

# NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Society

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## Repository Citation

Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Society*, 3 Wm. & Mary Bus. L. Rev. 203 (2012), <https://scholarship.law.wm.edu/wmblr/vol3/iss1/6>

NCAA SCHOLARSHIP RESTRICTIONS AS  
ANTICOMPETITIVE MEASURES:  
THE ONE-YEAR RULE AND SCHOLARSHIP  
CAPS AS AVENUES FOR ANTITRUST SCRUTINY

ABSTRACT

*By referencing the historical record to expose the NCAA's one-year rule and per sport scholarship limits as cost-cutting, anticompetitive measures imposing harmful effects upon scholarship-seeking student-athletes, this Note argues that despite the United States District Court for the Southern District of Indiana's unfavorable ruling in Agnew v. NCAA, a Sherman Act claim against the NCAA linking bachelor's degrees and scholarships could be legally viable. In particular, just application of the quick look rule of reason, an abbreviated form of antitrust analysis, could lead a court to find the NCAA's one-year rule and per sport scholarship caps as violative of Section I of the Sherman Act. This follows from the origins of the targeted scholarship rules in a horizontal agreement among NCAA members informed by motives of crass commercialism, not the romantic NCAA values of amateurism and the educated athlete. A court mindful of this legacy, and possessing evidence of the anticompetitive results that these rules have brought about, could fairly find the one-year rule and per sport scholarship caps to be illegal restraints of trade meant to boost NCAA member revenues at the expense of their student-athlete consumers.*

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## INTRODUCTION

With the filing of his October 2010 class-action complaint against the National Collegiate Athletic Association (the NCAA),<sup>1</sup> Joseph Agnew became the latest in a long line of disgruntled college athletes<sup>2</sup> to seek federal court remedies for alleged NCAA violations of Section I of the Sherman Act.<sup>3</sup> A former football player at Rice University, Agnew brought his claim after Rice's newly hired head football coach declined to renew Agnew's athletic scholarship<sup>4</sup> in the summer before his senior year.<sup>5</sup> Such a move was well within the bounds of the NCAA's bylaws, which permit member institutions to revoke athletic scholarships at the end of each school year without cause.<sup>6</sup>

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<sup>1</sup> Complaint at 1, *Agnew v. NCAA*, 2011 WL 3878200 (N.D. Cal. 2010) (No. 10-4804). The complaint consistently cited in this Note is that which Agnew filed with the United States District Court for the Northern District of California in October of 2010. This complaint is distinct from the amended version Agnew brought against the NCAA in March, 2011 in the United States District Court for the Southern District of Indiana—the forum in which the case was ultimately decided. *See infra* note 19 and accompanying text.

<sup>2</sup> *See, e.g.*, *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975). These cases represent only a sample of antitrust suits athletes have brought against the NCAA since the 1970s.

<sup>3</sup> 15 U.S.C. § 1 (2006); *see also* ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* 16–20 (2010); discussion *infra* Part III.A.

<sup>4</sup> The NCAA terms scholarships given to students in return for their athletic services as “grants-in-aid.” Generally, these grants may cover the “actual cost of tuition and required institutional fees,” but no more. NCAA, 2010–2011 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS art. 15.2.1, at 196 (NCAA ed. 2010).

<sup>5</sup> Katie Thomas, *NCAA Sued Over One-Year Scholarships*, N.Y. TIMES, Oct. 26, 2010, at B16. Agnew's story is a fairly sympathetic one. A highly recruited defensive back in high school, he accepted an athletic-scholarship offer from Rice University in 2006. After a promising freshman year, injuries limited his sophomore campaign. When the coach who had recruited Agnew left after that season, Agnew found himself an injury-prone player under a new coach who was uninterested in his services. Although Agnew won an appeal to retain his scholarship for his junior year, the new coaching staff was successful in terminating his athletically-based aid the following summer.

<sup>6</sup> NCAA bylaws allow member institutions to revoke athletic scholarships after the end of each academic year *without cause*. Bylaw 15.3.5.1 details the extent of a school's obligation to its scholarship athletes:

After assuming, therefore, the unanticipated cost of one year's tuition at Rice in order to earn his degree, Agnew turned to federal court for restitution, claiming in particular<sup>7</sup> his victimization at the hands of the one-year rule<sup>8</sup> that defines the duration of all NCAA athletic scholarships.<sup>9</sup> Asserting unlawful collusion by NCAA member institutions to create a rule prohibiting schools from offering athletic scholarships on anything other than a yearly basis, Agnew's claim rested on the proposition that such cooperation amounted to an illegal price-fixing scheme: an agreement to minimize members' costs in competing for student-athletes by mandating price maximization of the bachelor's degrees those athletes presumably seek.<sup>10</sup> The one-year rule, in other words, by preventing opportunistic schools from driving up costs through competitively offering

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The renewal of institutional financial aid based in any degree on athletics ability shall be made on or before July 1 prior to the academic year in which it is to be effective. The institution shall promptly notify in writing each student-athlete who received an award the previous academic year and who has eligibility remaining in the sport in which financial aid was awarded the previous academic year (under Bylaw 14.2) whether the grant has been renewed or not renewed for the ensuing academic year.

NCAA, *supra* note 4, art. 15.3.5.1, at 205; *see also* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 43–46 (2006) (describing the deceptive nature of the athletic-scholarship “contract”).

<sup>7</sup> Complaint at paras. 41–46, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>8</sup> The principal portion of the “one-year rule” for grants-in-aid to which Agnew's complaint objects reads as follows: “If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.” NCAA, *supra* note 4, art. 15.3.3.1, at 203.

<sup>9</sup> Although this Note will make its case primarily by citing information pertaining to NCAA Division I athletics and the ways in which the member institutions of that division interact, it is of note that NCAA Division II bylaws also mandate the renewal of athletic scholarships on a yearly basis. NCAA, 2010–2011 NCAA DIVISION II MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS art. 15.3.3.1, at 154 (NCAA ed. 2010) [hereinafter “NCAA DIVISION II MANUAL”]. Meanwhile, member institutions of NCAA Division III, the NCAA's least athletically competitive division, are not permitted to grant scholarships based on athletic talent. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 270–71 (2000). For further discussion of the NCAA's organization of member institutions by athletic divisions, *see infra* note 69.

<sup>10</sup> Complaint at paras. 1–4, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804); *see also* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 6, *available at* <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-collegesports/8643/6/> (describing Agnew's impetus for filing suit against the NCAA and the inquiries of the United States Justice Department into the NCAA's one-year scholarship rule).

guaranteed four- or five-year athletic scholarships, instead had allegedly helped NCAA members maximize revenues by retaining the possibility of extracting tuition dollars from erstwhile scholarship athletes.

Finally, Agnew's complaint alleged an additional source of illegal collusion by NCAA institutions<sup>11</sup> via the NCAA's mandated per sport scholarship limits.<sup>12</sup> Agnew claimed that these NCAA-imposed caps on athletic scholarships for each NCAA sport supplemented the intent of the one-year rule to reduce competition between, and thus costs for, NCAA members.<sup>13</sup> Specifically, the complaint asserted that these caps would frustrate competition<sup>14</sup> by preventing ambitious athletic departments from offering as many scholarships as they had roster spots available on a given team.<sup>15</sup> The consequence, claimed Agnew, was to further increase the cost of a bachelor's degree for prospective student-athletes<sup>16</sup> by forcing some to "walk-on" to teams.<sup>17</sup> Such walk-ons, without the benefit of an athletic scholarship, would thus have to pay their school's full tuition.<sup>18</sup>

Unfortunately for Agnew, when the United States District Court for the Southern District of Indiana eventually resolved the issue,<sup>19</sup> it showed

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<sup>11</sup> Complaint at para. 1, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>12</sup> Although the NCAA permits both Division I and Division II institutions to offer their student-athletes financial support via "grants-in-aid," the number of grants per sport permitted at Division I schools is considerably greater than that permitted at Division II schools. For example, in one year a Division I Football Bowl Subdivision team may grant up to eighty-five "equivalencies" (full grants-in-aid), while a Division II football team may apportion amongst its players only thirty-six equivalencies. *Compare* NCAA, *supra* note 4, art. 15.5.6.1, at 210, *with* NCAA DIVISION II MANUAL, *supra* note 9, art. 15.5.2.1.1, at 156.

<sup>13</sup> Complaint at paras. 4, 28, 64, 67, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>14</sup> *Id.* at para. 64.

<sup>15</sup> For example, while a Division I Football Bowl Subdivision team has eighty-five athletic-scholarships at its disposal, it may carry up to one hundred and five practicing participants by the start of the regular season. NCAA, art. 17.9.2.1.2.1, at 262.

<sup>16</sup> Complaint at paras. 48–49, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>17</sup> Although Agnew's complaint does not specifically use the phrase "walk-on," his complaint actually refers to the fate of walk-ons. For clarification of walk-ons in college sports, and for an example of a similar price-fixing claim that walk-ons have brought, see Complaint at paras. 7–8, *In re NCAA I-A Walk-On Football Players Litig.*, 2004 U.S. Dist. Ct. Pleadings 1650 (W.D. Wash. Aug. 12, 2004).

<sup>18</sup> Complaint at para. 48, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>19</sup> The NCAA succeeded, via a Motion to Transfer, in changing the case's venue from the United States District Court for the Northern District of California to the United States District Court for the Southern District of Indiana. *See* *Agnew v. Nat'l Collegiate Athletic Ass'n*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*3 (S.D. Ind. Sept. 1, 2011).

little sympathy for his position.<sup>20</sup> Citing Seventh Circuit precedent, the court declared the necessity of defining a relevant market in response to any antitrust claim against the NCAA, and in turn dismissed the complaint on the pleadings by concluding that Agnew's asserted market for bachelor's degrees was not in fact a plausible market.<sup>21</sup>

Though mindful of the district court's adverse response to Agnew's antitrust challenge, the goal of this Note is to determine whether a similar claim could nonetheless be viable in a jurisdiction not bound by precedent to grant the NCAA the benefit of the doubt. Admittedly, a pessimistic response to this effort would be just; the recent *Agnew* decision was reflective of a history littered with failed attempts by plaintiff students to allege NCAA violations of the Sherman Act in federal courts.<sup>22</sup> In particular, though courts have suggested that collusion among NCAA members to fix the price and availability of the NCAA's output, college sports, could violate antitrust provisions,<sup>23</sup> the courts have distinguished such "commercial" activity from the formation of NCAA rules that advance the "non-commercial" objectives of preserving amateurism, competitive balance, and academic integrity.<sup>24</sup> Those rules, of course, affect student-athletes, who serve as necessary "inputs" for the NCAA's product,<sup>25</sup> and whom the courts apparently wish to protect from such evils as the "cold commercialism" of the professional ranks.<sup>26</sup> As a result, despite widespread recognition of the NCAA as a functioning cartel of revenue-seeking institutions,<sup>27</sup>

<sup>20</sup> See *id.* at \*23–30.

<sup>21</sup> *Id.* at \*12–13, 26–30. For a discussion of the role of definition of a relevant market in antitrust analysis, see discussion *infra* Part III.A.2. This Note will contend that another court reviewing a claim such as Agnew's would not be obliged to define a relevant market, but could instead analyze the claim under the "quick look" rule of reason. See discussion *infra* Part IV.B.2.

<sup>22</sup> Since the mid-1970s, plaintiffs have brought a great number of antitrust claims against the NCAA before federal courts. See, e.g., WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 387–92 (1995). Only twice, however, have these courts recognized NCAA violations of the Sherman Act, first in *NCAA v. Board of Regents of the University of Oklahoma*, and later in *Law v. NCAA*.

<sup>23</sup> See, e.g., *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85 (1984).

<sup>24</sup> Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big Time" College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 4 (2000); see also *Bd. of Regents*, 468 U.S. at 96.

<sup>25</sup> ARTHUR A. FLEISHER ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 15 (1992).

<sup>26</sup> Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 331–35 (2005).

