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Weakening Its Own Defense? The NCAA's Version of Amateurism

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WEAKENING IT'S OWN DEFENSE? THE NCAA'S VERSION OF AMATUERISM

> A basic purpose of this Association is to maintain intercollegiate 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.[1]

When President Theodore Roosevelt summoned representatives from Yale, Harvard, and Princeton,[2] along with other "football leaders,"[3] to the White House in 1905 to discuss his concern over the increasingly dangerous, and even fatal,[4] state of college football, it is unlikely that he considered the future legal and philosophical battles that the National Collegiate Athletic Association (NCAA)—the eventual result of this meeting—would face. What began as a way to combat the "flying wedge formation"[5] turned into an organization charged with safeguarding the ideals of collegiate athletics—despite the fact that those ideals are often left for debate. Although the issue of amateurism was already important in the early days of the Intercollegiate Athletics Association of the United States (IAAUS, formally renamed the National Collegiate Athletic Association in 1912),[6] the present debate of

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1. NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art 1.3.1, *in* 2002-03 NCAA DIVISION I MANUAL (2002).

2. ARTHUR A. FLEISHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 39 (1992); ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 32 (1998); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 8 (1999).

3. SACK & STAUROWSKY, *supra* note 2.

4. *Id.*; ZIMBALIST, *supra* note 2.

5. ZIMBALIST, *supra* note 2. The flying wedge "consisted of players locking arms, then heading upfield in a V-formation with a runner located inside." Willie T. Smith III, *Tribute to Flying Wedge a Starting Point for NCAA's Hall,* USA TODAY, Mar. 30, 2000, at 7C.

6. SACK & STAUROWSKY, *supra* note 2, at 33; ZIMBALIST, *supra* note 2. For a history of events leading up to the founding of the IAAUS and the NCAA, see FLEISHER III ET AL., *supra* note 2, at

amateurism's legitimacy, both philosophically and legally in regard to antitrust law, dwarfs those concerns of early twentieth century amateur notions[7] and all but replaces Roosevelt's original concern of the flying wedge.

The question of amateurism's place in college sports extends beyond the philosophical debate of whether collegiate athletes are also amateur athletes. The argument also includes a legal aspect: whether intercollegiate athletics are still "amateur" in nature, and whether the justification of amateur ideals should serve as a defense in antitrust claims against the NCAA in light of the accepted deregulation plans. While the NCAA is not categorically exempt from antitrust laws, two things "have worked in its favor with respect to its legal status . . . . First, sports in the United States have historically been given a great deal of leeway in terms of their treatment under the antitrust laws . . . . Second, the NCAA is strongly linked to higher education and traditions of amateurism."[8] In part because of the acceptance by courts of this objective and defense,[9] amateurism remains a legal lightning rod within college sports and is one of the issues that could ultimately transform the foundation of big time intercollegiate athletics from an institution tied to education to a minor league system for professional sport leagues.[10]

This comment will focus on amateurism in intercollegiate athletics, particularly with regard to the NCAA's use of this ideal in its defense of antitrust claims. While this paper will examine college sports in general, the narrower focus in caselaw and commentary often turns to "big time college sports," which refers generally to Division I athletics, and primarily to Division I football and men's basketball programs. Section I provides an overview of amateurism and focuses on the changing definition of what it means to be "an amateur." Section II addresses the use of amateurism as a defense to antitrust claims made against the NCAA, and will provide antitrust discussion, including an explanation of the *per se* and rule of reason standards, insight into the NCAA's regulations that may be classified as "commercial" or "noncommercial," and an examination of the courts' attitude towards the

37-39.

7. SACK & STAUROWSKY, *supra* note 2, at 34-35.

8. FLEISHER III ET AL., *supra* note 2, at 6-7 (citations omitted).

9. Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

10. While it may be argued that this is already the case, it is still only in theory. At this point, scholarships received by student-athletes cover *educational* expenses. The implementation of a "pay for play" system or the unionization of student-athletes, however, would create a different system of "compensation" and likely eliminate the educational tie between intercollegiate athletics and the scholarship form of amateur pay. If this happens, then college athletics, at least on the "big time" level, will become professional minor leagues.

NCAA's mission of amateurism. Finally, Section III addresses the amateurism deregulation packages of Divisions I, II and III. Given that big time college sports already stand close to the professional line, any form of deregulation lessens the validity of the NCAA's amateurism, which often serves as the Association's defense to antitrust allegations. If there is any "saving grace" in these deregulation packages, it is that they are directed towards pre-enrolled student-athletes, and that Division I, although it did accept some change, did so in a conservative manner. Because of these factors, the viability of the amateurism defense is likely to continue to survive antitrust scrutiny in many instances.

I. A LOOK AT AMATEURISM

This section focuses on the evolution of the NCAA's amateurism ideal. While some of the ideas that underlie the NCAA's actions are founded in economic theory,[11] the purpose of this section is not to examine the economic rationales and effects of the NCAA's behavior, but to explain the background of amateurism so that it may be applied in later discussion regarding antitrust issues. Additionally, this section will address the tension between the "dictionary" definition of amateurism and the "NCAA" definition of amateurism, and present a brief discussion on how amateurism is still present in intercollegiate athletics, which provides later assistance when the NCAA continues to use the defense.

A. Then and Now

The definition of amateurism has changed over time. Originally, the concept began in England to "maintain class distinction in competitive sport . . . . [and] 'was clearly attached to the elite establishment . . . . Those of the leisure class were the accepted amateurs and the working class, professionals.'"[12] In the American context, an accepted definition of "amateur" is a "person who engages in a study, sport, or other activity for pleasure rather than for financial benefit or professional reasons."[13] Additionally, an amateur is "an athlete who has *never* competed for payment

11. For further discussions on the economic theory behind NCAA actions, see FLEISHER III ET AL., *supra* note 2, and ZIMBALIST, *supra* note 2.

12. Christine Grant, *Editorial,* http://www.ncaa.org/library/membership/amateurism_deregulation/committee.pdf (quoting Bobby Dodd, president, Amateur Athletic Union) (last visited Feb. 26, 2003).

13. RANDOM HOUSE UNABRIDGED DICTIONARY 63 (2d ed. 1993).

or for a monetary prize."[14]

Early NCAA statements on amateurism comported favorably with the amateurism ideal of intrinsic, rather than extrinsic, rewards. In 1906 the NCAA's stance was that "[f]inancial inducements from any source, including faculty or university financial aid committees, were not allowed. Singling out prominent athletic students from preparatory schools was a violation of the amateur code, as was playing those who were not bona fide students."[15] In addition, the 1916 NCAA bylaws defined the "amateur" as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."[16] While this definition does not differ dramatically from the current "Principle of Amateurism" in words,[17] the notion of receiving any remuneration for athletic skill in the early years of the NCAA—as opposed to today's athletic scholarships—was forbidden. Further action on the receipt of financial aid occurred at the 1948 NCAA Convention when the Sanity Code, which "represented the first attempt by the NCAA to couple rules on amateurism, financial aid, and eligibility with an enforcement mechanism,"[18] was passed. Under this attempt to "ban[] a full athletic scholarship . . . . a student-athlete could receive a tuition and fees scholarship (not room and board) if the student had a demonstrated financial need *and* met the school's *normal* admissions requirements."[19]

Despite these rules and efforts to regulate payments to student-athletes, boosters, alumni, and even athletic departments themselves[20] still attempted to gain a competitive advantage through illegal payments to student-athletes. In 1956, in an effort to diminish these practices, the NCAA "voted to allow full grants-in-aid (tuition, fees, room and board, books and $15 a month 'laundry money'). But schools and their booster groups still sought a competitive advantage and devised new ways to pay their athletes on the side."[21] This

14. *Id.* (emphasis added).

15. SACK & STAUROWSKY, *supra* note 2, at 34.

16. *Id.* at 34-35 (citations omitted).

17. The "Principle of Amateurism" states that

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

NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art. 2.9.

18. FLEISHER III ET AL., *supra* note 2, at 47.

19. ZIMBALIST, *supra* note 2, at 23.

20. *Id.*

21. *Id.* at 23-24.

tension still exists today with economic and commercial interests influencing the management of the games. At this point in time, collegiate athletics and those who run them sit in a precarious position with a difficult choice. They can continue to fight against the increasing loss of amateur ideals in big time college sports, or give in to the calls that herald intercollegiate athletics as being a minor league version of professional sports.

