The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules

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The plaintiff is currently a student, not a businessman in the traditional sense . . . .1

Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body . . . . This Court is hard-pressed to see any validity to the parties' interpretation of college football players like Brad Gaines as 'sellers' and NCAA schools and professional football teams as 'buyers' in an economic market.2

I. INTRODUCTION

On August 24, 2004, the National Collegiate Athletic Association (NCAA) rendered a final decision with respect to the eligibility of Colorado University (CU) football player Jeremy Bloom. Bloom happens to be talented in two sports: in addition to being a star kickoff and punt returner during his time at CU, Bloom is the world's third-ranked freestyle moguls skier. Not coming from an affluent background, Bloom decided earlier in the year to accept endorsement money from two ski apparel companies in order to help fund his training for the 2006 Olympics. While the NCAA's rules on amateurism allow college football players to accept money from professional baseball teams and allow CU to profit from sales of Bloom's No. 15 jersey (with no share of the sales going to Bloom), the cartel's3 rules do not allow


2. Gaines v. NCAA, 746 F. Supp. 738, 744-45 (M.D. Tenn. 1990) (holding that the NCAA's eligibility rules for college athletes are not and should not be subject to federal antitrust law).

3. As sports economist Robert Tollison has noted, "economists generally view the NCAA as a
college athletes to accept endorsement money. Bloom was therefore held ineligible to play college football, a decision that caused him to lose his scholarship at CU and could potentially destroy his aspirations of playing professional football in the future.

Most commentators denounced the NCAA's decision as wrongheaded, self-serving, hypocritical, and even vindictive, and many other similar stories can be told about the college sports cartel. College athletes have repeatedly brought suit to challenge the NCAA's bylaws, principally on antitrust grounds, and they will undoubtedly continue to do so. To date, however, every antitrust challenge to the NCAA's eligibility rules has failed. Federal courts have consistently held that the NCAA's preservation of "amateurism" is, as a matter of law, a valid excuse for what would otherwise be flagrant violations of the Sherman Act. Viewing the NCAA as a purchaser of labor and college athletes as suppliers, the NCAA is allowed to engage in price fixing: it limits

cartel." Robert Tollison, Understanding the Antitrust Economics of Sports Leagues, Spring 2000 ANTITRUST at 21, 22. See also ARTHUR FLEISHER III, et al., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR (1992); Lesley Chenoweth Estevao, Student Athletes Must Find New Ways to Pierce the NCAA's Legal Armor, 12 SETON HALL J. SPORTS L. 243, 248 n.22 (2002) ("Economists who have studied the NCAA argue that the Sanity Code [a measure passed by the NCAA in 1948] marks the beginning of the NCAA behaving as an effective cartel"); Daniel R. Marburger & Nancy Hogshead-Makar, Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?, 14 MARQ. SPORTS L. REV. 65, 81 (2003) ("the NCAA has been repeatedly criticized by economists for acting as an economic cartel").


6. Just two days after it held Bloom ineligible, the cartel rendered its decision holding Mike Williams, the University of Southern California's star wide receiver and one of the most talented players in contemporary college football, permanently ineligible to play. Williams had attempted to leave college football for the pros after a federal district court held the NFL's rule requiring players to be at least three years out of high school to be in violation of federal antitrust law. Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004). That federal court ruling was subsequently overturned, and Williams immediately attempted to return to USC. See NCAA Turns Down Williams's Reinstatement Bid, at http://sportsillustrated.cnn.com/2004/football/ncaa/08/26/williams.denied.ap/index.html (last visited Apr. 1, 2005).

7. A prominent Seattle class action law firm, for example, recently filed an antitrust suit against the NCAA on behalf of college football players denied scholarship money (known as "walk-on" players) because of the cartel's rule limiting the number of scholarships that can be given out per team. See In re NCAA Division I-A Walk-on Football Players Litigation, Civ. Action No. 04-1254 (W.D. Wash. May 19, 2004).
the amount of scholarship money and benefits (e.g., health and disability insurance) cartel members can pay their athletes. Similarly, the NCAA is allowed to keep its athletes dependent on their individual schools: athletes cannot switch schools without losing a year of eligibility, cannot speak to agents about prospective employment with professional teams, and cannot accept endorsement money. All of this, the courts have held, is justified not by any economic reasons but by the NCAA's purported desire to ensure that college athletes "be protected from exploitation by professional and commercial enterprises."

This article argues that the federal courts' treatment of the NCAA's amateurism rules is critically flawed and cannot be explained by any principled application of antitrust law. The NCAA's amateurism rules, by which I mean the no-compensation, no-draft, and no-agent rules, have been criticized by numerous authorities. No one, however, has yet provided

8. NCAA, supra note 4, arts. 12.1, 12.5.2, 15.1.
9. Id. NCAA, supra note 4, arts. 14.5; 12.1.1(g) & 12.3; 15.1.
10. Id. art. 2.9; see e.g., Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) ("We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes proper focus on their educational pursuits and direct their attention to the quick buck in pro sports").
11. NCAA, supra note 4, arts. 12.1, 12.5.2, 15.1.
12. Id. art. 12.2.4. As discussed below, in October 2002 the NCAA amended its prohibition against college athletes' entering a professional draft by making an exception for Division I-A football players, the athletes most severely affected by the restriction. Under the new rule, Division I-A football players are allowed to enter a professional draft once during their college careers without jeopardizing their eligibility. Id. art. 12.2.4.2.3. Because the NFL has a rule barring players from entering the professional league until they are three years out of high school, college players typically do not have a need for entering a draft more than once. Despite this more lenient rule, I include the no-draft rule among the amateurism rules discussed in this article because the amendment took place after all of the cases to address the amateurism rules and several of the opinions focus on the old no-draft rule. Furthermore, because the no-compensation rule is the most controversial and most economically significant of the rules, the fact that the no-draft rule has been amended does not lessen the significance of the issues discussed in this article.
13. Id. arts. 12.1.1(g), 12.3.
a unifying theory that explains why the six federal courts to publish decisions on the issue all decided to uphold the NCAA's bylaws. This article provides that theory. Part II provides a brief overview of the Rule of Reason, the antitrust analysis applicable to restraints such as the NCAA's amateurism rules, and takes a close look at *NCAA v. Board of Regents of the University of Oklahoma*, the only Supreme Court opinion to apply the Rule of Reason to the NCAA (though to rules having to do with TV contracts and not to any of the restraints on athletes). Part III reviews each of the six published federal court decisions to squarely address antitrust challenges to the NCAA amateurism rules. Part IV then argues that these decisions cannot be explained by any principled application of antitrust law but instead only by the personal values and beliefs of the individual judges involved: the opinions reveal that these judges simply refused to view college athletes as suppliers of labor, felt that the athletes' "proper" focus should be on academics and not professional sports, and had an open aversion to "cold commercialism" and the "quick buck of pro sports." Rather than confront the facts in the cases, which were often squarely at odds with their stated beliefs, these judges decided to impose their values on college athletes as a matter of law. As the lone dissenter in these cases put it, when "confronted with the clash between soothing nostalgia and distressing reality," these judges chose the former. In light of the fact that the victims of this judicial social engineering are disproportionately African American athletes and the beneficiaries are predominantly affluent white men (as were all the judges involved), this

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17. *Banks*, 977 F.2d at 1091.
18. *Id.* at 1100.
19. Black students typically comprise over fifty percent of the athletic teams in "revenue sports," which are the sports that actually generate profits for NCAA members and which likewise are the sports in which the college athletes suffer the greatest antitrust injury as a result of the NCAA's restraints of trade. See Table 7: Comparison of Black Student-Athletes to Total Student-Athletes in 2001-02 Race Demographics of NCAA Member Institutions' Athletic Personnel, available at http://www.ncaa.org/library/research/race_demographics/2001-02/2001-02_race_demo.pdf (last visited Apr. 4, 2005). In contrast, in the 2001-02 academic year 82.2% of athletic directors at Division I schools and 80% of the head coaches of Division I-A football and Division I basketball teams were white men. See *id.* at Table 34b, p. 85, *Athletics Administrative Staff: 2001-02 Division I Percentiles & Table 42a, p. 120, Head Coaches: 2001-02 Division I Figures.* As Walter Byers, Executive Director of the NCAA from 1951-87 has pointed out, the major beneficiaries of restraints on athletes' compensation are the NCAA members' athletic directors and head coaches, most of whom have inordinately high salaries. See BYERS, supra note 14, at 340. Numerous Division I football and basketball coaches, for example, currently have annual salaries of over $1 million. See *In re NCAA*
trend in the federal judiciary is particularly disturbing.

As new challenges to the NCAA's amateurism rules are brought, courts must recognize what these judges allowed themselves to forget: social values, particularly values that are not shared across racial and socioeconomic groups, have no place in a legitimate Rule of Reason analysis. Federal judges, whatever their own personal beliefs, should no longer uphold an aristocratic, Victorian notion of the "proper" education of young men as a valid defense to Sherman Act violations, particularly when that notion is enforced by a cartel whose own leaders and supporters admit its rampant hypocrisy.\textsuperscript{20}

II. THE RULE OF REASON AND NCAA V. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA

A. The Rule of Reason

Section 1 of the Sherman Act provides that "[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, is declared to be illegal."\textsuperscript{21} The Supreme Court, however, has long held that this provision was intended to prohibit only unreasonable restraints of trade.\textsuperscript{22} Ordinarily,
therefore, "whether particular concerted action violates Section 1 of the Sherman Act is determined through case-by-case application of the so-called Rule of Reason."23 Under this rule, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."24 Specifically, the Rule of Reason comprises three steps involving shifting burdens of proof:

(1) The plaintiff shows that the agreement has a substantially adverse effect on competition.

