Train Wreck
(of the I-AA)

John R. Maney[*]

The curves around midnight aren't easy to see
Flashing red warnings unseen in the rain
This thing has turned into a runaway train[1]

ABSTRACT

In 2009, the Knight Commission, which addresses major problems facing intercollegiate athletics, polled the presidents of the Football Bowl Subdivision schools (I-A schools) about their views on the state of financial affairs in college athletics. Less than 25 percent of those polled thought intercollegiate athletics was sustainable in its present form. As a result, the Commission recommended a series of reforms to help maintain the health of collegiate athletics. Unfortunately, the Commission did not poll the presidents of Football Championship Subdivision schools (I-AA schools). They should have polled those presidents because the I-AA schools' fiscal health is worse. In 2010, only five I-AA schools had minimal profits in football as compared to the large profits of sixty-nine I-A schools. Football is the largest moneymaking sport in college athletics and, unlike basketball, I-AA schools have unfairly been prevented from competing for, and playing in, the Division's highest national championship and in its elite postseason bowls. I-AA schools are also excluded from the conferences with billion-dollar TV contracts that distribute millions to I-A schools. To correct these inequities, this Article argues that the National College Athletic Association (NCAA) should adhere to its constitutional principle of competitive equity and should amend its bylaws to eliminate the I-A/I-AA distinction. If self-reform is not possible, this Article argues that Congress should amend the antitrust

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1. ROSANNE CASH, RUNAWAY TRAIN (Columbia Records 1988).

laws and scrutinize the tax law covering non-profit organizations. If neither the NCAA nor Congress is willing to provide relief, I-AA presidents should follow the recent lead of the National Basketball Association players and seek antitrust relief through the courts.

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The expense of a college education is astronomical, and the cost of intercollegiate athletics is a driving factor of this expense at many schools. Consequently, the Knight Commission, formed twenty years ago to address major problems facing intercollegiate athletics,[2] has turned its attention to fiscal reform. As a first step, in 2009, the Commission polled National Collegiate Athletic Association (NCAA)

2. Frank G. Splitt, *The Knight Commission on Intercollegiate Athletics: Why it Needs Fixing*, DRAKE GROUP, 1 (Dec. 2, 2009), *available at* http://www.thedrakegroup.org/Splitt_Knight_Commission.pdf.

Division I-A (I-A)[3] presidents to gather their views on the state of financial affairs in college athletics.[4]

Less than 25 percent of university presidents polled believed that continued operation of intercollegiate athletics in its present form was sustainable nationally, and approximately 80 percent of presidents who believe that sustainability is problematic at their own institution believed that sweeping reform is necessary.[5] In a follow-up study one year later, the Commission said the "financial arms race in [I-A schools] threatens the continued viability of athletic programs and the integrity of our universities,"[6] and concluded that "[i]t [could not] be maintained."[7]

Recognizing this problem long before the survey results were in, pundits have offered a variety of fixes. One popular solution is changing the present postseason Bowl Championship Series (BCS) to a playoff format. Such a move would, it is estimated, give I-A schools an additional $600 million a year to spread among themselves.[8] But, the Co-chairmen of the Knight Commission say, in no uncertain terms, that I-A athletics is facing more pressing problems than the inequity of the BCS bowl system. They suggest that the most pressing problem facing intercollegiate athletics is the unsustainability of its business model, which they believe "is on a path toward meltdown."[9]

The meltdown has begun. Between 2007 and 2009 schools were forced to cut 227 sports from their athletic programs "mostly due to budget shortfalls."[10] Some entire conferences are now finding

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3. Since 2006, the public has referred to Divisions I-A and I-AA as the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS), respectively. *See* NCAA, 2009-10 NCAA DIVISION I MANUAL § 20.1.1.2 (July 2009) [hereinafter 2009-10 NCAA MANUAL], *available at* http://grfx.cstv.com/photos/schools/okla/genrel/auto_pdf/20100302_ncaa_manual.pdf. However, for continuity and clarity purposes, this Article will use I-A and I-AA.

4. *See* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, QUANTITATIVE AND QUALITATIVE RESEARCH WITH FOOTBALL BOWL SUBDIVISION UNIVERSITY PRESIDENTS ON THE COSTS AND FINANCING OF INTERCOLLEGIATE ATHLETICS: REPORT OF FINDINGS AND IMPLICATIONS 24-32 (Oct. 2009), *available at* http://www.knightcommissionmedia.org/images/President_Survey_FINAL.pdf.

5. *Id.* at 24-25.

6. *See* Letter from William E. Kirwan Co-Chairman, Knight Comm'n, et al., to Alberto Ibargüen, President & CEO, John S. and James L. Knight Found. (June 17, 2010), *in* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, RESTORING THE BALANCE: DOLLARS, VALUES, AND THE FUTURE OF COLLEGE SPORTS 1–2 (June 2010), *available at* http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf.

7. *Id.*

8. DAN WETZEL ET AL., DEATH TO THE BCS: THE DEFINITIVE CASE AGAINST THE BOWL CHAMPIONSHIP SERIES 7 (2010).

9. William E. Kirwan & R. Gerald Turner, *Playoffs Not the Answer to College Football's Financial Crisis*, WASH. POST, Dec. 19, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/18/AR2009121803510.html.

10. WETZEL, *supra* note 8, at 77-78.

themselves in the midst of financial throes. Twelve years ago, the Western Athletic Conference (WAC) consisted of sixteen schools; by August 2010, it was down to eight.[11] When Boise State, the WAC's flagship program, announced in June 2010 that it was leaving the conference, Commissioner Karl Benson brokered a solidarity pact with the remaining eight schools while he pursued other options.[12] But only four days later two more schools decided to leave, reducing the Conference to just six schools.[13]

Commissioner Benson, notifying the WAC's Board of Directors of this development in an email, said:

> (We) watched the "project" disintegrate due to the unethical and selfish actions of two college presidents. As I am sure you know by now, Fresno State and Nevada have accepted invitations to join the Mt. West Conference. I know you all have to be devastated by what has occurred. In a 12-hour period, the WAC went from having secured a prosperous future to now not knowing what the future will be.[14]

Since that email, the University of Hawaii also has defected.[15] The WAC has managed to attract I-AA Texas State and two schools without football programs: the University of Texas at San Antonio (which will form a football program) and the University of Denver (which will be a non-football member).[16] The WAC's future is bleak.

But the WAC's future is not the only one in question. In 2009, ESPN journalist Pat Forde predicted there would be a landscape change in college football saying the "gruesomely bloated" I-A would soon be downsized when the forty best football teams in the country formed four ten-team conferences.[17] To the remaining eighty teams, he said:

> [T]ake your small stadiums and tight budgets and step-slow players to the Greyhound buses parked outside. They're waiting to relocate you to a middle-class home of your own. You're headed to the Tom Joad Subdivision[18] (motto: "They fix 'em so you can't win nothing"), where you huddled masses can battle each other in relative obscurity while

11. Ferd Lewis, *Fleeing Members Foiled Conference's Big Plans*, STAR ADVERTISER, Aug. 29, 2010, http://www.staradvertiser.com/sports/sportsnews/20100830_Fleeing_members_foiled_conferences_big_plans.html.

12. *Id.*

13. *Id.*

14. *Id.*

15. Andy Katz, *Hawaii Joins MWC, Big West for 2012*, ESPN (Dec. 10 2010), http://sports.espn.go.com/ncaa/news/story?id=5907111.

16. *WAC Expands with Three Schools*, ESPN (Nov. 11, 2010), http://sports.espn.go.com/ncf/news/story?id=5792840.

17. Pat Forde, *Get Ready for a New World Order*, ESPN (Aug. 3, 2009), http://sports.espn.go.com/espn/columns/story?columnist=forde_pat&id=4369091.

18. That is to say, welcome to the I-AA.

> the upper class[19] counts its money. . . . [And, he warns,] [d]on't let the marching band hit you on the way out, Have-Nots.[20]

In September 2010, the *Washington Post*'s John Feinstein predicted that the landscape of college football would soon change dramatically.[21] He said:

> Because the greedy presidents and commissioners don't want to share the wealth, the power or the control of college football with their non-BCS brethren, [and because of this] there is no playoff. Because there is no playoff, millions of corporate dollars have been left sitting on the table. Because of that, the presidents and commissioners insist they must expand and re-align now because (wait for it) they need more money. . . . Yup, there's tradition in college football, lots of it. But the number one tradition is greed. And there's never been more of it at any time in history than right now.[22]

In September 2011, the ever-changing world of college football saw Texas A&M jump from the Big Twelve to the Southeastern Conference (SEC),[23] and the University of Pittsburgh and Syracuse jump from the Big East to the Atlantic Coast Conference (ACC).[24] Texas Christian University (TCU) previously of the Mountain West Conference (Mountain West), then reneged on its commitment to join the Big East and, in October 2011, joined the Big Twelve to fill the hole created by Texas A&M's departure.[25] To fill the hole left by TCU's departure, and to guard against other departures, the Mountain West announced a football-only merger with Conference USA in October 2011.[26] In November 2011, the realignments continued when Missouri left the Big Twelve and joined the SEC.[27] In December 2011, Boise State and San Diego State left the Mountain

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19. In 2010, sixty-nine I-A football programs (the upper class) had a median net profit of $9,123,000, fifty-one football programs (the lower class) had a median net loss of $2,868,000, twenty-two athletic programs had a median net profit of $7,367,000, and ninety-eight had a median net loss of $11,597,000. NCAA, REVENUES & EXPENSES: 2004-2010 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 13, 28 (Aug. 2011)[hereinafter REVENUES & EXPENSES], *available at* http://www.ncaapublications.com/productdownloads/2010RevExp.pdf.

20. Forde, *supra* note 17.

21. *See* John Feinstein, *Greed is the Most Powerful Tradition in College Football*, WASH. POST, Sept. 3, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090205411.html.

22. *Id.*

23. *Texas A&M Officially Joins SEC*, ESPN (Sept. 26, 2011), http://espn.go.com/college-football/story/_/id/7019493.

24. Heather Dinich, *ACC Adding Big East's Syracuse, Pitt*, ESPN (Sept. 19, 2011), http://espn.go.com/college-sports/story/_/id/6988468.

25. Angela K. Brown, *TCU joins Big 12 Nearly 15 Years After Exclusion*, YAHOO! (Oct. 11, 2011), http://sports.yahoo.com/top/news?slug=ap-big12-tcu.

26. Steve Behr, *Conference USA, Mountain West Conferences Come to Agreement*, WATAUGADEMOCRAT.COM (Oct. 16, 2011), http://www2.wataugademocrat.com/ASU_Sports/story/Conference-USA-Mountain-West-Conferences-merge-id-006216.

27. Iliana Limon et al., *Missouri Officially Joins SEC*, ORLANDO SENTINEL, Nov. 6, 2011, http://articles.orlandosentinel.com/2011-11-06/sports/os-missouri-officially-joins-sec-20111106_1_mizzou-missouri-athletic-director-mike-alden.

West and joined the Big East for football only, and the University of Central Florida (UCF), the University of Houston, and Southern Methodist University (SMU) left Conference USA and joined the Big East in all sports.[28] This will go on like musical chairs and the news will not be good for those that do not find a seat.

The US Congress, the Department of Justice, the Knight Commission, college presidents, experts, authors, and bloggers are all concerned about the fiscal crisis in college athletics. Their concern, however, has been limited to the 120 I-A schools.[29] This Article concentrates on the train wreck facing Division I-AA whose future looks even bleaker. Only five I-AA football programs had surpluses in 2010, and they were minimal.[30] That year, the median net loss of the remaining 115 football programs was $1.6 million.[31] No I-AA athletic program made money in 2010,[32] and the median "negative net generated revenue"[33] (loss) was approximately $9.8 million.[34] The losses have increased steadily over the last seven years.[35]

Therefore, it was not surprising when two I-AA schools shuttered their football programs in 2009.[36] First, Northeastern followed in the footsteps of Boston University and discontinued its football program.[37] Explaining Northeastern's decision, the Boston Globe reported that "the $3 million-plus annual program needed more help—millions more each year—than Northeastern wanted to give."[38] Next, Hofstra University officials announced they were eliminating their football program immediately because they could "use the $4.5 million spent annually on the team on scholarships and other priorities."[39]

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28. Iliana Limon, *Big East Officially Introduces UCF, Four Others as New Members*, ORLANDO SENTINEL, Dec. 7, 2011, http://www.orlandosentinel.com/sports/college/knights/os-ucf-big-east-1208-20111207,0,4220643.story.

29. The number of schools (120) in Division's I-A and I-AA is the number reported in the NCAA's 2011 Revenue and Expense Report. REVENUES & EXPENSES, s*upra* note 19, at 28, 54.

30. REVENUES & EXPENSES, s*upra* note 19, at 14, 54.

31. *Id*. at 54.

32. *Id.* at 14.

33. Negative net generated revenue is the loss created when expenses exceed generated revenue (generated revenue is that revenue generated independently by the athletic program through ticket sales, concessions, contributions and NCAA and conference distributions). *Id.* at 107.

34. *Id*. at 14.

35. *Id.* at 53 (noting the loss increased from $5,907,000 in 2004 to $9,789,000 in 2010).

36. *Infra* text accompanying notes 37-39.

37. Andrew Ryan, *Northeastern Calls an End to Football*, BOS. GLOBE, Nov. 23, 2009, at B9. Boston University eliminated its program in 1997. *Id.*

38. *Id.*

39. Frank Eltman, *Hofstra Drops Football Program*, LONG ISLAND PRESS, Dec. 3, 2009, http://www.longislandpress.com/2009/12/03/hofstra-drops-football-program.

Jim O'Day, athletic director of the University of Montana, has considered how the turmoil in Division I-A could affect I-AA Montana.[40] In a recent email he declared it was possible this turmoil could cause Division I-AA to fail, and as a result, he wondered whether the NCAA could force Montana into Division II.[41] Mr. O'Day, at least, sees the flashing red warnings.

This Article will look at the creation of the NCAA, the development of Divisions I, II, and III within the NCAA, and how large football schools created two football subdivisions (Divisions I-A and I-AA) within Division I. It will also demonstrate how the I-A schools created a lucrative postseason arrangement, the BCS, which determines the I-A national championship, and how this is financially detrimental to I-AA schools. This Article contends that the creation of special subdivisions I-A and I-AA within Division I, for football only, constitutes a violation of the Sherman Antitrust Act. However, instead of filing an antitrust lawsuit, this Article recommends that Division I-AA presidents work within the NCAA to eliminate the bylaw that divides Division I into two football subdivisions. An antitrust lawsuit, however, should remain an option.[42]

I. THE NCAA

A. Origins

The NCAA owes its existence to college football. When Rutgers and Princeton met on November 6, 1869, to "kick-off" the first intercollegiate game, football was essentially a lawless event loosely governed by a combination of rugby and soccer rules.[43] In 1876, a meeting was convened to hammer out a precise set of rules that would bring some semblance of order to this fledgling sport.[44] At this meeting, representatives from Harvard, Yale, Princeton, and Columbia formed the Intercollegiate Football Association and adopted

40. *See Text of Jim O'Day's E-mail*, MISSOULIAN, Oct.1, 2010, http://missoulian.com/article_44bbeda2-cdde-11df-9730-001cc4c002e0.html.

41. *See id.*

42. In 2011, after over 100 days of labor negotiations between the National Basketball Association (NBA) and its players' union, the union was given a take it or leave it ultimatum. Gabe Feldman, *The Nuclear Winter is Over: The New CBA, and How the Lawyers Saved the Day (Sort of)*, GRANTLAND THE TRIANGLE BLOG (Dec. 2, 2011), http://www.grantland.com/blog/the-triangle/post/_/id/11258. In response, the players dissolved their union and filed an antitrust lawsuit; shortly thereafter, with the NBA backing off of its ultimatum, a deal was reached. *Id.*

43. RANDY R. GRANT ET AL., THE ECONOMICS OF INTERCOLLEGIATE SPORTS 8 (2008); *Gridiron Football*, BRITANNICA ONLINE ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/212839/gridiron-football (last visited Oct. 28, 2011).

44. GRANT ET AL., *supra* note 43.

the more violent rugby-type rules.[45] This turned out to be a bad decision.

As a result of these violent rules, over three hundred players died from football injuries between 1890 and 1904 and many more were seriously injured.[46] By October 1905, the problem was so acute that President Roosevelt convened a meeting with the Intercollegiate Rules Committee (Harvard, Yale, and Princeton).[47] As the meeting began, the President made it clear the future of the sport was in jeopardy unless something was immediately done about the violence.[48] The participants said that the football season was just beginning, but agreed to address the problem at the end of the year.[49] The violence continued. During the 1905 season, eighteen more college players, as well as forty-six high-school students, died as a result of football injuries.[50] But at least, as promised, the Intercollegiate Rules Committee met in December 1905 and formed the Intercollegiate Athletic Association of the United States (IAAUS) to address the violence.[51]

This new association immediately began changing the rules. However, these changes proved to be ineffective, as 1909 saw thirty-two more football-related deaths.[52] In 1910, the IAAUS changed its name to the NCAA and by 1911 the organization had grown from its original thirty-nine members to ninety-five members.[53]

After surviving its early years, football became a very popular sport. The 1920s saw more than 10 million fans trip the turnstiles (double that of the prior decade) and by the time the 1930s began, college football was known as "America's greatest sporting spectacle (as opposed to baseball, which was the national pastime)."[54]

While the NCAA helped bring football back from the brink of extinction in 1910, it did not finally gain regulatory authority until 1953.[55] This authority, however, was almost lost when the members called upon it to control the revenue flow from TV and postseason bowls. Small schools wanted some of this money and large schools did

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45. *Id.*
46. *Id.* at 15.
47. *Gridiron Football*, *supra* note 43.
48. *Id.*
49. GRANT ET AL., *supra* note 43, at 16.
50. *Id.*
51. *Id.* at 16, 19.
52. *Id.* at 27.
53. *Id.* at 23.
54. *Gridiron Football*, *supra* note 43.
55. GRANT ET AL., *supra* note 43, at 33.

not want to share it.[56] As it turned out, "[d]ivvying up these huge revenues nearly tore the NCAA apart."[57]

An equally contentious issue was the makeup of the NCAA divisions. In 1910, the NCAA had an executive committee of national officers and one representative from each of the seven regional districts.[58] By 1916, there were nine districts and each school had a single vote.[59] In 1956, the NCAA created the Collegiate and University Divisions for championship tournaments, and schools could participate where they felt they would be most competitive.[60] The University Division retained the existing tournaments, and the Collegiate (College) Division gradually added tournaments to its division.[61] In 1968, after championship tournaments were in place for most sports in the College Division, schools were required to select a division; 223 selected the University Division (those emphasizing football) while 386 selected the College Division.[62]

But problems remained. The University Division continued to have a "one member—one vote" policy[63] and larger schools were not happy about it; in addition, schools in the College Division had their own differences.[64] Accordingly, the NCAA called a special convention in 1973 and created three separate divisions for voting and competing.[65] The University Division became Division I and the College Division became Divisions II and III.[66] Instead of letting an institution pick where it wanted to go, the NCAA assigned institutions to a division "based essentially on the size and ambitions of the football program."[67] Problems still remained, and these problems spawned Division I-AA.