<sup>27</sup> See FLEISHER ET AL., *supra* note 25, at 14; James V. Koch & Wilbert M. Leonard, *The NCAA: A Socio-Economic Analysis*, 37 AM. J. OF ECON. & SOC. 225, 229 (1978).

courts have largely deemed acceptable the NCAA's collusive efforts to create rules that "preserve" its noncommercial values.<sup>28</sup> Further, courts have assented to such rules even when, for example, the rules have served to maximize NCAA profits at the expense of student-athletes' economic interests.<sup>29</sup>

Despite courts' justifications for permitting the NCAA's monopolistic oversight of its student-athletes, the prospect of advancing a claim like *Agnew's* intrigues in that it would threaten neither amateurism nor academic integrity. This is due in large part to its focus on the market for bachelor's degrees, and thus its demand that the NCAA relax rules limiting student-athlete access to a form of in-kind compensation<sup>30</sup> that does not affect their amateur status.<sup>31</sup> By describing college athletes as prospective students seeking a degree, and as consumers deserving of that degree at a competitive price, a bachelor's degree-based complaint would stand against the NCAA cartel's price fixing scheme without running afoul of the values of "amateurism" and "academic integrity" that have derailed past antitrust suits.

By referencing the historical record to expose the NCAA's one-year rule and per sport scholarship limits as cost-cutting,<sup>32</sup> anticompetitive measures imposing harmful effects upon scholarship-seeking student-athletes, this Note will argue that despite the ruling in *Agnew*, a Sherman Act claim against the NCAA linking bachelor's degrees and scholarships could be legally viable. Parts I, II, and III will set a foundation by discussing respectively the evolution of the NCAA into a cartel, the existence of athletic scholarship rules as a product of cartel behavior, and the federal courts' treatment of the NCAA cartel in the face of past antitrust chal-

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Koch defines a "cartel" as "a group of independent firms attempting, via collusive agreement, to behave as a collective monopoly." *Id.* at 229. See generally Craig A. Depken & Dennis P. Wilson, *The Impact of Cartel Enforcement in NCAA Division I-A Football*, in *ECONOMICS OF COLLEGE SPORTS* (John Fizek & Rodney Forts eds., 2004).

<sup>28</sup> Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 62–63 (1995).

<sup>29</sup> See Nagy, *supra* note 26, at 331–35.

<sup>30</sup> See MURRAY SPERBER, *COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* 208 (1990) (noting that college athletes sell their talents as sports entertainers in exchange for athletic scholarships).

<sup>31</sup> See BYERS, *supra* note 22, at 72 (explaining the NCAA's rationale, upon association-wide institution of the athletic-scholarship in 1956, that an athlete remained a true amateur if he received from his school only "commonly accepted educational expenses").

<sup>32</sup> See ANDREW ZIMBALIST, *THE BOTTOM LINE: OBSERVATIONS AND ARGUMENTS ON THE SPORTS BUSINESS* 234 (2006) (observing that "[t]he NCAA gets in trouble [with the courts] when its regulations are designed to reduce the costs of operating an athletic program").

lenges. Part IV will explain how just application of the quick look rule of reason, an abbreviated form of antitrust analysis, could lead a court to find the NCAA's one-year rule and per sport scholarship caps as violative of Section I of the Sherman Act. Fundamentally, this Note will show the targeted scholarship rules to be products of a horizontal agreement among NCAA members informed by motives of crass commercialism, not the romantic NCAA values of amateurism and the educated athlete. A court mindful of this legacy, and possessing evidence of the anticompetitive results that these rules have brought about, could fairly find the one-year rule and per sport scholarship caps to be illegal restraints of trade<sup>33</sup> meant to boost NCAA member revenues at the expense of their student-athlete consumers.

#### I. THE NCAA: INFORMAL ASSOCIATION TO BUSINESS-ORIENTED CARTEL

Article I of the NCAA Constitution, which offers an articulation of the NCAA's "basic purpose," would not be supportive of an antitrust claim's implication that the NCAA concerns itself with commercially-focused activities, much less the restraint of trade.<sup>34</sup> It offers no mention of input or output markets, and no discussion of revenues or the centrality of a commercial agenda. It articulates instead the values of academics and amateurism,<sup>35</sup> the very principles federal courts have often cited in waving away student plaintiffs' claims of NCAA antitrust violations.<sup>36</sup> Although such principles are admirable, and while they may yet have a place in informing NCAA policies and rules, they strike an odd contrast with a statement on the NCAA's website, under a heading of "Commercialism," which reads: "[T]he NCAA maintains that 'amateur' describes intercollegiate athletics participants, not the enterprise."<sup>37</sup> There appears to be, in other words, a place in the NCAA reserved for "relationships with corpo-

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<sup>33</sup> See ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 8–9 (1994) (defining "restraint of trade," and discussing the point at which an ordinary business transaction becomes a deleterious restraint of trade).

<sup>34</sup> See, e.g., NCAA, *supra* note 4, art. 1.2, at 1.

<sup>35</sup> Article 1.3.1 of the NCAA Constitution reads, in part: "A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." *Id.* art. 1.3.1, at 1.

<sup>36</sup> See Nagy, *supra* note 26, at 334.

<sup>37</sup> *Commercialism*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/> (last visited Feb. 4, 2012).

rate entities” and “revenue-generating sports,”<sup>38</sup> commercial elements that are acceptable so long as their influence does not tarnish the amateur status of the students who play the games. In this way, the NCAA leads a “schizophrenic existence,”<sup>39</sup> negotiating on one hand a fourteen-year, \$10.8 billion contract with CBS and Time Warner to televise its Men’s Basketball Tournament,<sup>40</sup> and on the other claiming that the resulting average yearly intake of \$77 million will function entirely to support the non-commercial goals of amateurism and academics.

To be sure, the NCAA’s origins did not involve the same overwhelmingly commercial orientation and savvy.<sup>41</sup> With the passage of the twentieth century, however, the rise in popularity of college sports, especially football and men’s basketball, saw the NCAA grow to become the managerial hub of the college sports business: a business-oriented cartel of member institutions making rules as much in aid of economic interests as the principles of amateurism and academic integrity.<sup>42</sup>

#### *A. The NCAA Originally: Formation and the Amateur Ideal*

The NCAA arose primarily as President Theodore Roosevelt’s response to the rising number of deaths and serious injuries in early-twentieth century college football.<sup>43</sup> Specifically, it was the President’s admonition of certain Ivy League officials, whose football contests had been responsible for eighteen deaths in 1905, which helped prompt the creation of the NCAA the following year.<sup>44</sup> The new association, however, was not to have the enforcement and revenue-producing responsibilities that it currently maintains.<sup>45</sup> Rather, as reflective of Roosevelt’s concerns, it was to function as a regulatory body for college football, and its specific purpose was to develop and standardize rules of the game to stem the

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<sup>38</sup> *Id.*

<sup>39</sup> See ZIMBALIST, *supra* note 32, at 240.

<sup>40</sup> Curtis Eichelburger, *NCAA Says Sports Revenue Growth Won’t Exceed Three Percent at Biggest Schools in U.S.*, BLOOMBERG, Dec. 29, 2010, available at <http://www.bloomberg.com/news/2010-12-29/ncaa-says-sports-revenue-growth-won-t-exceed-3-at-biggest-schools-in-u-s-.html>.

<sup>41</sup> BYERS, *supra* note 22, at 37–38 (quoting President Roosevelt, saying of college football: “It is first-class, healthful play, and is useful as such. But play is not business...”).

<sup>42</sup> See generally ZIMBALIST, *supra* note 32, at 235–37.

<sup>43</sup> See BYERS, *supra* note 22, at 38–39.

<sup>44</sup> *Id.*

<sup>45</sup> See Craig A. Depken & Dennis P. Wilson, *Institutional Change in the NCAA and Competitive Balance in Intercollegiate Football*, in *ECONOMICS OF COLLEGE SPORTS* 203–05 (John Fizel & Rodney Fort eds., 2004).

alarming rise in casualties of its participants.<sup>46</sup> In this way, the NCAA became a loosely tied, voluntary association of a small number of schools seeking to provide uniform on-field rules for a particularly dangerous game.<sup>47</sup> Accompanying this purpose, though, was a now familiar-sounding principle, as declared by Roosevelt, that “no student shall represent a college or university in any intercollegiate game ... who has at any time received ... money, or any other consideration.”<sup>48</sup> Whether NCAA member schools at the time took to heart Roosevelt’s insistence on amateurism in the college game is another story.<sup>49</sup> Nonetheless, the principle had been expressed, its association with the NCAA affirmed by the President’s words, and its message made available for posterity to claim as part of the NCAA’s legacy.

*B. The NCAA Evolves: Centralization and Enforcement*

Although college football, and thus the NCAA, grew dramatically through the first four-and-a-half decades after the NCAA’s founding,<sup>50</sup> the NCAA’s influence over college sports, and over football in particular, did not extend far beyond its occasional propagation of amateurism-informed regulations regarding the eligibility and compensation of college athletes.<sup>51</sup> Yet because the NCAA had no mechanism through which it could enforce these rules, schools generally operated as they wished, particularly regarding compensation; the schools devised and carried out whatever compensatory means they preferred to attract talented athletes to their

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<sup>46</sup> *Id.*

<sup>47</sup> See Depken & Wilson, *supra* note 27, at 226. It is of note that upon its founding, the NCAA, made up primarily of faculty representatives from member schools, immediately developed additional regulations addressing issues such as athletes’ eligibility, rules regarding transfers, and amateurism. It would not, however, adopt any mechanisms to enforce these regulations for another forty-plus years. Nevertheless, Fleisher characterizes the NCAA’s development of these early regulations as an initial foray into the cartelization, defined by restraints on student-athletes as “inputs,” that today defines its behavior. FLEISHER ET AL., *supra* note 25, at 41–42.

<sup>48</sup> See BYERS, *supra* note 22, at 40.

<sup>49</sup> See *id.* at 40, 65. Byers notes, for example, that during the 1930s and early 1940s, “it was not uncommon for an alumnus to adopt a local high school athlete and ‘put him through college.’” *Id.* at 40, 65; see also FLEISHER ET AL., *supra* note 25, at 42.

<sup>50</sup> Fleisher describes the period from 1920 to 1940 as college football’s “golden age,” as the era “witnessed the expansion of college athletics from a small cottage industry into a nationwide preoccupation.” FLEISHER ET AL., *supra* note 25, at 42.

<sup>51</sup> See *id.* at 44–45.

campuses.<sup>52</sup> This changed, however, in the period from 1946 to 1953, when initiatives on the part of the NCAA's most influential members saw the once loosely bound, voluntary association transform into an effective, rules-wielding cartel.<sup>53</sup>

A new wave of rhetoric inspired this transition, espousing a renewed concern for amateurism in college sports—the old stand-by principle of the NCAA that college football had generally neglected to recognize through much of its history.<sup>54</sup> This concern arose with the return of America's World War II veterans in 1945, a massive crop of potential student-athletes eager for college degrees in response to the implementation of the G.I. Bill of Rights.<sup>55</sup> What followed was a recruiting free-for-all, as ambitious athletic programs looking to insert themselves into the scene of top-flight college football began offering whatever financial inducements they could to incorporate the new talent into their programs.<sup>56</sup>

Responding principally to these aggressive and increasingly expensive recruiting tactics was college football's entrenched elite, particularly the members of the tradition-rich Big Ten Conference.<sup>57</sup> Trumpeting the values of amateurism, but likely more concerned with the escalating costs of athlete recruitment,<sup>58</sup> leaders from The Big Ten and several other prominent NCAA football conferences convened in 1946 to draft the "Principles of Conduct of Intercollegiate Athletics" (the Principles).<sup>59</sup> At the core of this document was its emphasis on the "amateur ideal" of the college athlete, and thus a corresponding insistence that financial aid to athletic re-

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<sup>52</sup> See *id.* at 46. The NCAA was, by one account, "a singularly toothless organization that contented itself with vague resolutions commending amateurism." MURRAY SPERBER, *ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS* 171 (1998).

<sup>53</sup> See FLEISHER ET AL., *supra* note 25, at 46.

<sup>54</sup> *Id.* at 42–46.

<sup>55</sup> The G.I. Bill of Rights, providing "government funding for all former [military] service personnel wishing to attend university," inspired the enrollment in post-secondary educational institutions of many Americans who would have otherwise never considered attending college. See SPERBER, *supra* note 52, at 168.

<sup>56</sup> See, e.g., *id.* at 169–70.

<sup>57</sup> *Id.* at 171–73. Although the NCAA may have exhibited relatively "toothless" enforcement of its rules pertaining to recruitment and other matters, it encouraged, with some success, regulation of such matters at the conference level. By the 1940s, college football conferences, made up of athletically competitive schools independently organized by geographical region, functioned as relatively centralized entities with identifiable leadership able to exert an influence over their members that the NCAA could not. See FLEISHER ET AL., *supra* note 25, at 44–47; SPERBER, *supra* note 52, at 173–74.

<sup>58</sup> See SPERBER, *supra* note 52, at 174.

