A Brave Attempt: Can the National Collegiate Athletic Association Sanction Colleges and Universities with Native American Mascots?

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A BRAVE ATTEMPT: CAN THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION SANCTION COLLEGES AND UNIVERSITIES WITH NATIVE AMERICAN MASCOTS?

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The National Collegiate Athletic Association (NCAA) connotes many things to many people. In a technical sense, the NCAA is an unincorporated association of around 1,250 colleges and universities founded to promote intercollegiate athletics. To zealous football fans, though, the NCAA might evoke images of a favorite college team playing for a national championship in the Bowl Championship Series (BCS). To a television executive, the NCAA might mean nothing more than dollar signs. To some student-athletes, the NCAA represents an opportunity to compete at a high athletic level while receiving an education they might not otherwise be able to afford. Other student-athletes, however, might view the NCAA as an overbearing organization whose monopolistic policies intrude too far into their private lives. This wide variety of opinions regarding the NCAA is what makes it such a fascinating organization because sufficient evidence exists to support all of these views. Simply put, the NCAA is a diverse and multifaceted organization whose policies have a tremendous effect, both positive and negative, on a large number of people.

In a recent and very controversial decision that took effect on February 1, 2006, the NCAA resolved to prohibit its member institutions from displaying hostile and abusive mascots with racial, ethnic, or national origins at any NCAA championship. Member institutions that have Native American imagery, in order
to comply with this policy, must exclude all such references from their team, cheerleading, dance team, and band uniforms, as well as any other paraphernalia that might make use of this imagery at all NCAA championships.\(^7\) Not only does this policy prohibit institutions from displaying certain mascots at championship events, but the policy also bars offending members from hosting an NCAA championship.\(^8\) Although not mandatory, the NCAA even suggests that its members refuse to schedule athletic competitions with schools that use Native American nicknames, imagery, or mascots.\(^9\) While the NCAA has created a review process to facilitate the determination of which mascots truly are hostile and abusive,\(^10\) the Review Committee has thus far only granted exemptions to Florida State University (Seminoles),\(^11\) Central Michigan University (Chippewas), and the University of Utah (Utes), citing close connections between these schools and their namesake tribes as the reason for granting the exemption.\(^12\)

eighteen colleges and universities that continue to employ Native American imagery or references, including: Alcorn State University (Braves); Central Michigan University (Chippewas); Catawba College (Indians); Florida State University (Seminoles); Midwestern State University (Indians); University of Utah (Utes); Indiana University-Pennsylvania (Indians); Carthage College (Redmen); Bradley University (Braves); Arkansas State University (Indians); Chowan College (Braves); University of Illinois-Champaign (Illini); University of Louisiana-Monroe (Indians); McMurry University (Indians); Mississippi College (Choctaws); Newberry College (Indians); University of North Dakota (Fighting Sioux); and Southeastern Oklahoma State University (Savages). \(^{13}\) While this policy is aimed at member institutions using racial, ethnic, or national origin references, the policy has only been enforced against schools that identify themselves with Native American culture. Conspicuously free from scrutiny are teams such as Notre Dame (Fighting Irish), whose mascot is most certainly based on national origin and, with the inclusion of the term “fighting,” is arguably just as “hostile” and “abusive” as any Native American mascot.

\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^11\) Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review (Aug. 23, 2005), available at http://www.ncaa.org/wps/portal (follow “Media & Events” hyperlink; then follow “News Releases” hyperlink; then follow “2005” hyperlink; then follow “8/23/2005 - Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review” hyperlink) (stating that the unique relationship between the university and the Seminole Tribe of Florida was a significant factor in the review committee's decision).
\(^12\) Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan University and University of Utah Reviews (Sept. 2, 2005), available at http://www.ncaa.org/wps/portal (follow “Media & Events” hyperlink; then follow “News Releases” hyperlink; then follow “2005” hyperlink; then follow “9/2/2005 - Statement
This Note critiques the NCAA's mascot policy, which sanctions member institutions that have decided to identify themselves through Native American imagery. Part II discusses the history and structure of the NCAA, as well as the NCAA's reasoning behind this rather unusual approach. Part III discusses United States antitrust law and the role it plays in judicial regulation of the NCAA. Part IV examines the feasibility of the NCAA's mascot policy under current antitrust law. Part V then concludes that the NCAA's policy of imposing sanctions on teams with Native American themed mascots is a violation of antitrust law.