B. Birth of Division I-AA

One major problem the larger Division I football programs had was that they still thought they were sharing too much television revenue with the smaller schools.[68] In an effort to solve this problem

56. *Gridiron Football*, *supra* note 43.
57. *Id.*
58. GRANT ET AL., *supra* note 43, at 37-38.
59. *Id.* at 38.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 38.
65. *Id.* at 39.
66. *Id.*
67. *See Gridiron Football*, *supra* note 43.
68. *See id.*

in 1976, more than sixty-one of the largest college football programs formed a cartel[69] known as the College Football Association (CFA).[70] The CFA's purpose was to reduce the number of football teams in Division I and lobby the NCAA for voting reform.[71] If the CFA schools could not get the changes they wanted within the NCAA, they planned to negotiate their own television contract.[72]

Faced with the prospect of the premier football schools entering into their own TV contract, "the NCAA at its 1978 convention split Division I into I-A (the big-time football schools) and I-AA."[73] This split, which is developed below, applies only to football;[74] all other Division I sports have the same number of scholarships.[75]

1. Infancy

Why is football treated differently than all other sports in Division I? The answer, in a word, is money. When the NCAA created Division I-A to satisfy the CFA schools, another football cartel was born. However, the expulsion of thirty-eight schools from I-A in 1978 did not satisfy the big-time CFA schools.[76] They wanted a larger purge.[77] In June 1981, the CFA received the more lucrative NBC-TV

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69. *See* GRANT ET AL., *supra* note 43, at 97-98. A cartel is a group of independent businesses with formal agreements on how each firm will produce and sell and with other limits on competition such as advertising. *Id.* at 71.

70. *Id.* at 53-54. The CFA consisted of the SEC, the ACC, the WAC, the Big Eight, the Southwest Conference and many major independents such as Notre Dame, Penn State, Oklahoma and Syracuse. *Gridiron Football*, *supra* note 43.

71. *See* GRANT ET AL., *supra* note 43, at 97-98; *see* Jonathan Feigen, *College Football Association Cites Lack of Authority, Votes to Disband*, HOUS. CHRON., June 1, 1996, at 4 ("The CFA was formed to negotiate television contracts for its members, provide football with a greater voice in the NCAA legislative process and lead to restructuring of the NCAA."); *I-AA Playoffs in Trouble Without Money from TV*, CHI. TRIB., Sept. 22, 1985, http://articles.chicagotribune.com/1985-09-22/sports/8503040698_1_ncaa-division-i-aa-television-networks-black-entertainment-television ("The big football schools wanted a forum within the NCAA because they constantly were outvoted on key issues by the smaller schools.").

72. GRANT ET AL., *supra* note 43, at 97-98.

73. *See Gridiron Football*, *supra* note 43.

74. GRANT ET AL., *supra* note 43, at 40.

75. NCAA, 2010-11 NCAA DIVISION I MANUAL § 15.5 (Maximum Institutional Grant-In Aid Limitations by Sport) (2010), http://www.ncaapublications.com/productdownloads/D111.pdf [hereinafter 2010-11 NCAA MANUAL].

76. John O'Connor, *Division I Castoffs in Fight For Poll Position*, RICH. TIMES DISPATCH, Oct. 1, 1985, at C1.

77. *Cf. NCAA Slices 39 Schools From I-A; CFA Approves*, DAILY OKLAHOMAN, Feb. 3, 1982 [hereinafter *NCAA Slices*]. The larger purge had not taken place in 1978 because of a last minute amendment that allowed any school sponsoring twelve varsity sports to remain in I-A. *Id.* While the smaller schools were initially victorious, this last minute amendment further unified the big-time CFA schools in their effort to obtain a TV football contract. *See id.*

offer it had been seeking,[78] but the offer was contingent upon the Big Eight and SEC becoming part of the package.[79]

The threatened breakaway tactics proved successful. With the Big Eight and SEC pondering their future, the NCAA immediately sprang into action and called a special convention in December 1981 for all 907 Association members.[80] It also, however, threatened to sanction any school that accepted NBC's offer.[81] In response, two CFA schools (Georgia and Oklahoma) filed an antitrust suit in September 1981 seeking relief from the threatened sanctions and alleging that the NCAA's 1982-85 contracts with ABC, CBS, and Turner were in violation of sections 1 and 2 of the Sherman Antitrust Act.[82]

In spite of this lawsuit, the NCAA held the previously called convention in December 1981, at which time they moved more schools into I-AA because they did not meet new, specially crafted, standards for membership in I-A.[83] Included in this mass purge were independents and schools from the Southern Conference, the Mid-American Conference (MAC), the Ivy League, the Missouri Valley, and the Southland Conference.[84] In total, forty-three schools were purged after the last three lost their appeal at an August 1982 meeting.[85]

What was the "reason for the splitting of Division I?," asked the *Richmond Times Dispatch*.[86] The answer, it said, was because "[b]ig-time football schools were not satisfied with their share of television time and remuneration."[87] Therefore, the NCAA "somewhat

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78. *Id.*

79. *Id.* While these conferences indicated they were inclined to join, they said their final decision would not be made before the NCAA announced whether it would call a special restructuring convention. *Id.*

80. John Underwood, *To-Do Over What to Do,* SPORTS ILLUSTRATED, Sept. 21, 1981, at 34.

81. *Id.*

82. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1281-82 (W.D. Okla. 1982) (citing Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (2006)).

83. *See NCAA Slices*, *supra* note 77. To remain in Division I-A a school had to: (1) have averaged at least 17,000 paid home attendance during the four prior years, or (2) play in a 30,000 seat stadium and averaged 17,000 paid home attendance in at least one of the last four years, (3) play at least eight varsity sports including football, (4) play at least sixty percent of their games against I-A members. *Id.* However, even if a school did not meet these and other new criteria the NCAA would not expel it if there were at least six football teams in its conference and more than half met Division I-A criteria. *Id.*

84. *Division I-AA Features New Teams*, NCAA NEWS, Aug. 25, 1982, at 3, *available at* http://fs.ncaa.org/Docs/NCAANewsArchive/1982/19820825.pdf. A few schools in the Missouri Valley Conference and the MAC did retain I-A classification. *Id.*

85. *See id.* (the University of Cincinnati, Miami University (Ohio) and Western Michigan).

86. *See* O'Connor, *supra* note 76.

87. *Id.*

reluctantly" moved these schools from Division I to the new Division I-AA.[88] According to the *New York Times*, the NCAA expelled the Ivy League "from big-time college football" and "demoted [it] to the [NCAA's] Division I-AA" because of "a squabble over television revenue."[89] During the twenty-five years leading up to its expulsion, Ivy League schools won more than half of their out-of-conference games, often against prominently known opponents.[90] In 1981, for example, Yale was one of the most powerful teams in the east with a 9-1 record and three future NFL draft picks.[91]

In 2006, John Rogan, who quarterbacked Yale's 1981 team, said it had been "painful to watch the unnecessary atrophy of the league."[92] In a similar vein, Yale's athletic director, Thomas Beckett said, "[t]he Ivy League should have remained in the top division of college football. We still play quality football with gifted students, . . . it would have been a wonderful way to continue a worthy tradition."[93] Joe Restic, who coached Harvard's football team from 1971 to 1994, echoed this sentiment.[94] He said:

> It's depressing when you can walk up to one of those great old Ivy League places 15 minutes before game time and buy a ticket without even waiting in line. . . . It all started with the I-AA classification. Right away the recruits said to us, "I don't want to play with the second-class citizens."[95]

Furman, too, became "a second-class citizen" when the NCAA moved it, along with the rest of the Southern Conference, into I-AA.[96] In 1980, Furman had a 9-1 record and a Power Rating of 28 out of 139 Division I-A schools, which placed it ahead of schools such as, Arizona State, Louisiana State University, Texas, Virginia Tech, Clemson, Arkansas, Tennessee, Iowa State, North Carolina State, West Virginia, Auburn, Kansas, Syracuse, Indiana, Mississippi, Oklahoma State, Michigan State, Illinois, Wisconsin, Georgia Tech, and TCU.[97]

In 1981, Furman's record slipped to 8-3 and its Power Rating fell to 45 out of 138, but it was still ahead of Virginia Tech, Tennessee, Maryland, Syracuse, Iowa State, Auburn, Boston College, Minnesota,

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88. *Id.*

89. Bill Pennington, *Ivy Football and Academics Strike an Uneasy Balance*, N.Y. TIMES, Nov. 17, 2006, http://www.nytimes.com/2006/11/17/sports/ncaafootball/17ivy.html.

90. *Id.*

91. *See generally id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Southern Conference*, COLLEGIATE LICENSING CO., http://www.clc.com/clcweb/publishing.nsf/Content/institutionprofile-NBP.html?open&ucode=SC (last visited Nov. 11, 2011).

97. James Howell, *1980 NCAA Division IA Football Power Ratings*, JHOWELL.NET, http://www.jhowell.net/cf/cf1980.htm (last updated Dec. 15, 2006).

Arizona, North Carolina State, Purdue, Michigan State, Mississippi, Kansas State, Texas Tech, Georgia Tech, and Indiana to name a few.[98] At the same time, the Southern Conference had, a higher Power Rating than the MAC in both 1980 and 1981.[99] Yet the NCAA shuffled the MAC back into the first tier a year after it had shuffled them out,[100] while the Southern Conference remained, and still remains, among the "second-class citizens."[101] It is easy to see why the *Daily Oklahoman* reported that this purge was "one of the most divisive issues in the association's history."[102]

In addition to reducing the number of universities in what was to become Division I-A, the CFA also obtained the political reform it wanted, which went "a long way toward providing [them with] the proper legislative forum to vote on rules and regulations that have a major impact on the quality of football sponsored by Division I-A members."[103]

Today, I-A membership requires actual or paid attendance of at least 15,000 at each home football game once in a two-year period and at least sixteen varsity sports.[104] It also entitles a school to eighty-five football scholarships,[105] 90 percent of which the school must fill on a rolling two-year period.[106] In addition, each I-A school must offer a minimum of two-hundred scholarships or spend at least $4 million on athletic scholarships annually.[107] In contrast, I-AA schools only have to sponsor fourteen varsity sports[108] and do not have a football attendance requirement. Moreover, they are limited to sixty-three football scholarships[109] and only need to spend $1.2 million on scholarships annually.[110] One advantage of being in I-A is having the opportunity to compete for the BCS National Championship and share the loot generated by the BCS bowls.

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98. James Howell, *1981 NCAA Division IA Football Power Ratings*, JHOWELL.NET http://www.jhowell.net/cf/cf1981.htm (last updated Dec. 15, 2006).

99. *See* sources cited *supra* notes 97-98.

100. *See* O'Connor, *supra* note 76.

101. Pennington, *supra* note 89.

102. *See NCAA Slices*, *supra* note 77.

103. *Id.* (quoting Charles M. Neinas, executive director of the CFA).

104. 2010-11 NCAA MANUAL §§ 20.9.7.1 and 20.9.7.3.

105. *Id.* § 15.5.6.1.

106. *Id.* § 20.9.7.4(a).

107. *Id.* § 20.9.7.4(b).

108. *Id.* § 20.9.8.1.

109. *Id.* § 15.5.6.2.

110. *Id.* § 20.9.1.2(b).

II. THE BOWL CHAMPIONSHIP SERIES

The BCS, a CFA progeny, is a football arrangement consisting of five postseason bowl games, the last of which is the BCS National Championship Game.[111] To compete in this arrangement, a school must be in Division I-A.[112]

The BCS traces its direct lineage to the Bowl Coalition arrangement, which was formed in 1992; however, due to its limitations the Coalition changed its format and became known as the Bowl Alliance in 1996.[113] The Bowl Alliance had its own limitations and its format was changed in 1998 when the Bowl Alliance became the BCS.[114] The BCS is not an entity; rather, it is a five-game arrangement "designed to match the two top-rated teams in a national championship game and to create exciting and competitive match-ups among eight other highly regarded teams in four other bowl games."[115] This arrangement is made up of the Rose Bowl, Fiesta Bowl, Orange Bowl, and Sugar Bowl (BCS bowls), as well as a national championship game.[116] The event, in its present form, is scheduled through the 2013 season.[117]

The BCS has problems however, because some of its participants do not believe it treats them fairly. For example, it automatically extends invitations to play in games to the champions of the ACC, Big East, Big Ten, Big Twelve, Pac-Twelve, and the SEC, and to Notre Dame if it ranks eight or higher in the BCS standings (the automatic qualifiers).[118] Senator Orrin G. Hatch calls these conferences "the privileged conferences."[119] Sports fans often refer to them as "BCS Conferences." The BCS maintains, however, all eleven conferences are BCS Conferences because they all manage the BCS.[120] In fact, the BCS says "the term 'BCS Conference' is one of the most

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111. BOWL CHAMPIONSHIP SERIES, 2010-2011 MEDIA GUIDE 5 (2010) [hereinafter BCS MEDIA GUIDE 2010-11], *available at* http://a.espncdn.com/i/ncf/bcs/bcsguide2010b.pdf. Until 2006, there were only four bowl games, including the national championship game, which was played at one of the bowl sites on a rotating basis. *See id.* at 49. Beginning in January 2007, a fifth game was created, and now there are four bowl games plus the national championship game, which teams play at one of the four bowl sites on a rotating basis. *Id.* at 47.

112. *Id.* at 8-9.

113. *Id.* at 46-47.

114. *Id.* at 47.

115. *Id.* at 5.

116. *Id.*

117. *See id.* at 8.

118. *Id.*

119. Press Release, Orrin Hatch, Senator, U.S. Senate, Hatch Requests DOJ Investigation into BCS (Oct. 21, 2009), http://hatch.senate.gov/public/index.cfm/2009/10/hatch-requests-doj-investigation-into-bcs [hereinafter Hatch Press Release].

120. BCS MEDIA GUIDE 2010-11, *supra* note 111, at 5.

misused [terms] in sports."[121] In spite of what the BCS maintains, most believe there are two classes of conferences within this "arrangement." This Article refers to the so-called privileged conferences, or BCS Conferences, as "first-class conferences."

The five remaining or second-class I-A conferences (the Mountain West, Western Athletic, Sun Belt, Mid-America conferences, and Conference USA)[122] must earn an invitation to a BCS bowl.[123] Their major complaint is that it is difficult for their teams to automatically qualify.[124] In order to automatically qualify, a team in a second-class conference must finish twelfth or higher in the BCS standings (or sixteenth or higher and be ranked above a champion of a conference that automatically qualifies).[125] Should more than one team qualify, only the highest ranked team in the final BCS standings will be given the automatic bid.[126] If there are fewer than ten automatic qualifiers, then the bowls will select "at-large" participants to fill the remaining berths.[127] These rules work to exclude the second-class conferences from the major bowls. During the four years from 2006-09, the first-class conferences and Notre Dame took home more than $492 million or 87.4 percent of the BCS receipts, while the second-class conferences received less than $62 million or 12.6 percent of the take.[128]

The exclusion of teams in second-class conferences is not only financially unfair to these conferences, but it is also unfair to the fans. For example, "[t]he [2010] regular season game between Boise State [from a second-class conference] and Virginia Tech had the second-highest [TV] ratings of any game th[at] year, including conference championships."[129] Yet Boise State, while winning that game and only losing once the rest of the year (by a last minute field goal to a ranked team), did not get invited to a BCS bowl.[130] Virginia Tech, on the other hand, lost to I-AA James Madison the following week, but under the BCS qualification system, was eventually invited

121. BOWL CHAMPIONSHIP SERIES, 2009-2010 MEDIA GUIDE 6 (2009) [hereinafter BCS MEDIA GUIDE 2009-10], *available at* http://collegefootball.procon.org/sourcefiles/mediaguide.pdf.

122. The Mountain West and Conference USA merged for football purposes in 2011, *supra* note 25.

123. *Id.* at 6.

124. *See* Hatch Press Release, *supra* note 119.

125. *See* BCS MEDIA GUIDE 2010-11, *supra* note 111, at 8.

126. *Id.*

127. *Id.* at 9.

128. *See* Hatch Press Release, *supra* note 119.

129. Sally Jenkins, *BCS Title Game Crowns a Champion of a Fraudulent System*, WASH. POST, Jan. 11, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/10/ AR2011 011006115.html.

130. *Id.*

to the Orange Bowl as the automatic qualifier from the ACC.[131] These examples highlight why the BCS system is flawed and show that it needs change.