From this overview, a few points emerge regarding the NCAA's amateurism. First, based on the dictionary definition and the evolution of the NCAA's financial aid stance, it is obvious that the debate on amateurism becomes definitional at a point. For the NCAA's purposes, scholarships are not "payment" or "monetary prize"[22] because that would, in essence, eliminate the "amateur" label of student-athletes that the NCAA uses. Second, it is also clear that the NCAA has had a changing view on what qualities make an "amateur." Currently, "[a]s long as athletic endeavors are tied to academics, athletics are viewed as an avocation."[23] In addition, the "true concern of amateurism"[24] has most recently been expressed as "competitive equity."[25] A problem arises, however, because of the other aspects of intercollegiate athletics that appear contradictory to the amateur definition. Finally, some definitions of amateurism[26] prohibit any receipt of, or competition for, monetary prize. This stands in contrast to the deregulation packages discussed later.

The issue here is not that the NCAA cannot create its own rules as to eligibility and the like, but that the use of the understood definition of "amateur" is not entirely accurate. In essence, if the NCAA is to use the amateurism defense in antitrust claims, it must note that it is the *NCAA's* definition of amateurism that is being used, and that this definition incorporates non-traditional exceptions to the amateurism ideal.

B. Amateurism's Existence in Today's College Sports

Despite the abundance of proof that intercollegiate athletics are moving ever closer to the professional ranks, amateurism is still present to some extent in the college arena. In general, college athletics offer an alternative to the professional version of athletic competition. Among these differences are

22. RANDOM HOUSE UNABRIDGED DICTIONARY, *supra* note 13.

23. Division I Subcommittee on Amateurism and Agents, *Core Values,* http://www.ncaa.org/library/membership/amateurism_deregulation/core_values.pdf (last visited Feb. 26, 2003).

24. Grant, *supra* note 12.

25. *Id.*

26. RANDOM HOUSE UNABRIDGED DICTIONARY, *supra* note 13 and text.

"[t]he mixture of athletic and academic production found among NCAA members [that] does not exist in professional sports . . . . [the] built-in demand for athletics among many students and alumni . . . . [and t]he rules of NCAA contests[,] [which] generate a differentiated product from professional sports."[27] Specifically, intercollegiate athletics have also been viewed differently because of the theoretical ideals—educational and moral—derived from them. Undoubtedly, this is where the amateurism defense garners its strength:

> Intercollegiate athletics continue a tradition from ancient times, in which games allowed athletes to test and develop their own ability in competitions with one another. In theory, at least, college sports provided an important opportunity for teaching people about character, motivation, endurance, loyalty, and the attainment of one's personal best—all qualities of great value in citizens. In this sense, competitive athletics were viewed as an extracurricular activity, justified by the university as part of its ideal objective of educating the whole person.[28]

Regardless of these values, the NCAA's definition of amateurism deserves challenge primarily because of the presence of economic objectives[29] in intercollegiate sports that conflict with the amateur ideal. Despite the "unique facets of college sports, approaching the NCAA and its members as economic entities remains warranted . . . . because revenue is still an important objective to collegiate decision-makers."[30] The commercial aspect of college athletics—television contracts and bowl game revenue, for example—counteracts the nonprofit, amateur motives of the organization. As discussed later, this prevents the NCAA from avoiding economic and, hence, antitrust analysis,[31] although some courts have held NCAA noncommercial restraints as not subject to antitrust laws.[32]

Nevertheless, despite the fact that amateurism is a much-maligned ideal, there remains support that

> intercollegiate athletics are and can continue to be an important part of higher education. College sports can provide an important educational

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27. FLEISHER III ET AL., *supra* note 2, at 13-14.

28. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY 70 (2000).

29. FLEISHER III ET AL., *supra* note 2, at 14.

30. *Id.*

31. *Id.* at 7.

32. *Smith,* 139 F.3d at 185-86; *Gaines,* 746 F. Supp. at 743; *Jones,* 392 F. Supp. at 303; *see also* Coll. Athletic Placement Serv. v. NCAA, 1974 U.S. Dist. LEXIS 7050 (D.N.J. 1974).

> opportunity to the student-athlete[s] . . . . Played with integrity and in line with the educational mission of our schools, college sports can serve both as entertainment and even as educational lessons for our broader society. In fact, for most of college athletics the current models seem to achieve these objectives . . . . [T]he participants . . . are first and foremost students, with their first priority being a college education.[33]

Arguably, however, many student-athletes do not consider a college education as their first priority. While the educational link exists and remains part of collegiate amateurism, the NCAA's commercial objectives, in addition to its lessening of amateur standards, require that the current debate center on the legitimacy of amateurism as an NCAA ideal, particularly with respect to football and basketball,[34] and its validity in the antitrust arena. With this small background and discussion regarding amateurism, the next section provides a discussion of antitrust law and relevant caselaw dealing with intercollegiate athletics and the NCAA's defense of amateurism.

II. AMATEURISM AS A DEFENSE TO ANTITRUST CLAIMS AGAINST THE NCAA

Section 1 of the Sherman Act[35] prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[36] Since nearly every agreement or contract restrains trade in some fashion, the United States Supreme Court has held that the Sherman Act was intended to prevent only unreasonable restraints of trade.[37] Therefore, restraints of trade must undergo

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33. DUDERSTADT, *supra* note 28, at Preface ix.

34. *Id.* at Preface x.

35. The antitrust discussion in this article focuses on section 1 of the Sherman Act. This section requires an agreement in the form of a combination or conspiracy in order for there to be a violation. 15 U.S.C. § 1 (2003). The NCAA, however, is often misperceived as an "outside entity that has no accountability and is unresponsive to its member institutions" when, in fact, "the NCAA is a voluntary organization composed of member institutions. NCAA rules are enacted by its membership . . . . [T]he member institutions . . . are the NCAA." Tom Osborne, Editorial, *NCAA's Public Image an Inaccurate Reflection,* NCAA NEWS, Mar. 18, 2002, at 4. Hence, while "[i]t is fundamental that a single person or entity cannot by itself alone form a 'contract, combination, or conspiracy,'" the NCAA *can* be sued as an entity engaged in such combination "because conceptually the adoption and execution of . . . NCAA [b]ylaw[s] can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself, and it is permissible to sue but one of the several alleged co-conspirators." Hennessey v. NCAA, 564 F.2d 1136, 1147 (5th Cir. 1977).

36. 15 U.S.C. § 1.

37. NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984); *see also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-43 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687-

some form of examination before being declared illegal. The two primary analyses are the *per se* rule and the rule of reason.[38] This section will discuss both standards, explain why restraints in college sports are judged under the rule of reason, and focus on cases involving amateurism and the NCAA's mission, with emphasis on the distinction between commercial and noncommercial restraints.

A. An Explanation of Antitrust Standards: The Rule of Reason and the Per Se Rule

The first, and traditional, analysis of an antitrust allegation falls under the rule of reason. This approach balances the procompetitive and anticompetitive effects of the restraint[39] in a case-by-case evaluation. The examination under the rule of reason begins with the plaintiff showing an actual or potentially significant anticompetitive effect resulting from the defendant's actions. The defendant then has the opportunity to demonstrate that the restraint has procompetitive virtues, that the restrictions actually further these objectives, and that the "procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts."[40] In the case of its amateurism defense, for example, the NCAA must "assert the promotion of amateurism as a procompetitive [effect] justifying the restraint . . . . [and show that the rule] 'enhances competition' or . . . that it is 'necessary to produce competitive intercollegiate sports.'"[41] Finally, the court will examine whether there is a less restrictive alternative to the restraint at hand.

The second approach to antitrust analysis is the *per se* rule, which holds a practice illegal simply by its occurrence. Judicially-established *per se* actions include horizontal price fixing and market allocation between competitors.[42] The notion behind this rule is that certain practices in themselves are so economically heinous that there is no need to expend judicial resources in a rule of reason analysis. This approach is applied when "the practice facially appears to be one that would always or almost always tend to restrict

88 (1978); Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918).

38. *See* Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998).

39. *Chi. Bd. of Trade,* 246 U.S at 238.

40. *Law,* 134 F.3d at 1017.

41. Gregory M. Krakau, Note, *Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten Its Existence,* 61 OHIO ST. L.J. 399, 430 (2000) (quoting *Bd. of Regents,* 468 U.S. at 104).

42. ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS 197 (4th ed. 2001).

competition and decrease output,"[43] and where "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[44] Since procompetitive effects are not considered under this analysis, courts generally do not impose the *per se* rule "until after considerable experience with the type of challenged restraint."[45] Because the *per se* rule affords minimal analysis into procompetitive advantages, the NCAA's best chance for success in defense of an antitrust claim obviously falls under the rule of reason, where it can present its justifications, such as the protection of amateurism, for the restraint at issue. Due to established precedent, it is unlikely that the NCAA will have to convince a court to employ a rule of reason analysis, since the Supreme Court has established this as the rule in cases involving restraints in intercollegiate athletics.[46]

B. Escaping Per Se: *Why College Sports are Judged Under the Rule of Reason*

i. Moving the Analysis to the Rule of Reason

Discussion of *per se* analysis is necessary because some of the NCAA's alleged restraints fall under this standard[47] and would, under other circumstances, remain under *per se* analysis. Courts, however, have determined that the rule of reason should apply to intercollegiate athletics, therefore affording the NCAA an opportunity to present its procompetitive rationale. The process of getting from *per se* analysis to the rule of reason deserves a brief explanation.

One way to garner a deeper review of a restraint is to demonstrate an argument that the court will consider legitimate enough to look at in a rule of reason fashion. This argument must contain something more than an alleged procompetitive effect, since the whole point of *per se* condemnation is the "anticompetitive potential inherent"[48] in such classified restraints, and that the possibility of some procompetitive effect is so minimal as to not deter the

43. Broad. Music, Inc. (BMI) v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).

44. *Engineers*, 435 U.S. at 692.

45. *BMI*, 441 U.S. at 19 n.33; *accord* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219 (1940); *Bd. of Regents*, 468 U.S. at 100 n.21.

46. *See generally Bd. of Regents*, 468 U.S. 85.

47. *See, e.g., Law*, 134 F.3d 1010.

48. *Maricopa County*, 457 U.S. at 351.

"general application" of the rule.[49]

The second method of escaping *per se* analysis stems from the first: There are some elements in certain cases that will make courts distinguish them from the usual *per se* categorization. Known as "characterization," courts have moved a *per se* restraint into a rule of reason analysis because of the presence of a learned profession,[50] a novel situation,[51] or an understanding that a restraint is necessary if the product is to exist at all.[52] In these instances, the challenged practice may have redeeming competitive virtues, such as efficiency, ethical considerations, or public service, that would not be discovered under the *per se* rule. Simply garnering rule of reason analysis, however, is only the first step; the defendant still must demonstrate that the restriction's procompetitive benefits outweigh its anticompetitive effects.

ii. *NCAA v. Board of Regents*: Rule of Reason Applied

The relevant characterization issue in the case of intercollegiate athletics and the NCAA is demonstrated in *NCAA v. Board of Regents,*[53] where the Court determined that some restraints are necessary for the product of intercollegiate athletics to exist.[54] In *Board of Regents,* the NCAA awarded television rights of college football games to two networks.[55] The plan included the right to fourteen live telecasts per network (ABC and CBS),[56] plus a "supplementary series" that included between thirty-six and forty

49. *Id.*

50. *Engineers,* 435 U.S. at 687; *see also* Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 603 (7th Cir. 1984). In *Engineers,* for example, the National Society of Professional Engineers mandated that, as a condition of membership, individual engineers were required to agree to refuse to negotiate or discuss the question of fees with a prospective client until the client had selected engineers for a particular project. This was the Society's attempt at preventing unusually low prices and unsatisfactory engineering. The Court held this restraint, usually classified as *per se* illegal price fixing, unreasonable under a rule of reason analysis by utilizing the characterization of professions. In professions, certain practices might be reasonable, although viewed as a violation in another context, because of the ethical and public service considerations behind the restraint. Professions are not treated differently simply because they are professions, but because of the ethical and public service benefits that may occur through a profession's rules. If it is established that the alleged illegal act is not premised on ethics or public service, however, such restraint, if originally treated as *per se,* returns to that classification and receives no further consideration.

51. *BMI,* 441 U.S. at 20-22, 24 (where the Court examined the sale of blanket licenses, generally understood as price fixing, under a rule of reason because of the novelty of the situation, and acknowledged the importance of allowing the product to be sold in an effective and efficient manner).

52. *Bd. of Regents,* 468 U.S. at 101.

53. 468 U.S. 85.

54. *Id.* at 100-01.

55. *Id.* at 92.

56. *Id.*

exposures,[57] along with the authorization to "negotiate directly with member schools for the right to televise their games."[58] In addition, the plan required that each network schedule the games of at least eighty-two different schools during a two-year period.[59] Combined, the two networks were prohibited from televising an institution's games on television more than four times nationally, and six times overall,[60] during any two-year period of the plan.[61] In effect, the plan "limit[ed] the total amount of televised intercollegiate football and the number of games that any one team [could] televise. No member [was] permitted to make any sale of television rights except in accordance with the basic plan."[62] The College Football Association (CFA), made up of "five major conferences together with major football-playing independent institutions,"[63] desired greater say in the television rights and, in 1979, secured an independent, more beneficial contract offer from NBC.[64] When the NCAA announced that it would take disciplinary actions against CFA members, the Universities of Oklahoma and Georgia brought an action alleging that the NCAA's television control violated section 1 of the Sherman Act.[65]

Although the NCAA's plan of television rights to college football games amounted to horizontal price fixing, which is "ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that [this] practice[] [is] anticompetitive is so high,"[66] the Court found that "it would be inappropriate to apply a *per se* rule to this case .... [because it] involves an industry in which horizontal restraints on competition are essential *if the product is to be available at all.*"[67] The Court went on to discuss the NCAA's role in the preservation and production of intercollegiate athletics[68] and that, although the NCAA's plan restricted price and output competition between schools, "a fair evaluation of [the restraint's] competitive character requires consideration of the NCAA's justifications for the restraints."[69] This

57. *Id.* at 92 n.7.
58. *Bd. of Regents,* 468 U.S. at 93.
59. *Id.* at 94.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Bd. of Regents,* 468 U.S. at 89.
64. *Id.* at 94-95.
65. *Id.* at 95.
66. *Id.* at 100.
67. *Id.* at 100-01 (emphasis added).
68. *Bd. of Regents,* 468 U.S. at 102.
69. *Id.* at 103.

acknowledgement of the unique character of intercollegiate athletics has been shown in other cases with the use of the rule of reason, as well.[70] The purpose of analyzing *Board of Regents* is to show the use of the rule of reason in cases involving the NCAA because of the "ample latitude" courts have found it needs to preserve amateurism in college sports;[71] once this method of analysis is chosen, there still remains the actual balancing of competitive effects where, in the case of *Board of Regents,* the Court concluded that the NCAA's television plan unreasonably restrained competition.[72] While not all restraints will be held reasonable, the NCAA will at least receive a chance to prove their reasonableness because of the necessity of certain restraints within the industry of college athletics.

With the rule of reason analysis in place for examination of restraints within intercollegiate athletics, the next part of this section examines the defense of amateurism proffered by the NCAA within the rule of reason analysis, with a focus on courts' handling of commercial and noncommercial restraints.

C. Cases and Explanation: Rule of Reason Applied to Amateurism

The NCAA has faced a number of challenges to its rules under section 1 of the Sherman Act. This subsection will discuss those cases, focusing on the distinction between two related issues: characterization used to determine if commercial and noncommercial restraints are subject to antitrust scrutiny, and the place of amateurism within the structure of antitrust consideration. The essence of the amateurism defense is that the challenged restraints are in furtherance of the NCAA's objective of amateurism, and that it is a procompetitive justification for the NCAA's restraints that outweighs any anticompetitive effect of these restraints.

i. Noncommercial Restraints: Exemption from Antitrust Analysis

One of the primary distinctions made by courts between NCAA regulations is the commercial[73] and noncommercial[74] nature of various

70. *See Law*, 134 F.3d at 1018; Hairston v. Pac.-10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1995); Banks v. NCAA, 977 F.2d 1081, 1088 (7th Cir. 1992); McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988); *Hennessey,* 564 F.2d at 1132-33; Justice v. NCAA, 577 F. Supp. 356, 382 (D. Ariz. 1983).

71. *Bd. of Regents,* 468 U.S. at 120.

72. *Id.*

73. *Id.* at 103; *Law,* 134 F.3d at 1014.

