked agreements are situations where the parties entering the agreement have no economic integration. *See United States v. Brown University*, 5 F.3d 658, 678 (3d. Cir. 1993) (evaluating agreements on scholarships among universities in a non-integrated setting).

[17] *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.2d 290, 338 (2d Cir. 2008) (Sotomayor, Circuit Judge, concurring) ("Joint ventures are typically evaluated as a whole under the rule of reason because the competitive effects of an individual restraint are intertwined with the effects of the remainder of the venture").

[18] *Bd. Of Regents*, 468 U.S. at 90.

appear on television more than twice per season.[19] The 1951 plan received virtually unanimous support from the schools for limiting televised college football to one game per week with a total blackout for three of the ten weeks during the season.[20] This model existed for over 25 years.

In 1977, the NCAA received membership approval to implement "principles of negotiation" for future contracts – discontinuing the practice of submitting plans for approval each year.[21] Accordingly, the NCAA entered into an exclusive, four-year contract with ABC for the 1977-1981 seasons. For the 1982-1985 seasons, the NCAA entered into a contract with both CBS and ABC that granted each network the right to telecast fourteen live games per season.[22]

In this same period, schools with major football programs developed their own television plan.[23] In substance, the college football powers wanted a broadcast contract without sharing the revenue with non-football schools.[24] As a result, a number of major football programs formed the College Football Association ("CFA") and explored their broadcast options. In 1981, the CFA signed a contract with NBC,

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[19] *Id.*.

[20] *Id.*

[21] *Id.* at 91.

[22] *Id.* at 92.

[23] *Id. at* 95.

[24] *Id.*

which provided for a greater number of appearances for each CFA institution than the NCAA plan, "and would have increased the overall revenues realized by CFA members."[25] After the NCAA threatened the CFA and its members with sanctions for violating the NCAA television plan, the University of Oklahoma and the University of Georgia brought an antitrust suit against the NCAA challenging the NCAA's control over television.

The trial court found that the NCAA's restrictions on television contracts were anticompetitive for three reasons. First, the NCAA's television plan fixed the price of particular telecasts.[26] Second, the NCAA's television plan was essentially a group boycott of other broadcasters and was a threatened group boycott of members that sought to enter contracts outside of the plan.[27] Finally, the NCAA's television plan placed artificial caps on the number of televised college football games.[28] The court also found that the NCAA's procompetitive justifications – that the plan protected gate attendance and competitive balance – were insufficient to justify the restraint.[29] The Court of Appeals upheld the trial court's decision.

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[25] *Id.*

[26] *Id.* at 96.

[27] *Id.*

[28] *Id.*

[29] *Id.*

The Supreme Court agreed with the lower courts that the NCAA's control over television violated the antitrust laws.[30] The Supreme Court applied the rule of reason (as opposed to *per se* analysis) because the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[31] The Court recognized that the NCAA is like any sports league which requires that the competition be regulated by agreement.[32]

The Supreme Court elaborated further on the core procompetitive basis that gives the NCAA the ability to place significant restrictions on college football consistent with the antitrust rule of reason. Specifically, the Court stated:

> [T]he NCAA seeks to market a particular brand of football – college football… In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class and the like. And the integrity of the "product" cannot be guaranteed except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice – not only the choices available to sports fans but also available to athletes – and hence can be viewed as procompetitive.[33]

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[30] *Id.* at 100-01.

[31] *Id.* at 101.

[32] *Id.*

[33] *Id.* at 101-02.

In other words, the basic antitrust inquiry when evaluating NCAA restrictions on Division I football – now the Football Bowl Subdivision ("FBS") – is how closely related is the restriction to the procompetitive objectives of the NCAA, and to what extent is that competitive benefit offset by any anticompetitive effect. If the net effect, on balance, is not anticompetitive, then the restriction should withstand antitrust scrutiny.

2. The Supreme Court's Application of the Rule of Reason Takes an Unduly Narrow View of the NCAA's Mission

While recognizing the many procompetitive benefits of NCAA rules, the Supreme Court struck down the NCAA's television plan because it was deemed a price and output restriction that did not have sufficient countervailing competitive benefits to offset the plan's adverse effect on competition.[34] Without the NCAA's restrictive plan, teams would have been free to sell their own television rights, which would have allowed many more games to be shown on television.[35] In addition, the Court found the procompetitive benefits of protecting live attendance and maintaining competitive balance were not sufficient to offset the anticompetitive effect of the rules.[36]

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[34] *Id.* at 104-05.