Eighty-five percent of the people in a 2007 Gallup poll said that they preferred to see the I-A national champion crowned through a playoff,[132] but in spite of fan preference, the bowl system goes on. Beginning in 2011, and for the next four years, ABC and ESPN will pay approximately half a billion dollars for BCS television rights.[133] As a result of this disparity, in 2009 the second-class I-A conferences proposed an eight-team playoff system to get a fair shot at the national championship trophy and a larger share of the pot.[134] The BCS Presidential Oversight Committee (controlled by Notre Dame and the six first-class conferences), however, rejected this proposal.[135] They did so even though all other college varsity sports (including I-AA football) determine their champion through a playoff system.[136]

Why the NCAA treats football differently is under scrutiny by Congress.[137] The House Subcommittee on Consumer Protection investigated the BCS from 2005 to 2009.[138] The Senate Judiciary Committee conducted inquiries regarding potential antitrust violations in 1997, October 2003, and July 2009.[139]

At the conclusion of the 2009 Senate Hearings, Senator Orrin G. Hatch summoned the Department of Justice (DOJ) to investigate the BCS and then sent a formal letter to President Obama advising him that "[a]t its most basic level, the BCS is 'an agreement among competitors on the way in which they will compete with one another' and how they will compete with schools outside their elite circle."[140]

In January 2010, the DOJ advised Senator Hatch that the Antitrust Division was considering whether to launch an inquiry into

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131. James Howell, Virginia Tech Historical Scores, Jhowell.net (last updated Jan. 15, 2011), http://www.jhowell.net/cf/scores/VirginiaTech.htm.

132. ANDREW ZIMBALIST, CIRCLING THE BASES: ESSAYS ON THE CHALLENGES AND PROSPECTS OF THE SPORTS INDUSTRY 181 n.3 (2011).

133. Rich Thomaselli, *As College Football's TV Landscape Changes, Brands Still Find Marketing Opportunities*, ADVERTISINGAGE (July 26, 2010), http://adage.com/article/special-report-sports-marketing-2010/espn-locks-bcs-500m-advertiser-holes-fill/145068.

134. Ryan Christopher DeVault, *BCS Rejects Playoff Plan for College Football*, ASSOCIATED CONTENT (June 25, 2009), http://www.associatedcontent.com/article/1877853/bcs_rejects_playoff_plan_for_college.html.

135. *Id.*

136. ZIMBALIST, *supra* note 132, at 59.

137. *Id.* at 48.

138. *Id.*

139. *Id.*

140. *See* Hatch Press Release, *supra* note 119 (quoting Letter from Orrin G. Hatch, U.S. Sen., to Barack H. Obama, U.S. President (Oct. 21, 2009)).

his antitrust allegations.[141] In May 2011, Assistant Attorney General Christine Varney sent a letter to NCAA President Mark A. Emmert asking for his views on the "best course of action with regard to the BCS" because "[s]erious questions continue[d] to arise suggesting the current Bowl Championship Series system may not be conducted consistent with the competition principles expressed in the federal antitrust laws."[142]

In response, the NCAA diplomatically informed the DOJ that its "questions [could] best be answered by the BCS and the group of institutions that operate the BCS system."[143] This is so, the NCAA explained, because the BCS does not fall under its purview.[144] This explanation is not exactly accurate since licensing bowls to participate in the postseason bowl system does fall within its purview.[145] In any event, the NCAA strangely punted when asked for its views on the BCS system;[146] therefore, the DOJ will have to look elsewhere for its answers. If the DOJ launches an antitrust investigation, those involved should bear in mind that both Section 1 and section 2 of the Sherman Antitrust Act provide for criminal remedies as well as civil sanctions.[147]

Indeed, when speaking about antitrust violations, the United States Attorneys' Manual states: "While every violation of this Act is technically a felony, the Department reserves criminal prosecution for so called 'naked' or 'per se' unlawful restraints of trade among competitors, e.g., price fixing, bid rigging, and customer and territorial

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141. *DOJ Mulls Antitrust Probe of College Football Championships*, CNN POL. TICKER BLOG (Jan. 30, 2010, 1:30 PM), http://politicalticker.blogs.cnn.com/2010/01/30/doj-mulls-antitrust-probe-of-college-football-championships. The DOJ further said that the Obama Administration was looking at various other options such as: (1) encouraging the NCAA to take control of postseason football as it does with other sports, (2) requesting an examination by the Federal Trade Commission under consumer protection laws, (3) looking into possible legislative initiatives, and (4) looking into roles other agencies could play. *Id.*

142. *Feds to NCAA: Why No Playoffs?*, ESPN (May 5, 2011, 5:09 PM), http://sports.espn.go.com/ncf/news/story?id=6479279.

143. Frederic J. Frommer, *NCAA Tells DOJ Football Playoff Out of its Hands*, WASH. TIMES, May 18, 2011, http://www.washingtontimes.com/news/2011/may/18/ncaa-tells-doj-football-playoff-out-of-its-hands.

144. *Id.*

145. Jon Solomon, *Fiesta and Insight Bowls Keep Licenses, Land on NCAA Probation*, AL.COM (May 17, 2011), http://www.al.com/sports/index.ssf/2011/05/fiesta_and_insight_owls_keep.html. Two days after BCS sanctions were announced, the NCAA re-licensed the Fiesta bowl. *Id.*

146. Could it be that the NCAA does not want the DOJ to stick its nose under the March Madness tent?

147. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (2006).

allocation agreements."[148] In 2009, attorney Barry J. Brett, testifying before Senator Hatch's subcommittee on behalf of a second-class conference, described the BCS as "a naked restraint imposed by a self-appointed cartel."[149] Perhaps Mr. Brett has been reading the United States Attorneys' Manual.

William Monts, who represented the BCS before the same Senate Subcommittee, argued that the BCS did not violate the Antitrust Act because it was procompetitive in that it created a national championship game that did not previously exist.[150] He further argued that non-championship BCS bowls are more competitive because they are able to select their teams after the regular season ends; that the BCS strengthens the broad-based bowl system, thus maximizing the number of postseason playing opportunities for the students; and that it preserves and enhances the regular season.[151]

Aware of the mounting criticism against it, the BCS, in its 2010 Media Guide, adds that the "Championship Game usually trails only the Super Bowl in terms of television ratings for sporting events," and that, when compared to a playoff, it enjoys the support of 93 percent of I-A coaches.[152] When it comes to money, Bill Hancock, its executive director, notes that the five I-A conferences that do not automatically qualify for BCS bowls do much better under the BCS system than they did without it, pointing out they received a record $24 million from BCS games in 2010.[153]

In rebuttal, the University of Utah's President Michael Young argues:

> If someone suggested that college baseball and college basketball change their operations to effectively eliminate nearly half of their participating teams from the national championship even before their seasons begin, that person would be soundly criticized and subject to tremendous ridicule. Similarly, if someone proposed a system for a new college sport in which 120 universities were to participate, and suggested that nearly half of those institutions would be, for all practical purposes, eliminated from the

148. U.S. ATTORNEY GEN., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 7-4.100 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title7/4mant.htm.

149. *The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?: Hearing Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. 40 (2009) [hereinafter *BCS Hearing*] (statement of Barry J. Brett, Esq., Partner, Troutman Sanders).

150. *Id.* at 178 (statement of William Monts III, Partner, Hogan & Hartson).

151. *Id.*

152. *See* BCS MEDIA GUIDE 2010-11, *supra* note 111, at 5, 7.

153. Bill Hancock, *BCS Responds to Sens. Hatch and Baucus, Telling Them to Mind Their Own Business*, ORLANDO SENTINEL C. GRIDIRON BLOG (May 20, 2010), http://blogs.rlandosentinel.com/sports_college/2010/05/bcs-responds-to-sens-hatch-and-baucus-telling-them-to-mind-their-own-business.html.

> national championship even before their seasons begin, that person's idea would be met with tremendous derision.[154]

He summed up, adding, "the George Mason story in basketball showed that everybody loves the underdog."[155] The story is about George Mason's showing in the 2006 NCAA basketball tournament.[156] It was quite a Cinderella story about a commuter school from the I-AA Colonial Athletic Association that knocked off North Carolina, Michigan State, and Connecticut on its way to the Final Four.[157] Unsurprisingly George Mason's applications were up 25 percent in 2007 as compared to the 10 percent increase in prior years.[158] More importantly, the growth was "especially noticeable in high-achieving applicants."[159]

The George Mason name is now synonymous with sports upsets. *USA Today* has referred to Boise State as "the George Mason of college football" and called giant-killer Trinidad and Tobago "the George Mason of the World Cup."[160] As the school's president, Alan Merten, quipped, "We've become a noun."[161] The next "George Mason" appeared on the scene in 2010 when the I-AA Butler Bulldogs lost a thrilling 61-59 game to the storied Duke Blue Devils in the national championship.[162] The Butler-Duke game demonstrated that I-AA conference teams could achieve wide fan appeal. The ratings for this game were 31 percent higher than the North Carolina-Michigan State championship game the previous year, and it had the highest number of viewers since the Arizona-Kentucky final in 1997.[163]

The Virginia Commonwealth Rams, also from the Colonial Athletic Association, became the next basketball Cinderella. After defeating Southern California, Georgetown, Purdue, and Kansas in the 2011 NCAA tournament, headlines in the *Washington Post*

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154. *BCS Hearing*, *supra* note 149, at 232 (testimony of Michael Young, President, University of Utah). Since Utah has moved up to the PAC [a first-class conference], President Young might not be as concerned about correcting this wrong as he once was.

155. *Id.* at 237.

156. *See generally NCAA Tournament History*, CBSSPORTS.COM, http://www.cbssports.com/collegebasketball/ncaa-tournament/history (last visited Oct. 26, 2011).

157. *See id.* (North Carolina was defending champion; Michigan State and Connecticut had won the championship within the prior six years.)

158. Graham Meyer, *Fast Times at George Mason U*, WASHINGTONIAN, Apr. 1, 2007, http://www.washingtonian.com/articles/education/3839.html.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Duke-Butler NCAA Final Generates Highest TV Rating Since 2005*, SEATTLE TIMES, Apr. 6, 2010, http://seattletimes.nwsource.com/html/collegesports/2011540368_mhoop07.html.

163. *Id.*

exclaimed that, "Upstart VCU crashes Final Four gate."[164] The story noted that they "pulled a George Mason on Sunday, blowing out top-seeded Kansas."[165] In the end, Butler made its second straight appearance in the finals only to lose again, this time to the University of Connecticut.[166] While the TV ratings for the final were down in 2011, they still exceeded the 2006 finals (UCLA and Florida), the 2008 finals (Kansas and Memphis), and the 2009 finals (Michigan and Connecticut).[167]

There could be Cinderellas from I-AA football, too. Despite the huge stadiums and the large scholarship differentials, I-AA teams are beginning to compete favorably on the football field. For I-A schools, the NCAA allows one game against a I-AA school to count toward I-A postseason bowl eligibility,[168] and I-A teams sometimes schedule them as warm-up cannon fodder at the beginning of the season. But when then fifth-ranked Michigan fell to I-AA Appalachian State in 2007,[169] it might have been difficult to convince Michigan's fans that the Mountaineers were cannon fodder. Michigan's close 42-37 win over I-AA Massachusetts in 2010[170] might even convince these fans it would be a good idea to get this cannon fodder off their schedule.

There were more than close calls in 2010. Division I-AA Jacksonville State defeated Ole Miss,[171] and North Dakota State defeated Kansas.[172] The big one, however, was James Madison defeating then thirteenth-ranked Virginia Tech.[173]

Journalist Jeff Sagarin of *USA Today* produces an annual strength of schedule ranking of Division I teams[174] that college football

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164. Mike Wise, *Upstart VCU Crashes Final Four Gate*, WASH. POST, Mar. 28, 2011, at A1.

165. *Id.*

166. *Connecticut Wins Third National Title Thanks to Butler's Woeful Shooting*, ESPN (Apr. 4, 2011), http://espn.go.com/ncb/recap?gameId=310940041.

167. Andrew Sharp, *NCAA Championship Game TV Ratings: Down From 2010, But Far Too High*, SBNATION.COM (Apr. 5, 2011, 1:25 PM), http://www.sbnation.com/2011-ncaa-tournament/2011/4/5/2092332/ncaa-championship-2011-tv-ratings-butler-uconn.

168. Amy Daughters, *Should FBS vs. FCS Games Be Banned Permanently?*, BLEACHER REP. (Sept. 28, 2010), http://bleacherreport.com/articles/475339.

169. Bob Long, *The Power of the FCS*, BOB LONG'S SPORTS BLOG (Sept. 20, 2010), http://bobsportsblog.wordpress.com/2010/09/20/the-power-of-the-fcs.

170. *Id.*

171. *Id.*

172. Matt Tait, *North Dakota State Stuns Jayhawks, 6-3*, KUSPORTS.COM (Sept. 4, 2010, 11:39 PM), http://www2.kusports.com/news/2010/sep/04/north-dakota-state-stuns-jayhawks-6-3.

173. Long, *supra* note 169.

174. *Jeff Sagarin NCAA Football Rankings*, USA TODAY, Jan. 8, 2010, http://www.usatoday.com/sports/sagarin/fbt09.htm ("The schedule ratings represent what the rating would have to be for a hypothetical team to have a mathematical expectation of winning precisely 50% of their games against the schedule played by the team in question . . . .").

fans widely watch. His year-end ranking of 245 teams in 2009 placed I-AA Villanova at number thirty ahead of schools like Florida State, West Virginia, Oklahoma State, Tennessee, South Carolina, and Notre Dame; William and Mary at number forty-nine ahead of schools like UCLA, Texas A&M, Missouri, and Michigan State; and Montana and Richmond at numbers fifty-seven and sixty, respectively, ahead of schools like Arizona State, Kansas State, Michigan, and Maryland.

The public should give I-AA football its due. It has produced more than its fair share of star professionals like Jerry Rice, Brandon Jacobs, Brock Marion, Kurt Warner, Terrell Owens, Gary Clark, Richard Dent, Phil Simms, Randy Moss, Steve McNair, Tony Romo, Rich Gannon, and Joe Flaco.[175] In fact, *College Sporting News* reported that, "a claim can be made that a team of FCS all-time all-stars could compete with a team of FBS all-stars in terms of notoriety and performance at the professional level."[176] In spite of this talent, I-AA still gets the Rodney Dangerfield treatment. Sports analyst Bob Long said:

> FCS [Football Championship Subdivision] football does not get the respect it deserves for the talent it produces and the success it has against the FBS [Football Bowl Subdivision]. For years the public has neglected the quality of the FCS, but this ignorance is beginning to fade. The many FCS victories over FBS opponents are no longer upsets, they will become more prevalent as the playing field becomes even more level. It has been proven that FCS programs have caught up to many FBS football programs in terms of recruiting and success. It has been shown that many FCS teams have played well against and defeated quality FBS teams in 2009 and 2010. Fans will be reluctant to accept the fact that the FCS is in fact extremely competitive, but given the rapid increase in the quality of play, people need to begin to give it more respect.[177]

Long says the reason for this coming parity is that:

> High school football has expanded across the country and has produced many more talented players than ever before. The quality of the top high school players in the country has not drastically improved, but the number of talented players has increased greatly. This trend has created a surplus of quality talent across the high school football circuit.[178]

In agreement, Adam Miller of the *Daily Collegian* said, "[t]he bottom line is that the margin between the FBS and the FCS is much smaller than it used to be and that difference will only continue to shrink. . . . As the FBS is finding out, these so called 'second-rate programs' have first-rate talent."[179] But I-AA schools are owed more

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175. *1978 to 2008: The FCS Top Thirty Lists*, C. SPORTING NEWS (Dec. 18, 2008), http://www.championshipsubdivisionnews.com/log/index.php/2008/12/18/1978-to-2008-the-fcs-top-thirty-lists?blog=5.

176. *Id.*

177. Long, *supra* note 169.

178. *Id.*

179. Adam Miller, *Gap Between FBS and FCS Schools Closing*, MASS. DAILY COLLEGIAN, Sept. 21, 2010, http://dailycollegian.com/2010/09/21/gap-between-fbs-and-fcs-schools-closing.

than respect. They are owed the opportunity to compete in first-tier conferences and in postseason I-A bowl games instead of the money-losing[180] I-AA playoffs. If, in these changing times, Division I-A is allowed to solve its financial problems without including I-AA schools in the solution, many of these schools will have to follow in the footsteps of Northeastern and Hofstra and cut their football programs altogether.

College football is survival of the fittest. And the sixty-one teams that formed the CFA and used it to devour the smaller schools had no trouble devouring the CFA itself after it served its useful purpose. Initially, the CFA did an excellent job coercing the NCAA into reforming its legislative process and into forming a separate Division I-A. It continued its good work by causing Oklahoma and Georgia to file an antitrust suit against the NCAA, which the CFA schools won.[181] It also negotiated TV contracts for I-A football programs between 1984 and 1996.[182] However, in 1990 Penn State pulled out of the CFA, and Notre Dame, finding it could get a better TV contract deal on its own, left the cartel in 1991.[183]

In 1995, the SEC finally left the CFA, and the remaining conferences followed suit.[184] With no more good work to do, the CFA closed its doors in 1997.[185] Its progeny, having learned well, continue to thrive on television contracts.[186] As things stand today, the Big East will pull in $200 million between now and 2013; the Big Twelve will get $1.58 billion over the next thirteen years; the ACC will get $1.86 billion over the next twelve years; the SEC's take will be $3.075 billion over the next fifteen years; the Big Ten will get $3.8 billion over the next twenty-five years; and the Pac-Twelve has just signed a $3 billion twelve-year contract.[187] This translates into annual revenue of $45 million,[188] $130 million, $155 million, $205 million, $220 million, and $250 million to the Big East, Big Twelve, ACC, SEC, Big Ten, and

180. *Text of Jim O'Day's E-mail*, *supra* note 40.