(2) The defendant must then show that the challenged conduct promotes a sufficiently procompetitive objective.

(3) In rebuttal, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.25

Two points must be emphasized about this analysis. First, a defendant's procompetitive justification for a challenged agreement must actually be procompetitive—that is, it must actually enhance competition. Generally, the Court has held that noncommercial objectives are not legally cognizable justifications for anticompetitive agreements. The leading case is National Society of Professional Engineers v. United States.26 In that case, the United States brought suit under Sherman Act Section 1 challenging a canon of ethics prohibiting competitive bidding among professional engineers.27 The society that instituted the canon argued that it served "the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety."28 The Court concluded that the society's "asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation,"29 and it upheld the district court's decision to reject that defense without even making any findings on the issue.30 The Court acknowledged that engineering "is an important and learned profession" and that the society sought "to preserve the profession's 'traditional' method of

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24. Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).
27. Id. at 681.
28. Id.
29. Id.
30. Id.
selecting professional engineers." Nevertheless, these kinds of arguments simply are not cognizable under the Rule of Reason. Rather, the Court held, "the inquiry is confined to a consideration of impact on competitive conditions." The Court offered the following analysis:

Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. This principle is apparent in even the earliest of cases applying the Rule of Reason . . . . The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason. As the Court observed in Standard Oil Co. v. United States, "restraints of trade within the purview of the statute . . . [can] not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made."

The Court drove the point home by further noting that "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Thus, even the "fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter [the] analysis." In sum, as the Court has affirmed in several other cases, "the Rule of Reason does not support a

31. Id. at 684.
32. Id. at 690 (emphasis added).
33. Id. at 688-90 (quoting 221 U.S. at 65) (citations omitted).
34. Id. at 692.
35. Id. at 695.
36. See FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (striking down boycott of the courts by public defenders in spite of the fact that their protest had a public interest element to it); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 465 (1986) (striking down agreement among dentists to refuse to provide insurance companies with copies of their X-rays, despite the fact that dentists argued that they were merely enforcing a state law preventing insurance companies from considering the X-rays; the Court stated that the fact that "a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it"); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (striking down maximum price-fixing agreement among doctors, despite the fact that the agreement allowed the doctors to agree on a common insurance scheme);
defense based on the assumption that competition itself is unreasonable."37

The second point worth noting is that the Rule of Reason necessarily involves a factual inquiry: plaintiffs must establish facts demonstrating the anticompetitive effects of agreements and defendants must establish facts that demonstrate actual procompetitive justifications. Perhaps the clearest statement of this point is Justice Brandeis's formulation of the Rule of Reason in Chicago Board of Trade v. United States,38 a statement the Court has called the "classic statement of the rule of reason."39

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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.40

Thus, opinions applying the Rule of Reason ordinarily (1) point to factual evidence (or the lack thereof) when analyzing both plaintiffs' proof of anticompetitive effect and defendants' assertion of procompetitive justification and (2) reject noncommercial justifications for the challenged restraint as

Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (holding state bar association's minimum fee scale unlawful under Sherman Act and specifically concluding that state's interest in regulating the legal profession was not sufficient to exempt the fee scale from antitrust scrutiny); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (holding that horizontal restraints by cooperative buying association for small and medium sized regional supermarket chains constituted per se violation of Sherman Act Section 1 despite the fact that the practices were necessary to allow smaller chains to compete with larger, national chains, and stating that "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy").

37. Nat'l Soc'y of Prof'l Engineers, 435 U.S. at 696.
38. 246 U.S. 231 (1918).
40. 246 U.S. at 238 (emphasis added).
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legally irrelevant.

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

The only case in which the Supreme Court has applied the Rule of Reason to the NCAA is NCAA v. Board of Regents of the University of Oklahoma.41 In that case, plaintiffs, the Universities of Oklahoma and Georgia, challenged a television broadcasting plan (the "Plan") that the NCAA cartel enforced by means of imposing a group boycott on schools that did not comply.42 The Plan limited the number of games that could be broadcast, fixed the prices that could be charged, and generally benefited smaller schools at the expense of the bigger football powerhouses.43 The plaintiffs asserted that the Plan violated Sherman Act Section 1.44

The Court initially noted that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high."45 In such circumstances, the Court continued:

a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.46

Thus, the Court applied the "no noncommercial justifications" principle and squarely rejected the notion that amateurism in and of itself is a legitimate excuse for anticompetitive behavior by the NCAA.47 Indeed, the principle of amateurism was not even enough to move the NCAA's horizontal price fixing

42. Id. at 94-95.
43. Id. at 91-94.
44. Id. at 88.
45. Id. at 100.
46. Id. at 100-01 (emphasis added).
47. Id. at 101. The Court provided further elaboration highlighting this point in a footnote: "While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice." Id. at 101 n.23 (citations omitted).
activities from *per se* condemnation to a Rule of Reason standard. Rather, the only acceptable justification, the "critical" thing, was that the NCAA operated in an industry in which some horizontal restraints are *essential* if the product is to be available at all.\footnote{48}

Whether the TV contract restraints were essential to the product of televised college football was undeniably a question of *fact*. In conducting its Rule of Reason analysis, the Court specifically relied on evidence submitted to, and findings of fact made by, the district court.\footnote{49} The extensive trial record included (1) evidence of the history of the NCAA television plan, including the changes and development of the NCAA's broadcasting practices since 1938,\footnote{50} and (2) the testimony of "a parade of witnesses" specifically addressing the factual veracity of the NCAA's assertions of procompetitive benefits.\footnote{51} The district court, relying on expert testimony and objective data, specifically found that (1) "if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights;"\footnote{52} and (2) "by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market."\footnote{53} The Court's analysis specifically highlighted the critical significance of factual findings to the Rule of Reason determination: "In light of these findings, it cannot be said that 'the agreement on price is necessary to market the product at all'. . . . The NCAA's efficiency justification is not supported by the record."\footnote{54}

In light of this analysis, one would expect that the post-*Regents* cases considering antitrust challenges to the NCAA's amateurism rules would similarly (1) *not* rule in favor of the NCAA simply out of "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics;"\footnote{55} and (2) would, instead, require the submission of evidence (e.g., testimony from a "parade of witnesses") by both the plaintiffs and the NCAA so that the court could make findings as to whether the

\begin{itemize}
  \item \footnote{48}{*Id.* at 101.}
  \item \footnote{49}{*Id.* at 104-08.}
  \item \footnote{50}{*Id.* at 89-94.}
  \item \footnote{52}{*Bd. of Regents*, 468 U.S. at 105.}
  \item \footnote{53}{*Id.* at 106.}
  \item \footnote{54}{*Id.* at 114-15 (quoting Broad. Music Inc., v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979)).}
  \item \footnote{55}{*Id.* at 101.}
\end{itemize}
challenged rules are in fact "necessary to market the product at all."\textsuperscript{56} Quite the contrary, not a single court that has considered the question has required the NCAA to actually prove that the particular amateurism rule at issue was \textit{necessary} to market the product of college football. In other words, no federal court has ever actually received evidence and made findings on the issue of whether particular amateurism rules are in fact essential to the NCAA's product. Rather, these courts have simply assumed that the amateurism rules are necessary.\textsuperscript{57} While the ultimate explanation for this appears to be psychosocial, as discussed at length below, there is a portion of \textit{Board of Regents} that is partially to blame.

As noted above, early in its analysis the Court rejected mere "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics" as a basis for not striking down horizontal restraints by the NCAA as illegal \textit{per se}.\textsuperscript{58} Rather, the Court explicitly stated that it would apply the Rule of Reason because college football is an industry in which some "horizontal restraints on competition are \textit{essential} if the product is to be available at all."\textsuperscript{59} "A myriad of rules," the Court explained, "affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete."\textsuperscript{60} Justice Stevens, however, then wrote several sentences of dicta—premised, apparently, on nothing more than his personal opinion—that have become the final word on the amateurism issue:

Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product"

\textsuperscript{56} \textit{Id.} at 114.

\textsuperscript{57} \textit{See infra} Part III; \textit{see also} Pekron, \textit{supra} note 14, at 53 ("Whenever a court of law has discussed amateurism, the court has always simply assumed that it is necessary to produce college athletics. However, the NCAA has never been required to prove that without amateurism, college athletics would be indistinguishable from professional athletics"). The author is unaware of any comprehensive survey evidence addressing the issue of the necessity of the NCAA's amateurism rules to the preservation of college football or other college sports as distinct goods. However, there are significant empirical facts that suggest that the viewing public would \textit{not} flip the channel simply because the players on a college football team were receiving an increased stipend or were receiving a share of the endorsement money that their coaches currently keep all to themselves. In 2003, for example, both the Nebraska legislature and the California senate passed bills that called for their states' schools to pay college athletes. \textit{See Legislature Votes to Pay Cornhuskers}, N.Y. TIMES, April 12, 2003, at S3; Steve Wieberg, \textit{NCAA's Extra Funding Benefits Athletes}, USA TODAY, available at http://www.usatoday.com/sports/college/2003-12-23-ncaa-athlete-welfare_x.htm (last visited Apr. 1, 2005); \textit{see also} discussion \textit{infra} Part IV.A.