[35] *Id.* at 105-06.

[36] *Id.* at 115-18.

Justice White, joined by Justice Rehnquist, dissented in *Board of Regents* on the ground that the NCAA's television plan was reasonably related to the NCAA's preservation of amateurism. While he agreed with the majority's view that rule of reason analysis should be applied in the case, he disagreed on the majority's application of that standard. Contrary to the majority, Justice White believed that allowing wide dissemination of college football on television would make the sport awash in cash which would lead to the over commercialization of college athletics.[37] Excessive commercialization, in turn, would blur the lines between amateurism and professional sports, and interfere with the NCAA's goal of using college athletics to supplement, rather than inhibit, educational achievement.[38] He believed that limiting television exposure was necessary to maintain the concept of the student-athlete, thus making the NCAA's television rules reasonable under rule of reason analysis.

What Justice White foresaw in 1984 has effectively come to pass. The movement of teams from conferences is tied to the pursuit of ever increasing amounts of television revenue.[39] With so much television revenue associated with college football, the concept of amateurism is eroded, and corruption follows in the

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[37] *Bd. Of Regents*, 468 U.S. at 123-24 (White, J., dissenting); *see also* Sally Jenkins, *NCAA Lost Its Teeth in Court in 1984 and No One's Been In Charge Since*, The Washington Post, Sept. 23, 2011, *available at* http://www.washingtonpost.com/sports/colleges/ncaa-lost-its-teeth-in-court-in-1984-and-no-ones-been-in-charge-since/2011/09/23/gIQAVDyoqK_story.html.

[38] *Bd. Of Regents,* 468 U.S. at 135 (White, J., dissenting).

[39] Michelle Kaufman, *Conference Call: Who Is Going Where? When? And Why?*, The Miami Herald, Oct. 2, 2011, *available at:* http://www.miamiherald.com/2011/10/02/v-fullstory/2434148/conference-call-who-is-going-where.html.

form of scandals and rules violations. If the NCAA had not been stripped of its authority over television in 1984, many of the problems we see today could have been avoided. At bottom, Justice White understood the proper application of the antitrust laws to the NCAA with respect to its product and mission, and the majority unduly restricted the authority of the NCAA, to the ultimate detriment of college athletics.

C. Antitrust Litigation in the Post-*Board of Regents* Era

The purpose of this article is not to revisit the past, however, but to analyze NCAA restrictions under the law as it currently exists to determine whether restrictions on paying student-athletes are permissible under the antitrust laws. There have been numerous lawsuits against the NCAA since *Board of Regents* challenging various NCAA restrictions on football and other sports. While courts have not specifically categorized the legality of NCAA restraints, they have largely upheld NCAA rules, and have created a continuum to evaluate the restrictions. That continuum follows the concept derived from *Board of Regents* – balancing the need for the restriction to create the college football "product" against any anticompetitive effect.

On the one end of the continuum, many restraints are consistently upheld as lawful because on their face they merely regulate, and there is little anticompetitive effect, or that effect is outweighed by procompetitive benefits. On the other end of the continuum, an NCAA restraint has been found to be anticompetitive because it was deemed to have anticompetitive effects that were not adequately justified by the

competitive benefit of promoting the NCAA's goals of amateurism and competitive balance.

Cases upholding NCAA restrictions are numerous, and include the following:

- *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1998) (upholding dismissal of antitrust suit against the NCAA for sanctions imposed on the SMU football program for rule violations because "we have little difficulty in concluding that the challenged restrictions are reasonable.")

- *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (denying preliminary injunction sought by player challenging bylaw that prevented him from further eligibility because he declared himself eligible for the draft and hired an agent.)

- *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (upholding dismissal of antitrust suit challenging no-agent and no-draft bylaws). The Court held, "The 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. They all constitute eligibility requirements essential to participation in NCAA sponsored amateur athletic competition."

- *Smith v. NCAA*, 139 F. 3d 180 (3d Cir. 1998) (upholding dismissal of antitrust suit challenging postbaccalaureate bylaws that restricted Plaintiff's ability to compete as a graduate student for a university that she did not attend as an undergraduate).

- *Warrior Sports, Inc. v. NCAA*, 623 F. 3d 281, 286 (6th Cir. 2010) (upholding NCAA restrictions on lacrosse sticks against antitrust challenge of disadvantaged manufacturer of lacrosse sticks).