181. John J. Siegfried & Molly Gardner Burba, *The College Football Association Television Broadcast Cartel* 8-10, (Dep't of Econ., Vanderbilt Univ., Working Paper No. 03-W20, 2003), *available at* http://www.vanderbilt.edu/econ/wparchive/workpaper/vu03-w20.pdf.

182. *Id.* at 11-19.

183. *Id.* at 29.

184. *Id.* at 30.

185. *Id.* at 31.

186. *See* Brian Bennett, *TV Deal, Not Expansion, Big East's Big Issue*, ESPN C. FOOTBALL NATION BLOG (May 5, 2011), http://espn.go.com/blog/ncfnation/post/_/id/41660.

187. *Id.*

188. Mike Casazza, *Evaluating and Projecting Big East TV Deal*, DAILY MAIL WVU SPORTS BLOG (June 23, 2010, 12:37 PM), http://blogs.dailymail.com/wvu/2010/06/23/evaluating-and-projecting-big-east-tv-deal.

Pac-Twelve respectively.[189] In addition, Notre Dame is still in its relationship with NBC and, as a result, will reap $15 million a year until 2015,[190] and the University of Texas will soon be enjoying the fruits of its $300 million twenty-year side deal with ESPN.[191] One writer explains that the root of these large television contracts is the BCS because "[u]nder the BCS, power conferences are able to secure much more lucrative [television] contracts, in part, because they (unfairly) have a leg up on the other conferences in the pursuit for [sic] the championship."[192] While the power (first-class) conferences in Division I-A have a leg up on the second-class conferences, both have a leg up on I-AA schools that will never have an opportunity to enter into these billion dollar contracts or play for the BCS championship. Because of these disadvantages, I-AA schools need to take action to even out the playing field.

III. THE SHERMAN ANTITRUST ACT

After Oklahoma and Georgia won their antitrust suit in 1984, the financial life of CFA schools improved immensely, but perhaps things are coming full circle.[193] Based on the precedent set in that lawsuit, Senator Hatch, Boise State, and the Mountain West Conference are now asking the DOJ to institute an antitrust case against the BCS.[194]

The DOJ is still pondering these requests and has said it has serious questions about whether the BCS is operating "consistent with the competition principles expressed in the federal antitrust laws."[195] If the marginalized, second-class I-A conferences have an antitrust case, the I-AA conferences have a better one. The five second-class I-A conferences hauled in $24 million from the BCS in 2009, while I-AA schools only received $1.8 million (approximately $15,000 per school)

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189. *Report: PAC-12 Lands the Most Lucrative TV Deal in College Sports,* SI.COM (May 3, 2011), http://sportsillustrated.cnn.com/2011/football/ncaa/05/03/pac-10-tv.ap/index.html.

190. Richard Sandomir, *NBC Still Likes its Notre Dame Strategy*, N.Y. TIMES, Dec. 10, 2009, http://www.nytimes.com/2009/12/11/sports/ncaafootball/11sandomir.html.

191. *Texas, ESPN Announce New Network*, ESPN (Jan. 19, 2011, 5:51 PM), http://sports.espn.go.com/espn/news/story?id=6037857.

192. Brian Frederick, *Congress Should Investigate Conference Realignment Decisions*, HUFFINGTON POST (Sept. 23, 2011, 7:35 PM), http://www.huffingtonpost.com/brian-frederick/conference-realig-nment-congress_b_977995.html.

193. *See* Sally Jenkins, *NCAA Lost its Teeth in Court in 1984, and No One's Been in Charge Since*, WASH. POST, Sept. 23, 2011, http://www.washingtonpost.com/sports/colleges/ncaa-lost-its-teeth-in-court-in-1984-and-no-ones-been-in-chargesince/2011/09/23/gIQAVDyoqK_story.html.

194. *See Feds to NCAA: Why No playoffs?*, *supra* note 142.

195. *Id.*

"to support the overall health of college football."[196] And, since 2007, eight teams from second-class I-A conferences have appeared in BCS bowls[197] while, of course, no I-AA team made an appearance.

Because the Supreme Court treats college football as a business and the NCAA as a cartel subject to the Sherman Antitrust Act,[198] other associations such as the BCS, Division I-A, and conferences like the Big Ten have to be mindful of the Act.

A. History and Structure of the Sherman Act

The Sherman Act became law on July 2, 1890, and, as amended, is codified in 15 U.S.C. §§ 1-7. The Wilson Tariff Act, codified in 15 U.S.C. §§ 8-11, and the Clayton Act of 1914, codified, as amended, in 15 U.S.C. §§ 12-27, have expanded the original Act.[199] Section 1 prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States."[200] This section only addresses concerted action (action taken by two or more persons) that restrains trade.[201] Section 2 makes it a violation for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . trade or commerce."[202] This section addresses both independent and concerted action that "threatens actual monopolization."[203]

Sections 1 and 2 provide for criminal sanctions[204] as well as civil remedies.[205] Criminal matters, of course, only the DOJ prosecutes. The Federal Trade Commission (FTC) and the DOJ may enforce civil sanctions[206] in the form of restraining orders and injunctions,[207] seek up to treble damages when the antitrust action injures the United States,[208] and seek interest on actual damages.[209]

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196. BCS MEDIA GUIDE 2009-10, *supra* note 121, at 13.

197. BCS MEDIA GUIDE 2010-11, *supra* note 111, at 48; Feinstein, *supra* note 21.

198. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 96 (1984).

199. *See generally* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL (4th ed. 2008), *available at* http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf.

200. 15 U.S.C. § 1 (2006).

201. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

202. 15 U.S.C. § 2.

203. *Copperweld*, 467 U.S at 767.

204. 15 U.S.C. §§ 1-2. These sections provide that in the event of conviction, a defendant that is a corporation could be fined up to $100 million, and a defendant that is an individual may be fined up to $1 million, or imprisoned for up to ten years, or both. *Id.*

205. 15 U.S.C. §§ 15, 26.

206. *Id.* § 4.

207. *See id.*

208. *Id.* § 15a.

209. *Id.*

They may also seek recovery of litigation costs.[210] As a general rule, the FTC does not have jurisdiction over the nonprofit sector; however, it does have jurisdiction if a nonprofit is organized to carry on business on behalf of its for-profit members.[211]

Private individuals who believe they have been, or will be, injured by violations of antitrust laws can also pursue civil sanctions.[212] They can obtain injunctions, restraining orders,[213] up to treble damages for injuries sustained, court costs, and reasonable attorney's fees.[214] In addition, a state attorney general may bring civil actions on behalf of any natural person residing in her state.[215]

When considering an antitrust lawsuit, the foregoing legislation is the first place to look. Nevertheless, a litigant must also consult case law because:

> From the beginning the [Supreme] Court has treated the Sherman Act as a common-law statute. ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions.[216]

For example, while not in the statute, common law makes it clear the Sherman Act was meant to prohibit only unreasonable restraints of trade,[217] and was not written to protect individual competitors from harm.[218] Rather, legislators passed it to protect competition.[219] Such restraint may be determined to be unreasonable under either a per se or under a "rule of reason" standard.[220] Once a court finds a practice to be illegal per se, no further inquiry by the court is necessary.[221]

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210. *Id.*

211. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 765-66 (1999).

212. 15 U.S.C. § 15(a).

213. *Id.* § 26.

214. *Id.* § 15(a).

215. *Id.*§ 15c(a). Utah's Attorney General is planning to bring such a suit against the BCS. Steve Wieberg & Kelly Whiteside, *Utah Attorney General Says He Will File Antitrust Lawsuit Against BCS*, USA TODAY, Apr. 20, 2011, http://www.usatoday.com/sports/college/football/2011-04-20-bcs-anti-trust-lawsuit_N.htm.

216. Leegin Creative Leather Prods., Inc v. PSKS, Inc., 551 U.S. 877, 899 (2007) (second alteration in original) (citations omitted) (quoting Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 98 n.42 (1981)).

217. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59-62 (1911).

218. Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 338 (1990) (citing Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 116 (1986)).

219. *See, e.g.*, NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 139 (1998); *Atl. Richfield Co.*, 495 U.S. at 338; Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

220. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)); *see* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

221. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100, 103 (1984).

On the other hand, under the more demanding rule of reason analysis, the court or jury determines whether an agreement merely regulates and possibly promotes competition (reasonable), or whether it suppresses or destroys competition (unreasonable).[222] If the court or jury determines the agreement is unreasonable, the defendant then has the opportunity to prove that it promotes competition, i.e., that it is procompetitive.[223] This standard involves "shifting burdens of proof."[224] A plaintiff bears the initial burden of showing that the agreement has a substantially adverse effect on competition.[225] If a plaintiff can do this, the burden then shifts to the defendant to come forward with any procompetitive virtues of the alleged unlawful conduct.[226] Should the defendant establish this, then the burden shifts back to the plaintiff, who will prevail if she can establish that the defendant could have achieved his objective through an alternative, less restrictive means.[227]

The law requires a rule of reason analysis when the challenged restraint "might plausibly be thought to have a net procompetitive effect,"[228] and presumes this analysis applies in cases brought under Section 1 of the Sherman Act.[229] The function of the fact-finder is "to form a judgment about the competitive significance of the restraint."[230] Since Section 1 does not apply to the conduct of a single enterprise,[231] it does not prohibit "the coordinated activity of a parent and its wholly owned subsidiary" because the Act views both as a "single enterprise."[232] However, joint ventures consisting of separate entities, such as the NCAA and NFL, can violate Section 1.[233] Finally, unreasonable restraints of trade can take the form of horizontal price-fixing agreements, vertical price-fixing agreements, market division,

222. *Ind. Fed'n of Dentists*, 476 U.S. at 458 (1986) (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

223. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

224. *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); *see also* United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993).

225. *Brown Univ.*, 5 F.3d at 668.

226. *Law*, 134 F.3d at 1019; *Brown Univ.*, 5 F.3d at 669.

227. *Law*, 134 F.3d at 1019.

228. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999).

229. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988).

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

231. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-71 (1984).

232. *Id.* at 771.

233. *See* Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2206-07 (2010); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99, 113 (1984). *But see* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006).

group boycotts,[234] bid rigging,[235] monopolies,[236] and tying agreements.[237]

B. The NCAA's Interaction with the Sherman Act Thus Far

With the NCAA's emphasis on promoting equity among competing schools and the Sherman Act's emphasis on preventing unreasonable restraints of trade, the two concepts were bound to collide. The collision course began in the 1950s when some schools believed that football games televised by the University of Pennsylvania hurt their gate attendance.[238] As a result, they turned to the NCAA for relief.[239]

In response, the NCAA asked a research firm to determine whether television was likely to have a negative impact on "live gate."[240] When the firm concluded it would, the NCAA devised a plan limiting the number of games member institutions could televise, and the NCAA membership approved the plan.[241] Thereafter, pursuant to a vote of member institutions, the NCAA took control of college football television rights and formed a committee that devised television contract plans.[242] Schools followed contracts formulated by this committee for about thirty years until a group of larger schools became dissatisfied with their restricted television appearances and the revenue distribution.[243]

This dissatisfaction, described above, caused two schools to file an antitrust suit against the NCAA on September 8, 1981.[244] The suit alleged that the pending 1982-85 contracts with ABC, CBS, and Turner were in violation of sections 1 and 2 of the Sherman Act,[245] and also moved for relief from sanctions threatened by the NCAA.[246] The

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234. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34 (1998).

235. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692-93.

236. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 388-89 (1956).

237. Standard Oil Co. of Cal. v. United States (*Standard Stations*), 337 U.S. 293, 305-06 (1949).

238. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1283 (W.D. Okla. 1982).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1285.

244. *Id.*

245. *Id.* at 1291-92.

246. *Id.* at 1286.

court granted the motion for relief the day the plaintiffs filed the suit.[247]

Then, after a lengthy bench trial on the merits, the US District Court for the Western District of Oklahoma found the NCAA's conduct amounted to a per se horizontal price-fixing agreement among competitors in violation of Section 1 of the Sherman Act, a per se boycott of the television networks in violation of Section 1, and monopolization of the college football television market in violation of section 2.[248] The US Court of Appeals for the Tenth Circuit affirmed the per se finding of horizontal price-fixing and reversed the boycott and monopoly findings.[249] The NCAA appealed, and the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma* affirmed but, for reasons explained below, used a rule of reason rather than a per se analysis.[250]

In determining whether the trial and appellate courts correctly applied the per se standard, Justice Stephens, writing for the Court, reasoned that the law had traditionally treated horizontal price-fixing as per se illegal because the practice facially appears to restrict competition and decrease output.[251] He added that courts had made exceptions for price-fixing agreements that might actually increase competition in limited markets.[252] The Court held that the instant case represented one of those exceptions[253] because the NCAA was in an industry where horizontal restraints[254] on competition were essential if the product (contests between competing institutions) was to be available at all.[255] Therefore, the lower courts should have followed a rule of reason analysis.[256] The majority then proceeded to utilize precedent and evidence before the district court to render its holding under the rule of reason analysis.[257]

Before the Court, the NCAA argued that, in order to establish that the alleged restraint was anticompetitive, the plaintiffs had failed

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247. *Id.*

248. *Id.* at 1281-82.

249. *See* Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1153 (10th Cir. 1983); *see also* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 125 (1984).

250. *Bd. of Regents*, 468 U.S. at 88, 100-01.

251. *Id.* at 100 (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979)).

252. *Id.* at 103 (citing *Broad. Music*, 441 U.S. at 18-23; Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977)).

253. *Id.* at 101-02.

254. A horizontal restraint is an "agreement between competitors at the same level of the market structure." Evans v. S. S. Kresge Co., 544 F.2d 1184, 1191 (3d Cir. 1976).

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

256. *Id.* at 99-101.

257. *Id.* at 111-21.

to prove that the NCAA had "market power."[258] Moreover, the NCAA contended they did not, in fact, have market power because advertisers and broadcasters could have switched from college football to other types of entertainment.[259] The Court rejected both arguments.[260] It rejected the first argument as a matter of law because "no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement"[261] when "there is an agreement not to compete in terms of price or output."[262]

With regard to the second argument, the Court held:

> [T]he District Court's market analysis is firmly supported by our decision in *International Boxing Club of New York, Inc. v. United States*, that championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events. Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "[rests] on generic qualities differentiating" viewers. It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power."[263]

The NCAA next argued that their television contract was procompetitive and therefore justified because it protected "live-gate" attendance of other college football games, which was necessary since their ticket sales could not compete with football telecasts (output).[264] The Court found that this contention was based on the NCAA's fear that live football (the product) would not be attractive enough to draw attendance when faced with competition from televised games.[265] The Court concluded this argument was unpersuasive because "[t]he Rule

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258. *Id.* at 109. Market power refers to "the power to control prices or exclude competition," United States v. Visa U.S.A., Inc. 344 F.3d. 229, 239 (2d Cir. 2003) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)), and the "ability to raise prices above those that would be charged in a competitive market," *Bd. of Regents*, 468 U.S. at 109 n.38.

259. *Bd. of Regents*, 468 U.S. at 111.

260. *Id.* at 109.

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

262. *Id.* The NCAA's plan restricted output (games on television) and raised prices the networks had to pay, thereby creating a price structure that was unresponsive to viewer demand. *Id.* at 105-06.

263. *Bd. of Regents*, 468 U.S. at 111-12 (alteration in original) (footnote omitted) (citations omitted) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956); Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 613 (1953)) (citing Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 249-52 (1959)).

264. *Bd. of Regents*, 468 U.S. at 116.

265. *Id.*

of Reason does not support a defense based on the assumption that competition itself is unreasonable."[266]

After *Board of Regents*, the large football powers became the major recipients of TV money, causing the NCAA even more concern about the competitive balance of intercollegiate athletics.[267] A 1985 study known as the Raiborn Report confirmed this concern.[268] According to this study, expenses of athletic programs increased more than 100 percent between 1978 and 1985, and 42 percent of NCAA Division I schools had deficits in their overall athletic budgets, with an average deficit of $824,000 per school.[269] In addition, "some college presidents had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students due to economic constraints."[270] The study further found that, in many cases, the economic constraints were due to pressures to "keep up with the Joneses" by increasing spending on recruiting talented players and coaches and on other aspects of their sports programs.[271]

Therefore, in 1989, the NCAA established a Cost Reduction Committee to consider ways of reducing the cost of intercollegiate athletics "without disturbing the competitive balance."[272] Before work began, the committee chairman sent a letter to all participants thanking them for joining together in a "gigantic attempt to save intercollegiate athletics from itself."[273] In the end, the committee made a number of recommendations, one of which was to reduce the salaries of all part-time assistant coaches, graduate assistant coaches, and volunteer coaches by reclassifying them as "restricted-earnings coaches" and paying them no more than $16,000 a year.[274] In support of this recommendation, the committee noted that personnel costs constituted the largest expense item in athletic budgets.[275] NCAA members adopted the committee's recommendation, and it became effective in the 1992-93 academic year.[276]

Not surprisingly, "restricted-earnings basketball coaches," some of whom had been making $60,000 to $70,000 a year, took a dim

266. *Id.* at 116-17 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978)).
267. Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998).
268. *See id.*
269. *Id.* at 1012-13.
270. *Id.* at 1012.
271. *Id.*
272. *Id.* at 1013.
273. *Id.*
274. *Id.* at 1014.
275. *Id.*
276. *Id.* at 1015.

view of this pay cut and filed a class-action price-fixing suit against the NCAA.[277] In *Law v. NCAA*, the US District Court for the District of Kansas used a rule of reason analysis and found as a matter of law that the salary restriction was in violation of Section 1 of the Sherman Act.[278] By way of summary judgment, the district court found for the plaintiffs on the issue of liability[279] and enjoined the NCAA from further enforcement of restricted-earnings salaries.[280]

On appeal, the NCAA argued that the coaches had not carried their burden of establishing that a relevant market existed, and that they had not shown that they (the NCAA) had power in the market.[281] In support of this argument, the NCAA contended the relevant market was made up of all college basketball coaches, and presented evidence showing that restricted-earnings basketball coaches only consisted of 8 percent of that market.[282] Accordingly, the NCAA argued that an issue of material fact existed and that the summary judgment was inappropriate.[283]

In rejecting this argument, the Tenth Circuit pointed to *Board of Regents* where the court said:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.[284]

Accordingly, the court found that it was proper for the trial judge to determine the anticompetitive effects of the bylaw under a "quick look"[285] analysis and proceed directly to the question of whether the

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277. *See* Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

278. *Id.* at 1409-10.