74. *Hennessey,* 564 F.2d at 1153; *Jones*, 392 F. Supp. 295.

restraints. For example, in *Justice v. NCAA*[75] the court noted that "it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose."[76] "Protection of amateurism" rules generally include noncommercial eligibility regulations like the no-draft and no-agent rules, and any other rules that control student-athlete participation. This distinction between restraints is pertinent because antitrust laws are aimed at commercial, competitive behavior, and not behavior that exhibits other, noncommercial objectives.[77] Following this understanding of antitrust law "suggests that regulations designed to achieve . . . noncommercial objectives are immune from application of the antitrust laws."[78] Hence, some courts have held that noncommercial restraints, such as those in the form of NCAA eligibility rules, are not subject to antitrust analysis.[79] In these instances, the noncommercial amateurism objective short-circuited any antitrust scrutiny, and demonstrated that while there may be "aggressive enforcement of antitrust laws in 'business' situations like those in *Board of Regents* and *Law*[, there may also be] deference to the NCAA rules governing amateurism."[80]

In *Jones v. NCAA,*[81] for instance, a Northeastern University hockey player (Jones) was declared ineligible from intercollegiate competition because of his pre-enrollment participation with Canadian and American "amateur" hockey teams that compensated him for his services.[82] The determination of ineligibility was based on Jones' alleged violation of the NCAA's "Principle of Amateurism," which includes the prohibition of taking or accepting a promise of pay for participation in the sport in question.[83] Jones alleged,

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75. 577 F. Supp. 356.

76. *Id.* at 383.

77. *Hennessey,* 564 F.2d at 1148 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940)); *see also* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959).

78. Krakau, *supra* note 41, at 403.

79. *Gaines*, 746 F. Supp. at 743 (noting that "the NCAA Rules are not subject to antitrust analysis because they are not designed to generate profits in a commercial activity but to preserve amateurism"); *Jones*, 392 F. Supp. at 303 (finding that "[a] threshold question is whether the Sherman Act reaches the actions of N.C.A.A. members in setting eligibility standards for intercollegiate athletics . . . . [T]his court concludes that it does not . . . . [N]ot every form of combination or conspiracy allegedly in restraint of trade falls within [the Sherman Act]").

80. Krakau, *supra* note 41, at 407.

81. 392 F. Supp. 295.

82. *Id.* at 296-97.

83. *Id.* at 298-99 (citing NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art. 3.1 (1974)). For the current (and generally similar) version of the "Principle of Amateurism," see NAT'L COLLEGIATE ATHLETIC ASS'N CONST., art. 2.9. For the current language on the prohibition of using athletic skill

among other things,[84] that the NCAA's eligibility rules were a violation of sections 1 and 2 of the Sherman Act.[85] Before beginning any analysis, however, the court held that the Sherman Act did not "reach[] the actions of N.C.A.A. members in setting eligibility standards for intercollegiate athletics."[86] The court went on to note that this claim was

> particularly inappropriate for application of the Sherman Act [because t]he plaintiff is . . . not a businessman in the traditional sense, and certainly not a "competitor" within the contemplation of the antitrust laws . . . . [It has not been] shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.[87]

Although the *Jones* court did go on to analyze the strength of the plaintiff's claim,[88] the statement of support for noncommercial eligibility standards is important. Since antitrust laws are aimed at regulating competition with *commercial* objectives, college athletics eligibility rules—with the objective of amateurism—do not, according to the *Jones* court, fall within the ambit of antitrust analysis. According to the NCAA, its eligibility rules were designed to promote the ideals of amateurism; while such rules may harm a person's ability to participate in intercollegiate athletics, that harm has been held to only be the "incidental result of the organization's pursuit of its legitimate goals."[89]

This understanding of the antitrust laws in *Jones* was proffered again in *Gaines v. NCAA*.[90] Similar to *Jones*, the *Gaines* court found that antitrust regulations did not apply to the NCAA's "no-draft" rule because of its noneconomic, amateurism-based objective.[91] In *Gaines*, a Vanderbilt football player (Gaines) challenged the NCAA's "no-draft" rule after he entered the 1990 National Football League (NFL) draft, was not drafted by any team, and was then declared ineligible to finish his last year of eligibility at Vanderbilt.[92]

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for pay in a sport, see *NCAA Division I Amateur Status*, Bylaw 12.1.1(a), *in* 2002-03 NCAA DIVISION I MANUAL (2002).

84. *Jones*, 392 F. Supp. at 296.

85. *Id.* at 303.

86. *Id.*

87. *Id.*

88. *Id.* at 303-04.

89. *Jones*, 392 F. Supp. at 304.

90. *Gaines*, 746 F. Supp. 738.

91. *Id.* at 744.

92. *Id.* at 740.

While Gaines alleged that the NCAA was engaged in monopolistic practices[93] under section 2 of the Sherman Act,[94] as opposed to a restraint of trade claim under section 1, the court focused on the application of antitrust law in general to NCAA *eligibility* rules. In rejecting the application of antitrust law to the no-draft rule, the court stated that

> [t]he overriding purpose of the eligibility [r]ules . . . is not to provide the NCAA with commercial advantage, but rather . . . to prevent commercializing influences from destroying the unique "product" of NCAA [athletics] . . . . [T]his Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes."[95]

Although the court went on to address the implications if the antitrust laws *were* applicable,[96] the court's language demonstrates its acceptance of the NCAA's amateurism objective and its recognition of noncommercial rules (the eligibility rules "at issue in this case"), while at the same time endorsing the already-held standard that commercial rules, such as the "NCAA's television restrictions,"[97] are subject to antitrust scrutiny.[98] Although not all courts have exempted arguably noncommercial rules from antitrust scrutiny, discussed *infra,* the *Gaines* court provided that option while also giving an analysis in dicta favorable to the NCAA's amateurism objectives.[99] In cases such as *Jones*, *Gaines* and *Justice*, preserving amateurism is judicially viewed as an exempt noncommercial regulation of student-athlete eligibility that removes NCAA rules from the ambit of antitrust scrutiny altogether.

Finally, *Jones*, *Gaines*, and *Justice* lend support to *Smith v. NCAA*,[100] which involved an allegation that the NCAA's Postbaccalaureate Bylaw violated section 1 of the Sherman Act by restraining trade and having an anticompetitive effect.[101] This bylaw allows post-graduate students to

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93. *Id.* at 741.

94. 15 U.S.C. § 2 (2003).

95. *Gaines,* 746 F. Supp. at 744.

96. Even if the antitrust laws were applicable, "Gaines cannot succeed on the merits of his § 2 claim because the NCAA has shown legitimate business justifications for the Rules at issue." *Id.* at 746.

97. *Id.* at 743.

98. *Id.* at 744; *see also Bd. of Regents,* 468 U.S. at 85.

99. *Gaines*, 746 F. Supp. at 746-47.

100. 139 F.3d 180.

101. *Id.* at 184.

participate in intercollegiate athletics only at the school from which the student earned his or her undergraduate degree.[102] In this case, the court focused on whether "antitrust laws apply only to the alleged infringer's commercial activities."[103] Like the courts in *Jones*, *Gaines*, and *Justice*, the *Smith* court found that the Sherman Act does not apply to the NCAA's eligibility rules because these rules do not give the NCAA a commercial advantage, but instead "primarily seek to ensure fair competition in intercollegiate athletics."[104] Also like previous courts, *Smith* posed a hypothetical application of the antitrust laws to the Postbaccalaureate bylaw and found that the bylaw was a "reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics."[105] The *Smith* court continued the acceptance of amateurism[106] as a possible bar to antitrust scrutiny where noncommercial restraints are at issue.

ii. Noncommercial and Commercial Restraints: Antitrust Analysis Applied

The next part of this section examines whether preservation of amateurism will justify a commercial restraint that has anticompetitive effects. *Jones*, *Gaines*, and *Smith* removed NCAA rules—primarily eligibility regulations—from the auspices of antitrust law because of their noncommercial nature and objectives. Other instances, however, have arisen within the antitrust context where the courts did not excuse NCAA rules from antitrust analysis, but did accept amateurism as an affirmative defense within a rule of reason analysis.

These instances involve both noncommercial and commercial restraints.[107] While "[c]ourts initially held that NCAA rule-making, regulatory, or enforcement activities do not sufficiently impact interstate trade or commerce to establish Sherman Act jurisdiction,"[108] they have also come to accept the

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102. *NCAA Division I Graduate Student/Postbaccalaureate Participation*, Bylaw 14.1.7., *in* 2002-03 NCAA DIVISION I MANUAL (2002).

103. *Smith*, 139 F.3d at 185.

104. *Id.*

105. *Id.* at 187.

106. *Id.* at 185, 187.