II. THE NCAA AND THE NATIVE AMERICAN CONTROVERSY

A. THE HISTORY OF THE NCAA

The 1905 version of American football would hardly be recognized as football by Americans today. Early participants wore little equipment, played in a manner that encouraged dangerous behavior, and sometimes fell victim to fatal injuries. In response to public outcry over collegiate football's increasing violence, President Theodore Roosevelt invited numerous representatives from American universities to the White House in order to discuss the future of the sport. Although Roosevelt received assurances from the American Football Rules Committee (Rules Committee), the governing body of college football at

by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan University and University of Utah Reviews” hyperlink (noting the special relationship between Central Michigan and the Saginaw Chippewa Indian Tribe and Utah and the Northern Ute Indian Tribe). Although the NCAA did not exempt Carthage College (Red Men) and Midwestern State University (Indians), it has removed these two schools from the list of schools employing hostile and offensive mascots. Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Carthage College and Midwestern State University (Nov. 9, 2005), available at http://www.ncaa.org/wps/portal (follow “Media & Events” hyperlink; then follow “News Releases” hyperlink; then follow “2005” hyperlink; then follow “11/9/2005 - Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Carthage College and Midwestern State University” hyperlink). In the case of Carthage College, the NCAA distinguished its “Red Men” mascot because Carthage College has committed to communicating that the historical use of that term is in no way associated with Native Americans. Id. With respect to Midwestern State, the NCAA granted the school an extension until the end of basketball season, more specifically until April 4, 2006, to remove the name “Indians” from its basketball court. Id.

14 Id. During the 1904 football season alone, “21 players were killed and over 200 injured.” Id. (citing James Hammond Moore, Football’s Ugly Decades, 1893-1913, SMITHSONIAN J. HIST., Fall 1967, at 49, 59).
15 SACK & STAUROWSKY, supra note 13.
the time, that the Rules Committee was making headway in creating a safer game, it produced few tangible results.\textsuperscript{16} Henry M. MacCracken, Chancellor of New York University, finally decided to organize a meeting of football-playing colleges in order to address the high level of violence in the game and try to succeed where the Rules Committee had failed.\textsuperscript{17} Although only thirteen colleges and universities sent delegates to this initial meeting, sixty-two schools sent representatives to a second meeting held in December of 1905.\textsuperscript{18} The delegates to this second meeting, acting without any sanction from the Rules Committee, created the Intercollegiate Athletic Association of the United States.\textsuperscript{19} This governing body would later become the NCAA in 1910.\textsuperscript{20}

From 1905 until 1921, the NCAA possessed little authority and acted mainly as a discussion and rule-making body for collegiate football.\textsuperscript{21} In 1921, however, the NCAA began to exert its influence over other areas of intercollegiate athletics and sponsored, as its first national championship, the NCAA's first National Collegiate Track and Field Championship.\textsuperscript{22} As the popularity of college athletics grew, problems regarding recruitment, financial aid, and eventually television began to demand more and more attention.\textsuperscript{23} The complexity and scope of these problems, the tremendous growth in the number of member institutions, and the increasing popularity of intercollegiate athletics necessitated that the NCAA increase its governing powers.\textsuperscript{24} Thus, the NCAA appointed Walter Byers as its first full-time executive director in 1951, established a Kansas City, Missouri Headquarters in 1952, and in that same year, adopted legislation governing postseason bowl games, as well as rules governing live television coverage of football games.\textsuperscript{25}

In 1973, the NCAA took another major step when it held its first Special Convention.\textsuperscript{26} At the Special Convention, the NCAA's member institutions voted to divide the NCAA into three legislative and competitive divisions.\textsuperscript{27}

\begin{footnotes}
\item[16] Id. at 32-33 (citing JACK FALLA, NCAA, THE VOICE OF COLLEGE SPORTS: A DIAMOND ANNIVERSARY HISTORY, 1906-1981, at 9-17 (1981)).
\item[17] SACK & STAUROWSKY, supra note 13, at 33.
\item[18] Id.
\item[19] Id.
\item[21] Id.
\item[22] Id.
\item[23] Id.
\item[24] Id.
\item[25] Id. In 1999, the NCAA relocated its headquarters to Indianapolis, Indiana. Id.
\item[26] Id.
\item[27] Id.
\end{footnotes}
I, II, and III, with a Board of Directors governing Division I and a Presidents’ Council governing each of Divisions II and III. Although the NCAA Executive Committee still acts as the main governing body, each division has some autonomy in governing its own affairs. Five years after the Special Convention, the NCAA further subdivided Division I into Divisions I-A and I-AA; however, both of these subdivisions fall under the general governance of the Division I Board of Directors.

The NCAA underwent its major change in 1980 when it took over responsibility for all its members’ women’s athletic programs and established ten additional Division II and III women’s national championships. Since 1980, the NCAA has increased the number of women’s championships by an additional nineteen events.

B. THE NCAA’S TRANSFORMATION

The NCAA justifies its increasingly complex and centralized governing strategy by claiming it is merely trying to ensure that colleges and universities provide an environment where the education of student-athletes is the highest priority. Actions, however, speak far louder than words.