279. *Id.* at 1410.

280. Law v. NCAA, 1996 U.S. Dist. LEXIS 3479, at *14-15 (D. Kan. Jan. 8, 1996).

281. Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

282. *Id.* at 1019-20.

283. *Id.* at 1020.

284. *Id.* (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984)).

285. *Id.* The Court has expanded on the circumstances in which a "quick look" is appropriate. *See generally* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-70 (1999). In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. 85, 110 (1984). Later, the Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character," Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978), of "horizontal agreements among competitors to refuse to discuss prices," *Cal. Dental Ass'n*, 526 U.S. at 770 (citing *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692), or "to withhold a particular desired service," *Cal. Dental Ass'n*, 526 U.S. at 770 (citing FTC v. Ind. Fed'n of Dentists, 476 U. S. 447, 459 (1986)).

> In each of these cases, which have formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason, an observer with even a

procompetitive justifications advanced by the NCAA outweighed the restraints.[286] Contending the bylaw was procompetitive, the NCAA argued that it helped retain entry-level coaching positions, reduced costs, and provided competitive equity by preventing wealthier schools from employing more experienced, higher-priced coaches as part-time coaches.[287]

Unconvinced, the Tenth Circuit reasoned that retaining coaching positions might have social value but did not promote competition.[288] Furthermore, the court held that "cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices [they would pay]."[289] Finally, the Tenth Circuit held that the restriction was not procompetitive because the Cost-Reduction Committee implemented these wage limitations to prevent disturbing the competitive balance.[290]

Because the evidence established that the salary restriction constituted a price-fixing agreement and that the NCAA had not established the agreement was procompetitive, the district court's order was affirmed.[291] In April 1998, the parties litigated the liability and damage issues and a jury awarded the coaches $22 million, which became $66 million after treble damages.[292] The parties subsequently settled the lawsuit for $54 million.[293] In addition, the court awarded the defense attorneys $20 million in fees and costs.[294]

Picking up on the portion of *Law* in which the court held that "cost-cutting by itself is not a valid pro-competitive justification,"[295] a group of walk-on football players from different I-A schools also filed

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> rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

Cal. Dental Ass'n, 526 U.S. at 770; *see Ind. Fed'n of Dentists*, 476 U.S. at 459 (finding a horizontal agreement among dentists to refuse to submit X-rays to dental insurers); *Bd. of Regents*, 468 U.S. at 99-100 (finding NCAA's television plan explicitly restricted output and fixed a minimum price); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (concluding the restraint was "an absolute ban on competitive bidding").

286. *Law*, 134 F.3d at 1020.

287. *Id.* at 1021, 1024.

288. *Id.* at 1022.

289. *Id.*

290. *Id.* at 1013, 1024 (explaining that the stated purpose of the Cost Reduction Committee was to reduce the costs of intercollegiate athletics "without disturbing the competitive balance").

291. *Id.* at 1020.

292. Law v. NCAA, 108 F. Supp. 2d 1193, 1195 (D. Kan. 2000), *aff'd* 134 F.3d 1010 (10th Cir. 1998).

293. *Id.*

294. *Id.* at 1193.

295. *Law*, 134 F.3d at 1022.

suit against the NCAA.[296] In *In re* N*CAA I-A Walk-on Football Players Litigation*, the walk-ons contended before the US District Court for the Western District of Washington that the NCAA bylaw restricting I-A schools to eighty-five football scholarships was a horizontal "cost-containment" agreement in violation of Section 1 of the Sherman Act.[297] The NCAA moved for judgment on the pleadings contending that the walk-ons had not alleged a legally cognizable relevant market or injury to competition.[298] The district court, in denying the motion, found the plaintiffs' pleading did state a cause of action in that it alleged an "input" market where schools competed for skilled amateur football players and that it alleged injury to competition by contending that "many walk-ons leave school with enormous student loans that they must pay off after they leave school."[299]

The parties settled the lawsuit in 2007 when the plaintiffs "walked away" with an extremely small amount of money.[300] The NCAA considered this settlement a victory,[301] and they still limit I-A schools to eighty-five football scholarships and I-AA schools to sixty-three.[302]

C. Future Antitrust Suits against the NCAA and the Boycott Theory

In *Board of Regents* and *Law*, the Supreme Court and the Tenth Circuit, respectively, held that the NCAA had violated Section 1 of the Sherman Act because it had engaged in horizontal price-fixing arrangements that did not increase "competitive equity among NCAA teams."[303] When it comes to a potential antitrust suit by the second-class I-A conferences against the BCS, academics have suggested that the "boycott theory" provides the greatest likelihood of success.[304] The same can be said about an antitrust suit by I-AA schools whether they

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296. *See In re* NCAA I-A Walk-on Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

297. *Id.* at 1146-47.

298. *Id.* at 1147.

299. *Id.* at 1150-51 (quoting Complaint at 26 n.79, *In re* NCAA I-A Walk-on Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (No. C-04-1254-C), 2004 U.S. Dist. Ct. Pleadings 1650).

300. Mark Alesia, *3 Lawsuits May Change How NCAA Operates*, USA TODAY, July 26, 2009, www.usatoday.com/sports/college/2009-07-26-ncaa-lawsuits_N.htm.

301. *Id.*

302. 2010-11 NCAA MANUAL, *supra* note 104, § 15.5.6.

303. *See* Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998).

304. C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 286 n.9 (2008).

label the theory a boycott, a concerted refusal to deal, or a conspiracy among federation members. Boycotts, concerted refusals to deal,[305] and conspiracies among federation members[306] come in different shapes and forms; some violate Section 1 per se while others do not. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[307] ten appliance manufacturers agreed, at the instigation of Broadway-Hale (a national chain), that they would not sell, or would only sell at higher prices and unfavorable terms, to one of Broadway-Hale's competitors doing business as Klor's.[308] As a result, Klor's, a solely-owned company, brought an antitrust suit against Broadway-Hale and the manufacturers seeking treble damages and an injunction claiming that the agreement was in violation of sections 1 and 2 of the Sherman Act.[309] Broadway-Hale moved for summary judgment, and the court agreed and dismissed the complaint finding that "[t]he controversy was a 'purely private quarrel' between [the parties], which did not amount to a 'public wrong proscribed by the Sherman Act.'"[310]

In affirming the dismissal, the US Court of Appeals for the Ninth Circuit said there was no proof that Broadway-Hale's actions adversely affected the price, quantity, or quality of goods offered to the public.[311] The Supreme Court granted certiorari; Justice Black explained: "The holding, if correct, means . . . a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively."[312] Reviewing this hypothesis, Justice Black observed that the landmark *Standard Oil* case held that the validity of an agreement depends on the surrounding circumstances and that some classes of restraints are unduly restrictive.[313] The Court then said, in reversing, that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."[314]

This holding seems to imply that a boycott agreement is itself an injury to the competitive process[315] and that once a court deemed an agreement to be part of a "group boycott," it normally resulted in

305. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 540, 552-53 (1978).
306. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 455 (1986).
307. 359 U.S. 207 (1959).
308. *Id.* at 209.
309. *Id.* at 208.
310. *Id.* at 210 (discussing the district court's decision).
311. Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214, 230 (9th Cir. 1958).
312. Klor's, 359 U.S. at 210.
313. *Id.* at 211 (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 57-65 (1911)).
314. *Id.* at 212.
315. *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134-35 (1998).

per se invalidation.[316] However, twenty-six years later, Justice Brennan, writing for the Court in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Company*, said that the type of boycott activity meriting per se treatment was far from certain,[317] explaining that the Court had generally limited the per se approach to "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'"[318]

In *Northwest Stationers,* members of a cooperative (Northwest Wholesale Stationers, Inc.), for no stated reason, kicked another member (Pacific Stationery and Printing Company) out of the cooperative without notice, explanation, or hearing.[319] This put Pacific at a disadvantage because, even though nonmember and member retailers could purchase supplies from Northwest at the same price, members received year-end rebates.[320] Moreover, members, unlike nonmembers, could use Northwest's warehouse.[321]

Thereafter, Pacific brought suit alleging that its expulsion amounted to a per se violation of section 1 of the Sherman Act.[322] The trial court rejected the per se analysis, holding instead that a rule of reason analysis should govern.[323] After applying this analysis, the court found the expulsion had no anticompetitive effect and granted summary judgment for Northwest.[324] The Ninth Circuit reversed, holding that "[t]he uncontroverted facts . . . support[ed] a finding of per se liability."[325]

The Supreme Court, however, rejected an automatic application of the per se analysis in this boycott:

> A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive

316. *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253, 259-60 (1963); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

317. Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 287 (1985).

318. *Id.* at 294 (quoting LAWRENCE SULLIVAN, LAW OF ANTITRUST 261-62 (1977)).

319. *Id.* at 287.

320. *Id.* at 286.

321. *Id.* The court noted that Northwest's activity did not really amount to a "concerted refusal to deal" but rather it amounted to "a concerted refusal to deal with Pacific on substantially equal terms." *Id.* at 295 n.6. "Such activity might justify per se invalidation if it placed a competing firm at a severe competing disadvantage." *Id.* (noting that even if the joint venture does deal with outside firms, it may place them at a severe competitive disadvantage).

322. *Id.* at 288.

323. Pac. Stationery & Printing Co. v. Nw. Wholesale Stationers, Inc., 715 F.2d 1393, 1395 (9th Cir. 1983) (discussing the trial court's disposition of the case).

324. *Nw. Wholesale Stationers*, 472 U.S. at 288.

325. *Pac. Stationery & Printing Co.*, 715 F.2d at 1395.

> effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive. When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition.[326]

Because Pacific had not shown that Northwest possessed "market power or unique access to a business element necessary for effective competition," the Court reversed the judgment and remanded to the circuit court for the limited purpose of determining whether the trial court's rule of reason analysis was correct.[327]

Next, in a "boycott-type case" the Court held that the plaintiff was not entitled to invoke the per se rule, but observed that the defendant was required to prove her restraints were procompetitive even though the plaintiff had not established market power.[328] In *Indiana Federation of Dentists,* a group of dentists formed a federation that initiated a policy prohibiting its members from furnishing patient x-rays to insurance companies.[329] The Federation created this policy to thwart insurance company requests for patient x-rays to assist in the evaluation of insurance claims.[330] After a hearing, the FTC found, under the rule of reason analysis, that the Federation's policy constituted unfair competition in violation of 15 U.S.C. § 45 (in other words, an unreasonable restraint of trade) and issued a cease-and-desist order.[331]

On appeal, the US Court of Appeals for the Seventh Circuit vacated the order holding that there was insufficient evidence to support the FTC's finding that the dentists conspired to withhold the x-rays.[332] It also held that there was insufficient evidence to establish that the Federation suppressed competition.[333] The Supreme Court granted certiorari to consider whether there was sufficient evidence to support the FTC's finding that the Federation's policy was anticompetitive, and to consider whether the Seventh Circuit had misconstrued the principles of antitrust law.[334]

At the outset, the Court addressed the question of whether the dentists' collective refusal to cooperate with the insurers constituted an "unreasonable' restraint of trade" in violation of section 1 of the

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326. Nw. Wholesale Stationers, 472 U.S. at 298.
327. *Id.*
328. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-59 (1986).
329. *Id.* at 451.
330. *Id.*
331. Ind. Fed'n of Dentists, 101 F.T.C. 57 (1983) (final order).
332. *Ind. Fed'n of Dentists v. FTC*, 745 F.2d 1124, 1135-38 (7th Cir. 1984).
333. *Id.* at 1143-44.
334. Ind. Fed'n of Dentists, 476 U.S. at 453.

Sherman Act.[335] In addressing the reasonableness of the policy, Justice White, writing for the Court, concluded that the Federation's practices resembled those that the Court had previously labeled "group boycotts" because "the policy constitutes a concerted refusal to deal."[336] He further concluded that, historically, group boycotts had been found unreasonable per se.[337] He reasoned, however, that they could not force the Federation's policy into a boycott pigeonhole and the per se rule could not be invoked because, as the Court noted:

> [I]n *Northwest Wholesale Stationers*, the category of restraints classed as group boycotts [was] not to be expanded indiscriminately, and [that] the per se approach ha[d] generally been limited to cases in which firms with market power [had] boycott[ed] suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here.[338]

Next the Court examined whether the policy was unreasonable under a rule of reason analysis, observing that "[t]he Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold from their customers a particular service they desire—the forwarding of x-rays to insurance companies along with claim forms."[339] The Court added:

> While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services—such an agreement limiting consumer choice by impeding the ordinary give and take of the market place, cannot be sustained under the Rule of Reason.[340]

The Federation did not make any countervailing procompetitive claims but did contend its policy was not an unreasonable restraint as a matter of law.[341] It argued that the FTC's rule of reason analysis was faulty because it failed to define the allegedly trade-restrained market and the Federation members' market power.[342] Rejecting this argument, Justice White said:

> This contention . . . runs counter to the Court's holding in [*NCAA v. Board of Regents of the University of Oklahoma*] . . . that "[a]s a matter of law, the absence of proof of

335. *Id.* at 457.

336. *Id.* at 458.

337. *Id.*

338. *Id.* (citations omitted).

339. *Id.* at 459.

340. *Id.* (citations omitted) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)) (internal quotation marks omitted).

341. *Id.* at 460.

342. *Id.*

> market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis."[343]

In this way, while boycott cases do not get per se treatment, once established, they are "naked" enough to dispense with the plaintiff's need to prove market power before the defendant is required to come forward with proof the alleged restraints are procompetitive.

He added that "even if the restriction imposed by the Federation is not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason."[344] This was so, he said, first, because the FTC found as a matter of fact the Federation's policy had an adverse effect on competition and second,

> [s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."[345]

In reversing, the Court said that substantial evidence supported the FTC's findings and these findings were sufficient as a matter of law to establish a violation of section 1 of the Sherman Act.[346]

College basketball's postseason National Invitational Tournament (NIT) successfully employed the boycott theory against the NCAA in *Metropolitan Intercollegiate Basketball Association v. NCAA*.[347] In this case, Metro Intercollegiate Basketball Association (MIBA)[348] filed suit against the NCAA, alleging that its bylaw required "any NCAA institution invited to the NCAA Tournament to boycott the Postseason NIT."[349] Here the NIT challenged a bylaw that required member institutions invited to the post-season NCAA tournament to either participate in the NCAA tournament or forgo postseason competition altogether.[350]

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343. *Id.* (second alteration in original) (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109-10 (1984)).

344. *Id.*

345. *Id.* at 460-61 (quoting 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1511 (1986)).

346. *Id.* at 465-66.

347. Metro. Intercollegiate Basketball Ass'n v. NCAA, 337 F. Supp. 2d 563 (S.D.N.Y. 2004) (finding successful plaintiffs' use of boycott theory to challenge NCAA bylaw).

348. The Metropolitan Intercollegiate Basketball Association is an unincorporated association consisting of Fordham University, Manhattan College, New York University, St. John's University, and Wagner College. *See id.* at 565-66.

349. *Id.* at 569.

350. *Id.*

After filing suit, the MIBA moved for summary judgment contending the bylaw was unreasonable per se.[351] The district court rejected this contention.[352] It reasoned that *Board of Regents* made clear that a per se analysis would not be appropriate when sports activities were involved because these activities could only be carried out jointly thereby making certain horizontal restraints necessary.[353] Therefore, in order to prevail, the Court found that the MIBA would have to proceed with its motion for summary judgment under a rule of reason analysis.[354] Since the MIBA did not argue it was entitled to summary judgment under a rule of reason analysis, its motion was denied.[355] The case went to trial in August 2005.[356] The parties settled after two weeks of litigation when the NCAA agreed to pay $16 million to end the trial and $40.5 million to purchase the NIT tournament.[357]

IV. THE SHERMAN OPTION

Senator Hatch and Arent Fox LLP partner Alan Fisher, who represents Boise State and the Mountain West Conference, have urged the DOJ to file an antitrust lawsuit against the BCS.[358] The DOJ has taken these requests under consideration.[359] While the second-class I-A conferences have a grievance, the 120 I-AA schools have the greatest likelihood of succeeding in an antitrust case.

A. Theory of the I-AA case

The theory of this case is twofold.[360] First, Division I-A football schools, their conferences, and the NCAA have conspired with each other to keep I-AA schools from competing at the highest level of Division I football. They have done this through forbidden boycotts.[361]

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351. *Id.* at 570.

352. *Id.* at 571.

353. *Id.* at 570-71 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984)).

354. *Id.* at 573.

355. *Id.*

356. Frank Litksy, *N.C.A.A. Buys N.I.T. for $56.5 Million*, N.Y. TIMES, Aug. 18, 2005, http://www.nytimes.com/2005/08/18/sports/ncaabasketball/18nit.html.

357. *Id.*

358. *See* Hatch Press Release, *supra* note 119; Jenkins, *supra* note 129.

359. *See Feds to NCAA: Why No Playoffs?*, *supra* note 142.

360. There could also be a third monopoly theory involving the BCS, but it is not addressed here.

361. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (noting that group boycotts—or concerted refusals to deal with others—have long been forbidden).

This exclusion, through a group boycott, impedes the ordinary give and take of the market place by lowering the quality of the product and by increasing the cost of doing business, which the schools pass on to consumers (the fans). Both features of the boycott unreasonably restrain competition in violation of section 1 of the Sherman Act.