These cases demonstrate the wide latitude the NCAA has under *Board of Regents* to implement and enforce restrictive rules.

Indeed, the only case to strike down an NCAA restriction since *Board of Regents* is *Law v. NCAA*.[40] In *Law*, an NCAA bylaw created a coaching position in every

[40] 134 F. 3d 1010 (10th Cir. 1998).

sport other than football as a "restricted earnings coach," who could earn no more than $16,000 per year.[41] The Tenth Circuit found that the restraint was an impermissible price restriction on coaches' salaries.[42] The Court found that the procompetitive benefits of the rule – retention of entry-level positions, cost reduction and maintaining competitive balance – were not sufficient to justify the anticompetitive effect on salaries.[43] In other words, the restricted-earnings rule was not sufficiently related to the creation of the college sports product to be lawful under rule of reason analysis. With these principles in mind, we address the issue of whether NCAA restrictions on paying college athletes are permissible under the antitrust laws in the post *Board of Regents* world.

II. Restrictions Necessary to Create the Unique Product of College Sports Do Not Violate the Antitrust Laws

The NCAA is a unique product as it is both a college-sports league and an amateur-sports league. In many ways the NCAA is no different than other leagues that limit eligibility on various grounds, such as Little League,[44] Junior Hockey,[45] Pop

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[41] *Id.* at 1014.

[42] *Id.* at 1024.

[43] *Id.*

[44] Restricted based on age and residency. *See* http://www.littleleague.org/learn/Start_Find_a_League/boundarymapreqs.htm ("The boundary map serves several purposes within the Little League program including maintaining a community environment within the league and maintaining parity during the Little League International Tournament. All players that sign up in a league must live within that league's geographic boundary.") A call to pay Little Leaguers in the Little League World Series has already begun. *See* Dan Wetzel, *Pay The Little League World Series Players*, Yahoo! Sports, Aug. 24, 2011, *available at*,

Warner football,[46] AAU,[47] and the Olympics.[48] Even the NFL and NBA restrict participation based on age and/or years out of high school.[49] With respect to the NCAA, the unique quality of the athletes is that they are college students who are also amateurs. Those unique qualities are what make NCAA sports so popular.

A. Athletes Must Be Students In Good-Standing In the NCAA Model

The first unique aspect of college sports is that the athletes are students. There is (correctly) little concern that the NCAA is acting unreasonably when it requires players to be students that meet certain academic standards. Yet it must be understood that the minimum academic standards in the NCAA bylaws are plainly a restriction on the competitive terms on which universities and colleges would otherwise compete for student-athletes. Without the academic bylaws, a school could

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http://sports.yahoo.com/top/news?slug=dw-wetzel_little_league_world_series_pay_kids_082411. Wetzel, similar to Branch, argues that players should be paid because Little League Baseball receives considerable revenue from ESPN for the rights to broadcast the Little League World Series.

[45] *Plymouth Whalers Hockey Club*, 419 F. 3d at 473-75 (finding that age limitations did not to have an anticompetitive impact).

[46] Restricted based on both age and weight. *see* http://www.popwarner.com/football/footballstructure.asp

[47] Amateurism, among other restrictions; *see* AAU 2011 Codebook, Art. III(B)(2)-(3), at 24, *available at* http://aausports.org/AAUInfo/CodeBook/CompleteCodebook.aspx

[48] Restricted to nationals of the country that is entering the athlete. *See* http://www.olympic.org/content/the-ioc/commissions/athletes-commission/olympians/?tab=1

[49] Under the NBA's former collective bargaining agreement, U.S. players were not eligible for the draft until one year after they graduated high school. *See* Associated Press, *Age Minimum Part of New Labor Deal*, June 22, 2005, *available at* http://sports.espn.go.com/nba/news/story?id=2091539. Similarly, the NFL restricts eligibility for its draft based on the number of years since a player graduated high school. *See Clarett v. Nat'l Football League*, 369 F. 3d 124 (2d Cir. 2004) (finding the age restriction was immune from antitrust scrutiny under the non-statutory labor exemption).

offer decreased academic requirements,[50] lower GPA thresholds,[51] or diminished degree progress benchmarks[52] in an effort to entice athletes to play for them as opposed to another institution. Consequently, the NCAA academic standards have an anticompetitive effect, particularly on less academically gifted student-athletes.