107. In general, aside from this broad categorization, courts can handle antitrust laws and amateur sports associations in one of three ways:

> (1) that noneconomic or 'noncommercial' factors are not relevant at all; (2) that they justify a total exemption from the antitrust laws [discussed *supra*]; or (3) that they justify application of the rule of reason in cases which would otherwise be subject to a per se test of illegality. In addition, if the court applies the rule of reason, it must determine what, if any, weight to give to noneconomic factors.

Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31, 32 (1985-1986).

108. Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College*

notion that the running of "big time" college sports is a business that should be subjected to the Sherman Act,[109] even if under a relaxed standard. Because examination of antitrust allegations within intercollegiate athletics is done through the rule of reason,[110] the NCAA has the opportunity to raise the need to preserve amateurism when defending itself against an antitrust allegation. The purpose of examining antitrust analysis in regard to noncommercial and commercial NCAA restraints is to discuss courts' views of the amateurism defense in relation to the type of restraint involved.

The discussion of noncommercial restraints in antitrust analysis stems from the second part of the analyses in *Jones*, *Justice*, *Gaines*, and *Smith*, where the courts discussed the possible results had the antitrust laws, in fact, been applicable to those noncommercial restraints.[111] Unlike the *Jones*, *Justice*, *Gaines*, and *Smith* courts, however, other courts have not immediately removed noncommercial restraints, such as coaching staff limits,[112] the no-draft rule,[113] the no-agent rule,[114] and recruiting rules and punishments,[115] from the antitrust arena. Following a rule of reason analysis in each instance, however, these restraints were held reasonable.[116] On the other hand, applying antitrust analysis to commercial restraints is obvious in nature. Antitrust regulation was designed to police the effect of restraints on free competition and commercial enterprise.[117] It is only natural that antitrust laws be applied to commercial restraints such as television contracts[118] and limits on coaching salaries,[119] albeit with a rule of reason analysis.[120]

Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century, 11 MARQ. SPORTS L. REV. 1, 3 (2000).

109. *Id.*

110. *Bd. of Regents*, 468 U.S. at 100-01; *accord Law*, 134 F.3d at 1018; *Hairston*, 101 F.3d at 1319; *Banks*, 977 F.2d at 1088.

111. *Smith*, 139 F.3d at 186; *Gaines*, 746 F. Supp. at 746; *Jones*, 392 F. Supp. at 303-04.

112. *Hennessey*, 564 F.2d at 1136.

113. *Banks*, 977 F.2d 1081; *McCormack*, 845 F.2d 1338. The court in *McCormack* analyzed a noncommercial restraint by first "[a]ssuming, without deciding, that the antitrust laws apply to the eligibility rules . . . ." *Id.* at 1343.

114. *McCormack*, 845 F.2d 1338.

115. *Hairston*, 101 F.3d 1315.

116. *Hairston*, 101 F.3d at 1020; *Banks*, 977 F.2d at 1090 (where the court found that the plaintiff failed to state a claim upon which relief could be granted and upheld the district court's finding that the NCAA eligibility rule in question was reasonable); *McCormack*, 845 F. Supp. at 1343; *Hennessey*, 564 F.2d at 1154.

117. *Hennessey*, 564 F.2d at 1148 (quoting *Apex*, 310 U.S. at 493; *Klor's*, 359 U.S. at 213 n.7).

118. *Bd. of Regents*, 468 U.S. 85.

119. *Law*, 134 F.3d 1010.

120. *Bd. of Regents*, 468 U.S. at 103; *accord Law*, 134 F.3d at 1018; *Hairston*, 101 F.3d at 1319; *Banks*, 977 F.2d at 1088.

Cases such as *Hennessey, Banks, McCormack,* and *Board of Regents* provide an understanding of the judiciary's antitrust analysis[121] and its view of the NCAA's self-proclaimed need to preserve amateurism with regard to noncommercial and commercial restraints. First, as noted, courts that do employ an antitrust analysis with either type of restraint do so under the rule of reason.[122] For noncommercial restraints, this appears as a compromise between a complete exemption from antitrust scrutiny and a *per se* analysis because, "[w]hile the participating [athletes] may be amateurs, intercollegiate athletics in its management is clearly business, and big business at that."[123] Using a rule of reason approach allows the NCAA to present justifications for the restraints and acknowledges that "the NCAA has played an important role . . . in collegiate sports . . . . [by] adopt[ing] and promulgat[ing] playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coach[es]."[124] In essence, while some courts have not given an antitrust exemption to noncommercial restraints[125] (and have not even considered it for commercial restraints), they have, at minimum, recognized the necessity of certain restraints within intercollegiate athletics, and the importance of the NCAA itself, by utilizing a rule of reason analysis.

Second, proceeding to a rule of reason analysis allows insight into the courts' attitude towards the NCAA, its purpose and regulations, and the idea of amateurism in regard to any restraints. Courts have consistently approved of the NCAA's mission and preservation of amateurism in intercollegiate athletics[126] because of the uniqueness of college sports, as compared to professional sports.[127] For example, the Court in *Board of Regents* acknowledged the role of the NCAA in preserving amateurism and the character of intercollegiate athletics,[128] even though these objectives did not

121. This is in comparison with the discussed decisions that exempted noncommercial intercollegiate athletics restraints from anything but a cursory antitrust analysis.

122. *Bd. of Regents,* 468 U.S. at 100-01.

123. *Hennessey,* 564 F.2d at 1150.

124. *Bd. of Regents,* 468 U.S. at 88.

125. The question of exempting commercial restraints is moot, since the commercial aspect is the heart of the antitrust laws.

126. *Bd. of Regents,* 486 U.S. at 120; *Banks,* 977 F.2d at 1090 (citing *Justice,* 577 F. Supp. at 382).

127. According to the *Bd. of Regents* Court, "the NCAA seeks to market a particular brand of [college sports]. The identification of this 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable." 468 U.S. at 101-02.

128. *Id.* at 88, 102.

overcome the anticompetitive nature of the NCAA's television plan.[129] In dicta, however, the Court lent support to the notion that amateurism is an acceptable defense for noncommercial restraints because "most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[130] While the ideal of amateurism finds support in caselaw,[131] it has been more likely to prevail in cases with noncommercial restraints than in those with commercial restraints, and in cases where the restraint actually furthers the objective of amateurism and is the least restrictive means available.

Overall, courts have not been antagonistic to the amateurism objective in intercollegiate athletics. In fact, they have been understanding. This is illustrated by courts upholding NCAA rules aimed at preserving the distinction between amateurism and professionalism, including the no-draft,[132] no-agent,[133] coaching staff limits,[134] and recruiting and punishment[135] rules.[136] Understanding a proposed motive, however, does not always guarantee that restraints allegedly fueled by that motive will be deemed reasonable under a rule of reason standard, especially when the restraint is economic in effect. The next section discusses the ramifications of the deregulation of amateurism within the NCAA structure, and whether the NCAA will be able to continue to rely on amateurism as a defense to challenged eligibility rules.

III. DEREGULATION'S EFFECT ON THE AMATEURISM DEFENSE

The NCAA's definition of amateurism is changing.[137] In January 2001,

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129. *Id.* at 120.

130. *Id.* at 117. Indeed, the Court's use of the "'rule of reason' both . . . condemn[ed] the particular restraint and . . . suggest[ed], in dicta, the lawfulness of other restraints imposed by the same organization." Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation,* 1995 WIS. L. REV. 545, 573.

131. *Bd. of Regents,* 468 U.S. at 120; *accord Smith,* 139 F.3d at 185-86; *Banks,* 977 F.2d at 1089; *Gaines,* 746 F. Supp. at 744; *Jones,* 392 F. Supp. at 304.

132. *Banks,* 977 F.2d at 1091; *McCormack,* 845 F.2d at 1343.

133. *McCormack,* 845 F.2d at 1343.

134. *Hennessey,* 564 F.2d at 1154.

135. *Hairston,* 101 F.3d at 1320.

136. As discussed in the next section, the purpose of these rules—maintaining a distinction between amateurism and professionalism—appears to be challenged by the passed and proposed deregulation of amateurism, including the aspect of the deregulation that allows former professionals to retain some collegiate eligibility.

137. It should be noted that there are three deregulation packages discussed (one for each Division) due to the NCAA's federated membership structure. While governed by an Association-

Division II membership passed Proposal No. 12, which "deregulates" the restrictions on the pre-enrollment activities of student-athletes[138] by allowing "athletes who have tried but failed to achieve professional athletics careers"[139] to retain some form of collegiate eligibility. At the NCAA Convention in January 2002, Division III membership passed its own form of deregulation by approving Proposal Nos. 40-44, which allow pre-enrolled student athletes to accept prize money based on finish, enter a draft, enter a professional contract, and compete with professionals on a professional team.[140] As discussed below, the Division I membership approved more conservative changes to its amateurism rules.[141] One obvious issue that comes from these deregulations is what effect the changes will have on the NCAA's amateurism defense to antitrust claims, and whether such a defense loses its vitality when NCAA members themselves are lessening the restrictions[142] aimed at preserving amateurism. This section gives an overview of the deregulation actions and proposals of each Division,[143] and discusses the actual use of the defense in future disputes.