Second, participants in the BCS (Division I-A schools and the BCS arrangement) have conspired with each other through a group boycott to exclude I-AA schools from the arrangement. Again, an examination of the facts under the rule of reason analysis establishes that I-A conferences manage the BCS, which specifically excludes all I-AA schools from participating in their postseason arrangement. This boycott also "limit[s] consumer choice by impeding the 'ordinary give and take of the market place'"[362] and, therefore, unreasonably restrains competition in violation of section 1 of the Sherman Act.

As a result, I-AA competitors have been, and continue to be, harmed by the loss of revenue and intangible benefits that come from competing at the highest level of NCAA Division I football. The remedies would include injunctions from the court such as: (1) barring further mandatory separation of NCAA Division I football programs into I-A and I-AA categories, and (2) barring further exclusion from postseason BCS and NCAA Division I-A bowls, and (2) a monetary award for past exclusions (within the four-year statutory period[363]) against all defendants including treble damages, court costs, and attorneys' fees.

B. Method of Proof

When a boycott theory is used to prove an antitrust violation, the per se analysis (as opposed to the more stringent rule of reason analysis) may be used to establish the violation if the defendant has market power *and* boycotts "suppliers or customers in order to discourage them from doing business with a competitor."[364] Since the alleged boycott in this case was not employed to discourage a supplier or customer from doing business with a competitor, the rule of reason analysis must be used to prove the violation. It is arguable, however, that the plaintiff in this case[365] can use a "quick look" rule of reason analysis (dispensing with the need to prove market power) because it has been said that a boycott, once established, is "naked enough" to

362. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

363. *See* 15 U.S.C. § 15b (2006).

364. *See Ind. Fed'n of Dentists*, 476 U.S. at 458.

365. The plaintiff(s) in this case being one or more I-AA institutions.

prove the restraint is unreasonable.[366] However, out of an abundance of caution, this plaintiff will establish that the defendants had market power.

C. The Law: Jury Instructions

At the conclusion of a jury trial in an antitrust boycott case, the jury would receive a number of instructions from the bench.

Using ABA Model instructions as a guide, and assuming the NCAA and the BCS are the defendants,[367] tailored instructions regarding the plaintiff's denial of membership claim might look like the following:

1. Exclusion from an Association

Persons who are in competition with each other in an industry, trade, or profession may lawfully join together in an association for the purpose of promoting legitimate goals such as product quality, safety standards, consumer confidence, or other interests of the industry, trade, or profession. To accomplish its goals, such an association will usually have to make and enforce rules and requirements for participation. If those rules are reasonably necessary to accomplish a procompetitive purpose, they can be applied without violating the law. However, if the association's rules significantly impair competition in a relevant market without a legitimate justification, the use of those rules to exclude [another person or organization] violates the Sherman Act.[368]

To prevail on its claim that the defendants' boycott constituted such a violation, the plaintiff must prove each of the following elements by a preponderance of the evidence.[369]

First. That a defendant possessed market power.[370] In determining whether a defendant has market power in this case you are instructed that, "college football constitutes a separate market for which there is no reasonable substitute."[371] A defendant has market power within this market if it has the "power to control prices or

366. *See Ind. Fed'n of Dentists*, 476 U.S. at 460.

367. There are other potential defendants such as I-A schools and first-class I-A conferences, but for the purposes of this discussion the defendants have been limited to the NCAA and the BCS.

368. MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES § B-57 (2005) [hereinafter MODEL JURY INSTRUCTIONS].

369. *Id.* § B-58.

370. *Id.*

371. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 112 n.48 (1984).

exclude competition."[372] Or, in the alternative, "market power may be presumed if [a] defendant controls a large enough share of the relevant market."[373]

Second. That the restriction on membership is not reasonably necessary or tailored to achieve the defendant's legitimate goals.

Third. That the defendant's denial of membership affects interstate commerce.

Fourth. That the plaintiff was injured in its business or property because of this denial of membership.

If you find that the evidence is insufficient to prove any one or more of these elements, as to a particular defendant then you must find for that defendant. If you find that the evidence is sufficient to prove all four elements as to a defendant, then you must find for the plaintiff and against that particular defendant on the plaintiff's denial of membership claim.[374]

2. Rule of Reason Overview

"Under Section 1 of the Sherman Act, a restraint of trade is illegal only if it is found to be unreasonable."[375] You must determine whether the agreements challenged here are unreasonable. In making this determination, you must first determine whether the plaintiff has proven that its exclusion from the first tier of Division I football (Division I-A) in the NCAA and from the BCS arrangement resulted in substantial harm to competition in a relevant product and geographic market.

"If you find that the plaintiff has proven that the challenged restraint results in . . . substantial harm to competition in a relevant market, then you must consider whether the [defendant has established that the] restraint produces countervailing competitive benefits."[376] If you find the defendant has established that the restraint produces countervailing competitive benefits, "then you must balance the competitive harm against the competitive benefit."[377] A challenged restraint is illegal only if you find that competitive harm substantially outweighs competitive benefits.[378]

372. United States v. Visa U.S.A., Inc., 344 F.3d 229, 239 (2d Cir. 2003) (citing Bd. of Regents, 468 U.S. at 109 n.38; United States v. E.I.du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

373. *Id.*

374. MODEL JURY INSTRUCTIONS, *supra* note 368, §§ 58-59.

375. *Id.* § A-4.

376. *Id.*

377. *Id.*

378. *Id.*

D. Closing Argument

Ladies and gentlemen we thank you for your time and attention during the course of this long trial. What I am going to do now is pull all of the testimony and documents together and show you why there is a wrong that must be made right. As you have seen from the evidence, college sports, rightly or wrongly is big business, and as you have also seen, many I-A colleges and most, if not all, I-AA colleges are finding it difficult, if not impossible, to sustain their athletic programs.[379] Unfortunately, the watchdog Knight Commission, Congress, the Department of Justice, and scholars are only concentrating on the problems facing I-A schools.[380] However, 120 I-AA football schools in NCAA Division I[381] have problems too, and a resolution of these problems is long overdue. This is something you can remedy.

At the conclusion of closing arguments, the judge will instruct you on the law, and at that time you will be told that in order for my client to prevail you will have to find that the defendants have market power. We have introduced evidence here to establish the market is college football for which you will be instructed there is no reasonable substitute.

To prove the defendants have power in this market we have introduced evidence showing that college athletic competition is conducted in three separate divisions (Divisions I, II, and III) under the control of the NCAA.[382] We have also introduced evidence showing that the NCAA has divided college football in Division I into two groups known as Divisions I-A and I-AA,[383] and that in order to participate in I-A's postseason a school may only count one victory against a I-AA opponent as a win against a "deserving team."[384] When it comes to the BCS, we introduced evidence specifically establishing the arrangement's requirement that its contestants come from Division I-A.[385]

These restraints prevent I-AA schools from playing football games in most of I-A's regular season, and they prevent them from

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379. REVENUES & EXPENSES *supra* note 19.

380. *See* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *supra* note 4; *DOJ Mulls Antitrust Probe of College Football Championships*, *supra* note 141; Hatch Press Release, *supra* note 119.

381. REVENUES & EXPENSES, *supra* note 19, at 54.

382. GRANT ET AL., *supra* note 43, at 40 (noting that Division I split into I-A and I-AA in 1978).

383. NCAA, 2010-11 NCAA DIVISION I MANUAL § 20.1.1.2.

384. *Id.* at §18.7.2.2.1.

385. BOWL CHAMPIONSHIP SERIES, *supra* note 111 at 8-9.

participating in postseason NCAA bowls and BCS bowls, including the BCS national championship game. This means that from September through November, Division I-A schools reign supreme because of NCAA regulations and in January they reign supreme under BCS regulations. In short, the NCAA and BCS have market power because each organization controls a "market for which there is no reasonable substitute,"[386] and each organization excludes I-AA schools from competing in this market.

This all came to pass because, in 1976, approximately sixty schools founded a football cartel known as the College Football Association.[387] By 1978, this cartel had caused the NCAA to create a new second tier of Division I football by forming something they called Division I-AA.[388] By 1982, the NCAA had pushed ninety-three schools[389] into this second tier in the wake of costly and unnecessary rules for membership in the first tier.[390] It is clear this second tier of Division I football was not made to accommodate football fans (the consumers). Rather, it was made to accommodate revenue sharing among big-time football schools. And, in the process, the NCAA eliminated Division I schools like Yale and Furman from top-tier Division I competition even though they were fielding better football teams than most schools the NCAA did not eliminate.[391] The year the NCAA eliminated the Ivy League, Yale had a 9-1 record and was one of the most powerful teams in the east.[392] The two years before the NCAA demoted Furman; it went 9-1 and 8-3 respectively and had higher Power Ratings than both LSU and Texas in 1980, and a higher Power Rating than Auburn in both 1980 and 1981.[393] Since 2005, LSU, Texas, and Auburn have won three of the six national championship games.[394]

Where would Furman fit in now if the NCAA had not pushed it into the second tier of Division I football? Before answering this question, take into consideration the fact that Stanford University,

386. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 112 n.49 (1984).

387. *See NCAA Slices*, *supra* note 77.

388. *Id.*

389. *Division I-AA Features New Teams*, *supra* note 84.

390. *See NCAA Slices*, *supra* note 77.

391. *See infra* text accompanying notes 392-93.

392. *See* Pennington, *supra* note 89; Howell, *supra* note 97 (listing 1981 ratings).

393. *See* Howell, *supra* note 97 (listing 1980 ratings); Howell, *supra* note 98 (listing 1981 ratings).

394. Tim Hyland, *College Football National Champions: The Complete List*, ABOUT.COM, http://collegefootball.about.com/od/nationalchampions/a/champions-list.htm (last visited Oct. 26, 2011).

with 6,900 undergraduate students,[395] defeated Virginia Tech 40-12 in the 2011 BCS Orange Bowl.[396] Also, take into consideration the fact that Stanford ended the next (2011) season ranked fourth in the nation, with an 11-1 record, earning it a match up with third ranked Oklahoma State in the 2012 BCS Fiesta Bowl,[397] which Stanford lost in a thrilling 41-38 overtime game.[398] If given a chance, small schools can play big-time football.

There was no rhyme or reason to the second tier created by the big-time football schools. The new NCAA Division I-A schools cared only about their bottom line, and the fewer schools in the first tier, the more money each would receive. In 1982, both the Southern Conference and the Mid-American Conference were cut en masse from the first tier of NCAA's Division I.[399] But, somehow before the 1983 season began, the NCAA readmitted the Mid-American Conference.[400] This was great for the MAC, but for some reason, the Southern Conference, which had higher Power Ratings than the MAC in both 1980 and 1981, was left behind.[401] How can this injustice be explained? Additionally, schools that the NCAA cut in the mass conference purges had further reason to complain when the NCAA allowed schools that did not meet its new I-A criteria to remain if they happened to be in a conference that consisted of at least six football teams, provided that half met I-A criteria. Which schools was the NCAA trying to protect with this exception?

In the end, these cuts were revenue-sharing measures among divined members of the NCAA's new I-A; they were not for the fans. That is, the big-time football schools did not carve out two Division I tiers because of the fans, but in spite of them. In the process, they eliminated most underdogs and increased the cost of doing business. Explaining why the BCS system is not fan friendly, Utah's President, Michael Young, noted that it eliminated the underdog and, as he said, "everyone loves the underdog."[402]

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395. Stanford Univ., *Stanford Facts 2012*, http://facts.stanford.edu/chron.html (last visited Jan. 9, 2012).

396. *See* James Howell, *Virginia Tech Historical Scores*, *supra* note 133.

397. Stanford Univ., *Bowl Central*, http://www.gostanford.com/bowlcentral (last visited Oct. 26. 2011).

398. Brian McIntyre, *Fiesta Bowl, Stanford Vs Oklahoma State: Cowboys open Door for Share of National Title*, SBNATION, Jan.3, 2012, http://www.sbnation.com/ncaa-football/2012/1/3/2678873/oklahoma-state-vs-stanford-fiesta-bowl-2012-score-recap/in/2376692.

399. *NCAA Slices*, *supra* note 77.

400. O'Connor, *supra* note 76.

401. *See id.*

402. *BCS Hearing*, *supra* note 149, at 237 (testimony of Michael Young, President, University of Utah).

To make his point, he singled out George Mason University from a I-AA conference, which, on its way to basketball's Final Four in 2006, knocked off defending champion North Carolina as well as Michigan State and Connecticut, each of which had won the national championship in one of the prior six years.[403] In this testimony, President Young said that if today anyone

> proposed a system for a new college sport in which 120 universities were to participate, and suggested that nearly half of those institutions would be, for all practical purposes, eliminated from the national championship even before their seasons begin, that person's idea would be met with tremendous derision.[404]

This suggestion, of course, has not only been made, it was implemented when the NCAA created Division I-AA and forced schools to leave their Division I status.[405] According to the *Daily Oklahoman*, it was "one of the most divisive issues in the [NCAA's] history."[406] This involuntary exclusion from a privileged group has created a boycott that continues today.

At the end of the day, the NCAA precluded nearly half of the football teams in Division I from competing in I-A's regular season and for I-A's national championship before the season even started.[407] As part of this purge, the NCAA eliminated schools that invented the game even though they were still competitive. The NCAA made this split and created I-AA for monetary reasons—not for procompetitive reasons.

The fans love the underdog. Not only did the fans love it when George Mason went to the NCAA Final Four in 2006, they also loved it when I-AA Butler took Duke to the wire in the 2010 finals and when Virginia Commonwealth University (VCU) went to the Final Four in 2011.[408] We know they loved watching the underdog because VCU's trip to the Final Four in 2011 was front page news in the *Washington Post*,[409] and the television rating for the 2010 Duke-Butler final was 31 percent higher than the 2009 North Carolina-Michigan State final.[410] Moreover, the Duke-Butler game had the highest number of viewers since the Arizona-Kentucky final in 1997.[411] Speaking of TV

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403. *See NCAA Tournament History*, *supra* note 156.

404. *BCS Hearing*, *supra* note 149, at 232 (testimony of Michael Young, President, University of Utah).

405. *See* O'Connor, *supra* note 76.

406. *NCAA Slices*, *supra* note 77.

407. *See supra* Part I.B.

408. *Infra* text accompanying note 410.

409. Liz Clarke, *Butler Ends VCU's Cinderella Run in the Semifinals*, WASH. POST, Apr. 3, 2011, at D1.

410. *See Duke-Butler NCAA Final Generates Highest TV Rating Since 2005*, *supra* note 162.

411. *Id.*

ratings for the "little guy," the 2010 Virginia Tech-Boise State football ratings were the second highest of the year, including conference championship games.[412]

Television ratings for the I-AA schools would be high, too, if the NCAA allowed them to compete with the big-time players on the football field. Even with the scholarship differential, Appalachian State took on, and beat, fifth-ranked Michigan on the road in 2007.[413] Likewise in 2010, I-AA James Madison topped Orange Bowl-bound Virginia Tech on the road.[414]

Today these games are an exception to the rule and, concededly, no one wants to go watch lopsided football games. This, however, will not happen if the NCAA removes the I-AA distinction. It will not happen because I-AA schools will no longer be "second-class citizens"[415] and will be able to recruit. It will not happen because today there are more talented high school football players than in the past and parity is inevitable.[416] And it will not happen because schools will seek their own conference level just as they do in basketball. What will happen is that Cinderella will get to go to the ball when she rises above the pack.

And when Cinderella is at the ball, the games make national news because everybody loves the underdog. Fans want to see all Division I football schools compete during the regular season and in the postseason, like they do in other sports, but unreasonable restraints have prevented this from happening.

One unreasonable restraint is the requirement that I-A schools have stadiums large enough to accommodate 15,000 fans and average 15,000 customers per home game once every two years.[417] Today, first class I-A conferences, with their billions in television revenue, are going to do well regardless of what happens to the schools the NCAA puts into I-AA. If Harvard, with its twenty-six billion dollar endowment,[418] wishes to play before one-thousand fans, and is financially capable of doing so, the market place should allow it. All this restraint does is make it hard for many schools to qualify for I-A status. For example, Villanova, which is a member of the I-A Big East in all sports except its I-AA football program, has seriously considered

412. Jenkins, *supra* note 129.

413. Long, *supra* note 169.

414. *Id.*

415. *See* Pennington, *supra* note 89.

416. *See* Long, *supra* note 169.

417. *See generally* 2010-11 NCAA MANUAL, *supra* note 104, § 20.9.7.3.

418. Kathy Hopkins, *10 Private Universities With Largest Financial Endowments*, U.S. NEWS & WORLD REP., June 28, 2011, http://www.usnews.com/education/best-colleges/articles/2011/06/28/10-universities-with-largest-financial-endowments.

moving football to I-A as well.[419] However, Villanova has a problem because its stadium only seats 12,500.[420] This is the same Villanova that was ranked thirtieth in the 2009 Sagarin strength of schedule of rankings (ahead of e.g. Oklahoma State, Florida State, West Virginia, UCLA, Michigan State, and Notre Dame).[421] Is it fair that a seating capacity restraint is keeping Villanova from competing at the I-A level? If Division I-A is looking for quality of competition, perhaps they should eliminate the seating capacity restraint and replace it with a strength of schedule restraint. Seating capacity and attendance restraints do not promote legitimate goals such as product quality, safety standards, or consumer confidence; they are unreasonable restraints.[422]

The varsity sport requirement is also an unreasonable restraint. A school may compete in NCAA Division I if it sponsors fourteen varsity sports, unless it wishes to compete in I-A football, in which case it must sponsor sixteen varsity sports.[423] This restraint only drives up the cost of sponsoring two additional sports, a cost that has nothing to do with football. This does not promote a procompetitive football purpose.