\textsuperscript{58} \textit{Bd. of Regents}, 468 U.S. at 101.

\textsuperscript{59} \textit{Id.} (emphasis added).

\textsuperscript{60} \textit{Id.}
with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.\textsuperscript{61}

The language in this dicta is directly on point, at least with respect to the most hotly contested and economically significant of the amateurism rules: it says in plain English that \textit{athletes must not be paid}. The language is also, however, plainly dicta, plainly not binding, and plainly not based on facts of any sort. Justice Stevens's casual ending of the last sentence indicates the musing tone with which this rambling dicta was written: \textit{and the like}. The passage itself states a possibility that might be borne out in a case that actually developed a factual record: it is only the identification with an academic tradition (\textit{i.e.}, a player's affiliation with a school), and not any restrictions on a players' receiving endorsement money (\textit{i.e.}, on his being paid) that is essential to the product of college football. Ironically, the Court itself has long warned of the dangers of "\textit{voluntary statement[s] on a point not in issue:}"\textsuperscript{62} "\textit{obiter dicta,} like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases."\textsuperscript{63}

III. AMATEURISM CASES BEFORE AND AFTER \textit{BOARD OF REGENTS}

There are six published decisions in which federal courts consider Sherman Act challenges to NCAA amateurism rules, two before \textit{Board of Regents} and four after it.\textsuperscript{64} As noted above, \textit{none} of these decisions contains a

\textsuperscript{61} \textit{Id.} at 101-02.


\textsuperscript{63} \textit{Id.}; see also U.S. v. Schultz, 333 F.3d 393, 407 n.8 (2d Cir. 2003) (quoting Bowen, L.J. and noting "dangers inherent in a court's reaching out to decide issues not essential to the outcome of the case before it").

\textsuperscript{64} There are two other cases rejecting Sherman Act challenges to the NCAA's eligibility rules: Hairston v. Pacific-10 Conference, 893 F. Supp. 1495 (W.D. Wash. 1995), aff'd 101 F.3d 1315 (9th Cir. 1996); and Smith v. NCAA, 978 F. Supp. 213 (W.D. Penn. 1997), aff'd 139 F.3d 180 (3d Cir. 1998). These cases, however, are not examples of direct challenges to the NCAA's amateurism rules. \textit{Hairston} involved a Section 1 challenge to sanctions imposed by the Pac-10, pursuant to NCAA rules, on the University of Washington football team for violations of the no-compensation rule. \textit{Hairston}, 893 F. Supp. at 1496. The district court applied the Rule of Reason and granted summary judgment for defendants, and the Ninth Circuit affirmed. \textit{Hairston}, however, did not involve a legitimate challenge to any of the NCAA's bylaws. Rather, the plaintiffs' claims were "based solely on their belief that the penalty was excessive and that, therefore, it must have been the product of an
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record developed by a trial court that considered whether the rules in question were in fact essential to the product of college football. Courts either conducted nothing more than a "blind look" Rule of Reason analysis, simply assuming that the amateurism rules were not unreasonable restraints of trade, or they held, in a similar vein, that the Sherman Act does not even apply to the amateurism rules. To date, therefore, the federal courts have not actually conducted a legally sound Rule of Reason analysis of the NCAA's amateurism rules.

A. Cases Before Board of Regents

1. Jones v. NCAA

In Jones v. NCAA, a district court considered a Sherman Act Section 1 challenge to the NCAA's most basic amateurism rule: the prohibition on athletes' receiving monetary compensation for playing sports. The plaintiff, Stephen Jones, was a student at Northeastern University who wished to play on the school's hockey team. Jones, however, "had played for a succession of Canadian and American 'amateur' hockey teams" during high school and for two years after graduating from high school and before enrolling at Northeastern. Because he received compensation from these teams, the NCAA declared Jones ineligible to play at Northeastern.

The district court noted 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." The Court concluded that it does not,
offering the following analysis:

The plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a "competitor" within the contemplation of the antitrust laws. The "competition" which the plaintiff seeks to protect does not originate in the marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university. And, of equal significance, plaintiff has so far not shown how the action of the N.C.A.A. in setting eligibility guidelines has any nexus to commercial or business activities in which the defendant might engage.\(^7\)

Thus, because Judge Tauro, a 1953 graduate of Brown University, viewed Jones as a "student" and "not [as] a businessman," the NCAA was not, in the court's view, subject to the Sherman Act at all. The judge's social outlook quite literally created a federal antitrust exemption for a multimillion dollar sports cartel.

For good measure, Judge Tauro provided the alternative analysis if one assumed that the NCAA was not in fact exempt from the Sherman Act. In that case, he concluded, Jones still could not make a substantial showing that he was entitled to relief because "[i]n order to make out a group boycott claim the plaintiff must allege that the defendant's purpose was to exclude a person or group from the market or accomplish some other anti-competitive objective."\(^7\) Judge Tauro summarily concluded that Jones would not be able to make this showing:

The N.C.A.A. was originally established to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions. The N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding. Any limitation on access to intercollegiate sports is merely the incidental result of the organization's pursuit of its legitimate goals.\(^7\)

What was the basis for these various conclusions about the NCAA? Nothing. Just as Judge Tauro had a certain preconceived view of who Jones

\(^7\) Id.
\(^7\) Id. at 304.
\(^7\) Id.
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was (a "student" and "not a businessman"), he had a certain preconceived view of what the NCAA was: a benevolent protector of principles of amateurism. Thus, despite the absence of any relevant language in the statute or any controlling case law, the Jones court decided to create a blanket exemption for the NCAA from federal antitrust regulation of its restraints on college athletes. The court relied on absolutely no evidence in reaching this conclusion, but instead based its decision entirely on its own assumptions about the NCAA and about college athletes. While these assumptions may have had some validity at Brown University in the early 1950s, the NCAA's own executive director at the time Stephen Jones filed suit has stated in no uncertain terms that the rule Jones was challenging was "not about amateurism" but was in reality about "who controls the negotiations and gets the money." 74

2. Justice v. NCAA

Justice v. NCAA 75 offers a longer but no less naïve analysis of the college-athlete plaintiffs' Sherman Act claims. In Justice, several members of the University of Arizona's football team had received cash payments as compensation for their efforts on the field. 76 The NCAA sanctioned the entire team by prohibiting the University of Arizona from participating in postseason football, an activity which typically generates substantial revenues for the school 77 and which gives the players substantial exposure to NFL scouts. Four students who had not received cash payments challenged the sanctions, asserting a Sherman Act Section 1 claim. 78

Unlike Judge Tauro, Judge Kelleher had no trouble concluding that the NCAA's amateurism rules have "a substantial effect on interstate commerce" and thus are subject to the Sherman Act. 79 Moving to the plaintiffs' group boycott claim, however, Judge Kelleher reached the same conclusion as the court in Jones: the sanctions at issue "have been shown to lack an

74. BYERS, supra note 14, at 346.
75. 577 F. Supp. at 356.
76. Id. at 362.
79. Id. at 378 (citations omitted). The Court initially concluded that the four football players in the case lacked standing: "the Court is of the opinion that the plaintiffs' allegation of threatened injury to their ability to compete for professional contracts is too remote to meet the standing requirement of Section 16 of the Clayton Act." Id. The Court, however, decided not to dismiss for lack of standing and instead disposed of the case on the merits.
anticompetitive purpose and to be directly related to the NCAA objectives of preserving amateurism and promoting fair competition."\textsuperscript{80} Just how this was "shown" is not indicated. Nothing in the record is pointed to, no evidence is discussed, nothing is written to suggest Judge Kelleher, a 1935 graduate of Williams College, did anything other than simply assume the NCAA had the best of intentions.

More significantly, from a legal standpoint, the *Justice* court applied the wrong legal standard to the sanctions. The court's conclusion that the sanctions were lawful was based not on a balancing of anticompetitive effect and procompetitive justification but rather on Judge Kelleher's unsubstantiated determination that the sanctions had no anticompetitive *purpose*:

In sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type, exemplified by the rules in *Hennessey* and *Jones*, is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose. The NCAA sanctions at issue here are clearly of the former variety. Because the sanctions evince no anticompetitive purpose, are reasonably related to the association's central objectives, and are not overbroad, the NCAA's action does not constitute an unreasonable restraint under the Sherman Act.\textsuperscript{81}

This test, of course, is not the test for the Rule of Reason but rather is a partial statement of the analysis to be applied in determining whether a sports league's self-regulatory measures come within the *Silver* exception to *per se* treatment for group boycotts.\textsuperscript{82} Indeed, Judge Kelleher used precisely this standard to make precisely that determination (*i.e.*, that he should apply the Rule of Reason and not the *per se* rule) just a couple pages earlier in the opinion.\textsuperscript{83} The *Justice* court's application of the same standard to its Rule of

\begin{itemize}
\item 80. *Id.* at 382.
\item 81. *Id.* at 383 (emphasis added) (citations omitted).
\item 82. Under the *Denver Rockets* test, in order for conduct to fall within the *Silver* exception to *per se* invalidation of group boycotts or concerted refusals to deal there must be proof that:
\begin{enumerate}
\item There is a legislative mandate for self-regulation "or otherwise";
\item The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary;[ and]
\item The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.
\end{enumerate}

\item 83. *Justice*, 577 F. Supp. at 381-82.
Reason analysis is legal error. The court made no findings of anticompetitive effect, made no findings of procompetitive benefits, and certainly made no attempt to balance the two. The *Justice* court, quite simply, never conducted a Rule of Reason analysis at all.