No one seriously suggests, however, that academic requirements are unreasonable restraints of trade. After all, the players are in school primarily to get an education, not play sports. As NCAA critic Andy Schwarz writes:

> The reasonableness and necessity of the collective agreement on ensuring that college athletes really go to college is an excellent contrast with the lack of reason for or necessity of the NCAA's collective agreement on athlete compensation. When the NCAA argues that if the college sport became just a normal minor league, it would be less popular, they are entirely correct. But that would happen only if the athletes lose their true connection to the university, not because they would get paid. What makes college sports so popular is the unique combination of high-quality athletics combined with the notion that the athletes attend school and truly represent the school in competition. **This makes the NCAA rule that college athletes be college students procompetitive...**[53]

Schwarz recognizes that the NCAA academic requirements are a key component of the attractiveness of the collegiate-sports product. As Schwarz understands, if

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[50] *See* 2010-2011 NCAA Division I Manual, Bylaw 14.3 (Freshman Eligibility Bylaws)

[51] *Id.*, Bylaw 14.01.2

[52] *Id.*, Bylaw 14.4

[53] Schwarz, *supra* note 2, at 67 (emphasis added).

colleges began excusing student-athletes from attending classes, maintaining a minimum GPA, or making progress toward a degree – essentially eliminating the academic eligibility requirements – the product of college athletics would not be differentiated from minor league professional sports, which are far less popular than college athletics.

B. College Athletes Must Be Amateurs In the NCAA Model

The second key prong of the NCAA model is that the athletes also must be amateurs. It is this aspect of the collegiate sports product that Branch and Schwarz argue is both unnecessary and anticompetitive. Upon examination, that is simply not the case.

Amateurism is at the very core of the product the NCAA creates. Requiring amateurism is no different in purpose and effect than the bylaws on academic standards. To be sure, both the academic standards and amateurism rules have similar adverse effects on certain athletes, *e.g.*, student-athletes who cannot meet academic standards are precluded from playing, no pay beyond scholarships, but under the antitrust laws those rules are judged against the overall creation of the NCAA product, not on some cherry-picked stand alone basis.

Eliminating the NCAA amateurism requirement would almost certainly negatively impact the attractiveness of college football and basketball. Look to the 1980 U.S. Olympic hockey team to see the incredible popularity of the unique blend of the student and amateur athlete. The current Olympics, with professional hockey

and basketball players, have none of the cache of that 1980 team. The combination of student and amateur as athlete is a product that consumers plainly want, as the current popularity of college sports demonstrates.

The antitrust laws do not require the NCAA to abandon its unique and popular product simply because it is successful. Indeed, if consumers were not receiving a product they wanted, and if players were not getting reasonably compensated for their services, market forces would drive the creation of a competitive league that would siphon fans and players away from NCAA sports. It is telling that such efforts have been attempted and failed.

In 2008, the All American Football League ("AAFL") was created. The league was designed to consist of players that had exhausted their college eligibility or graduated college, but failed to make an NFL team. The league would play its games in the Spring so it would not compete directly against college football. The AAFL teams would play in areas of the country where college football is extremely popular, and the teams would consist of players that played college football at a university in that teams state or a neighboring state – in an attempt to maximize the existing connections between fans, players and colleges.[54] Early reports were that players

[54] Chuck Klosterman, *AAFL Planning Spring Fling In 2008*, ESPN, June 5, 2007, *available at* http://sports.espn.go.com/espn/page2/story?page=klosterman/070605

would receive between $50,000 to $100,000 per season.[55] The AAFL has never played a game.

The United Football League ("UFL") is another example of an attempt to create a product to compete with NCAA football. The UFL played its inaugural season in 2009. The UFL was intended to provide quality, affordable football to underserved markets.[56] It has been recognized by others as a minor-league with a chance to be a developmental league for the NFL.[57] However, the future of the UFL is in doubt.[58] In the middle of its 2011 season, the UFL announced it was shortening its regular season by two games and would move straight to a championship.[59]

The unpopularity of both the AAFL and the UFL serve to reinforce the conclusion that the NCAA's two core requirements – academics and amateurism – are integral to the creation of a successful college sports product. The failures of the AAFL and UFL – which did not capture the amateurism prong of NCAA sports – show the importance of the NCAA's amateurism restrictions to the popularity of

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[55] *See* Andy Gardiner, *All American Football League To Hold First Draft Sunday*, USA Today, Jan. 24, 2008, *available at* http://www.usatoday.com/sports/football/2008-01-24-all-american-league-draft_N.htm

[56] UFL Mission Statement, *available at:* http://www.ufl-football.com/about-us.