<sup>59</sup> FLEISHER ET AL., *supra* note 25, at 47.

cruits be granted “on the basis of qualifications of which athletic ability is not one.”<sup>60</sup> The general consensus was that college athletes ought not to receive in-kind payments to play sports.<sup>61</sup> Two years later, those party to the Principles’ construction used them to form the backbone of the revolutionary “Sanity Code” (the Code), an assemblage of rules on amateurism, eligibility, and financial aid, coupled with an unprecedented mechanism to enforce those rules,<sup>62</sup> that NCAA membership voted into the NCAA constitution in 1948.<sup>63</sup>

Ultimately, the Sanity Code did not succeed in its mission to ensure nationwide compliance with NCAA rules.<sup>64</sup> This was largely due to the Code’s extreme call for the expulsion of rules violators from the NCAA. When a substantial number of schools immediately refused to abide by the Code’s ban on athletic scholarships, the NCAA’s new enforcement arm proved simply unwilling to mete out such a drastic and heavy-handed punishment.<sup>65</sup>

Despite the Sanity Code’s failure, however, it nevertheless set a precedent for cooperative action within the college football community to create a centralized, enforcement-oriented NCAA, a model inspired considerably by the growing costs of fielding competitive college football teams.<sup>66</sup> It was this precedent that transformed understandings of the NCAA’s potential, which thereby set the foundation for the full cartelization of the NCAA and a “new era of regulation” that would soon come to pass.<sup>67</sup>

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<sup>60</sup> SPERBER, *supra* note 52, at 173–74.

<sup>61</sup> *Id.* Fleisher describes the regulation, however, as one that simply “pushed all athletic scholarships through the regular financial aid routes,” thus eliminating athletic scholarships in name only. FLEISHER ET AL., *supra* note 25, at 47.

<sup>62</sup> A Compliance Committee and a Fact-Finding Committee executed enforcement of the Sanity Code; the former serving to evaluate alleged Code violations and dispense punishment as necessary, and the latter functioning as the former’s investigative arm. FLEISHER ET AL., *supra* note 25, at 48. During the Sanity Code’s brief reign, most Code infractions involved violations of its prohibition of athletic-scholarships, a prohibition established in the name of amateurism. BYERS, *supra* note 22, at 67.

<sup>63</sup> FLEISHER ET AL., *supra* note 25, at 47.

<sup>64</sup> *Id.* at 48.

<sup>65</sup> SPERBER, *supra* note 52, at 240–41.

<sup>66</sup> FLEISHER ET AL., *supra* note 25, at 65.

<sup>67</sup> *Id.* at 51.

*C. The Modern NCAA: Cartel Enforcement of Rules Supporting Economic Interests as Much as Amateurism*

On the heels of the Sanity Code's failure, the NCAA entered its modern era by reshuffling its management hierarchy and reforming its approach to rules enforcement, two moves that solidified its managerial clout in the college sports landscape.<sup>68</sup> Primarily, in 1953, NCAA members voted in their annual convention to grant the NCAA Council<sup>69</sup> (the Council) power to enforce NCAA-mandated rules other than the extreme measure of expulsion.<sup>70</sup> Further, the Council received authority to impose penalties for rule violations without having to wait for the approval of its members.<sup>71</sup> Now able to efficiently levy meaningful and realistic sanctions that could damage a school's ability to compete athletically, the NCAA Council and its newly credible enforcement arm achieved a revolutionary change: through its ability to both effectively create and enforce rules, it was in a much improved position to regulate the behavior of its constituent members.<sup>72</sup>

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<sup>68</sup> *Id.* at 50–51, 65. In terms of management, the NCAA disbanded the Compliance and Fact-Finding Committees under the Sanity Code, essentially replacing them with a Membership Committee and a Subcommittee on Infractions, respectively. The Membership Committee, charged with enforcing NCAA academic and amateur standards, would make rules enforcement recommendations to the Council of the NCAA that presided over the NCAA. *Id.* at 50. The NCAA Council would then subject the suggested penalties for an offending member to a vote of the entire convention. *See, e.g.,* BYERS, *supra* note 22, at 59–61.

<sup>69</sup> FLEISHER ET AL., *supra* note 25, at 50. The NCAA Council functioned as an oversight committee for the association, similar to that of a corporation's board of directors. *See id.* at 50, 70. Today, the NCAA Executive Committee performs this function for the entire NCAA, while the Division I Board of Directors and the Presidents' Councils of Divisions II and III play this role at the individual division level. *See* NCAA, *supra* note 4, at 29 fig.4-2. Members of the NCAA Executive Committee, taken from each of the NCAA's three divisions, earn appointment to office from members of the aforementioned Board of Directors and Presidents' Councils. *See* NCAA, *supra* note 4, art. 4.1.3, at 22.

<sup>70</sup> These powers included an ability to impose sanctions against offending schools such as: a ban from post-season play; limits on television appearances; scholarship restrictions; and even the "Death Penalty," requiring a school to drop the offending sport for a determined number of seasons. RANDY R. GRANT ET AL., *THE ECONOMICS OF INTERCOLLEGIATE SPORTS* 33 (2008). Today, rules enforcement occurs primarily at the division level, such that the NCAA Executive Committee, the contemporary equivalent of the old NCAA Council, is no longer so involved. *See* NCAA, *supra* note 4, at 28 fig.4-1.

<sup>71</sup> GRANT, *supra* note 70, at 33.

<sup>72</sup> FLEISHER ET AL., *supra* note 25, at 50.

Motivating the move to establish this regulatory power, and influencing member institutions' willingness to accept it, was a television-fueled boom in the 1950s of the nationwide demand for college sports.<sup>73</sup> With this boom finding the NCAA and its members as eager as ever<sup>74</sup> to get a share of the "sports business pie,"<sup>75</sup> commentators have asserted that the NCAA turned to cartelization<sup>76</sup> as a means to maximize profits flowing from the considerable revenues that accompanied televised games.<sup>77</sup> This was because cartel behavior, reflected in numerous rules agreements between NCAA members to restrict competition,<sup>78</sup> would permit close regulation of inputs and outputs in the college sports market, thereby allowing simultaneous minimization of costs and maximization of revenues.<sup>79</sup>

For example, from 1953 to 1984, the NCAA was able to regulate both the number of televised football games a network could show and the number of television appearances a team could make during a given season.<sup>80</sup> Until the Supreme Court banned that practice in 1984,<sup>81</sup> it had not only made the "price [of televised football games] higher and [their] output lower than they would otherwise be,"<sup>82</sup> but it had also protected and maximized gate receipt revenues by limiting the supply of games that might otherwise be televised.<sup>83</sup> In the eyes of more than a few informed observers, such efforts to restrict member competition in aid of profit

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<sup>73</sup> It was concomitant with this boom that "college sports began to tap the revenues from television exposure." *Id.* at 51.

<sup>74</sup> *Id.* at 50.

<sup>75</sup> James V. Koch, *A Troubled Cartel: The NCAA*, 38 LAW & CONTEMP. PROBS. 135, 136 (1973) (quoting Marlow W. Cook, United States Senator from Kentucky).

<sup>76</sup> See, e.g., Depken & Wilson, *supra* note 27, at 226. That the NCAA functions, and has functioned for years, as a cartel is not necessarily a fact to which the NCAA would readily admit. See, e.g., Koch, *supra* note 75, at 136 (noting that the NCAA's stated commitment to amateurism made no mention of its functioning as a "moderately successful business cartel"). Fleisher notes, however, that "economists generally view the NCAA as a cartel ... because the NCAA has historically devised rules to restrict output ... and to restrict competition for inputs." FLEISHER ET AL., *supra* note 25, at 5.

<sup>77</sup> BYERS, *supra* note 22, at 90 (noting the NCAA's collection of impressive television revenues between the 1950s into the 1980s, reaped from football and men's basketball contracts in particular); see also FLEISHER ET AL., *supra* note 25, at 54.

<sup>78</sup> See Koch, *supra* note 75, at 136-37.

<sup>79</sup> FLEISHER ET AL., *supra* note 25, at 51. Fleisher refers to the production of college sports as NCAA "output," and to the students and coaches that produce this output as "inputs." See, e.g., *id.* at 5, 51, 56. For the remainder of this Note, I will do the same.

<sup>80</sup> *Id.* at 52, 58-59.

<sup>81</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

<sup>82</sup> *Id.* at 107.

<sup>83</sup> FLEISHER ET AL., *supra* note 25, at 56.

maximization and cost minimization demonstrated that the NCAA was becoming a certifiable business cartel.<sup>84</sup>

Moreover, despite the Supreme Court's call in the mid-1980s for the NCAA to cease regulation of television outputs, the NCAA has not backed away from its commercially-oriented cartel behavior in recent years.<sup>85</sup> Commentators identifying as much have pointed particularly to NCAA efforts at regulation of two primary inputs of the college sports market: student-athletes and coaches.<sup>86</sup> As opposed to output restrictions, by which a cartel can increase product prices by limiting supply, input restrictions function to limit costs, thus permitting profit maximization by cutting expenses on the front end.<sup>87</sup> The NCAA's use of this practice has increased steadily since its structural reform in 1953, intensified through early 1970s efforts to: (1) set the maximum price paid for intercollegiate athletes via scholarship compensation rules, (2) regulate the quantity of athletes "purchased" in a given year via limitations on scholarship numbers, and (3) regulate the duration and intensity of members' usage of athletes with caps on eligibility and practice hours.<sup>88</sup> One commentator noted in 1973 that such efforts were intended to at once suppress members' input costs and prevent certain members from gaining competitive advantages over others, the latter function boosting profits by maintaining consumer interest through the production of closely contested sporting events.<sup>89</sup> Further, it is important to mention that the NCAA persists in these efforts today.<sup>90</sup>

Since 1970, the NCAA's institutionalization of such cost-cutting, input-restriction efforts has been manifest in the physical expansion of the NCAA Manual.<sup>91</sup> A publication of 161 pages in the 1970–1971 school year, it ballooned to a 1,268-page, three-volume edition by 1998–1999, much of which involved rules and restrictions regarding the recruitment and management of college athletes.<sup>92</sup> Combining the effects of these rules with both the NCAA's unabashed orientation as a revenue-seeking associ-

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<sup>84</sup> See, e.g., Koch, *supra* note 75, at 136.

<sup>85</sup> See BLAIR & HARRISON, *supra* note 3, at 188–89.

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., FLEISHER ET AL., *supra* note 25, at 56, 58, 65.

<sup>88</sup> Koch, *supra* note 75, at 137.

<sup>89</sup> *Id.* at 137.

<sup>90</sup> See, e.g., NCAA, *supra* note 4, art. 15.02.2, 15.5.1, 17.01.1, at 194, 205, 237.

<sup>91</sup> See ZIMBALIST, *supra* note 32, at 239; see also FLEISHER ET AL., *supra* note 25, at 94 (describing the NCAA manual as a reader's guide to the cartel rules).

<sup>92</sup> See ZIMBALIST, *supra* note 32, at 239. The 2010–11 NCAA Manual weighs in at a voluminous 434 pages, approximately half of which concern rules pertaining to student-athletes. See generally NCAA, *supra* note 4.

ation<sup>93</sup> and the critical roles that college athletes play as revenue-generating inputs,<sup>94</sup> it becomes clear that today, at the very least, the NCAA is a cartel of members colluding to “reduce [input] costs and thereby generate more ‘profit’ for their athletic programs.”<sup>95</sup>

## II. NCAA SCHOLARSHIP RULES: EVIDENCE OF ANTICOMPETITIVE BEHAVIOR

The history of NCAA athletic scholarships, including the NCAA’s agreement to impose the one-year rule and per sport limitations, is illustrative of the NCAA’s legacy of anticompetitive behavior,<sup>96</sup> and was at the heart of Agnew’s complaint.<sup>97</sup> This becomes particularly apparent upon examination of NCAA members’ traditional and strategic use of such scholarship rules to reduce their athletic departments’ costs. Ironically, however, the granting of athletic scholarships, or “grants-in-aid,” initially worked more to increase costs for individual schools than to limit them.<sup>98</sup>

The grant-in-aid concept arose in the 1940s among schools lacking the facilities and prestige to compete for football recruits with college football’s established powers in the Ivy League and the Big Ten Conference.<sup>99</sup> Specifically, if those lower profile, primarily southern,<sup>100</sup> schools could not ride the growing wave of college football’s popularity<sup>101</sup> by attracting athletes based on the schools’ existing merits, then they would do so by offering recruits a free education.<sup>102</sup> By so doing, schools of lower athletic

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<sup>93</sup> See *supra* Part I; see also NCAA, REVENUES AND EXPENSES 2004–2009: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 17 tbl.2.1 (2010) [hereinafter “NCAA, REVENUES AND EXPENSES”].