Furthermore, even the court's determination that the sanctions at issue lacked an anticompetitive purpose is almost certainly erroneous under current precedent, at least to the extent that the determination was made as a matter of law and not as a matter of fact. In concluding that the NCAA sanctions lacked an anticompetitive purpose, Judge Kelleher points not to evidence or the lack thereof, but rather to precedent. The case he relied on most heavily was *Hennessey v. NCAA*,\(^{84}\) which upheld an NCAA bylaw limiting the number of assistant coaches member institutions could employ for their Division I football and basketball teams.\(^{85}\) *Hennessey*, however, does not actually bear Judge Kelleher's position out. The *Hennessey* court, for example, acknowledged that the bylaw at issue in that case was a cost-containment measure (*i.e.*, that it was a concerted agreement among cartel members to lower the cost of their inputs).\(^{86}\) It upheld the bylaw in spite of that fact because of the dubious proposition that this cost-cutting was still principally about amateurism:

> Bylaw 12-1 was, with other rules adopted at the same time, intended to be an "economy measure". In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics by curtailing, as it were, potentially monopolistic practices by the more powerful and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.\(^{87}\)

This reasoning, which will certainly strike most economists as naïve, was recently rejected by the Tenth Circuit in a case involving a challenge to an NCAA bylaw limiting assistant coaches' salaries:

> [T]he *Hennessey* court placed the burden of showing the unreasonableness of the coaching restriction in that case on the plaintiff and then found that the plaintiff could not make such a showing because the rule had only recently been implemented. In our analysis, the plaintiff only has the burden of establishing the anticompetitive effect of the restraint at issue. Once the plaintiff

\(^{84}\) 564 F.2d 1136 (5th Cir. 1977).

\(^{85}\) *Id.* at 1152-53.

\(^{86}\) *Id.* at 1153.

\(^{87}\) *Id.*
meets that burden, which the coaches have done in this case by showing the naked and effective price-fixing character of the agreement, the burden shifts to the defendant to justify the restraint as a "reasonable" one .... The NCAA asserts that the Restricted Earnings Coaches [REC] Rule will help to maintain competitive equity by preventing wealthier schools from placing a more experienced, higher-priced coach in the position of restricted-earnings coach. The NCAA again cites *Hennessey* to support its position, and again we find *Hennessey* to be unpersuasive for the reasons previously articulated .... Nowhere does the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities. 88

The propriety of the Tenth Circuit's insistence on the NCAA's proving its self-serving contentions with evidence is shown by Walter Byers's own account of the "enhances competition" argument: "I contend most of the restraints are not there to enhance competition between and among the colleges of NCAA Division I (and certainly not between and among the colleges in the three divisions). The rules, based on a turn-of-the-century-theory of amateurism, enforce a modern economic order." 89

Furthermore, unlike Judge Kelleher, the *Hennessey* court acknowledged that "[t]he motive which underlies a challenged restraint is but one element in the examination of reasonableness," and that the ultimate issue must be the "relative positive and negative effects" of the challenged restrictions. 90 In *Hennessey*, the trial court did actually receive evidence on the effects of the challenged bylaw. 91 As the Fifth Circuit noted, however, the evidence was ultimately inconclusive: "The ultimate effects of the Bylaw, positive and negative, are difficult to determine .... The court .... is rather of the view admittedly bordering on speculation that the Bylaw will be of value in achieving the ends sought by the association and will have in time lesser, not greater, adverse effect upon assistant coaches than that already experienced." 92 Nevertheless, apparently giving the NCAA the benefit of the doubt, the Fifth

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88. Law v. NCAA, 134 F.3d 1010, 1021, 1024 (10th Cir. 1998) (emphasis added) (citations omitted).
89. BYERS, supra note 14, at 390.
90. Id.
91. *Hennessey*, 564 F.2d at 1153. The bylaw at issue in *Hennessey* had to do with the number of assistant coaches a school could employ and was not one of the amateurism rules at issue in this article.
92. Id.
Circuit affirmed the judgment in favor of the NCAA.

In relying on *Hennessey*, therefore, the *Justice* court was relying on questionable precedent that was based on admittedly speculative conclusions and whose central holding has since been rejected by a court ruling on a substantially similar NCAA bylaw with the benefit of a more developed record.\(^9\) Furthermore, like Judge Tauro, Judge Kelleher never considered any evidence or made any findings of fact with respect to the procompetitive and anticompetitive effects of the NCAA's amateurism rules. He simply asserted, without any evidentiary basis, that the sanctions at issue "have been shown to lack an anticompetitive purpose and to be directly related to the NCAA objectives of preserving amateurism and promoting fair competition."\(^9\)

*Justice* was, in sum, the second time a federal court gave the NCAA a free pass out of an antitrust challenge.

### B. Post-Regents Cases

1. **McCormack v. NCAA**

The Supreme Court's decision in *Board of Regents* served only to strengthen federal courts' sense that students are "not businessmen" and that amateurism is, as a matter of law, a valid defense to college athletes' Sherman Act claims against the NCAA. The first case decided after *Board of Regents* was *McCormack v. NCAA*.\(^9\) In *McCormack*, the NCAA imposed a "death penalty" sanction on Southern Methodist University because the school had been compensating its football players beyond the restrictions imposed by NCAA bylaws.\(^9\) Members of the football team brought suit, asserting that the restrictions on athletes' compensation constituted illegal price fixing in violation of Sherman Act Section 1.\(^9\)

The district court dismissed the complaint without opinion.\(^9\) The Fifth Circuit affirmed. The appellate panel determined that it should apply the Rule

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\(^9\) In *Hennessey*, the Bylaw was challenged just one month after it was adopted ("The ultimate effects of the Bylaw, positive and negative, are difficult to determine on the basis of evidence taken just a month after its effective date"). In *Law* the challenged bylaw had been in effect for over two years. See *Law v. NCAA*, 902 F. Supp. 1394, 1400 (D. Kan. 1995), aff'd, 134 F.3d 1010 (10th Cir. 1998).

\(^9\) *Justice*, 577 F. Supp. at 382.

\(^9\) 845 F.2d at 1338.

\(^9\) Id. at 1340.

\(^9\) Id.

\(^9\) Id.
of Reason to the NCAA's compensation rules. The panel then had no trouble concluding that the NCAA's bylaws satisfied the Rule of Reason, despite the fact that there was absolutely no evidence in the record —indeed, in spite of the fact that the district court had made no findings of fact at all. How could it do this? In the panel's mind, Board of Regents had decided the issue:

The essential inquiry under the rule-of-reason analysis is whether the challenged restraint enhances competition. Applying this test, we have little difficulty in concluding that the challenged restrictions are reasonable. The Supreme Court indicated strongly in Board of Regents that such was the case.

Under governing case law and basic principles of appellate review, the panel clearly should have remanded for factual findings on the anticompetitive effects and procompetitive benefits of the challenged restraint. Instead, Justice Stevens's offhand remark in a case that had nothing to do with amateurism rules served as the sole basis for the Fifth Circuit's decision on the issue.

2. Gaines v. NCAA

An even more disturbing result was reached by the court in Gaines v. NCAA. The plaintiff in Gaines was a Division I-A football player who had violated the NCAA's no-draft and no-agent rules, and who, after failing to be picked up in the NFL draft, sought collegiate reinstatement. The plaintiff brought suit under Section 2 of the Sherman Act, seeking an injunction.