[57] Pete Prisco, *NFL Could Find New UFL To Be A Nice Development*, CBS Sports.com, March 30, 2009, *available at* http://www.cbssports.com/nfl/story/11569904.

[58] Mike Florio, *UFL Fastforwarding to Title Game, Extinction*, Pro-Football Talk NBCSports.com, Oct. 16, 2011, *available at:* http://profootballtalk.nbcsports.com/2011/10/16/ufl-fast-forwarding-to-title-gam/.

[59] UFL Press, *Destroyers And Locos To Play For 2011 United Football League Championship Game in Virginia on October 21*, October 17, 2011, *available at* http://www.ufl-football.com/news/destroyers-and-locos-play-2011-united-football-league-championship-game-virginia-october-21.

NCAA sports. Indeed, Branch and Schwarz view that the NCAA should tinker with its successful amateurism model is the sports equivalent to the idea for "New Coke" in 1985.

The importance of the amateurism aspect to the NCAA model seems so clear that there should be a summary approach under the antitrust laws to analyzing NCAA rules that are designed to preserve amateurism. It should not be enough to state an antitrust claim against the NCAA simply that a rule has an adverse effect on some athletes, *e.g.* the academic bylaws effect on less academically gifted athletes. Rather, without a clear theory in an antitrust complaint as to how a challenged rule is unnecessary to secure the NCAA's overall amateurism and academic sports model, a case challenging that NCAA rule should not be allowed to proceed.

To elaborate, the antitrust laws offer a type of analysis known as "quick look," which is a hybrid of *per se* and rule of reason analysis. "Quick look" analysis "allows the condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.'"[60] What we suggest here is a "reverse quick look." A reverse quick look would permit a court to dismiss a challenge to an NCAA rule that is necessary within the overall purpose of creating the unique product that is NCAA football and basketball. As Justice Stevens wrote in *American Needle*, "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis;

[60] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763 (1999).

it 'can sometimes be applied in the twinkling of an eye.'"[61] Such should be the case with most NCAA restrictions designed to protect the unique NCAA college sports product.[62]

III. As A Policy Matter, "Pay-for-Play" Would Seriously Harm College Athletics

The foregoing analysis shows that NCAA model is not unlawful under the antitrust laws with respect to the restrictions on athlete compensation. But that does not answer the critics other contention that as a matter of policy, the world would be a better place if college athletes were paid. Although perhaps motivated by altruistic desires to help economically-disadvantaged student-athletes, the critics misapprehend the likely effects of paying college athletes. In reality, "pay-for-play" would almost certainly cause serious harm to student-athletes and college athletics, not help. To elaborate, it would likely decrease opportunities for football and basketball players, and seriously damage, if not eliminate, non-revenue sports. It would also have a substantial adverse effect on women's athletics, which have seen remarkable progress in the past 40 years.

A. "Pay-for-Play" Would Not, In the Aggregate, Benefit College Football and Basketball Players

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[61] *American Needle*, 130 S. Ct. 2201, 2216 (2010) (quoting *Bd. Of Regents*, 468 U.S. at 109, n.39).

[62] See James A. Keyte, *American Needle: Quick Look for Joint Ventures*, Antitrust, Fall 2010, at 48-52; see also Eric Grush & Claire Korenblit, *American Needle And A "Positive" Quick Look Approach In Challenges To Joint Ventures*, Antitrust, Spring 2011, at 55-60.

The anger over the NCAA's amateurism model essentially flows from the fact that some universities generate significant revenue with their college football and basketball programs and the players of these sports supposedly do not get a sufficient share.[63] A close look at the economics of college football, however, shows that few college athletes would be better off in a "pay-for-play" system than they are under the current scholarship model. To begin, all but fourteen athletic departments (including the costs of operating all sports) are currently operated at a loss.[64] As a result, many football programs would be unable to pay players above and beyond the current value of a scholarship.