30 See id. The Executive Committee is made up of eight I-A representatives from the Division I-A Board of Directors, two I-AA representatives, and two I-AAA representatives, all of whom sit on the Division I Board of Directors. Id. The Executive Committee is further comprised of two representatives from the Division II President’s Council, two representatives from the Division III President’s Council, the NCAA President (ex officio), and the chairs of Divisions I, II, and III Management Councils (ex officio). Id.

31 See Katherine McClelland, Comment, Should College Football’s Currency Read “In BCS We Trust” or Is Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series, 37 Tex. Tech. L. Rev. 167, 172 (2004) (describing the division of power within the NCAA). In 1997, Division I schools decided to create their own board of directors made up of eighteen Division I presidents who are appointed by their respective conferences. Id.


33 NCAA, supra note 20.

34 Id.

35 See SACK & STAUROWSKY, supra note 13, at 105-06.
Over the past century, the NCAA has gradually transformed into a monopolistic enterprise that rivals any professional sports league. Unlike professional sports leagues, however, the NCAA possesses several distinct economic advantages. NCAA members, for instance, do not have to work around salary caps, as their athletes do not receive any compensation above and beyond educational expenses. Furthermore, the NCAA and its member institutions are not subject to a general income tax. This is indeed a sweet deal. As long as the NCAA successfully creates the appearance that the interests of student-athletes are its primarily focus, the NCAA will be able to “continue signing multi-billion dollar deals with network television for the rights to broadcast sporting events,” while at the same time receiving the innumerable benefits afforded to educational, non-profit enterprises. Keeping up the appearance of placing the student athlete first allows the NCAA to have its proverbial cake and eat it too.

C. THE NATIVE AMERICAN CONTROVERSY

In August 2005, the NCAA announced its plan to sanction members that have what the NCAA deems to be hostile and abusive mascots. What makes this new policy so controversial are the broad range of intense opinions surrounding the
debate over whether or not sports teams should use native American imagery. On the one hand, many alumni support their alma mater's association with Native American culture because this association provides a unique identity that binds them to their university and fellow alumni.\footnote{See DON CALHOUN, SPORTS, CULTURE & PERSONALITY 306-08 (1981).} After all, sentimentality is a strong human emotion. On the other hand, Native American activist groups complain that these symbols engender feelings of animosity and hatred toward Native American communities and culture.\footnote{See, e.g., Debra Utacia Krol, Editorial, "Sports Mascots Dishonor Native Americans; the Mascots Make a Caricature of Native Culture and Must be Eliminated," NEWS & REC. (Greensboro, N.C.), Oct. 15, 1999, at A15 (likening Native American mascots to Little Black Sambo); Sherry Parmet, "Indians Take Aim at Mascots; School in Highland Valley College Cited," PRESS-ENTERPRISE (Riverside, Cal.), Aug. 6, 1999, at B1 (noting that "[h]umans are not mascots"); Mascot Angers Native Americans, TIMES UNION (Albany, N.Y.), Oct. 21, 1995, at A1 (stating that some indigenous groups consider the Atlanta Braves' use of the "Tomahawk Chop" to be offensive).}

Take the case of Florida State University, an NCAA member institution that has chosen to adopt the Seminoles and Chief Osceola as its nickname and mascot respectively.\footnote{C. Richard King & Charles Fruehling Springwood, The Best Offense . . . : Dissociation, Desire and the Defense of the Florida State University Seminoles, in TEAM SPIRITS: THE NATIVE AMERICAN MASCOTS CONTROVERSY 129, 130-31 (C. Richard King & Charles Fruehling Springwood eds., 2000). Although the NCAA has already granted an exemption to Florida State University, see NCAA, supra note 11 (permitting Florida State to continue using Seminole imagery), considerable opposition exists to Florida State's identification with the Seminole Tribe. Cf. Jake Curtis, Lose the War Paint; NCAA Bans Indian Mascots, but Only in the Playoffs, S.F. CHRON., Aug. 6, 2005, at D1 (noting the African American or Jewish communities would never allow their imagery to be used by colleges and universities).} Before every home football game, a student "wearing moccasins, a tasseled leather 'Indian' outfit, face paint, and a large bandanna, hoisting a large feathered lance . . . charges down the field riding an appaloosa horse named Renegade and hurls a flaming lance downfield."\footnote{King & Springwood, supra note 45, at 130.} Most Florida State supporters argue that Florida State's adoption of Chief Osceola (an historical figure who led an armed resistance against the United States in the 1830s) as its mascot is an act of homage to the Seminole tribe.\footnote{Id. at 130-31.} In fact, students consider it a great honor if Florida State selects them to impersonate Chief Osceola at sporting events.\footnote{Id. at 130.} Only students with a "high moral character" who are willing to undergo a two-year apprenticeship can don the famous headdress of the Chief.\footnote{Id.}