The overall spending on athletic scholarship requirements is another unreasonable restraint. A school in I-A must come up with $4 million a year to spend on athletic scholarships while the NCAA only requires I-AA schools to spend $1.2 million.[424] The restraint is intended to keep schools on tight budgets out of I-A, and in the process, it drives up the cost of doing business of those who choose to get into I-A. This rule is not reasonably necessary to promote a procompetitive football purpose.

Scholarship differentials in football also unreasonably restrain competition. After the NCAA divided Division I into two tiers, the first tier was given more football scholarships than the second tier.[425] Today the first tier is entitled to eighty-five scholarships and the second tier is limited to sixty-three.[426] The disparity, of course, is an attempt to lower the quality of I-AA football, which it does. In the process, it also drives up the cost of I-A business and keeps smaller

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419. Kevin McGuire, *Appalachian State with Fewer Hurdles to FBS than Villanova*, EXAMINER.COM, (Aug. 23, 2011), http://www.examiner.com/college-football-in-national/appalachian-state-with-fewer-hurdles-to-fbs-than-villanova.

420. *Id.*

421. *See* Sagarin, *supra* note 174.

422. *See* Pennington, *supra* note 89.

423. *See* 2010-11 NCAA MANUAL, *supra* note 104, §§ 20.9.7.1, 20.9.8.1.

424. *Id.* §§ 20.9.1.2(b), 20.9.7.4(b).

425. *Infra* text accompanying note 426.

426. *See* 2010-11 NCAA MANUAL, *supra* note 104, §§ 15.5.6.1-.6.2.

schools with tight budgets out of I-A. Similar to the athletic scholarship requirement, this rule is an unreasonable restraint and is not reasonably necessary to promote a procompetitive football purpose. When it comes to football, it is unreasonable for the NCAA to mandate that I-AA schools play with fewer scholarships than I-A schools. If the competitive playing field is to be level, the NCAA should entitle all Division I schools to offer the same number of football scholarships just like they do in all other sports. Whether all schools are able to fill their quota is another question. The quota, however, should be a reasonable one and not one designed to limit competition.

In setting a quota, the NCAA should keep in mind that NFL teams have only forty-five players on their active roster and eight on their inactive roster,[427] as compared to the average I-A team, which has eighty-five scholarship players with thirty-two walk-ons.[428] One example of football extravagance, says Andrew Zimbalist, a leading expert in sports economics,[429] is the size of Division I-A football teams.[430] In his opinion, "[s]ixty (or fewer players) would do fine."[431] This, he estimates, would save the average I-A college approximately $1 million a year.[432]

While the NCAA may argue to the contrary, it was clear to outside observers at the time of the purge that the restraints were not imposed for competitive purposes but, rather, it was about the money. As outside observer, Bill Pennington of the *New York Times* said the Ivy League was demoted to Division I-AA because of "a squabble over television revenue."[433] John O'Connor of the *Richmond Times Dispatch* said Division I football was split because "[b]ig-time football schools were not satisfied with their share of television time and financial remuneration."[434] Writers for the Encyclopedia Britannica said that "[b]y the 1990s television revenues were going almost entirely to the big football schools, and major conference realignments . . . as a result of actions initiated by the CFA."[435] In other words, these restraints were not imposed for the welfare of the

427. *See* ZIMBALIST, *supra* note 132 at 41, 73.

428. *Id.* at 83.

429. *Id.* at Biography. Mr. Zimbalist is the Robert A. Woods Professor of Economics at Smith College. *Id.* He is the author or editor of twenty books and a member of the Editorial Board of the *Journal of Sports Economics*. *Id.*

430. *Id.* at 41.

431. *Id.*

432. *Id.*

433. Pennington, *supra* note 89.

434. O'Connor, *supra* note 76.

435. *Gridiron Football*, *supra* note 43.

fans; it was about the money and what the NCAA had to do in order to hold its organization together.[436]

What the NCAA and Division I-A schools did was not valid under the Sherman Act. First, I-A schools did not join with the NCAA to promote legitimate regular season goals such as product quality, safety standards, or consumer confidence. Instead they joined together for the illegitimate purpose of eliminating almost half of the Division I football schools from competing with the first-tier conferences, which today have annual television contracts exceeding a billion dollars, and to prevent these schools from competing in postseason NCAA and BCS bowl games. They simply joined together to exclude others from seeking fame and fortune, and they did so for their own pecuniary benefit.

Secondly, the NCAA has not enacted rules of participation for procompetitive purposes. Instead they have enacted rules without legal justification to keep half of the NCAA's Division I schools from competing at the highest level. As a result, these rules have stymied competition and increased the cost of doing business. If these unreasonable restraints were removed, the cost of doing business would decrease for everyone and the meltdown of the struggling second-class I-A schools would be less likely because their bottom line would be better. Today you are not being asked to decide how the football money should be divided, but rather you are being asked to decide whether some Division I schools should be able to exclude other Division I schools from competing on an equal basis.

The restraints imposed by the NCAA and the I-A conferences and institutions do not stop when the regular season ends. In fact, they increase. In the late 1990s, a cartel known as the BCS, consisting of I-A schools, joined together to play in the four most lucrative postseason bowl games and to create a first-tier Division I national championship football game.[437]

The BCS maintains it was formed in order to provide the people with a national championship game they would not otherwise have.[438] This would be a legitimate goal if the fans really wanted a BCS postseason bowl system to determine the national champion, but they do not. Eighty-five percent of the people in a 2007 Gallup poll said they preferred to see the I-A national champion crowned through a playoff,[439] not a game put together by a BCS selection committee. But even if the BCS and I-A schools got their act together and

436. *See id.*

437. *See* BCS MEDIA GUIDE 2010-11, *supra* note 111, at 47-51.

438. *Id.*

439. ZIMBALIST, *supra* note 132, at 181 n.3.

produced a playoff system, the cartel would still be in violation of the law because the event is only open to I-A schools.[440] Do you really think this fair?

At the end of the 2009 football season, for example, the Sagarin strength of schedule rankings placed I-AA Villanova, William & Mary, Montana, and Richmond ahead of schools like Michigan, Arizona State, Kansas State, and Maryland.[441] Yet the BCS had prohibited these I-AA schools from competing for the national championship and in their prestigious postseason Bowls from day one of that season.[442] There is no potential for a George Mason, Butler, or VCU-type story in football. Does this favor competition? Not only have the fans suffered, but the exiled I-AA schools have suffered too. These schools have lost the exposure of competing for a first-tier national championship and the resultant increase in quality applicants. They have also suffered financially, as demonstrated by the $554 million the 120 I-A schools took home from the BCS bowls between 2006 and 2009[443] while the 120 I-AA schools were given approximately $7 million "to support the overall health of college football."[444]

It is evident that the NCAA designed these restraints to make a certain class of schools second-class citizens, not to maintain the competitive balance. These restraints were designed to, and did, create a minor league—a league that was not permitted by the BCS to compete for the major league championship. As a result of this minor league status, I-AA schools have lost fan and recruit interest. But most importantly, they lost television's interest. Football at the I-AA level is on life support.

Five of the 120 I-AA football programs had a median net profit of $378,000 in 2010[445] as compared to sixty-nine of the 120 I-A programs, which had a median net profit of $9,123,000.[446] The remaining 115 I-AA football programs had a median net loss of $1.6 million.[447] The I-AA athletic programs have gone from bad to worse. No I-AA athletic program reported a net profit in 2010, and net losses

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440. BOWL CHAMPIONSHIP SERIES, *supra* note 109 at 8-9.

441. *Jeff Sagarin NCAA Football Rankings*, *supra* note 174.

442. *See* BCS MEDIA GUIDE 2009-10, *supra* note 121, at 7-10 (describing eligibility requirements for bowl games).

443. Hatch Press Release, *supra* note 119.

444. BCS MEDIA GUIDE 2009-10, *supra* note 121, at 13; ZIMBALIST, *supra* note 129, at 187 (stating FCS conferences received annual payments of $1.8 million in 2008 and 2009; the $7 million dollar figure was calculated by multiplying $1.8 x 4).

445. REVENUES & EXPENSES, *supra* note 18, at 14, 54.

446. *Id.* at 13, 28.

447. *Id.* at 54.

have gone from $5,900,000 in 2004 to $9,700,000 in 2010.[448] I-AA's overall net loss continued to rise in 2010, increasing by 6.3 percent,[449] while I-A schools stopped the bleeding when their overall net loss decreased by 7.6 percent.[450]

Almost thirty years ago, a judge concluded that the NCAA had victimized large football schools and granted them relief under the Sherman Antitrust Act.[451] But he warned that if a "power elite" later emerged and abused its competitive edge through illegal means, antitrust laws would provide relief.[452] In so ruling, he said that "[i]f today's victim . . . is tomorrow's [violator], the Sherman Act [could] be employed against it."[453]

Instead, yesterday's violators (the NCAA) joined with yesterday's victims (I-A schools) and, along with the BCS, forged a new power elite to become today's violators. The NCAA should not, and cannot, use antitrust law to let these forces carve out a competitive advantage and stymie smaller schools for financial purposes. We are here today asking that all games played against I-AA schools be treated as a game against a "deserving team." We are here today asking for relief from this new power elite. We are here, requesting a verdict for today's victims.

V. OTHER OPTIONS

As we have seen, there has been a call for the DOJ to bring an antitrust suit against the BCS, and they have this request under advisement.[454] Regardless of what the DOJ does on behalf of the second-class I-A schools, there is no doubt someone should launch an investigation, or file a lawsuit, on behalf of the I-AA schools. In addition to the NCAA and the BCS, potential defendants could include the NCAA conferences that make up Division I-A and the collective I-A institutions.

But maybe there are other ways of addressing these intercollegiate athletic problems. Perhaps, in lieu of a lawsuit, the NCAA could amend its bylaws. The DOJ made it clear in its response to Senator Hatch that it would prefer to resolve this problem using

448. *Id.* at 14, 53.

449. *Id.* at 13.

450. *Id.* at12.

451. *See* Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1282, 1315 (W.D. Okla. 1982).

452. *Id.* at 1311.

453. *Id.*

454. *See supra* Part III.

other options, such as legislative action or amendments to the NCAA bylaws.[455]

A. Amend NCAA Bylaws

Most NCAA bylaws pass Sherman Act muster. In *Board of Regents*, the Court said, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[456] But, the Court rejected the television restrictions in that lawsuit because they did not fit into this protected mold.

To help fix today's problems, the NCAA could enact one bylaw that eliminates the unreasonable restraints imposed on I-AA schools, and one bylaw that sets reasonable limits on the amount a single institution could spend on its football and basketball programs. It could also enact a bylaw that requires a more equitable distribution of football and basketball revenues among all institutions. These bylaws would fit into *Board of Regents*'s "protected mold." These bylaws would fit into the protected mold because the *Board of Regents* majority recognized that the need to maintain a competitive balance among amateur athletic teams in the NCAA was legitimate and important.[457] And, to this end, the Court agreed the NCAA needed to issue rules that govern "the manner in which members of [their] enterprise . . . share the responsibilities and the benefits of the total venture."[458]

In explaining why the NCAA's television plan was an unacceptable regulation, the *Board of Regents* Court said it, among other things, did not

> regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.[459]

Expanding on this idea in his dissent, Justice Byron White[460] noted that the majority had not held that the redistribution of football revenue

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455. *DOJ Mulls Antitrust Probe of College Football Championships*, *supra* note 141.

456. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

457. *Id.*

458. *Id.*

459. *Id.* at 119.

460. Justice White was a college football All-American and a member of the College Football Hall of Fame. Joan Biskupic, *Ex-Supreme Court Justice Byron White Dies*, USA TODAY, Apr. 15, 2002, http://www.usatoday.com/news/nation/2002/04/15/white-obit.htm. He played three

> alone would be sufficient to subject the television plan to condemnation under § 1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics.[461]

Justice White added that *Board of Regents* does not purport "to hold that the NCAA may not (1) require its members who televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; [or] (2) limit the number of times any member may arrange to have its games shown on television."[462] In short, *Board of Regents* does not prohibit an even-handed redistribution of football revenue, because the majority recognized a need for the NCAA to maintain a competitive balance.[463] However, when money and intercollegiate athletics get mixed up, there is a problem. This is because, as Peter Likins said when he was the president of the University of Arizona, "we [presidents] do not play well together when it comes to money."[464]

Right now I-A college presidents are calling for reform in athletics; I-AA presidents should be at the table too, and they should, above all, be seeking to eliminate the I-AA football provision and its accompanying restraints. If the disenchanted I-A schools allied with the I-AA schools, there may then be enough votes for a restructured NCAA.

However, if voluntary reforms do not seem possible, Congressional interest might help convince college presidents that voluntary change is everyone's best option. Congressional interest already exists. In September 2011, when schools were changing conferences en masse, a Congressman from an adversely affected jurisdiction told the *New York Times* that these "issue[s] raised concerns over taxes, antitrust law, and potentially Title IX."[465] Brian Frederick, the Executive Director of SportsFans.org, believes that the NCAA is powerless, and says, "Congress can and must act before realignment creates a situation so tenuous, the whole thing falls

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years in the NFL before joining the Navy during World War II; after the war he decided to forgo football and attend Yale law school. *Id.*

461. *Bd. of Regents*, 468 U.S. at 128 (White, J., dissenting).

462. *Id.* at 126-27.

463. *Id.* at 117-20 (majority opinion).

464. Doug Lederman, *A Better Look at Sports Budgets*, INSIDE HIGHER ED (June 23, 2006), http://www.insidehighered.com/news/2006/06/23/ncaa.

465. Pete Thamel, *Syracuse and Pittsburgh Switch Conferences, Sowing Chaos*, N.Y. TIMES, Sept. 18, 2011, http://www.nytimes.com/2011/09/19/sports/ncaafootball/congressional-scrutiny-of-conference-realignment-is-said-to-be-likely.html.

apart."[466] Congress, with little trouble, could provide a small fix by amending the Sports Broadcasting Act of 1961, which was enacted to ensure relief for owners of NFL football teams.

B. Partially Exempt the NCAA from Sherman Act

In the early 1950s, NFL owners agreed not to telecast outside games into the home territories of other teams on days they were playing at home.[467] The government thereafter filed a suit in the US District Court for the Eastern District of Pennsylvania, contending that this, and other parts of the agreement, violated the Sherman Act.[468]

The court found for the government with regard to three parts of the agreement but with regard to the agreement not to televise outside games into the territories of teams playing at home, it found for the owners.[469] The court said there was little doubt that the challenged provision of the contract constituted a restraint of trade,[470] but concluded it was a reasonable restraint and therefore legal.[471] In so finding the court noted:

> The purposes of the Sherman Act certainly will not be served by prohibiting the defendant clubs, particularly the weaker clubs, from protecting their home gate receipts from the disastrous financial effects of invading telecasts of outside games. The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists.[472]

Thereafter, Congress codified this finding in the Sports Broadcasting Act of 1961.[473]

What the Court in *Board of Regents* took from this legislation was that when Congress was confronted with antitrust issues that needed clarification, Congress thought it was its job to clarify them and the Court thought it was significant that Congress had not acted in the instant (*Board of Regents*) matter.[474]

Since Congress had no trouble intervening in 1960 to help save the "weaker clubs" in professional sports it certainly should not be reluctant to intervene today to return "competitive equity" to college

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466. Frederick, *supra* note 192.

467. United States v. National Football League, 116 F. Supp. 319, 321 (E.D. Pa. 1953).

468. *Id.*

469. *Id.* at 330.

470. *Id.* at 322.

471. *Id.* at 326.

472. *Id.*

473. 15 U.S.C. §§ 1291-1295 (2006).

474. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 106 n.28 (1984) ("[I]t is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights.").

athletics, especially because the necessary intervention would be minimal.

In *Board of Regents*, the NCAA argued that the purpose of its television plan was to promote athletically balanced competition.[475] The Court rejected this argument.[476] Thus, if Congress wants to help create athletically balanced competition in college athletics it could enact a legislative fix. One such fix would be to insert a new section into the Sports Broadcasting Act of 1961, which might look something like this:

> § 1295. The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730) [15 U.S.C. 12], or in the Federal Trade Commission Act, as amended (38 Stat. 717) [15 U.S.C. 41 et seq.], shall not apply when the National Collegiate Athletic Association (NCAA) sells or otherwise transfers all or any part of the rights of NCAA member institutions in the sponsored telecasting of athletic events engaged in or conducted by its member institutions.

C. The Internal Revenue Code

Colleges and universities receive significant tax subsidies given in the public interest.[477] But it is not in the public interest to have a cartel of football schools in Division I excluding other Division I schools from equal participation. So, Congress could consider attaching strings to big-time football school tax subsidies.[478]

The federal government subsidizes both public and private institutions in several different ways. For example, colleges are subsidized through tax-free bonds[479] and through deductible contributions they receive.[480] Section 170(c)(2)(B) of the Internal Revenue Code (IRC) permits a 100 percent deduction for contributions to entities "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."[481] In addition to contributions for educational purposes, donors may also make contributions for athletic purposes and in return receive favorable treatment, such as preferred seating. These contributions are 80

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475. *Id*. at 97.

476. *Id*. at 117.

477. I.R.C. § 501(c)(3) (2006).

478. John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 156.

479. *See* CONG. BUDGET OFFICE, U.S. CONG., CBO PUB. NO. 3005, TAX PREFERENCES FOR COLLEGIATE SPORTS 12 (May 2009) [hereinafter TAX PREFERENCES], *available at* http://www.cbo.gov/ftpdocs/100xx/doc10055/05-19-CollegiateSports.pdf.

480. *See* Colombo, *supra* note 478, at 156.