The district court began its analysis by questioning whether the NCAA's eligibility rules are subject to federal antitrust law. Undeterred by the lack of any mention of the NCAA amidst the various statutory exemptions to

99. Id. at 1344.
100. Id.
101. See Hornsby Oil Co., Inc. v. Champion Spark Plug Co., Inc., 714 F.2d 1384, 1392 (5th Cir. 1983) ("The rule of reason inquiry focuses on the competitive significance of a particular restraint, to be measured by reference to 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,' as well as the actual impact of this restraint on competition") (emphasis added) (quoting Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978)); N. Miss. Communications, Inc. v. Jones, 792 F.2d 1330, 1334 (5th Cir. 1986) (noting that "the court should properly have applied the rule of reason and made a finding as to whether the agreement promoted or suppressed competition" but deciding not to remand case because the district court had made other "findings [that] are sufficient for us to make the necessary determination").
102. 746 F. Supp. at 738.
103. Id. at 740.
104. Id. at 741.
105. Id. at 742.
federal antitrust regulation\textsuperscript{106} or by the fact that the Supreme Court had squarely stated that "respect for amateurism" was not a basis for such exemption.\textsuperscript{107} Judge Wiseman held that the NCAA's eligibility rules are exempt from the Sherman Act; and he did so precisely out of respect for amateurism.\textsuperscript{108} Having adduced no evidence on the issue and thus having made no relevant findings of fact, Judge Wiseman, a 1952 graduate of Vanderbilt University, quite literally deferred first, to the NCAA's opinion of whether it should be subject to the Sherman Act and second, to his nostalgic sense of neo-classical education:

According to the NCAA Constitution, the purposes of the NCAA eligibility Rules are to maintain amateur 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." The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme—to prevent commercializing influences from destroying the unique "product" of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes." This Court, therefore, rejects the notion that such Rules may be judged or struck down by federal antitrust law.\textsuperscript{109}

If, in the alternative, the Sherman Act did apply to the NCAA, Judge Wiseman concluded that the NCAA would still prevail:

This Court is convinced that the NCAA Rules benefit both players and the public by regulating college football so as to preserve its amateur appeal. Moreover, this regulation by the NCAA in fact makes a better "product" available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs. Therefore, Gaines cannot succeed on the merits of his § 2 claim because the NCAA has

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\textsuperscript{106} See, e.g., 15 U.S.C. § 1291 (exempting from antitrust laws agreements covering the telecasting of sports contests and the combining of professional football leagues).

\textsuperscript{107} Bd. of Regents, 468 U.S. at 101.

\textsuperscript{108} Gaines, 746 F. Supp. at 743-44.

\textsuperscript{109} Id. at 744 (citations omitted).
\end{flushleft}
shown legitimate business justifications for the Rules at issue.110

Just what convinced the court that the no-draft and no-agent rules benefited both college football players and the public is never discussed in Gaines. What is certain is that whatever it was that convinced Judge Wiseman on the no-draft rule was unquestionably wrong. The NCAA amended its bylaws in October 2002 to allow players like Gaines to have their eligibility reinstated.111 The "educational underpinnings," "stability," and "integrity of college football programs" seem to have been unaffected by the new rule.112 Certainly the rule cannot be said to have been essential to the product of college football. Finally, although Gaines was a Section 2 and not a Section 1 case, Judge Wiseman felt that Board of Regents, particularly the dicta about not paying players, bolstered all of his conclusions.113

3. Banks v. NCAA

The next case to consider an antitrust challenge to the NCAA's amateurism rules was Banks v. NCAA.114 The plaintiff in Banks challenged the no-draft and no-agent rules under Section 1 of the Sherman Act.115 In contrast to Gaines, the district court in Banks readily concluded that the Sherman Act applied to the NCAA's eligibility rules.116 Citing the "must not be paid" dicta in Board of Regents, which the NCAA contended absolved it of antitrust liability, Judge Miller concluded as follows:

It does not appear, however, that this language was intended to mean that such activities are not subject to the Sherman Act. Instead, it appears that the Court was explaining its decision to apply the Rule of Reason to the television plan rather than finding it to be a per se violation of the Sherman Act.117

Judge Miller then turned to the allegations in Banks's complaint. After rejecting several alternative arguments by Banks, Judge Miller turned to Banks's central claims:

Mr. Banks argues that the Bylaws at issue constitute unreasonable restraints upon the activities of individuals like him (and

110. Id. at 746.
111. NCAA, supra note 4, art. 12.2.4.2.3.
113. Id. at 747.
114. 746 F. Supp. at 850.
115. Id.
116. Id. at 857.
117. Id.
institutions such as Notre Dame), since they are overbroad and sweep within their ambit many players who are still amateurs in every meaningful sense of the word, because they have not signed a professional athletic contract and have received nothing of value from any team, agent, or other person, except reimbursement for travel expenses to attend tryouts. . . . [In particular,] Mr. Banks has posited a credible anticompetitive effect of Bylaw 12.2.4.2, the "no-draft" rule. College football, he suggests, is a substantial moneymaker. The "no-draft" rule will deter better college football players from testing the waters of professional football for fear of finding themselves in the no-man's land in which Mr. Banks has placed himself. Accordingly, better players will remain in school and out of the NFL draft, enhancing the NCAA's already profitable product.118

While Judge Miller's opinion mentions no evidence submitted in support of Banks's claim, the court seemed to consider Banks's allegations to be self-evident, at least with respect to the anticompetitive effects of the no-draft rules.119 Judge Miller, however, next considered the NCAA's response:

In turn, the NCAA has articulated procompetitive effects of its "no-draft" rule. NCAA regulations are designed to preserve amateurism and to prevent the professionalization of college sports to the extent educational objectives would be overshadowed. . . . The NCAA contends, with some hyperbole, that without the restraints of eligibility rules, the distinct "product", college football, would not survive as an amateur sport.120

The task before the court was to conduct the traditional Rule of Reason analysis, an analysis in which

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied, [including] its condition before and after the restraint was imposed; the nature of the restraint and its effect, . . . [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained.121

Rather than ascertain any facts about the NCAA's contentions, however,

118. Id. at 860.
119. Id. ("Mr. Banks has posited a credible anticompetitive effect of Bylaw 12.2.4.2 . . . ").
120. Id. at 860-61.
121. Chi. Bd. of Trade, 246 U.S. at 238 (emphasis added).
the court merely cited to *Justice* and *Board of Regents* and accepted all of the NCAA's assertions as true:

The court agrees with the holdings of these cases and with the dicta in *NCAA v. Board of Regents* and finds that reasoning equally applicable to the Bylaws at issue here. The NCAA's "no draft" and "no agent" rules are intended to preserve the intercollegiate football's amateur nature. The concept of amateurism is no less central to the concept of amateur college football than are the modest propositions that an athlete must enroll in the college for which he wishes to play, attend classes, and maintain a minimal academic standing. Each of those limitations constitute restraints with some anticompetitive nature. The procompetitive nature of the regulations, however, outweighs the anticompetitive effects.\(^{122}\)

Thus, like the district courts before it, the *Banks* court concluded that the NCAA's amateurism rules were lawful under the Rule of Reason without ever conducting a factual inquiry into the NCAA's proffered procompetitive justifications. In light of the Rule of Reason analysis set out in *Board of Regents*, ruling in favor of the NCAA meant holding that the challenged eligibility rules were necessary to create the NCAA's product of college football. As we have already seen, however, there is no question that at least one of the rules challenged by Braxton Banks was not necessary to college football: the NCAA effectively dropped its no-draft rule in October 2002.

The Seventh Circuit affirmed, concluding that Banks "failed to allege an anti-competitive impact" at all.\(^{123}\) The court's opinion, authored by Judge John Louis Coffey, a 1943 graduate of Marquette University,\(^{124}\) is notable for its harsh tone and for its extraordinarily parochial view of college athletics, a view demonstrably out of touch with objective reality. Having no factual record whatsoever to work from, the court cited only to the NCAA's constitution to conclude that "[t]he NCAA Rules seek to promote fair competition, encourage the educational pursuits of student-athletes and prevent commercialism."\(^{125}\) Furthermore, the Court felt that "Banks' allegation that the no-draft rule restrains trade is absurd."\(^{126}\) Judge Coffey explained why as follows:

\(^{122}\) *Banks*, 746 F. Supp. at 862.

\(^{123}\) *Banks*, 977 F.2d at 1089.

\(^{124}\) The other member of the panel to vote with Judge Coffey was Judge Robert Allen Grant, a 1928 graduate of the University of Notre Dame.

\(^{125}\) *Banks*, 977 F.2d at 1089.

\(^{126}\) *Id.*
None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education. Because the no-draft rule represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives," the no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college and "play for pay" football.127

The court then made a point of insulating the NCAA from any further antitrust challenges by college athletes in the future, at least in the Seventh Circuit:

We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations, and hold that the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students.128

Had Judge Coffey bothered to ascertain a factual background of the NCAA's various bylaws before penning his strongly worded chastisement of college athletes like Braxton Banks, he may not have been so quick to conclude that those rules were "designed to preserve the honesty and integrity of intercollegiate athletics."129 Consider just one example that might have been before the court had Banks been allowed to develop a factual record. Throughout most of its existence, the NCAA allowed its members to offer college athletes four-year scholarships.130 Athletes, particularly athletes in dangerous sports such as Division I-A football, found the long-term scholarships desirable, since they effectively shifted the risk of injury to the schools and allowed an injured athlete to continue pursuing his education. The unrestrained market worked as any student of economic competition would have expected. Athletes deciding between institutions that offered four-year scholarships and those that offered only one-year scholarships frequently chose the former because of the desirability of those scholarship terms, and the one-year schools began offering better terms in order to compete with their

127. Id. at 1089-90.
128. Id. at 1090.
129. Id.
130. BYERS, supra note 14, at 75.
In the 1970s, however, the NCAA adopted a rule prohibiting long-term scholarships. NCAA members were required to offer only one-year scholarships, and, in fact, the current version of the rule specifically states that "[i]t is not permissible for an institution to assure the prospect that it automatically will continue a grant-in-aid past the one-year period if the recipient sustains an injury that prevents him or her from competing in intercollegiate athletics." This rule did nothing to "preserve the honesty and integrity of intercollegiate athletics." The rule was simply a cost-cutting measure, one that emphasized that NCAA members' focus was on the athlete and not on the student. And what about the no-draft and no-agent rules? Judge Coffey considered them "essential" to college football, stating that their elimination "would fly in the face of the NCAA's amateurism requirements." Yet, as we have seen, the no-draft rule was, as a matter of indisputable fact, quite simply not essential to college football: the NCAA effectively did away with the no-draft requirement in 2002. As for the no-agent rule, the NCAA's own former Executive Director Walter Byers has criticized the rule as hypocritical and has called for its abolition, and several authorities have argued that if a court ever bothered to actually make legitimate findings of fact the no-agent rule would fail to survive a Rule of Reason analysis. Even the term "student-athlete," as a matter of historical fact, is a vestige of the NCAA cartel's cost-containment efforts and has nothing to do with abstract principles of amateurism.