<sup>94</sup> See, e.g., FLEISHER ET AL., *supra* note 25, at 92–93 (offering estimates of boosts in revenue collection that star college athletes such as Patrick Ewing and Bo Jackson provided to their universities).

<sup>95</sup> BLAIR & HARRISON, *supra* note 3, at 189.

<sup>96</sup> See, e.g., *id.*; SPERBER, *supra* note 30, at 210.

<sup>97</sup> See *supra* note 10 and accompanying text.

<sup>98</sup> See BYERS, *supra* note 22, at 68.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See FLEISHER ET AL., *supra* note 25, at 42.

<sup>102</sup> See BYERS, *supra* note 22, at 68. Byers, a longtime NCAA executive director with deep Big Ten roots, notes with some apparent bitterness that, “[t]he South wanted to use the grant-in-aid to plunder the rich resources of white athletes in other parts of the country.” *Id.* Big Ten schools, meanwhile, though not formally offering grants-in-aid, began giving black athletes direct payments to play football in the aftermath of World War II. See SPERBER, *supra* note 52, at 169. This practice joined the already established “job plan” program in the Big Ten, by which schools paid athletes for “minimal work ... [and] phantom jobs.” *Id.* at 228.

repute were able to out-compete their better known rivals, thereby enhancing the status of their football programs, and, by consequence, the reputations of the schools themselves.<sup>103</sup> Of course, giving out grants-in-aid meant a hike in input costs for those up-and-coming schools, which were not only financing athletes' tuitions but also covering their lodging and incidental expenses.<sup>104</sup> The schools deemed the expense a worthwhile one, however, as it offered the chance to expand their athletic programs and to thus acquire "a larger piece of ... [college football's] economic pie."<sup>105</sup>

Despite the attempt of Big Ten schools to eliminate grants-in-aid from the NCAA through the inclusion of prohibitory terms in the 1948 Sanity Code,<sup>106</sup> the access to big time football that scholarships offered drove many schools to maintain the practice and to ignore the new rules.<sup>107</sup> When the NCAA balked at expelling those scholarship-granting schools in response to their "revolt,"<sup>108</sup> the Sanity Code, without a means of meaningful enforcement, lost its relevance and was soon abandoned.<sup>109</sup> By 1952, with nearly every school in major college football, save the Ivy League, handing out grants-in-aid<sup>110</sup> to remain competitive,<sup>111</sup> the members of the NCAA's most ambitious football conferences,<sup>112</sup> including those of the Big Ten, decided to institutionalize the practice.<sup>113</sup> As a result,

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<sup>103</sup> Byers describes in particular the use of this tactic at Michigan State University, which used athletic scholarships to steer athletes away from the University of Michigan, and to pull both the football program and the school itself up by the "bootstraps." See BYERS, *supra* note 22, at 41–43.

<sup>104</sup> See *id.* at 68.

<sup>105</sup> SPERBER, *supra* note 52, at 242.

<sup>106</sup> See *id.* at 233.

<sup>107</sup> See, e.g., SPERBER, *supra* note 52, (citing the University of Virginia as an example).

<sup>108</sup> *Id.* at 241.

<sup>109</sup> See BYERS, *supra* note 22, at 68.

<sup>110</sup> See SPERBER, *supra* note 52, at 381.

<sup>111</sup> See BYERS, *supra* note 22, at 69. In addition to the competition motive, Byers attributes to scholarship proponents the additionally stated motive of reinforcing amateurism in college sports through the elimination of direct cash payments from boosters to recruits. BYERS, *supra* note 22, at 72. Given, however, the NCAA's 1953 invention of the term "student-athlete" to dissuade courts from characterizing athletes as workers in response to the recent proliferation of compensation via grants-in-aid, it seems unlikely that many in the NCAA viewed grants-in-aid as a boon to the NCAA's stated amateur ideal. See BYERS, *supra* note 22, at 69.

<sup>112</sup> Despite their role as pioneers in the growth of college sports, members of the Ivy League rejected the notion of grants-in-aid and slowly began to deemphasize their athletic programs in the face of college sports' increasing resemblance to professionalism. See SPERBER, *supra* note 9, at 271.

<sup>113</sup> See BYERS, *supra* note 22, at 72.

in 1956 the NCAA took charge of grants-in-aid, standardizing by general agreement both their substance and the guidelines for their distribution.<sup>114</sup>

Of particular relevance to a bachelor's degree-based complaint like Agnew's was the NCAA's adoption, or lack thereof, of "safety proscriptions" regarding issues of scholarship duration and quantity that the NCAA addressed upon formally accepting grants-in-aid.<sup>115</sup> Regarding the former was a provision for grants-in-aid to last a maximum of four years.<sup>116</sup> In other words, granting institutions were generally at liberty to offer athletic scholarships from one to four years in duration,<sup>117</sup> with a four-year "no-cut" scholarship as the most competitive package.<sup>118</sup> Caps on total grants-in-aid, meanwhile, both per team and per year, rested within the purview of member conferences, whose rules could be extremely liberal.<sup>119</sup>

It did not take long, however, for NCAA members to determine that closer, more centralized regulation of athletic scholarships would work in their favor.<sup>120</sup> These closer regulations began in earnest in 1973, when the NCAA eliminated four-year athletic scholarships, mandating that schools could thereafter only give grants on a one-year, renewable basis.<sup>121</sup> The NCAA explained the move as a response to the actions of athletes who would accept athletic scholarships, but then refuse to compete.<sup>122</sup> Member schools were uninterested in spending money on athletes in the form of multi-year scholarships, only to have those athletes quit their teams but keep the guaranteed education.<sup>123</sup> Such reasoning, acknowledged by the NCAA no less, supports a description of the one-year rule as a collusively adopted cost-cutting measure intended to maximize degree prices for college athletes.

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<sup>114</sup> *See id.* at 72–73.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 72.

<sup>117</sup> Conferences tended to regulate this practice among their member schools, however, and some more tightly than others. For example, the Big Eight Conference might permit only one-year renewable grants, while the Southwestern Conference would permit four-year grants. *See id.* at 76.

<sup>118</sup> *See id.* at 75.

<sup>119</sup> The Southeastern Conference, for example, permitted its members forty new football grants each year with an overall total of one hundred twenty-five permissible per year. *See BYERS, supra* note 22, at 220.

<sup>120</sup> *See, e.g., Koch & Leonard, supra* note 27, at 235; *BYERS, supra* note 22, at 226–27.

<sup>121</sup> SPERBER, *supra* note 30, at 207.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

Further supporting a bachelor's degree-based antitrust argument was the NCAA's decision to place an enforced cap on total scholarship numbers in 1976.<sup>124</sup> Imposition of this rule meant that by the mid-1970s, a football team of over one hundred players could carry a maximum of only ninety-five scholarship athletes, and could dole out only twenty-five new scholarships to incoming players each year.<sup>125</sup> This decision, a response to financial difficulties faced by NCAA members with swollen athletic department budgets,<sup>126</sup> was one of 225 amendments proposed at the 1976 NCAA convention, the "great majority" of which "dealt with cost reduction."<sup>127</sup> In light of this reality, the description of scholarship caps as cost-reducing, anticompetitive measures to maximize the cost of bachelor's degrees gains strength. Moreover, it is of note that although the primary utility of the grant-in-aid cap was its role in reducing scholarship costs for NCAA schools, one observer noted soon after the rule's passage that schools additionally appreciated its effect of "giv[ing] them the legal and moral sanction of the NCAA" to make way for new athletes by canceling the scholarships of those who did not become stars.<sup>128</sup> With the overwhelming resemblance of this practice to Agnew's situation,<sup>129</sup> and given the practice's origins in NCAA measures to reduce input costs, a claim of victimization at the hands of collusive NCAA agreements to cut costs takes on still greater credibility.

### III. THE SHERMAN ACT, SECTION I: ANTITRUST OVERVIEW AND THE ACT'S HISTORY WITH THE NCAA

In order to obtain relief from the courts, however, Agnew's claim of NCAA price fixing and anticompetitive collusion must survive less an

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<sup>124</sup> See Koch & Leonard, *supra* note 27, at 235.

<sup>125</sup> BYERS, *supra* note 22, at 226.

<sup>126</sup> See Koch & Leonard, *supra* note 27, at 235; BYERS, *supra* note 22, at 219–21. Byers notes, for example, that despite considerable increases in college football attendance and television revenues during the 1960s, this new money "was chasing the 174% increase in football costs." *Id.* at 220.

<sup>127</sup> Koch & Leonard, *supra* note 27, at 235.

<sup>128</sup> *Id.* at 236.

<sup>129</sup> When Agnew's coach left Rice for the University of Tulsa, "the new Rice coach switched Agnew's scholarship to a recruit of his own." See Branch, *supra* note 10. This practice, by which coaches refuse to renew an athlete's scholarship in order to replace him with another, is known as "running off." The practice continues to occur with some regularity, yet the NCAA has done little to prevent it. See, e.g., Seth Davis, *New Coaches Thomas, Calipari Hurting Players in Scholarship Game*, SPORTS ILLUSTRATED, June 24, 2009, available at [http://sportsillustrated.cnn.com/2009/writers/seth\\_davis/06/24/hoop.thoughts/index.html](http://sportsillustrated.cnn.com/2009/writers/seth_davis/06/24/hoop.thoughts/index.html).

application of logical and historical analysis, and more the standards of antitrust jurisprudence, which have seen courts treat the NCAA somewhat differently than other would-be Sherman Act violators.<sup>130</sup> An overview of Section I of the Sherman Act (the Act), a synopsis of the Act's interpretation by federal courts, and an examination of federal courts' treatment of the NCAA in the face of previous Section I challenges is therefore necessary.

*A. The Sherman Act, Section I: Overview*

*1. Foundations and Purpose*

Although commentators disagree as to Congress's precise motivation for the development and passage of the Sherman Act in 1890,<sup>131</sup> there appears to be less dispute that this "legislative watershed[]" was revolutionary in its enabling of government agencies and private parties to enforce prohibitions against trade restraints and monopolization.<sup>132</sup> Functioning to improve upon the "hazy" dimensions of common law,<sup>133</sup> under which harmful trade restraints and monopolistic acts were unlikely to be challenged as unenforceable, the Act threatened considerable legal consequences for anticompetitive economic behavior,<sup>134</sup> and granted courts a more concrete reference point by which to identify those harmful acts.<sup>135</sup> Finally, though the Act's rather broad language<sup>136</sup> initially imposed an "interpretive challenge" upon courts to determine those "specific forms of collective and unilateral conduct that pose unacceptable competitive dan-

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<sup>130</sup> See, e.g., Nagy, *supra* note 26, at 332–33.

<sup>131</sup> Theories as to Congress's goals include: (1) a desire to promote consumer welfare; (2) an intent to allow small firms, farmers, and other individuals to compete with large manufacturers; (3) an attempt to prevent unfair redistributions of wealth from consumers to producers; and (4) an effort to sustain the vitality of democratic institutions. See GELLHORN & KOVACIC, *supra* note 33, at 21–22.

<sup>132</sup> *Id.* at 20, 24.

<sup>133</sup> *Id.* at 21.

<sup>134</sup> See *id.* at 24. Specifically, the Sherman Act grants aggrieved claimants the hefty award of treble damages and attorneys' fees. *Id.* The act provides for criminal punishment of the prohibited activities as well, threatening fines of up to \$100 million for corporations and \$1 million for individuals, or imprisonment for up to ten years. 15 U.S.C. § 1 (2006).

<sup>135</sup> GELLHORN & KOVACIC, *supra* note 33, at 24.