481. I.R.C. § 170(c)(2)(B) (2006).

percent deductible.[482] Experts say that such contributions to public institutions alone reduced tax revenue by approximately $100 million from 2004 to 2005.[483] An accounting professor at the University of Texas applauds tax subsidies for colleges and does not want to see them reduced.[484] Nevertheless, he said, "from an equity standpoint, it isn't fair that wealthy people can treat their personal entertainment expenses as a charitable donation."[485]

In addition to these deductible contributions, the IRC exempts income earned by colleges, the NCAA, and college conferences from taxation under IRC section 501.[486] Section 501(c)(3) exempts from taxation "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,[487] or to foster national or international amateur sports competition . . . ."[488] But with today's tight budgets, many are questioning whether big-time football schools should be able to retain a blanket tax exemption. At a minimum, people wonder whether these entities should pay taxes on income earned by successful college football and basketball programs.[489]

The IRS raised these same concerns in the 1940s when New York University (NYU) owned Mueller Macaroni Company and moved its profits to NYU's law school without either NYU or Mueller paying taxes on that income.[490] Such concerns caused Congress to intervene in 1950 and enact legislation that stopped schools, or any other exempt organizations, from operating commercial activities on the side while retaining the profits tax free.[491] This legislation is now set forth in IRC sections 511-13, and requires exempt organizations to pay

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482. Colombo, *supra* note 478, at 149 n.73.

483. Mark Alesia, *Colleges Play, Public Pays*, INDIANAPOLIS STAR, (Mar. 1, 2008, 9:09 PM), http://www.indystar.com/article/99999999/SPORTS06/399990029/Colleges-play-public-pays.

484. *Id.*

485. *Id.* (quoting Michael Granof).

486. *See* I.R.C. § 501(c)(3) (2006).

487. Even though public colleges and institutions are already exempt from federal taxation (by way of inter-governmental tax immunity and I.R.C. §§ 115), many seek recognition under I.R.C. § 501 (c)(3) in order "to avoid confusion in the minds of potential donors and because grants from private foundations are often limited to 'charitable' organizations exempt under § 501(c)(3)." Colombo, *supra* note 478, at 163 n.13.

488. I.R.C. § 501(c)(3).

489. *See, e.g.*, Eric Dexheimer, *Does Big-Time College Football Deserve its Big Tax Breaks?*, STATESMAN.COM (Dec. 26, 2009, 7:47 PM), http://www.statesman.com/news/texas/does-big-time-college-football-deserve-its-big-149737.html (discussing whether colleges should be allowed to maintain their nonprofit and tax-free status).

490. C.F. Mueller Co. v. Comm'r, 190 F.2d 120, 121 (3d Cir. 1951), *superseded by statute*, I.R.C. §§ 511-13.

491. *Id.* at 123 n.2.

taxes on income earned by "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its [exempt purpose] under section 501."[492] This is the so-called "unrelated business income tax," and it applies to public, as well as private, universities.[493]

Since the government taxes NYU on the profits generated by "Mueller's noodles and pasta," it would seem like the government should also tax the sixty-nine I-A football schools that generated a median net income of $9.1 million in 2010.[494] But the government does not tax them. The reason for this lies in the legislative history of the "unrelated business income tax," which contemplated that a university "would not be taxable on income derived from a basketball tournament sponsored by it, even where the teams were composed of students of other schools."[495] Further, "income of an educational organization from charges for admissions to football games would not be deemed to be income from an unrelated business, since its athletic activities are substantially related to its educational program."[496]

Following this lead, the IRS has since ruled on several occasions that "college athletics are an 'integral part' of the educational program of a university (and therefore 'substantially related' to a university's educational program)"[497] and tax exempt.

The mindset for blanket tax relief for intercollegiate athletics, however, comes from earlier days when thinking was different. Back in the day, the likes of the legendary Paul "Bear" Bryant at the University of Alabama, who coached from 1958-82, kept his salary $1.00 below the school president's because he "believed that it was symbolically important for the university president to be paid more than the head football coach."[498] But today Alabama's president, Dr. Robert Witt, makes approximately $600,000 per year while the football coach, Nick Saban, makes over $4 million per year. Other schools are paying coaches more too. Fifty-six other coaches make $1 million or more per year, twenty-five make $2 million or more, nine

492. I.R.C. § 513(a) (2006).

493. *See id.* § 511(a)(2)(B); Colombo, *supra* note 478, at 134-35.

494. *See* REVENUES & EXPENSES, s*upra* note 19.

495. H.R. REP. NO. 81-2319, at 37, 109 (1950).

496. S. REP. NO. 81-2375, at 29, 107 (1950).

497. Colombo, *supra* note 478, at 141 (citing Rev. Rul. 80-295, 1980-2 C.B. 194; Rev. Rul. 80-296, 1980-2 C.B. 195; Rev. Rul. 67-291, 1967-2 C.B. 184).

498. *See* ZIMBALIST, *supra* note 132, at 39.

make $3 million or more, two make $4 million or more, and the average salary of a I-A coach is $1.3 million a year.[499]

Not only are head coaches very well paid, but so are many assistant coaches whose salaries now approach, or exceed, the compensation of college presidents, and most exceed the compensation of full-time professors.[500] Indeed, in 2006, when coaches' salaries began to escalate, former Congressman William M. Thomas, then chairman of the House Ways and Means Committee, wrote to Myles N. Brand, then President of the NCAA, and asked him to explain from the federal taxpayer's point of view "why . . . the Federal government [should] . . . subsidize the athletic activities of educational institutions when that subsidy is being used to help pay for escalating coaches' salaries."[501] In response, Dr. Brand said "[t]he salaries are negotiated at arm's length and are within the range of reasonable compensation as defined for federal tax purposes."[502] Dr. Brand was, and is, right.[503] Therefore, as the law now stands, the taxpayer is left to subsidize the multi-million dollar salaries received by college coaches.

Congress could, however, cap these salaries as a condition of receiving favored tax treatment.[504] Even though Congressman Thomas retired in 2007, ranking member of the Senate Finance Committee, Charles E. Grassley, continues to raise questions about tax preferences going to colleges and universities.[505] And to get answers, he asked the Congressional Budget Office (CBO) to compare commercial income generated by the athletic departments with the income generated by the rest of the schools' activities.[506] In response, the CBO said:

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499. Steve Wieberg et al., *College Football Coaches See Salaries Rise in Down Economy*, USA TODAY, Nov. 10, 2009, http://www.usatoday.com/sports/college/football/2009-11-09-coaches-salary-analysis_N.htm.

500. *Id.*

501. Letter from Bill Thomas, Chairman, House Ways & Means Comm., U.S. Cong., to Myles Brand, President, NCAA (Oct. 2, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

502. Letter from Myles Brand, President, NCAA, to William Thomas, Chairman, House Ways & Means Comm., U.S. Cong. 8 (Nov. 13, 2006), *available at* http://charitygovernance.blogs.com/charity_governance/files/20061115_response_to_housecommitteeonwaysandmeans.pdf.

503. *See* Colombo, *supra* note 478, at 111 n.6, 140-53; *cf.* Letter from Myles Brand to William Thomas, *supra* note 502, app. A at 4-9.

504. Colombo, *supra* note 478, at 147, 155.

505. *See generally* Press Release, Chuck Grassley, U.S. Senator, Grassley: CBO Study Raises Questions About Commercialization of Some College Athletic Programs (May 19, 2009), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20840.

506. Letter from Chuck Grassley, Senator, U.S. Senate, to Peter R. Orszag, Dir., Cong. Budget Office (Apr. 3, 2007), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20840.

> Athletic departments in NCAA Division I schools derive a considerably larger share of their revenue from commercial activities than do other parts of the universities. . . . Nonetheless, removing the major tax preferences currently available to university athletic departments would be unlikely to significantly alter the nature of those programs or garner much tax revenue even if the sports programs were classified, for tax purposes, as engaging in unrelated commercial activity.[507]

Explaining why tax revenue probably would not increase if Congress tried to classify commercial income generated by the athletic department as "unrelated business income," the report stated: "As long as athletic departments remained a part of the larger nonprofit or public university, schools would have considerable opportunity to shift revenue, costs, or both between their taxed and untaxed sectors, rendering efforts to tax that unrelated income largely ineffective."[508]

My response to Senator Grassley would have been different. If schools do have "considerable opportunity to shift revenue, costs, or both between their taxed and untaxed sectors,"[509] the issuance of appropriate IRS Treasury Regulations could remedy this situation. Thereafter, the shifting of revenue or costs in order to understate unrelated business income would subject those doing the shifting to criminal prosecution, just like anyone else who shifts revenue or expenses to understate income.[510] Faced with the possibility of prosecution, it is likely the responsible parties would make appropriate accounting entries.

In addition to questioning whether athletic income should be subject to the unrelated income tax, in June 2010 when the Big Ten was considering expansion, Senators Grassley and Harkin sent a letter to Big Ten Commissioner James E. Delaney asking him to justify the Conference's tax-exempt status under IRC section 501(c)(3).[511] In particular, the letter noted that, according to the Big

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507. *See* TAX PREFERENCES, *supra* note 479, at vii-viii.

508. *Id.* at viii.

509. *Id.*

510. *See, e.g.*, United States v. Pomponio, 563 F.2d 659, 662-65 (4th Cir. 1977). In *Pomponio*, the defendants were charged with filing individual income tax returns the government contended were false because they failed to report income that had been carried as "loans" to defendants on books of closely held corporations and because they deducted a "partnership loss" that the government contended had been shifted from corporate books to partnership books. *Id.* at 661-62. Defendants' claimed they intended to repay these "loans" and that the loss had been incurred by the partnership. *Id.* at 662. Where income and losses belonged was question of fact for the jury and the jury, in convicting, followed substance rather than form. *Id.* at 662-65.

511. *See* Letter from Charles E. Grassley & Tom Harkin, U.S. Senators, to James E. Delaney, Comm'r, Big Ten Conference (June 10, 2010), *available at* http://www.desmoinesregister.com/assets/pdf/D2160017624.pdf.

Ten's Form 990,[512] the Conference's primary exempt purpose was "to regulate intercollegiate athletics as institutional activities, to encourage sound academic practices for student athletics, and to establish harmonious relationships among member institutions."[513] However, the senators said it appeared that the Big Ten was instead focusing on, "NCAA athletics and the marketing, promotion, and revenue-generating activities affiliated with those athletic activities."[514] Accordingly, the senators directed Commissioner Delaney to justify the Big Ten's tax-exempt status by answering a series of questions and by furnishing specified documents.[515]

The letter to Commissioner Delaney did not stop Nebraska from joining the Big Ten, but it may have stopped further expansion as well as the implosion of the Big Twelve.[516] Perhaps it is now time for Congress to examine the tax-exempt status of these first-tier conferences that will receive more than $13 billion in TV revenue in the coming years.[517]

The situation might be different today had the NCAA and the "band of CFA brothers" received a Grassley/Harkin-type letter when they were downsizing Division I football in 1978 and 1981. Such a letter, advising them that the tax-exempt status of their conferences was in jeopardy because the downsizing "[s]eem[ed] to be [taking place] for the sole purpose of enhancing the financial bottom line," might well have given them pause for thought.[518] Likewise, if the I-A conferences of today are abusing competition through illegal means by violating the Sherman Antitrust Act, it can be said that they are hindering, rather than fostering, amateur sports competition and thereby jeopardizing their IRC section 501(c)(3) tax status.

The IRS, the DOJ, and Congress seem to have strong arguments for dramatic changes to the NCAA's current arrangements.

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512. For a blank Form 990, *see* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2010), *available at* http://www.irs.gov/pub/irs-pdf/f990.pdf.

513. Letter from Charles E. Grassley & Tom Harkin to James E. Delaney, *supra* note 511, at 1.

514. *Id.*

515. *Id.* at 2-3.

516. *Cf. Nebraska Approved by Big Ten*, ESPN (June 12, 2010), http://sports.espn.go.com/ncaa/news/story?id=5276551.

517. *See* Bennett, *supra* note 186.

518. *U.S. Senators Grassley, Harkin Question Big Ten Officials on Expansion*, BLEACHER REP. (June 24, 2010), http://bleacherreport.com/articles/411038-senators-grassley-harkin-interrogate-big-ten-officals-on-expansion.

VI. CONCLUSION

The best course of action would be for I-AA presidents to work within the NCAA to obtain a merger of I-A and I-AA into one division, like it was before 1978. Eliminating the bylaw creating the distinction between I-A and I-AA[519] would achieve this goal. In attempting to remove this bylaw, the I-AA presidents should point out that it is inconsistent with the NCAA's constitutional "[p]rinciple of competitive equity,"[520] which provides that:

> The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.[521]

The I-AA presidents should also point out that equitable reform is in the air. This reform is coming from no less than Chuck Neinas, interim commissioner of the Big Twelve,[522] and formerly the executive director of the CFA,[523] who is calling for a movement to eliminate the automatic qualification status[524] (the provision creating the haves and have-nots) within the BCS. Instead of having privileged and unprivileged teams, he prefers that all I-A schools should compete in the BCS National Championship based on their own merit.[525]

Reform should not stop with the BCS—now is the time for the NCAA to initiate its own movement toward competitive equity. Dennis Dodd, senior college football columnist for CBSSports.com, believes the excess in I-A college football needs to go immediately. He says:

> Let's hope this is the moment [2011] when . . . a movement to take back college athletics from the current stakeholders [begins]. . . . This has to be the point when universities quit bowing down to King Football, quit drooling over the prospect of colorful uniforms, stop being beholden to ratings.
>
> Yeah, I know. That situation exists. It's called the Ivy League. Maybe I'm too idealistic, but we're witnessing the alternative. There currently is no middle ground. If you want to play in Division I-AA, that's up to you. If you want to step up, you gotta play hard and pay hard. . . .
>
> Let's downsize. Now. Let's cut scholarships. Let's limit the number of coaches. Let's limit their pay. . . . If everybody is playing by the same rules, it doesn't matter. . . .

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519. *See* 2010-11 NCAA MANUAL, *supra* note 75, § 20.01.2.

520. *Id.* § 2.10.

521. *Id.*

522. Dennis Dodd, *B12 Commish Senses Big Change in BCS*, CBSSPORTS.COM (Nov. 9, 2011), http://www.cbssports.com/mcc/blogs/entry/6270202/33203093.

523. *See* Siegfried & Burba, *supra* note 181.

524. Dodd, *supra* note 522.

525. *Id.*

> Football can't ever be this big again. . . . I've said for years FBS [I-A] football can exist on 63 scholarships. Hell, Division I-AA does![526]

Dodd, in essence, says it is time to put "King Football" in its place and seek a middle ground. He is right.

Eighty percent of the Division I-A presidents polled by the Knight Commission believe "sweeping reform" of intercollegiate athletics is necessary.[527] Division I-AA presidents were not polled, and the time for polling has passed. The I-AA presidents need to initiate reform—now. In addition to merging the two subdivisions, the NCAA needs to reduce the number of football scholarships allowed per school. Andrew Zimbalist has suggested sixty, a number he believes would save I-A schools about a million dollars a year.[528] Dodd suggests sixty-three. Regardless of the number, in the interest of competitive equity, it should be the same for all Division I schools.

Such a reduction might not be out of the question. The NCAA did not put a ceiling on football scholarships until 1973, when it voted to limit the number to 105.[529] In a later study, it was discovered that the strongest schools were "more likely to have voted for this rule."[530] Since the stronger schools would have been the least likely to promote parity, the surmised cost was the motivating factor for this surprising vote.[531] In 1992, the NCAA again reduced the I-A scholarship ceiling, this time to the present limit of eighty-five.[532] Consequently, a further drop of scholarships to the realistic number of sixty-three is indeed a possibility.

The NCAA should also give all Division I schools an opportunity[533] to compete for the same football championship and the same elite bowls throughout the year. This would create competitive equity and spark fan (and television) interest among all Division I schools, and not just among certain select schools. Whether such change could actually take place remains to be seen because of the way Division I is governed. In a nutshell, NCAA Division I is overseen by a Board of Directors[534] which consists of eighteen presidents or

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526. Dennis Dodd, *Now is the Time: Schools Must Take Back their Athletic Programs*, CBSSPORTS.COM (Nov. 10, 2011), http://www.cbssports.com/collegefootball/story/16056344/now-is-the-time-schools-must-take-back-their-athletic-departments.

527. *See supra* text accompanying note 5.

528. *See* ZIMBALIST, *supra* note 132, at 41, 73.

529. GRANT ET AL., *supra* note 43, at 34.

530. *Id.* (citing a 2003 study by Sutter and Winkler.)

531. *Id.*

532. *Id.*

533. Schools should be permitted to opt out of this arrangement and form an alternative arrangement if they wish to do so.

534. *See* 2010-11 NCAA MANUAL, *supra* note 75, § 4.5.2(g).

chancellors.[535] Eleven of these presidents come from the eleven I-A conferences, and seven come from the other 20 Division I conferences.[536] A forty-nine member Management Council, consisting of athletic directors and faculty, is under the Board of Directors. The majority of these members come from I-A conferences.[537]

When it comes to legislation, Divisions II and III have a one member, one vote policy.[538] But, in Division I the Management Council acts "much like an elected legislature, such as the US House of Representatives"[539] and either forwards or does not forward proposed legislation to the Board of Directors for action.[540]

In view of Division I's composition and form of governance, it would appear at first blush that change from within is unlikely, but this may not be the case. With all the conference realignments presently taking place, enough nervous I-A schools might be interested in change themselves. Today, I-A schools and conferences might be willing to take meaningful steps toward competitive equity rather than risk receiving a Grassley/Harkin-type letter inquiring into their tax-exempt status. Division I-A schools might also be willing to work toward competitive equity rather than risk Congress returning TV contracting rights to the NCAA through an amendment of the Sports Broadcasting Act.

If all else fails, I-AA presidents should not hesitate to seek antitrust relief in court. The red warnings are flashing faster and faster!

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535. *Id.* § 4.2.1.
536. *Id.*
537. GRANT ET AL., *supra* note 43, at 46-47.
538. *Id.* at 47.
539. *Id.*
540. *Id.* at 47-48.