A. Deregulation

The discussion on amateurism includes a spectrum of ideas and plans. On one hand, "pay for play" proponents argue that student-athletes should be paid for competing.[144] On the other hand, critics argue that a "pay for play" system would drastically change the face of collegiate athletics.[145] Amateurism

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wide Constitution, "[e]ach [D]ivision [also] has had the autonomy to craft legislation to best fit its needs and interests." Gary T. Brown, *2001 Year in Review. The Amateurism Rollercoaster: Bylaw 12 Examinations Have Taken Association on a Thrill-a-Month Ride,* NCAA NEWS, Dec. 17, 2001, http://www.ncaa.org/news/2001/20011217/active/3826n32.html (last visited Feb. 26, 2003). While it is debatable as to whether this autonomy is good in the area of amateurism—with each Division having the ability to create different standards than the others—the current federated system allows this to occur.

138. *Id.*

139. David Pickle, *Division II Finds Comfort Zone with Amateurism Legislation,* NCAA NEWS, Sept. 10, 2001, http://www.ncaa.org/news/2001/20010910/active/3819n02.html (last visited Feb. 26, 2003).

140. Kay Hawes, *Division III to Examine its Future, Amateurism Proposals Approved,* NCAA NEWS, Jan. 21, 2002, at 1.

141. Gary T. Brown, *Management Councils Take Mountain-Sized Steps at Denver Session,* NCAA NEWS, Apr. 15, 2002, at 1.

142. By, for example, allowing former professionals to have college eligibility.

143. Although the issues discussed in this paper relate primarily to Division I, the deregulation plans of all three Divisions are presented here for comparative value.

144. Jeff K. Brown, Comment, *Compensation for the Student-Athlete: Preservation of Amateurism,* 5 KAN. J.L. & PUB. POL'Y 147, 148 (1996).

145. *Id.* at 149-50.

deregulation falls within this spectrum and acknowledges the opportunities and needs of *pre-enrolled* student-athletes. In general, deregulation attempts to consider competitive equity and loosens the NCAA's control over prospective student-athletes with the idea that "rather than linking amateurism to issues of money and whether someone is labeled as professional, amateurism should reflect the link between education and sport."[146] This view allows prospective student-athletes to pursue opportunities prior to participation in college athletics without losing all eligibility and helps keep educational opportunities available for prospective student-athletes by not turning them away from college through ineligibility.[147] While Division I, primarily because of its "big time" sports of football and men's basketball, is often the first consideration when the effects of deregulation are discussed, Divisions II and III were the divisions that actually adopted plans to deregulate amateurism. The plans of each Division are discussed in the order of their passage.

i. Division II

At the January 2001 NCAA Convention, Division II became the first Division to adopt an amateurism deregulation package, known as Proposal 12.[148] The package, effective in August 2001, allows pre-enrolled Division II student-athletes to "accept prize money, sign contracts, enter a professional draft and/or be drafted, accept compensation for athletics participation and compete with professionals."[149] In something of a tradeoff, however, the "seasons-of-competition rule" takes one year of collegiate eligibility from prospective student-athletes "for every year that an athlete participates in organized competition after the next opportunity to enroll in college."[150] Student-athletes choosing to enroll in a Division II school after participating in organized competition must also fulfill one year in academic residence before participating.[151]

For this deregulation plan, the NCAA Division II Amateurism Project

146. Grant, *supra* note 12.

147. Division I Subcommittee on Amateurism and Agents, *Why Deregulation,* http://www.ncaa.org/library/membership/amateurism_deregulation/why_dereg.pdf (last visited Feb. 26, 2003).

148. Brown, *supra* note 137.

149. *Id.*

150. NCAA Division II Amateurism Deregulation, *Overview,* http://www.ncaa.org/agents_amateurism/amateurism/2/overview.html (last visited Apr. 3, 2003) [hereinafter *Overview*].

151. Brown, *supra* note 137.

Team shifted the idea of amateurism from the traditional emphasis on money to two "core values: Welfare of the Prospective Student-Athlete (PSA) and Competitive Equity."[152] The Project Team reasoned that, in consideration of a PSA's welfare, "rules that involve acts that do not give a PSA a competitive advantage should be liberalized."[153] This was the motivation behind the allowance of prize money, contracts, entering professional drafts and being drafted, and accepting compensation for athletics participation.[154] The value of competitive equity also leads to the "seasons-of-competition" rule.[155] By switching the focus of amateurism from money to the core values enunciated by the Project Team, a balance was struck in the evolving world of collegiate athletics. Current student-athletes remain governed by the same rules, without a "pay for play" system, while pre-enrolled student-athletes have greater leeway, although with some ramifications, to pursue professional careers without immediately losing their entire collegiate eligibility. The question becomes one of competitive advantage gained in pre-enrollment activity. Although there are some critics who are concerned with the ramifications of Division II's decision,[156] proponents point to the educational value—a notion tied to the amateurism objective of the NCAA in antitrust cases—of the proposals.[157]

While Division II's deregulation reduces some collegiate eligibility, it also allows those who attempt professional and organized competition to maintain a form of collegiate eligibility. Prior to deregulation a student-athlete would be permanently ineligible[158] for collegiate competition after professional or organized competition; now, a student-athlete may retain a form of collegiate eligibility and take advantage of educational opportunities still available. Nevertheless, this change in amateurism policy goes against the amateur

152. *Overview*, *supra* note 150.

153. *Id.*

154. *Id.*

155. *Id.*

156. Critics argue that Division II deregulation makes college athletics a place for "failed professionals," which will upset competitive balance within collegiate sports, and that Division II will place dominant, successful professional athletes on teams. These situations are unlikely to occur, however, because of the safeguards in place (the "year for a year" of the "organized competition rule") and because, in reality, successful professionals are not likely to return to the collegiate level. Pickle, *supra* note 139.

157. According to Wingate University President Jerry E. McGee, "There's a price to be paid for giving your pro career a shot . . . . But the price to be paid shouldn't be so severe that you can never participate in intercollegiate athletics or perhaps go to college." *Id.*

158. *Id.* Prior to the adoption of Proposal No. 12, "pre-enrolled student athletes in all divisions have been ruled permanently ineligible if they have professionalized themselves or shown an intent to professionalize." *Id.*

ideal[159] because student-athletes who have accepted compensation and competed with professionals, even though they were pre-enrolled at the time, are now allowed to partake in intercollegiate athletic competition as "amateurs." This may adhere to the NCAA's idea of amateurism, but in actuality it blurs the line between collegiate student-athletes and professional athletes.

ii. Division III

Division III is unique among the three Divisions because it alone does not give student-athletes skill-based financial aid (scholarships). It remains the purest form of amateurism in this respect; while scholarships may or may not be considered "pay," the argument remains that there is some form of compensation in Divisions I and II, not received by others, because of athletic skill. In January 2002, the Division III membership passed its own deregulation package at the NCAA Convention.[160] This adoption allows pre-enrolled student athletes to "accept prize money based on . . . place finish . . . in an open athletics event,"[161] "sign a contract with a professional team for athletics participation,"[162] "enter a professional draft and be drafted,"[163] and "compete with professionals on a professional team."[164] Like Division II, Division III's deregulation includes a "seasons-of-competition" rule that establishes the years of eligibility a student-athlete has when he enrolls[165] and which charges a student-athlete one season of competition for "every calendar year the prospect engages in organized competition after his or her first opportunity to enroll in college."[166] Further, after the "seasons-of-competition" rule is triggered, the student-athlete must serve one academic year in residence before participating in the sport in question.[167]

One distinct difference between this plan and the one adopted by Division II is the lack of a "pay for play" proposal for pre-enrolled student-athletes. While pre-enrolled Division III student-athletes are allowed to accept prize

159. RANDOM HOUSE UNABRIDGED DICTIONARY, *supra* note 13 and text.

160. Hawes, *supra* note 140.

161. NAT'L COLLEGIATE ATHLETIC ASS'N, 2002-03 DIVISION III AMATEURISM DEREGULATION GUIDE FOR COACHES 7 (2002), http://www.ncaa.org/library/membership/division-_iii_amateurism_guide/2002-03/amateurism_guide.pdf (last visited Feb. 26, 2003).