<sup>136</sup> The prohibitory language of the Sherman Act, Section I (the section with which Agnew's complaint is concerned) reads: "Every 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 hereby declared to be illegal." 15 U.S.C. § 1 (2006).

gers,”<sup>137</sup> courts have met the challenge by establishing practical tests to identify and punish such activities as cooperative price fixing, boycotts, and output restrictions.<sup>138</sup>

In accusing the NCAA and its members of unlawfully agreeing to artificially inflate the price of a bachelor’s degree for scholarship athletes, Agnew’s complaint implicates Section I of the Sherman Act by describing this alleged restraint of trade as an exercise in horizontal price fixing.<sup>139</sup> Such an action, in which separate, competing entities of a particular market conspire jointly<sup>140</sup> to inhibit inter-firm competition by fixing prices,<sup>141</sup> involves a collective effort to carry out the improperly restrictive agreements prohibited by Section I.<sup>142</sup> This activity is distinct from the unilateral conduct of a single firm or person to establish monopoly power over a market through wrongful exclusionary means, as prohibited by Section II of the Sherman Act.<sup>143</sup>

## 2. Section I Jurisprudence and the Rule of Reason

In terms of Section I analysis, though, it is important to note that courts will not deem all restraints of trade illegal.<sup>144</sup> This has followed from the Supreme Court’s 1910 reasoning in *Standard Oil Co. v. United States*,<sup>145</sup> in which the Court recognized that any contract, “by obligating one party to another,” must restrain trade to some extent.<sup>146</sup> In so deciding, the Court characterized as unacceptable only those restraints of trade that are “unreasonably restrictive of competitive conditions,”<sup>147</sup> a statement affirming for posterity the importance of understanding a trade restraint’s effects before drawing any legal conclusions.<sup>148</sup> As a result, for a plaintiff

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<sup>137</sup> GELLHORN & KOVACIC, *supra* note 33, at 23.

<sup>138</sup> *See infra* Part III.A.2.

<sup>139</sup> Complaint at para. 1, Agnew v. NCAA (N.D. Cal. 2010) (No. 10-4804).

<sup>140</sup> *See* GELLHORN & KOVACIC, *supra* note 33, at 224.

<sup>141</sup> *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 106–07 (1984).

<sup>142</sup> GELLHORN & KOVACIC, *supra* note 33, at 23.

<sup>143</sup> *Id.*; *see also* 15 U.S.C. § 2 (2006). Commentator Christopher Norris points out that the NCAA cannot be found guilty of a Section II violation, as it is by definition “not a monopolist, but the result of a group of competitors who have combined to place some restraints on the [college sports] market.” Christopher B. Norris, *Trick Play: Are the NCAA’s New Division I-A Requirements an Illegal Boycott?*, 56 SMU L. REV. 2355, 2364 (2003).

<sup>144</sup> *See* GELLHORN & KOVACIC, *supra* note 33, at 26.

<sup>145</sup> *Standard Oil Co. v. United States*, 221 U.S. 1, 58–62 (1910).

<sup>146</sup> *See* Norris, *supra* note 143, at 2364.

<sup>147</sup> *Standard Oil Co.*, 221 U.S. at 58.

<sup>148</sup> *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998).

to prevail in most claims under Section I of the Sherman Act today, he or she must prove at the outset that the accused: “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”<sup>149</sup>

Building on *Standard Oil* was the Supreme Court’s articulation in 1918 of a “rule of reason” in *Chicago Board of Trade v. United States*.<sup>150</sup> In this case, the Court discarded the notion that a certain activity, here a price fixing effort by parties with power in the relevant market, should be considered automatically unreasonable and thus “per se” illegal;<sup>151</sup> instead, the Court insisted on a more deliberate approach. A “true test of legality,” it stated, must ask whether the restraint imposed uses regulation to promote competition, or instead only suppresses and destroys it.<sup>152</sup>

Upon establishing the rule of reason as a legitimate means for analysis of restraint of trade issues, the aftermath of *Chicago Board of Trade* saw courts left with two relatively workable Section I tests: a “per se rule and the rule of reason.”<sup>153</sup> Today the per se rule applies to those “naked restraint[s] of trade” that courts have deemed unacceptable under any circumstances, on account of their recognized tendency to “always or almost always ... restrict competition.”<sup>154</sup> The rule of reason, on the other hand, applies to all restraints of trade not considered illegal per se, and requires a showing that the challenged action has or can have an adverse effect on competition that is both unjustifiable and substantial.<sup>155</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *See Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *see also* GELLHORN & KOVACIC, *supra* note 33, at 174–79.

<sup>151</sup> GELLHORN & KOVACIC, *supra* note 33, at 177.

<sup>152</sup> *See Chi. Bd. of Trade*, 246 U.S. at 238. The Court went on to note that the test’s application should involve consideration of the following factors: “facts peculiar to the business” in question, the condition of the business before and after the restraint’s imposition, and the probable or actual nature of the restraint’s effect. *Id.* Although this landmark decision provided a foundation for future analysis of restraint of trade claims, it left in its wake some perplexing questions, such as how to rank the stated factors and on which party the burden would rest to provide proof regarding those factors. *See* GELLHORN & KOVACIC, *supra* note 33, at 176–77.

<sup>153</sup> *See Law*, 134 F.3d at 1016.

<sup>154</sup> *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 19–20 (1979). Interestingly, courts will generally declare horizontal price-fixing schemes, such as that in which Agnew has alleged the NCAA to have engaged, as illegal per se. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984). Courts have, however, permitted the NCAA to engage in a wide range of horizontal agreements, largely in the name of the NCAA’s stated commitment to amateurism. *See Nagy*, *supra* note 26, at 332–33.

<sup>155</sup> *See Law*, 134 F.3d at 1017.

As suggested by *Chicago Board of Trade*, however, the rule of reason analysis becomes complex due to its demand for the consideration of numerous factors.<sup>156</sup> Although courts today rely on a fairly standardized, multi-step test in analyzing restraints of trade under this rule, the process can become a protracted one.<sup>157</sup>

Described as a structure cast “in terms of shifting burdens of proof,”<sup>158</sup> the test places an initial burden on a plaintiff to show that there has been an agreement to restrain interstate trade in order to produce significant anticompetitive effects within a relevant market.<sup>159</sup> In response to this burden, a plaintiff must first offer contextual information to help the court better understand the challenged practice’s negative effect on competition.<sup>160</sup> These initial hurdles generally include: (1) a demonstration that the challenged act was an agreement implicating trade or commerce,<sup>161</sup> (2) identification of the relevant market in which the challenged restraint will be felt, and (3) the provision of evidence establishing the defendant’s power over that market.<sup>162</sup> Further, whereas the definition of “commercial” in this context is unclear, thus impelling courts to examine the nature of a challenged act “in light of the totality of the surrounding circumstances,”<sup>163</sup> more concrete definitions for “relevant market” and “market power” do exist. Specifically, a relevant market is one comprising of products “reasonably interchangeable” with those that a defendant sells<sup>164</sup> or buys,<sup>165</sup> and which extends over a defined geographic area.<sup>166</sup> Market power, meanwhile, exists with a party’s ability “to alter the interaction of supply and demand in the market,”<sup>167</sup> thus permitting that party “to raise

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<sup>156</sup> See *supra* note 152 and accompanying text.

<sup>157</sup> See, e.g., *Law*, 134 F.3d at 1019–20.

<sup>158</sup> *Id.* at 1019.

<sup>159</sup> *O’Bannon v. NCAA*, 2010 WL 445190, at \*4 (N.D. Cal. Feb. 8, 2010) (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001)).

<sup>160</sup> See *Law*, 134 F.3d at 1019.

<sup>161</sup> See, e.g., *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005).

<sup>162</sup> *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545, 549–50 (S.D.N.Y. 2004).

<sup>163</sup> *United States v. Brown Univ.*, 5 F.3d 658, 666 (3d Cir. 1993).

<sup>164</sup> *Metro. Intercollegiate Basketball Ass’n*, 339 F. Supp. 2d at 549.

<sup>165</sup> Recall that an agreement to restrain trade can exist among cartel members controlling either an output market as sellers or an input market as buyers. See *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1151–52.

<sup>166</sup> That is, a plaintiff must define the geographic region across which the relevant market stretches. See WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* § 3:4 (2009).

<sup>167</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984).

prices above those that would be charged in a competitive market.”<sup>168</sup> It is of note, however, that where proof of a blatant or “naked” trade restraint demonstrating clear anticompetitive effects exists, some courts have shown a willingness to bypass the context-building function of market analysis altogether.<sup>169</sup> Application of this practice, known as a “quick look” rule of reason analysis, is often appropriate in horizontal price fixing cases, the understood purpose of which is often to make prices “unresponsive to a competitive marketplace.”<sup>170</sup>

Regardless of whether a court utilizes a traditional or quick look rule of reason, a plaintiff must at some point meet his or her burden of showing the anticompetitive nature of the defendant’s activity.<sup>171</sup> When a restraint of trade is alleged to exist, indicators of anticompetitive elements typically include prices and outputs unresponsive to consumer preference, thus leaving prices higher and outputs lower than they would otherwise be.<sup>172</sup> A plaintiff may, alternatively, indirectly show the existence of anticompetitive effects by demonstrating the defendant’s overwhelming market power.<sup>173</sup>

Provided that the plaintiff survives this first step, the burden then shifts to the defendant to show the merits of his or her activity by pointing out its procompetitive elements.<sup>174</sup> In other words, the defendant must show that, on balance, the restraint in question functions to enhance competition.<sup>175</sup> Should a court determine the targeted practice’s anticompetitive effects outweigh its procompetitive virtues, then a finding of an antitrust violation will result.<sup>176</sup>

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<sup>168</sup> *Id.* at 109 n.38.

<sup>169</sup> *See* *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998).

<sup>170</sup> *Id.* at 1019–20.

<sup>171</sup> *See* HOLMES, *supra* note 166, § 3:4.

<sup>172</sup> *Bd. of Regents*, 468 U.S. at 106–07.

<sup>173</sup> *Law*, 134 F.3d at 1010, 1019.

<sup>174</sup> *Id.* at 1017.

<sup>175</sup> *Id.* at 1021.

<sup>176</sup> *See, e.g., Bd. of Regents*, 468 U.S. at 119–20; *Law*, 134 F.3d at 1024. It is of note that should a court find the procompetitive qualities of a horizontal agreement to overwhelm its anticompetitive effects, all is not lost for the plaintiff. Rather, a court at this point will apply the final step of a rule of reason analysis by deciding whether a “less restrictive alternative” to the complained of practice exists. *See* Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 93 (2011) (citing *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50 (2d Cir. 1997)). If a plaintiff can convince a court of such an alternative, the court will in turn find an antitrust violation. *See id.*

*B. The Sherman Act and the NCAA: A Two-Sided Relationship*

If, as asserted in Part I *supra*, the NCAA is a cartel seeking to minimize costs and maximize profits by limiting inter-member competition for inputs,<sup>177</sup> then it would seem perfectly reasonable to expect courts' hostile treatment of such an apparent antitrust violation.<sup>178</sup> Thus, it has been to the consternation of many commentators<sup>179</sup> that federal courts have often taken the opposite approach, frequently determining that restrictive NCAA rules regarding its inputs are, in fact, legally acceptable.<sup>180</sup> Informing this seemingly counterintuitive reasoning has been courts' recognition of the NCAA's stated commitment to the preservation of amateurism in college sports.<sup>181</sup> Application of this reasoning has arisen most often in courts' responses to college athletes' antitrust attacks on the NCAA's eligibility rules, which courts have consistently recognized as procompetitive efforts to boost the popularity of college sports by preserving its unique amateur character.<sup>182</sup>

That said, federal courts have insisted even in rulings favorable to the NCAA that it is not exempt from antitrust scrutiny,<sup>183</sup> and in two cases, *NCAA v. Board of Regents* and *Law v. NCAA*, have found the NCAA in violation of Section I of the Sherman Act.<sup>184</sup> With these cases breaking

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<sup>177</sup> See, e.g., BLAIR & HARRISON, *supra* note 3, at 189.

<sup>178</sup> Gellhorn notes that informing the policy behind Section I is an assumption that "society may lose the benefits from competition if rivals are permitted to join together and to consolidate their market power." GELLHORN & KOVACIC, *supra* note 33, at 156.

<sup>179</sup> See generally, e.g., Mitten, *supra* note 24; Mitten, *supra* note 28, at 62–63; Nagy, *supra* note 26, at 331–35; Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28–29 (2000).

<sup>180</sup> See, e.g., Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988); Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975).

<sup>181</sup> See *supra* note 24 and accompanying text.

<sup>182</sup> See, e.g., NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) (noting that the amateur character of college football "makes it more popular than professional sports to which it might otherwise be comparable, such as ... minor league baseball"); Banks, 977 F.2d at 1089 (asserting the NCAA's "vital role" in preserving college football's amateur character, thereby "enabl[ing] a product to be marketed which might otherwise be unavailable").

<sup>183</sup> See, e.g., Gaines, 746 F. Supp. at 744 (noting that the NCAA, "with its multimillion dollar annual budget, is engaged in a business venture and is not entitled to a total exemption from antitrust regulation").