Consequently, if college football were turned purely into a business – requiring that athletes be paid out of the profits – there likely would be a loss of scholarships in college football.[65] This would happen because only sixty-eight of the 120 FBS college football programs earn a profit (without considering the cost of operating other sports). The other fifty-two football programs that operate at a loss (averaging nearly $3 million per football program) would likely end their college football programs, as those teams would become even less competitive on the field because they would

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[63] Norlander, *supra* note 4 ("You cannot lawfully, honorably, deny these people a fair portion of their income."); *see also Mike and Mike*, (ESPN Radio broadcast August 19, 2011) (Interview of David Cromwell, attorney for Terrelle Pryor), *available at* http://espn.go.com/espnradio/play?id=6877534 (beginning at 18:45).

[64] Associated Press, *NCAA Report: Economy Cuts Into College Athletics*, Aug. 23, 2010, *available at* http://sports.espn.go.com/ncf/news/story?id=5490686.

[65] *Id.*

have insufficient revenues to compete with the more lucrative programs. If this occurred, the value of approximately 4,420 scholarships that are currently offered to the players in those programs would be lost.[66]

Furthermore, as a question of "fairness," critics like Branch engage in hyperbole when they claim that "student-athletes generate billions of dollars for universities and private companies while earning *nothing* for themselves."[67] Plainly, student-athletes get a great deal from participating in college sports. They earn scholarships that cover tuition and fees, room and board, and textbooks.[68] Depending on the institution attended, the value of these benefits can be over $250,000 for five years of athletic eligibility. College athletes also get an opportunity to develop personal "goodwill," which is of value to the athlete in whatever they do after graduation.[69] As a result, those calling for "pay" for student-athletes are really talking about the amount and distribution of benefits given to college athletes. The

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[66] NCAA rules permit eighty-five scholarships to be given per team in FBS.

[67] Branch, *supra* note 3.

[68] See 2010-2011 NCAA Division I Manual, Bylaw 15.02.5. The NCAA has recently adopted changes that will increase the permissible amount of a scholarship to cover up to $2,000 of other costs associated with attending a university that would not otherwise covered by the permissible grant of tuition, fees, room and board, and textbooks. *See* Associated Press, *NCAA Panel Approves Major Changes*, Oct. 27, 2011, *available at:* http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes.

[69] Personal goodwill would include such things as notoriety and public feelings of attachment to an athlete. Such things would be of great value to the athlete in the future in many occupations, including such areas as sales, public relations and law.

system the critics advocate would lead to a small number of athletes getting more, but most losing benefits and, in many cases, getting nothing.[70]

B. Schools Would Eliminate Women's Sports and Non-Revenue Sports

The "pay-for-play" proposal also ignores the fact that the money football and basketball teams generate are used to fund other sports, thereby increasing the overall availability of opportunities for student-athletes. In other words, revenues from football and basketball provide a subsidy for other sports. If, instead, college football and basketball players were paid out of the profits generated by those sports, these subsidies would disappear. Consequently, the NCAA's general amateurism model, which increases the number of opportunities across the greatest number of sports, would be largely undermined. In other words, "pay-for-play" would unravel the entire NCAA model.

1. Womens' Sports Would Be Severely Harmed

While not requiring any minimum number of women's sports teams, under Title IX, universities must create equal opportunities for men and women, including in athletics.[71] The NCAA's bylaws, however, further require that Division I members

[70] The student's benefitting the most from "pay-for-play" generally will be those that go on to become professional athletes because these players are the college football "stars." That small category of student-athlete already gets more benefits from college sports, in that college football and basketball create the opportunity for them to become professional athletes, with all the attendant financial rewards, *e.g.*, Cam Newton.

[71] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681.

produce at least fourteen sports.[72] At least seven of those sports must be women's sports.[73] Without these NCAA bylaws, universities would maximize profits by fielding only teams in football, Men's Basketball, and a small number of women's sports just sufficient to satisfy Title IX.

While women's sports have still not reached equality with men's sports in terms of money spent, or even total participation numbers,[74] the growth in women's sports under the current NCAA model has been remarkable over the past 40 years. In 1972, fewer than 32,000 women competed in college athletics.[75] During the 2009-2010 school year, over 186,000 women competed in college athletics.[76] Between 2004-2005 and 2009-2010 the number of women participating in college athletics increased by about 20,000.[77]

This growth of women's sports has spawned significant change in our society, as professional athletics is no longer a male-only endeavor. In 1997, the WNBA received full backing from the NBA and currently operates twelve franchises. The

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[72] *See* 2010-2011 NCAA Division I Manual, Bylaw 20.9.4.