How, then, could the Seventh Circuit panel, which is to say Judges Coffey and Grant, have gotten it so wrong? A later portion of the opinion provides the answer: the panel had a preconceived, paternalistic view of what college athletes should be like, and they had a strong distaste for the lifestyle they associated with elite athletes like Braxton Banks, athletes who attended college having hopes of playing professional sports rather than having "a

131. See id. ("Some colleges were offering only one-year grants to recruits, who were being wooed away by colleges offering 'no-cut' four-year grants. To offset the potential talent drain, many schools making one-year grant offerings stated that the grants would be renewed so long as the student continued in intercollegiate athletics").
132. NCAA, supra note 4, art. 15.3.3.1.2.
133. Banks, 977 F.2d at 1090.
134. Id. at 1091.
135. BYERS, supra note 14, at 346, 392.
136. See, e.g., Pekron, supra note 14; and Sherman Act Invalidation, supra note 14.
137. BYERS, supra note 14, at 67-76 (relating the history of the term "student-athlete," and noting that the term was created in response to "the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts," and so the schools would be required to provide workmen's compensation for their injured players).
proper focus on their *educational* pursuits."¹³⁸ Judge Coffey painted this parade of horribles:

Elimination of the no-draft and no-agent rules would fly in the face of the NCAA's amateurism requirements. Member schools might very well be exposed to agents offering the services of their football playing clients to the highest bidder. In representing their "pro athlete" clients, the agents would in all probability attempt to bargain with the NCAA school and might very well expect the school to offer their client an attractive contract possibly involving automobiles, condominiums, and cash as compensation in contravention of the NCAA amateurism rules. Such arrangements might involve cash compensation payable only in the future after the player has completed his college eligibility and continues with an NFL club. The involvement of professional sports agents in NCAA football would turn amateur intercollegiate athletics into a sham because the focus of college football would shift from educating the student-athlete to creating a "minor-league" farm system out of college football that would operate solely to improve players' skills for professional football in the NFL. We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.¹³⁹

Judge Coffey thus clearly had a personal distaste for "cold commercialism" in college athletics. He did not want to see the "quick buck of pro sports" infect college campuses, "possibly involving automobiles, condominiums, and cash as compensation."¹⁴⁰ Rather, in Judge Coffey's view of the world, college athletes' proper focus is on their educational pursuits. Just why a rational economic actor who could sell his athletic abilities for millions more than his academic talents would focus on academia is never explained. One wonders, however, whether Judge Coffey would uphold similar explicit restrictions by law firms on the salaries and employment conditions of young attorneys (e.g., summer associates, or all attorneys four years or less out of law school) in order to keep those budding young lawyers properly focused on their work and to prevent them from being distracted by

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¹³⁸ *Banks*, 977 F.2d at 1091.

¹³⁹ *Id.*

¹⁴⁰ *Id.*
the decadent lifestyle espoused by many young, highly-paid urban professionals. If he would not, why not? What exactly is the principled difference between a twenty-something attorney at a whiteshoe law firm and a twenty-something college football player like Braxton Banks?

IV. A UNIFYING THEORY OF FEDERAL COURT APPROVAL OF NCAA AMATEURISM RULES

Each of the six federal courts to consider antitrust challenges to the NCAA's amateurism rules concluded that the cases could be dismissed without requiring the NCAA to prove that the challenged rules were, in fact, essential to the product of college football. This uniformity cannot be explained by any governing precedent: two of the cases did not have the benefit of Board of Regents, and each of the cases after Board of Regents recognized that the relevant portion of that opinion was only dicta. The best explanation for the federal courts' treatment of NCAA amateurism rules to date is not legal but sociological: the judges who ruled on the issue, all of whom were white men and all but one of whom attended college before 1960, had a preconceived notion of what college athletes should be like, and they quite literally wrote that viewpoint into law. This attempt at social engineering is particularly striking for two reasons: (1) it is demonstrably at odds with factual reality; and (2) it flies in the face of well-established antitrust principles that call for competition unrestrained by social norms.

A. ASSUMPTIONS ABOUT "STUDENT-ATHLETES" AND THE NECESSITY OF AMATEURISM RULES

In explaining why the NCAA amateurism rules satisfy the Rule of Reason (or why the antitrust laws do not apply to those rules at all), the opinions we have reviewed all make one fundamental assumption: the college athletes at issue in the cases either are, or should be, students who engage in athletics

simply as an extracurricular activity. Judge Coffey was most explicit about this point: "the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes [sic] proper focus on their educational pursuits and direct their attention to the quick buck in pro sports." In other words, the plaintiffs and potential plaintiffs in these cases should be, as the NCAA puts it, student-athletes.

Even a cursory examination of the present day NCAA and its players would demonstrate that this assumption about so-called "student-athletes" is factually erroneous. The best players on Division I-A football teams are not, generally speaking, students first and athletes second—they are, instead, quite the opposite. The easiest and most relevant way to see this is simply to look at how the NCAA treats these players. The players are heavily recruited by the NCAA members' athletic teams; they are allowed to enroll in the schools in spite of their poor academic records; they are given full scholarships that have little to do with their academic ability and that are tied entirely to athletic performance. The NCAA restricts these students' ability to hold jobs during the school year, and they are expected to train during the summer. Finally, the best players, those who aspire to play in the NFL someday, are not enrolled in an NCAA school because they want to pursue a college education in lieu of just going to the minor leagues. There is no mainstream minor

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142. Banks, 977 F.2d at 1091 (emphasis added).
143. As noted above, the term "student-athlete" was created by the NCAA as a cost-cutting measure by a cartel. In particular, as former NCAA Executive Director Walter Byers has related, the term was created as part of a marketing campaign to convince courts and state industrial boards not to force the schools to provide workmen's compensations benefits to seriously injured athletes. See BYERS, supra note 14, at 67-76.
144. See generally ZIMBALIST, supra note 14, at 16-36.
145. Id.
146. Mike Williams, former star wide receiver for the University of Southern California, illustrates the point. As a first year player on a professional NFL team Williams could have earned millions of dollars a year for his labor. Having a college degree would add nothing to this earning potential. Accordingly, when a federal district court in New York held an NFL rule requiring that players be at least three years out of high school in order to be eligible for professional recruiting, Williams, then a college sophomore, contacted an agent and sought to enter the NFL draft. The decision was one any rational economic actor would have made: Williams wanted to leave a restricted market that severely capped his earnings and enter a fairly competitive market that amply rewarded his most valuable skills. After the Court of Appeals for the Second Circuit reversed the district court, effectively preventing Williams from entering the professional draft, Williams returned all the money he had been given by the agent and sought to return to USC. The NCAA, however, decided to make an example of Williams and, in August 2004, declared him permanently ineligible to play college football. See NCAA Turns Down Williams's Reinstatement Bid, at http://sportsillustrated.cnn.com/2004/football/ncaa/08/26/williams.denied.ap/index.html (last visited Apr. 1, 2005).
league for professional football. The NCAA is it.

More importantly, as the discussion in Part III made clear, no federal court has ever actually received evidence and made findings on the issue of whether particular NCAA amateurism rules are essential to the product of college football or other college sports. Rather, the courts whose opinions we have reviewed have simply assumed that the amateurism rules are necessary, typically because the dicta in Board of Regents suggests that this is so. To date, however, there appears to be no comprehensive survey evidence that indicates that the NCAA's amateurism rules are in fact essential to the product of college football. That is, there is no evidence that suggests that the viewing public would consider college football to be a different, less desirable product if college athletes were paid higher stipends by their schools, or were allowed to receive full four-year scholarships that could not be revoked in the case of injury, or were allowed to receive a share of the endorsement money that is currently kept entirely by their coaches.

Furthermore, there is significant evidence that suggests that rules such as these are not only unnecessary but outright undesirable. For example, in the 1980s the U.S. Olympic Committee, an association that was once identified as the leading institution of amateurism, moved away from the core requirements of the old Victorian principle and now allows paid professionals to compete in the Olympic games, a change that was encouraged by the International Olympic Committee and adopted in most countries. The viewing public did not respond with any sense of outrage at the changes, and if anything, the commercial popularity of the Olympic games increased. With respect to college football in particular, the objective accuracy of the NCAA's assertions

147. See supra Part III; see also Pekron, supra note 14, at 53 ("Whenever a court of law has discussed amateurism, the court has always simply assumed that it is necessary to produce college athletics. However, the NCAA has never been required to prove that without amateurism, college athletics would be indistinguishable from professional athletics").