<sup>184</sup> See *Bd. of Regents*, 468 U.S. at 120; *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

from the seeming jurisprudential norm of NCAA antitrust analysis, it is of interest that both involved not eligibility rules, but rather NCAA-imposed restrictions on outputs and input costs, respectively.<sup>185</sup>

In *Board of Regents*, the Supreme Court applied the quick look rule of reason<sup>186</sup> to find an antitrust violation in the NCAA's practice of restricting both the quantity of college football games televised and the number of televised games allowed to a given team in a single season.<sup>187</sup> In using the quick look approach, the Court explained that though the NCAA's television plan involved horizontal price fixing, which is ordinarily "illegal *per se*,"<sup>188</sup> some rule of reason application was appropriate for an industry like college sports, "in which horizontal restraints on competition are essential if the product is to be available at all."<sup>189</sup> A full blown rule of reason analysis, meanwhile, including both the precise identification of a relevant market and an evaluation of market power, was not necessary because the NCAA's television plan involved an "agreement not to compete in terms of price or output" that required no industry analysis to demonstrate its anticompetitive character.<sup>190</sup> Ultimately, the Court decided that the NCAA's procompetitive justifications for the plan did not outweigh its anticompetitive effects.<sup>191</sup> Specifically, the plan both decreased the output of games to viewers and increased their price for television networks.<sup>192</sup> This effect, noted the Court, was in opposition to factual findings regarding demands of the market, and therefore directly violated the Sherman Act's procompetitive, consumer-oriented policy.<sup>193</sup>

*Law v. NCAA*, decided fourteen years later, relied greatly on the reasoning of *Board of Regents* in reaching a similar conclusion.<sup>194</sup> In particular, upon confronting a Section I complaint regarding the NCAA's imposition of maximum salary limits on entry-level assistant coaches at Division I schools, the Tenth Circuit applied the quick look rule of reason to deem

<sup>185</sup> See Mitten, *supra* note 24, at 3.

<sup>186</sup> *Bd. of Regents*, 468 U.S. at 109–10.

<sup>187</sup> *Id.* at 118–20.

<sup>188</sup> *Law*, 134 F.3d at 1010, 1017.

<sup>189</sup> *Bd. of Regents*, 468 U.S. at 101.

<sup>190</sup> *Id.* at 109. "The [NCAA's] plan," wrote the Court, "is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.... This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." *Id.* at 110.

<sup>191</sup> *Id.* at 114.

<sup>192</sup> *Id.* at 107.

<sup>193</sup> *Id.* at 119–20.

<sup>194</sup> See *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998).

the “restricted-earnings coaches” (REC) Rule<sup>195</sup> an anticompetitive, cost-cutting measure.<sup>196</sup> This approach followed from the court’s recognition of the REC Rule as an effective horizontal price-fixing agreement, as it noted that “[n]o ‘proof of market power’ is required where the very purpose ... is to fix prices so as to make them unresponsive to a competitive marketplace.”<sup>197</sup> The court then deemed the NCAA’s procompetitive rationales insufficient to overcome the REC Rule’s anticompetitive nature, pointing out especially that a horizontal agreement is acceptable only when enhancing competition, rather than merely maintaining the status quo.<sup>198</sup> The court further noted that the motivation of cost savings, apparent here in the effort to minimize input costs by capping certain coaches’ salaries, could not qualify under antitrust laws as a defense to anticompetitive effects.<sup>199</sup>

Though there has been no successful antitrust claim against the NCAA since *Law*, the 2008 settlement of *White v. NCAA*<sup>200</sup> suggests additional support for the notion that courts will not uphold NCAA rules placing limits on input costs.<sup>201</sup> The claim in *White*, a response to NCAA rules limiting grant-in-aid compensation to tuition, books, and room and board,<sup>202</sup> described those rules as the product of NCAA collusion to keep maximum athletic scholarship payments below the actual cost of attending college.<sup>203</sup> Although the NCAA denied any wrongdoing, it nonetheless agreed to terms of settlement, establishing, among other payments, a \$218 million fund to cover the expenses of athletes in need over a period of six years.<sup>204</sup> That the NCAA settled the case is not determinative of how a federal court would have decided it. At the very least, however, the NCAA’s decision did seem to be an acknowledgment of a potential finding of antitrust liability.

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<sup>195</sup> *Id.* at 1014.

<sup>196</sup> *Id.* at 1024.

<sup>197</sup> *Id.* at 1020.

<sup>198</sup> *Id.* at 1024.

<sup>199</sup> *Id.* at 1020.

<sup>200</sup> See *White v. NCAA, Stipulation and Agreement of Settlement*, No. CV-06-0999 RGK (C.D. Cal. filed Jan. 28, 2008); see also Jack Carey & Andy Gardiner, *NCAA Agrees to \$10M Settlement in Antitrust Lawsuit*, USA TODAY, Jan. 30, 2008, [http://www.usatoday.com/sports/college/2008-01-29-ncaasettlement\\_N.htm](http://www.usatoday.com/sports/college/2008-01-29-ncaasettlement_N.htm). For an in-depth look at the plaintiffs’ claim in *White* and a step-by-step review of the full blown rule of reason analysis a court would apply to most student-athlete antitrust claims brought against the NCAA, see Baker III et al., *supra* note 176.

<sup>201</sup> See BLAIR & HARRISON, *supra* note 3, at 10–11 & nn.37–38, 198; see also Carey & Gardiner, *supra* note 200.

<sup>202</sup> See Baker III et al., *supra* note 176, at 76; Carey & Gardiner, *supra* note 200.

<sup>203</sup> BLAIR & HARRISON, *supra* note 3, at 198.

<sup>204</sup> *Id.*; Carey & Gardiner, *supra* note 200.

Given the outcomes of *Board of Regents*, *Law*, and *White* over the twenty-year span during which they occurred, somewhat of a pattern appeared to have arisen regarding federal courts' treatment of antitrust accusations against the NCAA. In terms of NCAA rules addressing athlete eligibility requirements and other amateurism-centric provisions, these seemed "to be virtually per se legal under the antitrust laws."<sup>205</sup> On the other hand, where evidence existed of effective agreements among NCAA members to directly fix prices in college sports' input or output markets, the possibility had arisen that courts would find antitrust violations via application of the quick look rule of reason.<sup>206</sup>

The ruling in *Agnew v. NCAA*, however, upon firmly rejecting the plaintiffs' claim that NCAA enforcement of the one-year scholarship rule and per sport scholarship caps constituted an illegal attempt to fix the prices of bachelor's degrees, resisted any momentum that *Board of Regents*, *Law*, and *White* might have built in favor of a price fixing claim against the NCAA.<sup>207</sup> That said, in dismissing the plaintiffs' complaint on the pleadings, the United States District Court for the Southern District of Indiana did not cite concerns for amateurism to explain its ruling.<sup>208</sup> The court instead applied a full blown rule of reason analysis, and determined in its attendant market analysis that a market for the sale of bachelor's degrees could not exist, reasoning that bachelor's degrees are not bought and sold, but rather must be earned.<sup>209</sup>

<sup>205</sup> See Mitten, *supra* note 24, at 5.

<sup>206</sup> *Id.* at 4; see also *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005). In the case of *White*, the parties settled the matter before the court could issue a final ruling. See Baker III et al., *supra* note 176, at 77.

<sup>207</sup> See *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744 (S.D. Ind. Sept. 1, 2011).

<sup>208</sup> *Id.*

<sup>209</sup> See *id.* at \*27–30. In finding a market for bachelor's degrees "implausible," the court pointed out that "earning a bachelor's degree requires the student to attend class, take required courses, and maintain certain grades, among many other things." *Id.* at \*28. For the court, however, to suggest that all top tier college athletes "earn" bachelor's degrees in the same way that non-athletes do is misleading. The court did not mention, for example, that athletic departments at Division I universities have made liberal use of academic fraud—often by finding tutors to complete athletes' schoolwork for them—to keep these athletes academically eligible so they can continue to compete. See, e.g., Jonathan Jones, *UNC NCAA Football Academic Fraud Case Details Released*, THE DAILY TAR HEEL, Sept. 22, 2011, available at [http://www.dailytarheel.com/index.php/article/2011/09/unc\\_ncaa\\_football\\_academic\\_fraud\\_case\\_details\\_released](http://www.dailytarheel.com/index.php/article/2011/09/unc_ncaa_football_academic_fraud_case_details_released); Tom Farrey, *Seminole Helped by "LD" Diagnoses*, ESPN.COM (Dec. 18, 2009), <http://sports.espn.go.com/espn/otl/news/story?id=4737281>; Doug Lederman, *Another Case of Academic Fraud*, INSIDE HIGHER EDUC. (Jan. 21, 2010, 3:00 AM), <http://www.insidehighered.com/news/2010/01/21/gasouthern>. Moreover, even where such fraud does not occur, universi-

In electing to use a full blown rule of reason analysis, the *Agnew* court departed from the quick look analyses applied by the Supreme Court and the Tenth Circuit in *Board of Regents* and *Law* respectively.<sup>210</sup> Whereas a quick look would not have demanded definition of a relevant market,<sup>211</sup> the court elected instead to follow Seventh Circuit precedent, determining therefore that an antitrust claim against the NCAA “must allege anticompetitive effects on a discernible market.”<sup>212</sup> By not proclaiming amateurism as a bar to a bachelor’s degree-based price fixing claim against the NCAA, and by instead using the market definition requirement of the full blown rule of reason analysis to dismiss such a claim, the court in *Agnew* set aside the NCAA’s traditional amateurism shield, and thus left open the possibility of a plaintiff’s victory in a court more amenable to the quick look approach.

#### IV. APPLYING SECTION I ANTITRUST ANALYSIS TO A BACHELOR’S DEGREE-BASED COMPLAINT

In asserting the unlawfulness of NCAA members’ ongoing agreement to place limitations on athletic scholarships, thereby restricting competition in the pricing and availability of bachelor’s degrees for student-athletes, a bachelor’s degree-based complaint places the challenged scholarship rules within the category of output market restrictions upon which federal courts have looked unfavorably, and could thus induce a court to find an antitrust violation. Specifically, before a court feeling less bound by precedent to apply the demanded market analysis of the full blown rule

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ties routinely hire tutors to help student-athletes fulfill their academic obligations. *See, e.g.,* Erin Hartness, *UNC to Phase out Undergrads as Tutors for Athletes*, WRAL SPORTSFAN.COM (Sept. 21, 2011), <http://www.wralsportsfan.com/unc/story/10165186/>. With Division I universities expending so many resources, and in some cases violating NCAA rules, to ensure their scholarship athletes remain academically eligible for the duration of their college careers, it seems that in many cases a student athlete’s path to a bachelor’s degree is less challenging than that of a non-athlete. When scholarship athletes enter college as illiterate freshmen and graduate several years later, the concept of a market for bachelor’s degrees begins to seem less implausible. *See* Farrey, *supra*.

<sup>210</sup> *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109–10 (1984); *Law v. NCAA*, 134 F.3d 1010, 1014 (10th Cir. 1998).

<sup>211</sup> *See, e.g., Law*, 134 F.3d at 1020 (noting that anticompetitive effect can be established without determination of a relevant market); *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (citing with approval use of a quick look rule of reason that eschews defining a market).

<sup>212</sup> *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*13 (S.D. Ind. Sept. 1, 2011) (quoting *Banks v. NCAA*, 977 F.2d 1081, 1088 (7th Cir. 1992)).

of reason, the commercially motivated horizontal agreement behind the challenged rules would allow a court to not only ignore issues of amateurism but also make use of quick look analysis. Upon such an approach, the challenged rules could well not survive.

*A. The Questioned Scholarship Rules Implicate Commercial Interests, Not Concerns for Amateurism*

Recognizing the distinction federal courts have drawn between the NCAA's horizontal agreements to promote amateurism and those that unlawfully fix prices,<sup>213</sup> study of the origins of the challenged scholarship rules shows the agreements creating them to fall squarely in the latter category. Suggesting as much are both the motives that informed those rules and the willingness of federal courts to associate financial aid for college students with "trade or commerce."<sup>214</sup>

Whereas the majority of federal courts have described most NCAA rules as protective of amateurism and thus safe from the commercially oriented agreements with which the Sherman Act is concerned,<sup>215</sup> several have also accepted the notion that financial assistance to students is a commercial transaction.<sup>216</sup> The court in *In re I-A Walk-On Football Players Litigation* advanced this view, drawing a distinction between NCAA rules addressing student-athlete eligibility and the rule implementing per sport scholarship limitations that a bachelor's degree-based claim could cite.<sup>217</sup> In particular, upon responding to an NCAA motion for judgment on the pleadings, that court noted the possibility that NCAA rules imposing scholarship restrictions, while certainly not advancing amateurism, might instead function to unlawfully contain costs, and could thereby become vulnerable to Sherman Act scrutiny.<sup>218</sup> With federal court precedent thus seemingly in favor of viewing NCAA scholarship restrictions as commercially oriented,<sup>219</sup> examination of the historical motives for those restrictions provides further support for their commercial nature.