[73] *Id.*, Bylaw 20.9.4.

[74] Marcia Greenberger & Neena Chaudhry, *Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Courts, Congress and the Federal Agencies*, 55 Clev. St. L. Rev. 491, 492 (2007).

[75] NCAA, Participation 1981-82–2009-10 NCAA Sports Sponsorship & Participation Rates Report, at 246, *available at* http://www.ncaapublications.com/productdownloads/PR2011.pdf

[76] *Id.* at 67.

[77] *Id.* at 57 & 67.

relative success of the WNBA has also led to increased publicity for women's college basketball. The same can be said for the women's soccer. The first Women's World Cup was played in 1991 with the 1999 Women's World Cup becoming a major event before over 90,000 fans at the Rose Bowl in Pasadena.[78]

The growth of women's sports has helped change stereotypes of women athletes as well. As Taylor Branch notes, the Association for Intercollegiate Athletics for Women believed well into the twentieth century that "the whole point [for women athletics] was that young women required cooperative sport of limited exertion, modeled on the 'play for all' exercises introduced by President Herbert Hoover's wife, Lou."[79] As is obvious, women athletes have come a long way since then. Without the NCAA rules requiring at least seven women's sports for Division I schools, and the subsidies from college football and basketball that help fund the NCAA model, much of this probably would not have happened.

2. Non-Revenue Sports Would be Severely Curtailed

The NCAA's mission extends beyond just football and basketball. In 2009-2010, over 430,000 students participated in NCAA intercollegiate athletics.[80] Less

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[78] U.S. Soccer, *Women's World Cup History: 1991-2007*, *available at* http://www.ussoccer.com/News/Womens-National-Team/2011/06/Womens-World-Cup-History.aspx.

[79] Branch, *The Cartel* (noting that a Title IX historian wrote, "Until the middle of the twentieth century, a common myth was that being athletic could cause a woman's uterus to fall out"). *The Cartel* is an expanded version, in e-book format, of Branch's article, *The Sham of College Sports*, *supra* note 3.

[80] NCAA, Participation 1981-82–2009-10 NCAA Sports Sponsorship & Participation Rates Report, at 67-68, *available at* http://www.ncaapublications.com/productdownloads/PR2011.pdf

than 85,000 of those athletes participate in football and men's basketball – the number drops to less than 20,000 when counting only Division I men's basketball and FBS football.[81] In other words, less than 5% of athletes play in the two revenue sports. It is evident that NCAA members would not subsidize this 95% of student-athletes in these non-revenue sports but for the educational importance of expanding the availability of athletics on campus and developing leadership, physical fitness, and athletics excellence.[82]

In addition, without subsidies from football and basketball, funding for these other sports would have to come from a different source – either cuts to academic departments or increases in tuition and student fees. As a result, requiring that the football and basketball players receive part of the profit from those sports would cause significant harm to one of the NCAA's main missions – "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."[83] Without the revenue derived from football and basketball being used to support other sports, in many cases the only men's sports left on campus would be football and basketball.

CONCLUSION

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[81] *Id.* at 68.

[82] NCAA Constitution, Art. 1.2(a).

[83] NCAA Constitution, Art. 1.3.1.

The NCAA model is not illegal under the antitrust laws. Courts have repeatedly found that most NCAA restrictions – especially those limiting participation to amateurs – are procompetitive as part of a legitimate joint venture. The NCAA's amateurism restrictions have been found legal in significant part because they increase opportunities for fans and athletes. They increase options for fans because a distinct product is made available that would not otherwise be available – college sports. They increase options for athletes, because those athletes get to participate in college sports while obtaining a college degree at low cost, an option that would not exist but for the NCAA model. Furthermore, the NCAA model provides opportunities for male and female athletes beyond just the revenue sports of football and basketball.

In sum, while the NCAA model may not be perfect, it is at plainly quite good. The popularity of college football and basketball is at an all time high. The NCAA is enacting more rigorous academic standards, to ensure that the athletes are in fact receiving a good education. Women and non-revenue sports are flourishing. All this flows from the NCAA's amateurism model. The critics have lost perspective on all this, and are using a flawed vision of "perfection" to condemn the good. That, we submit, is a mistake. The NCAA should continue to strive to make its model better and stronger, but not turn college sports into a pure business, and destroy the dynamic benefits that its amateurism model provides.