148. See NCAA, supra note 4, art. 12.01.4 (limiting total "grant-in-aid" that college athletes can receive).

149. See id. art. 15.3.3.1.2 ("[i]t is not permissible for an institution to assure the prospect that it automatically will continue a grant-in-aid past the one-year period if the recipient sustains an injury that prevents him or her from competing in intercollegiate athletics").

150. College football and basketball coaches frequently receive hundreds of thousands of dollars a year in endorsement money from apparel manufacturers like NIKE. See ZIMBALIST, supra note 14, at 81 (listing examples). NCAA bylaws permit coaches to receive these exorbitant sums of money but prohibit college athletes from receiving any amount of it. See NCAA, supra note 4, art. 12.5.1.

151. When asked about the change, the U.S. Committee's Director of Public Information replied simply: "We wanted to rid ourselves of the hypocrisy." ZIMBALIST, supra note 14, at 20.

about the necessity of its amateurism rules is significantly undercut by the following fact: in 2003, both the Nebraska legislature and the California senate passed bills that called for their states' schools to reject the NCAA's amateurism rules and to pay college athletes.\(^{153}\) Surely, then, it cannot be assumed that college football would crumble without the NCAA's amateurism rules, at least not in the football-powerhouse states of the Cornhuskers and the Trojans.

How, then, did the federal courts whose opinions we have reviewed reach the conclusions that they did? How could they have been willing to simply ignore these facts and not even consider the possibility that it is the players' affiliation with a school, and not their lack of endorsement contracts or ties to agents, that makes college football a truly distinct product?\(^{154}\) The only consistent answer appears to be that the judges in question did not want to see this reality. As the dissent in Banks, discussed in greater detail below, put it, when "confronted with the clash between soothing nostalgia and distressing reality," the judges in these cases simply chose the former, they literally asserted that their personal beliefs, demonstrably false as a matter of fact, were true as a matter of law.\(^{155}\)

In the very first case to address the amateurism rules, for example, Judge Tauro simply refused to view the plaintiff college hockey player as a supplier of labor, or indeed as a market participant of any sort. "The plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws."\(^{156}\) No legal basis or explanation was offered for this conclusion. In Gaines, Judge Wiseman stated quite clearly that he found it difficult to view college football players as anything other than students: "This Court is hard-pressed to see any validity to the parties' interpretation of college football players like Brad Gaines as 'sellers' and NCAA schools and professional football leagues or teams as 'buyers' in an economic market."\(^{157}\) Furthermore, this conclusion was clearly part of a larger belief system of Judge Wiseman about the nature of college athletics: "Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete

\(^{153}\) See Legislature Votes to Pay Cornhuskers, supra note 57, at S3; Wieberg, supra note 57.

\(^{154}\) Indeed, the Supreme Court itself has stated that it is the "identification of this 'product' with an academic tradition [that] differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball." Bd. of Regents, 468 U.S. at 101-02.

\(^{155}\) Banks, 977 F.2d at 1100 (Flaum, J., dissenting).

\(^{156}\) Jones, 392 F. Supp. at 303.

\(^{157}\) Gaines, 746 F. Supp. at 745.
education derived from fostering full growth of both mind and body.\textsuperscript{158} The Victorian, aristocratic underpinnings of the concept of amateurism are evident in Judge Wiseman's statement.

For his part, Judge Coffey was clearly opposed to seeing his own vision of amateur athletics soiled by the "cold commercial nature of professional sports."\textsuperscript{159} Without the NCAA's various concerted restraints, "[m]ember schools might very well be exposed to agents offering the services of their football playing clients to the highest bidder."\textsuperscript{160} If this were to happen then "the agents would in all probability attempt to bargain with the NCAA school and might very well expect the school to offer their client an attractive contract possibly involving automobiles, condominiums, and cash as compensation in contravention of the NCAA amateurism rules."\textsuperscript{161} And of course, all of that would be undesirable because it "would interfere with the athletes [sic] proper focus on their educational pursuits and direct their attention to the quick buck in pro sports."\textsuperscript{162} If his obvious distaste for the lifestyles of talented young athletes had not distracted him so, Judge Coffey might have noticed that he was quite clearly making an argument that "competition itself is unreasonable."\textsuperscript{163}

B. \textbf{THE LAW PROVIDES A REMEDY EVEN IF THE JUDGES WILL NOT}

What makes the federal courts' treatment of NCAA amateurism rules to date particularly troubling is that the law appears to provide a remedy to college athletes who feel exploited, or at least the right to have the NCAA be required to prove its assertions regarding the necessity of its various cartel agreements. Not only have nearly all commentators to address the issue reached this conclusion,\textsuperscript{164} but then-Chief Judge Flaum of the Seventh Circuit also provided a cogent argument making this very point in his dissent in \textit{Banks}.\textsuperscript{165}

Judge Flaum first noted that "[i]t is well settled that an agreement among employers to control a material term of employment harms competition in the

\begin{thebibliography}{99}
\bibitem{158} \textit{Id.} at 744.
\bibitem{159} \textit{Banks}, 977 F.2d at 1091.
\bibitem{160} \textit{Id.}
\bibitem{161} \textit{Id.}
\bibitem{162} \textit{Id.}
\bibitem{163} \textit{Nat'l Soc'y of Prof'l Engineers}, 435 U.S. at 696 (stating that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable").
\bibitem{164} \textit{See supra} note 14.
\bibitem{165} \textit{Banks}, 977 F.2d at 1094-1100 (Flaum, J., dissenting).
\end{thebibliography}
labor market at issue." Casting aside Athenian notions of "proper" education and withholding any feelings of aversion he may have had to the lifestyle of talented young athletes, Judge Flaum then provided the following common-sense economic analysis of Braxton Banks's claim:

Banks also alleges how the NCAA rules at issue-I will focus upon the no-draft rule-harm competition in that market: they foreclose players "from choosing a major college football team based on the willingness of the institution to waive or change [the] rule[ ]." It is hardly a revelation that colleges fiercely compete for the most promising high school football players-the players who, incidentally, are most likely to feel constrained by the challenged rules two or three years down the line. If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football labor market. It categorically rules out a term of employment that players, the suppliers of labor in that market, would find advantageous.167

Acting as he would towards any other antitrust plaintiff, Judge Flaum concluded that Banks had indeed stated a claim under the Sherman Act, "[t]he NCAA's protestations notwithstanding, there can be no doubt that Banks has alleged an anticompetitive effect in a relevant market."168

Judge Flaum made two other particularly noteworthy points. First, he identified what every other judge to write a published opinion on this issue somehow missed: a proper Rule of Reason analysis of the amateurism rules requires a factual inquiry that is not satisfied by merely looking to the NCAA's constitution and that cannot be disposed of on a motion to dismiss. Judge Flaum put it this way:

I add here a caveat to avert any potential misunderstandings. My point is only that Banks has properly alleged an anticompetitive effect in a relevant market and has demonstrated antitrust injury, and hence that his damages action should survive the NCAA's motion to dismiss. But this is, of course, only the first step. To

166. *Id.* at 1095 (Flaum, J., dissenting) (citing Radovich v. NFL, 352 U.S. 445 (1957); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967)).

167. *Banks*, 977 F.2d at 1095 (Flaum, J., dissenting).

168. *Id.* at 1096 (Flaum, J., dissenting).
ultimately prevail, Banks also must demonstrate, under the rule of reason, that the no-agent and no-draft rules, despite their anticompetitive effects, are not "justifiable means of fostering competition among amateur athletic teams and therefore procompetitive" on the whole. It may very well be that the no-draft and no-agent rules are essential to the survival of college football as a distinct and viable product, in which case Banks would lose. A lively debate has arisen among those who have already considered this matter. I opt not to join the fray here, for I think it unwise to weigh pro- and anticompetitive effects under the rule of reason on a motion to dismiss.169

Put simply, Judge Flaum pointed out to the Banks majority that there was no factual basis for their conclusion that the no-draft and no-agent rules were essential to the survival of college football as a distinct and viable product. That standard, as we have seen, was not simply Judge Flaum's interpretation of the law but was directly stated in Board of Regents.170

Judge Flaum's second point was psychological. Though particularly applicable to the majority opinion in Banks, Judge Flaum's insight here applies to all of the opinions we have seen:

Today's decision, by holding that Banks has not alleged that the rules are anticompetitive in the first instance, deprives him of the opportunity to join this issue on remand. As I have discussed, it is difficult to reconcile this holding with a sound reading of Banks' complaint. On a broader level, I am also concerned that today's decision—unintentionally, to be sure, for it suggests that a "more artfully drafted complaint" could have alleged an anticompetitive effect in this market—will provide comfort to the NCAA's incredulous assertion that its eligibility rules are "noncommercial." The NCAA would have us believe that intercollegiate athletic contests are about spirit, competition, camaraderie, sportsmanship, hard work (which they certainly are) . . . and nothing else. Players play for the fun of it, colleges get a kick out of entertaining the student body and alumni, but the relationship between players and colleges is positively noncommercial. It is consoling to buy into these myths, for they remind us of a more innocent era—an era where recruiting

169. Id. at 1098 (citations omitted) (Flaum, J., dissenting).
170. Bd. of Regents, 468 U.S. at 101 ("Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all").
scandals were virtually unknown, where amateurism was more a reality than an ideal, and where post-season bowl games were named for commodities, not corporations. On the flip side, it is disquieting to think of college football as a business, of colleges as the purchasers of labor, and of athletes as the suppliers.\footnote{171}

None of the opinions we have seen explained why they could not view college athletes as suppliers of labor. To Judge Tauro, Stephen Jones was simply a student and not a businessman; to Judges Wiseman and Coffey, the same was true of Bradford Gaines and Braxton Banks. In contrast, citing \textit{Professional Engineers} for the proposition that non-commercial values cannot justify anticompetitive restraints, Judge Flaum directly confronted the distressing reality presented by Braxton Banks's case: "[t]he NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed."\footnote{172}

Finally, it is, interesting to note Judge Coffey's response to Judge Flaum's dissent. Rather than point to evidence in the record (there was none) to demonstrate factual inaccuracies in Judge Flaum's opinion or address the fact that \textit{Professional Engineers} clearly held that non-commercial justifications cannot excuse anticompetitive restraints, Judge Coffey responded as anyone avoiding a "distressing reality" would be expected to respond: denial.