<sup>213</sup> See discussion *supra* Part III.B.

<sup>214</sup> *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005).

<sup>215</sup> See, e.g., *Banks*, 977 F.2d 1081; *Gaines v. NCAA*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975).

<sup>216</sup> See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

<sup>217</sup> *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1149.

<sup>218</sup> *Id.*

<sup>219</sup> It is of note that in dismissing Agnew's bachelor's degree-based claim, the district court in *Agnew v. NCAA* made reference to the shield of amateurism that has often protected the NCAA from antitrust challenges, but at no point stated that this shield would

With respect to the one-year rule, persuasive evidence for the primacy of financial motives informing scholarship restrictions follows from the difficult circumstances that arose after the NCAA's 1956 institutionalization of athletic scholarships.<sup>220</sup> Although the NCAA at that time permitted schools to grant their athletes four-year scholarships, certain athletic conferences only permitted affiliated members to offer one-year renewable scholarships.<sup>221</sup> This disparity threatened a "talent drain" of the most capable athletes from one-year scholarship schools.<sup>222</sup> The result was concern among several big-time football programs during the 1960s and 1970s that a loss in talent would mean a decrease in their "escalating rewards" for winning provided by an "ever-rising flood of television money."<sup>223</sup> The NCAA's response was permissive legislation intended to assuage those influential schools' commercially-inspired concerns.<sup>224</sup> Of particular relevance, as discussed in Part II *supra*, was the agreement of NCAA members to permit the granting of all athletic scholarships on only a one-year renewable basis.<sup>225</sup> Whether the motive for this rule was, as evidence suggests, to protect the NCAA's valuable college football product by placing its powerhouses on a more equal footing, or, by the NCAA's account, to prevent athletes from accepting four-year grants only to quit their sport at the school's expense,<sup>226</sup> there appears little doubt that the one-year rule was a commercially informed measure, not one intended to safeguard amateurism and serve the interests of student-athletes.

Recalling the origins of per sport scholarship caps demonstrates similarly commercial motivations.<sup>227</sup> The idea originated during the 1975 "Economy Convention,"<sup>228</sup> the purpose of which was to address the increasingly unmanageable athletics budgets of the NCAA's most athletically competitive schools. With a need to cut costs in order to "save money for the colleges," and in an effort to "spread player talent" among Division I football programs,<sup>229</sup> the NCAA sought again to limit input spending by dictating a hard cap of scholarship players that a given team could carry in

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apply to the contested scholarship rules. *See Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*12, \*24–30 (S.D. Ind. Sept. 1, 2011).

<sup>220</sup> *See* BYERS, *supra* note 22, at 72–73.

<sup>221</sup> *See id.* at 75–76.

<sup>222</sup> *Id.* at 75.

<sup>223</sup> *Id.* at 76.

<sup>224</sup> *Id.*

<sup>225</sup> *See* SPERBER, *supra* note 30, at 207.

<sup>226</sup> *Id.* at 207.

<sup>227</sup> *See* discussion *supra* Part II.

<sup>228</sup> BYERS, *supra* note 22, at 225.

<sup>229</sup> *Id.* at 228.

a given sport.<sup>230</sup> In this way, the per sport scholarship caps join the one-year rule as NCAA regulations instituted for the purpose of reducing members' costs in producing college sports. Because these rules have thus functioned as a means to fix production costs rather than to preserve amateurism,<sup>231</sup> a plaintiff characterizing those rules as commercially inspired products of an illegal horizontal agreement would likely be able to avoid the shield of amateurism that has deflected so many prior antitrust challenges of NCAA behavior.

### *B. Passing the Rule of Reason Test*

As discussed in Part III.B *supra*, however, mere evidence of NCAA price-fixing activity in the output market of bachelor's degrees for college athletes is not sufficient to demonstrate an antitrust violation. The Supreme Court asserted in *Board of Regents* that where an industry requires at least some horizontal restraints on competition to make its product available at all, it would be unreasonable to deem an NCAA price-fixing agreement illegal per se.<sup>232</sup> In response to complaints regarding NCAA horizontal price-fixing efforts, courts have instead used the rule of reason to decide upon allegations of Sherman Act violations.<sup>233</sup>

#### *1. Appropriateness of Quick Look versus Full Blown Analysis*

Assuming a court's use of the rule of reason to evaluate a bachelor's degree-based claim, it would need to decide whether to apply a quick look or a full-blown analysis.<sup>234</sup> As seen in *Agnew*,<sup>235</sup> the latter would force a plaintiff to demonstrate both a relevant market and the NCAA's market power regarding production of athletic scholarships.<sup>236</sup> The former would allow him to instead rely only on a demonstrably effective effort by the NCAA to so nakedly fix the prices of bachelor's degrees for student-athletes as to make them unresponsive to a competitive marketplace.<sup>237</sup>

<sup>230</sup> See *supra* notes 124–25 and accompanying text.

<sup>231</sup> See, e.g., BLAIR & HARRISON, *supra* note 3, at 188–89.

<sup>232</sup> See *supra* notes 188–89 and accompanying text.

<sup>233</sup> See *supra* notes 186–89, 195 and accompanying text.

<sup>234</sup> See *supra* notes 189–90 and accompanying text.

<sup>235</sup> See *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*24–30 (S.D. Ind. Sept. 1, 2011).

<sup>236</sup> See discussion *supra* Part III.A.2.

<sup>237</sup> See *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998). The court in *Law* wrote specifically that:

In *Agnew*, the court cited the importance of adherence to Seventh Circuit precedent in deciding to apply a full blown rule of reason analysis.<sup>238</sup> It is certainly conceivable, however, that a court beyond the constraints of Seventh Circuit precedent would apply the quick look analysis to a claim similar to that of *Agnew*'s: that is, by its promulgation of the one-year rule and per sport scholarship caps via horizontal agreement, the NCAA and its members have fixed the price of bachelor's degrees for student athletes at artificially high levels.<sup>239</sup> Supporting the quick look approach on one hand would be its use in a case like *Law*, in which the Court of Appeals for the Tenth Circuit found the "obvious anticompetitive effects" of an alleged NCAA price fixing scheme to warrant quick look analysis.<sup>240</sup> Further supporting the quick look tack are the anticompetitive origins of the one-year rule and per sport scholarship caps, measures intended to restrain NCAA members' competition for student-athletes by limiting both the quantity and duration of athletic scholarships.<sup>241</sup>

## 2. Anticompetitive Effects

Upon review of student-athletes' access to bachelor's degrees via scholarship before the imposition of the one-year and per sport rules, the "obvious anticompetitive effects"<sup>242</sup> following enforcement of those rules become more apparent.<sup>243</sup> The discussions in Parts II and IV.A, *supra*, explain that before institution of the scholarship restrictions, schools had significant latitude in terms of the duration and quantity of the scholarships they offered.<sup>244</sup> This meant that the price and supply of bachelor's

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Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than would have resulted from the operation of market forces.

*Id.*

<sup>238</sup> See *Agnew*, 2011 U.S. Dist. at \*12–13.

<sup>239</sup> See Complaint at para. 1, *Agnew v. NCAA* (N.D. Cal. 2010) (No. 10-4804).

<sup>240</sup> *Law*, 134 F.3d at 1020.

<sup>241</sup> See discussion *infra* Part VI.B.2–3.

<sup>242</sup> *Law*, 134 F.3d at 1020.

<sup>243</sup> Article 19 of the NCAA Manual includes eight pages devoted to "enforcement" of rules violations. See NCAA, *supra* note 4, art. 19.01, at 319. Penalties, which range in severity, generally serve to hinder a school's ability to compete athletically in the violating sport, and in some cases limit a school's access to television and other NCAA-arranged revenues. See *id.* art. 19.5.1–19.5.2, at 322–24.

<sup>244</sup> See *supra* notes 110–19 and accompanying text.

degrees for student-athletes, accessed via athletic scholarships, were responsive to competitive conditions and consumer demand.<sup>245</sup> For example, schools attracting athletes with four-year scholarships tended to out-compete those that did not offer four-year scholarships for the best incoming talent.<sup>246</sup> Meanwhile, prospective student-athletes reliably followed the lines of scholarship supply, as liberal rules pertaining to per sport scholarship limits allowed schools to take on the expense of massive numbers of scholarship players in any one year, thus facilitating the rapid construction of competitive teams.<sup>247</sup> In other words, access to bachelor's degrees via athletic scholarships was considerable, and prospective college athletes could browse the market for the most competitive offers.

With NCAA members looking to cut input costs,<sup>248</sup> their institution of the challenged scholarship rules in the 1970s saw student-consumers lose this freedom. Today, NCAA schools, bound by the scholarship restrictions to which they horizontally agreed, can no longer meaningfully compete for athletes via the market for bachelor's degrees.<sup>249</sup> This has left athletes unable to find opportunities for more than one year of guaranteed or discounted tuition.<sup>250</sup>

A court's decision to apply a quick look rule of reason follows from a plaintiff's establishment of such obvious anticompetitive effects, those which are apparent when an effective horizontal agreement has made a product's price less favorable to a plaintiff than it would have been from the operation of free market forces.<sup>251</sup> Indeed, investigation into the rela-

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<sup>245</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984) (noting the Sherman Act's command that price and supply be responsive to consumer preference).

<sup>246</sup> See discussion *supra* note 118 and accompanying text.

<sup>247</sup> Byers points out, for example, the immediate success of the University of Pittsburgh's football team in the mid-1970s, when the head coach brought on eighty-three new scholarship players in just one year, and from that group developed a nucleus that rose to dominance over the next four years. BYERS, *supra* note 22, at 228.

<sup>248</sup> See *supra* notes 228–31 and accompanying text.

<sup>249</sup> See BLAIR & HARRISON, *supra* note 3, at 191–94 (noting the evident function of NCAA scholarship rules to restrain inter-school competition for student-athletes via differentiation in scholarship offers).

<sup>250</sup> See, e.g., Hanlon, *supra* note 6, at 43–45 (decrying in particular the absence of bargaining power between student-athletes and their schools that stems from the one-year rule); see also Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 166–69 (2000). Hakim discusses the one-year rule's effect of stressing athletic performance over academics, as student-athletes must generally devote more time to their sport than their schoolwork.

<sup>251</sup> *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998).

tive price of bachelor's degrees before and after imposition of the NCAA's scholarship restrictions, as well as inspection of the motives behind those restrictions, would help persuade a court that anticompetitive effects plague the scholarship athlete's bachelor's degree market. Where, for example, liberal scholarship rules once saw universities compete with one another to promise student-athletes tuition sufficient to last them through four years of college, a span of time sufficient to earn an undergraduate degree, those same universities have since agreed to no longer compete in that manner.<sup>252</sup> This has meant that on a yearly basis, athletes like Agnew risk losing the compensation they need to help them earn their degrees. Given these contrasting responses to consumer preference between pre- and post-scholarship restriction eras, a court could fairly decide that the anticompetitive effects of the NCAA's one-year and per sport scholarship rules are sufficient to justify a quick look rule of reason analysis.

### 3. Procompetitive Justifications

As indicated in Part III.A *supra*, a court, upon finding such obvious anticompetitive effects as to adopt the quick look approach to rule of reason analysis, would proceed directly to an evaluation of the scholarship rules' potential procompetitive effects.<sup>253</sup> With a court able to find obvious anticompetitive effects in this case, the burden would shift to the NCAA to show a procompetitive rationale for the challenged scholarship rules, leaving a court to determine whether the NCAA's proffered evidence could sufficiently demonstrate that the scholarship restrictions enhance competition.<sup>254</sup> At this point, if *Board of Regents* and *Law*—and more recently *In re NCAA I-A Walk-On Football Players Litigation*—are any indication, the NCAA would likely turn to its standby procompetitive defense of “competitive balance.”<sup>255</sup> As it did in the aforementioned cases, the NCAA would argue that its challenged horizontal agreement, here the close regulation of the duration and quantity of athletic scholarships, ensures that schools with more resources cannot out-compete those of fewer means.<sup>256</sup> This much is necessary, the NCAA has legitimately argued,

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<sup>252</sup> See *supra* Part I.B–C.