162. *Id.* at 8.

163. *Id.* at 9.

164. *Id.* at 10.

165. *Id.* at 6.

166. *Id.*

167. *Id.*

money for place finish and sign contracts to compete in professional athletics, they are not allowed to accept compensation for their athletic participation. Prospective student-athletes who compete on professional teams or enter a professional draft may do so as long as they do not accept compensation or retain the services of an agent.[168] This prohibition of accepting pay for athletic services is more in-line with notions of pure amateurism and helps keep Division III athletics as "pure amateur sport" while at the same time allows the "'failed professional' whose only crime might have been unwisely signing a contract or entering a draft"[169] to participate in collegiate athletics.

The Division III Task Force on Amateurism posited core values similar to those of its Division II Project Team counterpart. Competitive fairness and prospective student-athlete welfare, along with "[c]larity, common sense, and consistency of amateurism rules .... [and] [c]onsistency with Division III philosophy"[170] motivated the proposals. In addition, similar to Division II, the subjective element of "intent" when determining the eligibility of a student-athlete is removed. Under the old standards, a student who "intended" to professionalize was penalized with a loss of eligibility; under the new standards, however, the evaluation of a student-athlete's thought process gives way to an objective assessment of the student-athlete's experience and competitive advantage, if any, gained through his activities prior to enrolling collegiately.[171] These changes to the Division III landscape apply "only to student-athletes before their initial collegiate enrollment and do[] not modify amateurism rules as they apply to enrolled student-athletes .... [P]rospects who clearly 'professionalize' themselves by accepting a salary or agreeing to be represented by an agent still will be ineligible to compete at Division III institutions."[172] Again, however, like Division II, these deregulation standards lessen the true meaning of "amateur" by allowing student-athletes to compete in the collegiate ranks after testing the professional waters.

iii. Division I

Division I, the Division most susceptible to blurring the lines between amateurs and professionals, chose a form of deregulation that, while not as

168. Kay Hawes, *Amateurism Takes Center Stage in Division III,* NCAA NEWS, Jan. 7, 2002, at A1.

169. Hawes, *supra* note 140.

170. NCAA Division III Amateurism Deregulation, *Task Force,* http://www//ncaa.org/agents_amateurism/amateurism/3/taskforce1.html (last visited Feb. 26, 2003).

171. *Id.*

172. Gary Karner, Editorial, *Proposals Don't Betray Division III Principles,* NCAA NEWS, Jan. 7, 2002, at 4.

liberal as Divisions II and III, still alters the meaning of amateurism.[173] The following pre-enrollment proposals were the primary components included in the discussion for Division I amateurism deregulation:

> Proposal 99-106—Organized Competition: "[P]rospects who do not enroll full-time in college at their first opportunity after high-school graduation . . . will lose a season of eligibility for each year they participate in organized competition. Those individuals must also fulfill a year in residence."[174]
>
> Proposal 99-107—Professional Draft: Prospects may enter a professional draft, and be drafted, without losing eligibility.[175]
>
> Proposal 99-108—Signing a Professional Contract: Prospects may sign a professional contract without affecting intercollegiate eligibility.[176]
>
> Proposal 99-109—Competition with Professionals: Prospects may play on a professional team without losing eligibility.[177]
>
> Proposal 99-110—Prize Money Based on Finish: Prospects may accept prize money without losing eligibility.
>
> Proposal 99-110-2—Prize Money Based on Finish: Prospects may "accept prize money for place finish up to actual and necessary expenses."[178]
>
> Proposal 99-111—Compensation for Athletics Competition: Prospects may accept compensation for participation in athletic competition without losing eligibility. This does not allow prospects to receive payment for promotional or commercial activities.[179]
>
> Proposal 2000-47—Prospects can take educational expenses for high school or preparatory school, as long as the funds are "disbursed by the school and not provided by an agent, athletics representative or professional sports team."[180]

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173. *See* Brown, *supra* note 141.

174. NCAA Division I Amateurism Deregulation Proposals, *Preenrollment Proposals,* http://www.ncaa.org/library/membership/amateurism_deregulation/preenrollment_proposals.pdf (last visited Feb. 26, 2003).

175. *Id.*

176. *Id.*

177. *Id.*

178. Brown, *supra* note 141.

179. NCAA Division I Amateurism Deregulation Proposals, *supra* note 175.

180. Brown, *supra* note 141.

In April 2002, the Division I Management Council approved a package that "permits prospects to enter a draft and be drafted . . . receive prize money (not to exceed expenses) . . . . [and] receive educational expenses to attend a high school or preparatory school" as long as the funds do not come from "an agent, athletics representative or professional sports team" and are given out by the school.[181] Further, the Management Council approved an organized-competition rule under which "individuals who participate in organized competition for no more than one year after high school and who receive no more than actual and necessary expenses lose one year of eligibility and are required to spend an academic year in residence after they enroll at a collegiate institution."[182] At the same time, the accepted package "does not allow prospects to sign professional contracts, receive a salary or compete with professionals."[183]

Although Division I limited its deregulation from the options presented, this deregulation still allows pre-enrolled student-athletes to accept compensation (up to actual and necessary expenses determined on an event-by-event basis) for athletic participation. While competition with professionals is still not permitted, the fact that pre-enrolled student-athletes can receive money for their athletic skill goes against amateur notions. Nevertheless, although amateurism was deregulated, it was done so in a relatively conservative manner at the Division I level, helping save the amateurism defense in antitrust cases. The next part of this section discusses the continued validity of amateurism as a defense in antitrust cases in light of the changes in all Divisions.

B. Why Amateurism Can Still be a Valid Defense to Challenged NCAA Eligibility Rules

The adoption by all Divisions of some type of deregulation harms the validity of the NCAA's amateurism defense to antitrust allegations.[184]

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181. Brown, *supra* note 141.

182. *Id.*

183. *Id.* at 15; *see also* Telephone Interview with Julie Roe, NCAA (Apr. 14, 2003).

184. An example of this difficulty is shown by looking at the *Jones* case, where the plaintiff was declared ineligible from intercollegiate athletic competition because he had competed with professionals and accepted payment for his participation prior to his collegiate enrollment. 392 F. Supp. at 296-98. Under Division II's adoption, Jones would have retained his eligibility. Had he not accepted payment for his playing, he would have been eligible under Division III's new regulations, as well. He would not be eligible under Division I's deregulation because he competed with professionals and was compensated for his athletic services (as opposed to receiving only actual and necessary expenses as prize money, which is allowed). This is not to say that the deregulation of amateurism eliminates the amateurism defense within antitrust cases; it merely demonstrates the

Despite this augmentation of amateurism, however, the defense (which has only come to light because of cases involving Division I institutions) should still exist, although in a qualified way, for two primary reasons: (i) the presence of an educational focus and (ii) the scope of the deregulation proposals in regard to maintaining the NCAA's mission, and the fact that the Division I Management Council accepted a narrower version of deregulation.

i. Intercollegiate Athletics Remain Tied to Education

The amateurism deregulations do not remove the amateur from intercollegiate athletics; instead, they adapt to the change in opportunities afforded to prospective student-athletes. They place a strong emphasis on competitive balance and fairness, and they still prohibit an enrolled student-athlete from receiving compensation for athletic participation. Most importantly, however, the amateurism proposals keep education at the front of intercollegiate athletics because they allegedly increase the number of prospective student-athletes who may attend college. Although it may not be for the right reason, many student-athletes attend college in order to play their sport; at the same time, they end up receiving an education. By lessening the amateurism restrictions on prospective student-athletes, people who may not have ever entered college because of amateurism "red tape"[185] will now consider it an option because they still have athletic eligibility. Education's relation to amateurism should continue to encourage courts to at least consider the amateurism defense.

Admittedly, the idea of "amateurism" is tailored to the NCAA's interests through deregulation. "Amateurism" in the NCAA-sense may or may not be the exact definition generally associated with the concept; however, the NCAA's definition of amateurism for enrolled student-athletes, *within the games that it governs in intercollegiate athletics*, has remained the same. Christine Grant, Chairperson of the Division I Subcommittee on Agents and Amateurism, defended the alleged change in amateurism, which can be held as a statement across all Divisions:

> The subcommittee often is asked why it is changing the NCAA's philosophy of amateurism. In actuality, nothing in the amateurism proposals alters this philosophy as reflected in NCAA Principle 2.9—The Principle of Amateurism: "*Student-Athletes* shall be amateurs in an *intercollegiate* sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits

difficulty courts may face when dealing with precedent and current issues.

185. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77 (Ky. 2001).

> to be derived. Student participation in *intercollegiate* athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises."[186]

In essence, the NCAA is following what it has always followed (questionable as that may be in itself because of economic interests) and what the courts have accepted: The Principle of Amateurism. This tie to education emphasizes the avocation aspect of intercollegiate athletics and correlates to the still-present amateur ideal.

Alternatively, there are enough protections in place in the new rules to safeguard intercollegiate athletics from "failed professionals" and others not seeking to also gain an education while competing in intercollegiate athletics. The seasons-of-competition rule in Divisions II and III takes a year of eligibility from the prospective student-athlete for each year played in organized competition between high school and college, and requires an academic year in residence before beginning collegiate competition once this rule is triggered. Division I's organized-competition rule imposes similar guidelines. Hence, student-athletes are faced with committing to educational, amateur values or forgoing intercollegiate competition. This, too, emphasizes the NCAA's continuing commitment to amateurism. While there are economic objectives within the NCAA, "amateurism" (the NCAA's "amateurism" means that former professionals are still amateurs in determining intercollegiate athletic eligibility) still remains an essential part of intercollegiate athletics.

ii. Scope: The Proposals Do Not Regulate Actual Collegiate Athletic Competition

The second reason that deregulation should not be considered a bar to the amateurism antitrust defense expands upon the first. Deregulation does not regulate actual participation in intercollegiate athletics; the NCAA's goal of amateurism within this competition remains untouched because deregulation applies only to pre-enrolled student athletes. Although Division I, where the litigation has taken place, adopted a more conservative approach, Divisions II and III—also a part of the NCAA—adopted their own deregulation packages. This overall intention to deregulate should have some impact on the overall view of the NCAA's amateurism.

These plans limit the NCAA's control of pre-enrolled student-athletes, and acknowledge that the "principle [of amateurism] was expanded to the preenrollment period without a clear directive about the intended purpose of

186. Grant, *supra* note 12.

such an expansion."[187] While it is not a strict version of amateurism because it allows former professionals to be current "amateurs" in some instances under deregulation, the NCAA still adheres to its Principle of Amateurism, which is what it has proffered as a defense in antitrust cases, and which is what courts have looked upon with favor, even if ultimately determining that the anticompetitive factors of a restraint in question outweigh the procompetitive effects motivated by amateurism.

In addition, deregulation does not allow a "pay for play" system in regard to currently enrolled student-athletes. This lends itself to supporting the NCAA's objectives of amateurism and education *within the scope of the organization's control.* As Grant's comment points out, it is still the same version of amateurism that has been espoused through the NCAA's Principle of Amateurism, and that the courts have accepted. The hard part now, however, will be explaining to courts why some current student-athletes were allowed to professionalize before college, making them something less than a true amateur. Although not in college at the time, the fact remains that some student-athletes will have competed professionally and received money for their skill. The NCAA must encourage courts to keep the focus on the belief that the "NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports."[188] Whether or not this belief outweighs the anticompetitive effects of a given restraint or is the least restrictive means to accomplishing the objective is left to the courts, but the amateurism defense still deserves consideration in the balancing.

These two reasons demonstrate that the deregulation of amateurism does not eliminate the NCAA's amateurism defense in antitrust cases, although it should cause courts to more closely examine such defenses. The new rules do not affect actual intercollegiate athletic competition—the "'product' with an academic tradition"[189] that the NCAA seeks to market—and they noticeably state the intended focus and connection to educational values. They do, however, call into question the amateuristic purity of student-athletes who have had prior professional and/or paid experience, since this does not fully adhere to amateur values. The issues become the balance between the activities of pre-enrolled and current student-athletes, and what realm the NCAA actually deserves control over. While admirably taking the stance that (at least for some situations) it does not control student-athletes before they enter college, the NCAA has nevertheless lessened its own "product" by allowing certain past experiences to not influence student-athlete eligibility,

187. *Id.*

188. *Bd. of Regents,* 468 U.S. at 120.

189. *Id.* at 101.

even when that allowance may contradict the idea of amateurism. In light of the fact that Division I cases are the primary issue, however, and that Division I membership accepted a lesser version of deregulation, under a rule of reason analysis in certain circumstances the amateurism defense should still be considered a legitimate, procompetitive justification to an implemented restraint. Those circumstances are discussed in the next part of Section III.

C. Qualifications to the Amateurism Defense

There are two parts to understanding the use of the amateurism defense in future antitrust claims against the NCAA. First, the previous parts of Section III established that there is still, in some way, a mission of amateurism within the NCAA, and that it is tied to education and the scope of the NCAA's control of the actual competition in collegiate athletics. Second, the remaining issue is what type of deference courts should give to amateurism, in light of the deregulation actions, and what restraints are justified by the need to preserve amateurism.

First, noncommercial restraints, such as eligibility rules, can still receive a measured level of deference from the courts because of amateurism's continued presence, albeit in an amended version, in the NCAA's mission. Because of deregulation creating a possibly lesser value of amateurism and because of the NCAA's economic interests, however, all noncommercial restraints should be subject to a rule of reason antitrust analysis that accepts amateurism as a procompetitive justification to the alleged anticompetitive restraint. This method takes into account the NCAA membership's changed concept of amateurism, but at the same time allows the mission of amateurism and education to be proffered as defenses. It also acknowledges that the restraints in question are noncommercial in nature, and that Division I, as the main ground for litigation, accepted the least deregulation of amateurism. Still, the NCAA should be seen as a whole, and the decisions by Divisions II and III to deregulate amateurism on their levels effects the organization's use of the defense. Hence, these restraints should be subject to antitrust analysis because of the NCAA's economic objectives and the changing face of amateurism, but should be afforded deference because of their noncommercial traits and because amateurism is still, in some form, a mission of the NCAA.

Second, the NCAA would be wise to limit the amount of economic restraints it places on its members. The NCAA's economic interests were shown in *Board of Regents* and *Law,* where restraints on television rights and coaching salaries were declared unreasonable. The combination of an economic interest and an altered version of amateurism at some levels will likely have a difficult time overcoming the anticompetitive effects of a given

commercial restraint. When such economic restraints are necessary, they should be closely tied with procompetitive noncommercial objectives,[190] such as education and eligibility, and should be the least restrictive alternative possible. While an economic restraint might actually be necessary to promote noncommercial interests, such a restraint will probably be looked at as "an attempt to further [the NCAA's] economic interests [by] assert[ing] a regulatory power appropriate only to further its goals of academic integrity."[191] Simply because a noncommercial objective is *a* goal of the organization will not qualify it as *the* justification for an economic restraint. While amateurism still exists as a part of the NCAA, too much has changed in the collegiate athletics landscape to blindly accept the defense of amateurism when a commercial, economic restraint is involved. Amateurism may be used as a defense, but it should face a higher level of scrutiny because of the underlying commercial objectives.

IV. CONCLUSION

The deregulation of amateurism should change the courts' view of the NCAA's amateurism defense in antitrust cases, although it will probably not do so in a drastic manner. It is legitimate to hold true economic restraints to a strict antitrust analysis under the rule of reason. Restraints that are noncommercial in nature,[192] or that are commercial in nature but have valid, legitimate, related noncommercial justifications, however, should be given deference by the courts. This means examining the proffered reasons and justifications for the restraint. Therefore, under a rule of reason analysis, noncommercial restraints should receive the deference—although not an exemption from antitrust law—of the courts because of the established continuation of the *NCAA's* form of amateurism, and commercial restraints should receive a scrutiny that is skeptical of the amateurism defense in light of the current changes and the economic objectives of the NCAA. In order for commercial restraints to pass judicial muster, they should be closely tied to education or amateurism. While "the availability to the NCAA of the amateurism justification, and the courts' history of complicity in protecting sports organizations from the full force of antitrust law[] make it unlikely that the basic structure of college sports will be overturned judicially in the near

190. Kirby & Weymouth, *supra* note 107, at 51.

191. Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete,* 26 LOY. L.A. L. REV. 1213, 1218 (1993).

192. *Id.* at 1217 (commenting that "if a regulation affects the academic integrity of the student-athlete, courts should give a great deal of deference to the NCAA").

future,"[193] it is also unlikely that the courts should be as supportive of the amateurism defense as they have been in past cases because of the NCAA's changing self-defined notion of amateurism.

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193. Krakau, *supra* note 41, at 434-35.

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