The dissent takes a surprisingly cynical view of college athletics and contends that "colleges squeeze out of their players one or two more years of service" because the no-draft rule forces the player to choose between continued collegiate eligibility and entering the draft. This description of players "selling their services" to NCAA colleges stands in stark contrast to the academic and amateurism requirements of the vast majority of college athletic programs that, in compliance with the NCAA rules and regulations, are foreclosed from offering cash compensation or "non-permissible awards, extra benefits, or excessive or improper expenses not authorized by NCAA legislation . . . ."\footnote{173}

In other words, NCAA members could not possibly be exploiting their players because they have all agreed to limit their players' compensation. If that sounds absurd, that is because it is.\footnote{174}

\footnote{171. \textit{Banks}, 977 F.2d at 1098-99 (Flaum, J., dissenting).}
\footnote{172. \textit{Id.} at 1099 (Flaum, J., dissenting).}
\footnote{173. \textit{Id.} at 1092 (citing 1992-1993 \textit{NCAA Division I Operating Manual} §§ 14.01.5.1, 14.01.5.2).}
\footnote{174. Byers makes a noteworthy comment on this point: "Today's educational reformers seem increasingly content to engage in a pedantic tautology. Players may not receive money, except what}
C. A More Fundamental Problem with the Courts' Antitrust Analysis of NCAA Amateurism Rules

Because of their shared assumption that college athletes are students only and not market participants of any sort, the six courts whose opinions we have reviewed all missed one critical point about their cases: they were dealing with human labor. Let us use Gaines as an example. Judge Wiseman explicitly stated that he was "hard-pressed" to accept the notion of football players as suppliers of labor and colleges as purchasers. Accordingly, he held that the Sherman Act did not even apply to the NCAA's amateurism rules. Then, however, maintaining this same assumption that college football players are not suppliers of labor but are only "student-athletes," Judge Wiseman proceeded to offer his alternative analysis if it were assumed that the Sherman Act did apply. In that case, as we saw above, the judge summarily concluded the NCAA bylaws would survive a Rule of Reason analysis.

Judge Wiseman missed a critical point. By erroneously holding on to his first assumption during his Rule of Reason analysis, Judge Wiseman failed to consider the significance of the fact that he was applying antitrust law to restraints on a market for human labor. This fact is critical because the consumers in this market are not consumers at large, but rather the purchasers of that human labor, namely the colleges. Judge Flaum was the only judge in any of the cases to recognize this point:

[It] is important first to identify the consumers and the market at issue in this case. By "consumers," the NCAA apparently means people who watch college football. These individuals certainly are consumers in the college football product market, but the market at issue here is the college football labor market, and the NCAA member colleges are consumers in that market.

Furthermore, in this market it is not the harm to the purchasers of labor or to consumers at large that is relevant but rather the harm to the suppliers of labor that matters. To hold otherwise, to focus on the general notion of "consumer benefit" in this context, leads to the abhorrent result of allowing we give them, because they must remain amateurs to be eligible under our rules. They are amateurs if our rules say they are. Thus, they may only receive what our rules permit. BYERS, supra note 14, at 390.

175. Gaines, 746 F. Supp. at 745.
176. Id. at 748.
177. Id. at 745.
178. Id. at 747.
179. Banks, 977 F.2d at 1098 (Flaum, J., dissenting).
180. See id. (Flaum, J., dissenting).
purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another, presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games).\textsuperscript{181}

Consider an example from a different context. In June 2002, a class action antitrust suit was filed on behalf of fashion models in New York City.\textsuperscript{182} The lawsuit alleges that modeling agencies conspired to fix the wages of the models at unfairly low levels. If the judge in this case focuses on the welfare of consumers at large, the models should lose, even if their allegations are true: the consumers of magazines and fashion shows actually benefit from the exploitation of the models because their magazines and fashion show tickets should cost less. That result, however, is absurd. It would justify price fixing and human exploitation by employers in any industry.

The same is no less true in cases challenging the NCAA's amateurism rules. The fact that Ohio State alumni are better off because their alma mater can retain star football players at cartel wages should not justify imposing otherwise unlawful restraints on the talented young men who make up the team. In short, it is the laborers, not the purchasers of labor or consumers at large, who matter in labor market antitrust cases. As Judge Flaum put it: "It would be perverse . . . to hold that the very object of the law's solicitude and the persons most directly concerned—perhaps the only persons concerned—could not challenge the restraint."\textsuperscript{183} What is most troubling about the dicta in \textit{Board of Regents}, then, is that it suggests that human exploitation is acceptable and even desirable. By stating in his rambling list that "athletes must not be paid" Justice Stevens implies that it is okay to exploit college athletes—to allow colleges to conspire to limit scholarships terms to one year, for example, so that injured athletes can be cheaply and quickly disposed of—

\textsuperscript{181} The district judge in \textit{Law}, which as noted above involved a conspiracy by NCAA cartel members to fix the wages of assistant basketball coaches, noted precisely this point in granting the assistant coaches' motion for summary judgment on the issue of antitrust liability:

If price-fixing buyers were allowed to justify their actions by claiming procompetitive benefits in the product market, they would almost always be able to do so by arguing that the restraint was designed to reduce their costs and thereby make them collectively more competitive sellers. To permit such a justification would be to give businesses a blanket exemption from the antitrust laws and a practically limitless license to engage in horizontal price-fixing aimed at suppliers. This license the Court will not issue—even in the unique context of intercollegiate athletics.

\textit{902 F. Supp. at 1406.}

\textsuperscript{182} \textit{See} Masters v. Wilhelmina Model Agency, Civil Action No. 02-4911 (S.D.N.Y.).

\textsuperscript{183} \textit{Banks}, 977 F.2d at 1098 (Flaum, J., dissenting) (quoting PHILLIP AREEDA & DONALD F. TURNER, II, ANTITRUST LAW ¶ 338(c), at 200 (1978)).
so long as the TV-viewing public is fed a little more cheap entertainment and college alumni enjoy an occasional pleasant dose of nostalgia. Indeed, perhaps encouraged by its success in exploiting college athletes and prevailing against them in court, the NCAA decided to fix the wages of other low-level human inputs in the production of college athletics. In 1991, the cartel adopted a rule fixing the annual salary of assistant basketball coaches at $12,000. The primary case cited by the NCAA in its defense was, of course, Board of Regents. Fortunately for the assistant coaches, neither the district judge nor the judges on the Tenth Circuit were persuaded by the NCAA's transparent platitudes about amateurism and enhancing competition, all for the ultimate benefit of the consuming public. "To permit such a justification," the district court judge wrote, "would be to give businesses a blanket exemption from the antitrust laws and a practically limitless license to engage in horizontal price-fixing aimed at suppliers. This license the Court will not issue—even in the unique context of intercollegiate athletics."

V. CONCLUSION

The NCAA has enjoyed a virtual exemption from federal antitrust law with respect to its amateurism rules. This exemption is based not on any principled construction of federal antitrust law, but rather is the result of the practical reality that the individuals sitting on the federal bench, at least in the cases to date, have been "hard pressed" to view college athletes as anything other than students engaged in extracurricular activities. Confronted with "the clash between soothing nostalgia and distressing reality," these judges, all of them white men who attended college before 1960, simply refused to view college athletes, even the participants in big-time college football, as suppliers of labor in an economic market. Federal judges, however, "take an oath to enforce all laws, without regard to their (or the litigants') social, political, or religious beliefs." Judges hearing future antitrust challenges to the NCAA's amateurism rules must require the NCAA to prove its various assertions about those rules with actual evidence. The mere fact that the NCAA's assertions paint a prettier picture of the world, or conform with the judge's own college experience, should be irrelevant to both the legal characterization of college athletes and to the ultimate outcome of the case.

184. See Law, 902 F. Supp. at 1400.
185. Id. at 1400.
186. Id. at 1406.
187. Banks, 977 F.2d at 1100 (Flaum, J., dissenting).
188. Endres v. Ind. State Police, 349 F.3d 922, 927 (7th Cir. 2003).