<sup>253</sup> See discussion *supra* Part III.A.2.

<sup>254</sup> See *supra* note 198 and accompanying text.

<sup>255</sup> See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117–20 (1984); *Law* 134 F.3d at 1024; see also *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150–51 (W.D. Wash. 2005).

<sup>256</sup> See cases cited *supra* note 255.

because it “must be able to ensure some competitive equity between member institutions in order to produce a marketable product.”<sup>257</sup>

Although it is noteworthy that the courts in both *Board of Regents* and *Law* found the NCAA to have offered no evidence whatsoever of support for “competitive equity” by its price-fixing schemes,<sup>258</sup> it is of greater relevance that observations from the last forty years show the NCAA’s scholarship restrictions, along with other similar horizontal agreements, to have more likely hurt than helped competitive balance in college sports.<sup>259</sup> Beginning with the institution of athletic scholarship caps and the one-year rule in the 1970s, restrictions on athletic scholarships immediately prevented ambitious coaches from accumulating talent in their football programs through sheer numbers.<sup>260</sup> That is, with coaches no longer able to dole out as many scholarships as desired in a given year, thereby creating a massive pool of freshman talent from which the very best could be retained,<sup>261</sup> “catching up with ... traditional winners” possessing other “built-in recruiting advantages” became considerably more difficult.<sup>262</sup> By the time of the 1984 *Board of Regents* decision, the Supreme Court noted, although without referring specifically to scholarship rules, that the NCAA’s attempts to restrict inter-member competition in aid of encouraging parity had been “strikingly unsuccessful,” as evinced by the emergence of a “power elite” in high level college football.<sup>263</sup>

Further, more recent evidence has pointed to similar conclusions. For example, observations have suggested that the NCAA’s revenue-sharing efforts—those intended to distribute athletically generated revenues from

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<sup>257</sup> *Law*, 134 F.3d at 1023–24.

<sup>258</sup> See cases cited *supra* note 255.

<sup>259</sup> See discussion *supra* Part II.

<sup>260</sup> See BYERS, *supra* note 22, at 228; see also *supra* note 247 and accompanying text.

<sup>261</sup> Despite NCAA-enforced caps on athletic scholarships per team, some Southeastern Conference schools still use a modified form of this technique to gain a competitive advantage in football. The practice, known as “oversigning,” finds schools promising scholarships to incoming freshmen that exceed the team’s eighty-five scholarship maximum. Coaches, however, then fix this problem by refusing to renew the scholarships of older players they no longer want, thus bringing their teams into compliance with NCAA mandated scholarship limits by the beginning of the next school year. Stewart Mandel, *SEC’s Postseason Dominance Killing Cyclical Theory of Sport: More Mail*, SI.COM (Jan. 13, 2011), [http://sportsillustrated.cnn.com/2011/writers/stewart\\_mandel/01/11/Wednesday.bag/index.html](http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/01/11/Wednesday.bag/index.html).

<sup>262</sup> See BYERS, *supra* note 22, at 228. Professor Koch, writing in 1978, made a similar observation, noting that coaches operating big-time athletic programs believed that such restrictions allowed their programs’ prestige to attract recruits in an environment otherwise unresponsive to consumer demand. See Koch & Leonard, *supra* note 27, at 235–36.

<sup>263</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118 (1984).

the most successful schools to their weaker counterparts—have evolved to appease its strongest members by limiting the funds they must share.<sup>264</sup> The NCAA's acceptance of this imbalance between haves and have-nots, it is asserted, has arisen largely to "prevent the defection" of its most competitive and best-supported institutions.<sup>265</sup>

A closer look at college football, the sport that generates the greatest revenues for the NCAA's most competitive members,<sup>266</sup> does further damage to the NCAA's potential procompetitive argument. In a study of NCAA attempts through 2001 to encourage "competitive balance" in college football by institutional change and rule promulgation, Professors Craig Depken and Dennis Wilson found that these changes most often came at the behest of influential "pressure groups," the NCAA's strongest athletic institutions, whose true intent was to increase the success of their programs at the expense of weaker members.<sup>267</sup> The result of these initiatives, as suggested by statistical analysis, was the reduction of competitive balance in the NCAA's most competitive football division,<sup>268</sup> known today as the Football Bowl Subdivision (FBS).<sup>269</sup> Seemingly consistent with that study's conclusion is the list of FBS championship teams since the introduction of scholarship limitations in 1973.<sup>270</sup> Of the twenty-two FBS programs to have earned a championship since 1973,<sup>271</sup> sixteen appeared on Forbes.com's list of college football's twenty "most valuable teams" of 2009.<sup>272</sup> Further, a focus on more recent championship teams shows that of the fifteen FBS programs to have won at least one of the twenty championships since 1992,<sup>273</sup> thirteen appeared on the Forbes list. Although this seeming correlation between monetary value and consistent success is far from an airtight test for establishing the failure of scholarship regulations to ensure competitive balance in college football, that this relationship exists at all casts further doubt upon the NCAA's ability to assert procompetitive results from those regulations. Instead, as much as ever, the Su-

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<sup>264</sup> See BLAIR & HARRISON, *supra* note 3, at 194.

<sup>265</sup> *Id.*

<sup>266</sup> See NCAA, REVENUES AND EXPENSES, *supra* note 93, at 36.

<sup>267</sup> See Depken & Wilson, *supra* note 27, at 209.

<sup>268</sup> *Id.*

<sup>269</sup> *Championship History*, NCAA, <http://www.ncaa.com/history/football/fbs> (last visited Feb. 4, 2012).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Peter J. Schwartz, *College Football's Most Valuable Teams*, FORBES.COM, (Dec. 22, 2009), <http://www.forbes.com/2009/12/22/most-valuable-college-football-teamsbusiness-sports-college-football.html>.

<sup>273</sup> *Championship History*, *supra* note 269.

preme Court's 1984 observation in *Board of Regents* of the dominance of a college football "power elite"<sup>274</sup> rings true.

In contradiction to its own assertions,<sup>275</sup> the NCAA's attempts to enhance competitive balance via horizontal agreements among its members, whether by scholarship regulations or otherwise, appear to have consistently failed. In light of this evidence, it seems unlikely that a court hearing a bachelor's degree-based complaint citing the anticompetitive effects of scholarship restrictions would identify any procompetitive effects arising from the NCAA's one-year and per sport scholarship rules. Rather, with an accumulation of surface-level information suggesting no improvement in competitive balance within top-level college football, the NCAA sport involving more scholarship athletes than any other, the NCAA's scholarship restrictions appear more and more likely to be little beyond their characterization in Agnew's complaint: regulations functioning to maximize the price of a bachelor's degree for college athletes, thereby serving the revenue building ends of the institutions offering them.

#### CONCLUSION

Mindful of the district court's assertive dismissal of the plaintiffs' complaint in *Agnew v. NCAA*,<sup>276</sup> this Note recognizes that a Section I Sherman Act claim alleging illegal price fixing of bachelor's degrees by the NCAA invites a steep uphill battle. In particular, the *Agnew* court is persuasive in its conclusion that a market for the sale of bachelor's degrees cannot exist for scholarship athletes, this based on reasoning that even a guaranteed four-year scholarship would not ensure a student-athlete a degree.<sup>277</sup> Further, the *Agnew* opinion is only the most recent in a grisly history of failed student-initiated antitrust suits against the NCAA dating back to the 1970s.<sup>278</sup>

<sup>274</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118 n.62 (1984).

<sup>275</sup> See Depken & Wilson, *supra* note 27, at 198.

<sup>276</sup> *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*29–30 (S.D. Ind. Sept. 1, 2011).

<sup>277</sup> *Id.* at \*27–29. The author wonders if the *Agnew* court, or any other court evaluating a bachelor's degree-based claim, would be more open to an asserted market for the opportunity to earn bachelor's degrees, as opposed to Agnew's assertion of a market for bachelor's degrees themselves. See, e.g., Branch, *supra* note 10, at 6.

<sup>278</sup> See, e.g., *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Hennessey v. NCAA*, 564 F.2d 1136 (9th Cir. 1977); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975).

In the face of these obstacles, however, this Note concludes that *Agnew* has left future plaintiffs enough wiggle room to cite the price fixing of bachelor's degrees in asserting that the NCAA's one-year and per sport scholarship rules constitute an antitrust violation. First, *Agnew* was the latest in a recent line of cases to undertake rule of reason analysis in confronting an antitrust suit against the NCAA.<sup>279</sup> This approach suggests that in such a case, the NCAA's traditional defense of upholding amateurism<sup>280</sup> does not apply. Moreover, with the quick look rule of reason affording plaintiffs a way to avoid the troublesome market analysis stage of the full blown rule of reason,<sup>281</sup> a plaintiff able to convince a court to apply a quick look rule of reason could well find himself in the favorable position of forcing the NCAA to demonstrate the unlikely procompetitive effects of the scholarship restrictions.<sup>282</sup>

That said, the path to persuade a court to adopt the quick look rule of reason could be rocky. The *Agnew* opinion offers no endorsement of its use, and a plaintiff would face the burden of demonstrating sufficient anticompetitive harm imposed by the targeted scholarship restrictions upon student-athletes seeking bachelor's degrees.<sup>283</sup> As this Note mentions, however, the commercially driven circumstances surrounding the inception of those restrictions,<sup>284</sup> and the reduction of student freedom in seeking out the most favorable scholarship offer since the restrictions' imposition,<sup>285</sup> provide support for the notion that the targeted scholarship restrictions have had an anticompetitive effect sufficient to justify a quick look analysis.

Ultimately, whether a court would find a Sherman Act violation to follow from a bachelor's degree-based price fixing claim is far from certain. This Note would assert, however, that given the circumstances of the for-

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<sup>279</sup> See Baker III et al., *supra* note 176.

<sup>280</sup> See discussion *supra* notes 22–33 and accompanying text.

<sup>281</sup> See *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998). In adopting a quick look rule of reason, the court dispensed with market analysis, explaining that market definition is not an end unto itself, but rather only one means of illuminating a practice's effect on competition. *Id.*

<sup>282</sup> See discussion *supra* Part IV.B.3.

<sup>283</sup> This is to assume, moreover, that the plaintiffs bringing the complaint would have adequate antitrust standing to do so in the first place. The *Agnew* court determined that this was indeed the case for Agnew and his fellow plaintiff, noting their allegations of adequate harm suffered on account of the scholarship restrictions. See *Agnew v. NCAA*, No. 1:11-cv-0293-JMS-MJD, 2011 U.S. Dist. LEXIS 98744, at \*29 n.9 (S.D. Ind. Sept. 1, 2011); see also Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student Athlete*, 26 LOY. L.A. L. REV. 1213, 1232–33 (1993).

<sup>284</sup> See discussion *supra* Parts II, IV.A.

<sup>285</sup> See discussion *supra* Part IV.B.2.

mation of the one-year and per sport scholarship rules, the effects on student-athletes those rules have had, and the reasoning in those court opinions that have eroded the NCAA's traditional protected status from anti-trust scrutiny, the issue is at least in question.

AUTHOR'S NOTE

In October, 2011, the NCAA's Board of Directors enacted a proposal to permit Division I schools to offer multi-year scholarships to prospective student-athletes—a decision effectively undoing the one-year scholarship rule referenced in this Note.<sup>286</sup> At the time of publication of this Note, however, popular protest among Division I schools had seen the fate of the new multi-year scholarship legislation left in question.<sup>287</sup> Should a 5/8 majority of Division I schools vote to override the new legislation in a February, 2012 on-line vote, the one-year rule would again take effect, and multi-year scholarships would remain a relic of the past.<sup>288</sup>

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<sup>286</sup> Brian Bennett, *Big Ten Schools Offering More Security*, ESPN.COM (Feb. 1, 2012 6:49 PM), [http://espn.go.com/college-football/story/\\_id/7528614/some-big-ten-offering-4-year-scholarships](http://espn.go.com/college-football/story/_id/7528614/some-big-ten-offering-4-year-scholarships).

<sup>287</sup> Steve Yanda, *NCAA Schools Voting on Whether to Allow Multiyear Scholarships*, WASH. POST, available at [http://www.washingtonpost.com/sports/ncaa-schools-voting-on-whether-to-allow-multiyear-scholarships/2012/02/11/gIQAWP8PER\\_story.html](http://www.washingtonpost.com/sports/ncaa-schools-voting-on-whether-to-allow-multiyear-scholarships/2012/02/11/gIQAWP8PER_story.html).

<sup>288</sup> *Id.*

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