Even in light of the great respect that Florida State shows both the Seminole tribe and the portrayal of Chief Osceola, critics of Florida State's association with the Seminole Tribe argue that depicting Chief Osceola as "warlike or bellicose
dehumanizes and demonizes" the Seminole Tribe.\textsuperscript{50} The Seminole Tribe’s official encouragement of Florida State’s identification with the Seminole Nation, however, undermines this argument.\textsuperscript{51} Still, members of the American Indian Movement of Florida, a fringe activist group, staunchly contend that the Seminole Tribe fails to see the damage Indian mascots inflict on the common perception of Native Americans.\textsuperscript{52} Regardless of what the American Indian Movement of Florida and other groups allege, the fact remains that the Seminole Tribe approves of Florida State’s use of the Seminole image, even going so far as sending its Miss Seminole and Junior Miss Seminole to Tallahassee for the crowning of Florida State’s homecoming “chief” and “princess.”\textsuperscript{53} By both actively seeking approval from the Seminole Tribe and taking steps to portray chief Osceola in a reverent fashion, Florida State clearly indicates that its choice to identify itself with the Seminole Tribe is not meant to demean that particular group of people; rather, Florida State’s actions indicate that it identifies itself with the Seminole Tribe and Chief Osceola in order to symbolize the fighting spirit that Florida State wishes to instill among its students and athletes. Similarly, other colleges and universities more than likely retain their Native American imagery for this same reason.

Of course, the argument over whether or not colleges and universities should adopt mascots free of Native American imagery does not rest entirely on a moral and philosophical foundation. Changing one’s mascot can also have a substantial economic impact. Over the last several decades, some colleges and universities have bowed to the pressures of political correctness and dropped their Native American nicknames.\textsuperscript{54} Dartmouth and Miami of Ohio, for instance, changed their nicknames from the “Indians” and “Redskins” to the “Big Green” and “RedHawks” respectively.\textsuperscript{55} According to Miami of Ohio spokesman Richard Little, however, this name change came with a price tag of approximately one-hundred thousand dollars because Miami had to replace the image of and references to its old mascot with its new mascot on its stadium, arena floors, and uniforms.\textsuperscript{56}

In addition to the direct costs involved with removing “offensive” images from an institution’s infrastructure, a change in mascots could potentially anger and alienate generous alumni and benefactors. When North Dakota, for instance, considered dropping its “Fighting Sioux” moniker, alumnus Ralph Engelstad

\textsuperscript{50} Id. at 141.
\textsuperscript{51} \textit{See id. at 144; Tom Dangelo, \textit{Look. Hard. Are You Offended?}, PALM BEACH POST, Apr. 4, 2002, at C1 (noting the Seminole Tribe’s explicit approval of Florida State’s use of the “Seminoles”).}
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} Id.
\textsuperscript{56} Id. (comments made by Miami University spokesman Richard Little).
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donated one-hundred million dollars for a new hockey arena on the condition that North Dakota retain the nickname.\(^{57}\) The fact that large Division-I schools like Florida State earn as much as $1.8 million each year from the sale of merchandise bearing their nicknames places officials at the offending universities in a tough position when deciding whether to retain their Native American mascots.\(^{58}\) Regardless of the social agenda underlying the NCAA’s imposition of sanctions against teams utilizing “hostile” and “abusive” mascots, the practical economic effect will be substantially negative, especially since a majority of those most strongly opposed to the use of Native American imagery are likely not even consumers of intercollegiate athletic events and merchandise.

D. NCAA POLICY REGARDING NATIVE AMERICAN MASCOTS

In April of 2001, members of the NCAA Executive Committee began to address what they perceived to be a significant problem among the ranks of their member institutions, namely the use of Native American insignia.\(^{59}\) To further study this issue, the Executive Committee sought the advice of the Minority Opportunities and Interests Committee (MOIC), which passed along its findings to the Executive Committee’s own Subcommittee on Gender and Diversity Issues (Subcommittee).\(^{60}\) The MOIC initiated its review and discussion of this issue during its July 2001, October 2002, and June 2005 meetings, specifically taking into account the NCAA Constitution, self-evaluations from thirty-three member institutions thought to have improper Native American mascots, letters and emails from the Native American community, and various articles and publications.\(^{61}\) Ultimately, the MOIC determined that the NCAA should strongly

\(^{57}\) George Dohrmann, Face Off: A Bullying North Dakota Alumnus Built the School a $100 Million Rink but Tore Its Campus Asunder, SPORTS ILLUSTRATED, Oct. 8, 2001, at 44.

\(^{58}\) King & Springwood, supra note 45, at 145.

\(^{59}\) NCAA EXECUTIVE COMM. SUBCOMM. ON GENDER AND DIVERSITY ISSUES, REPORT ON REFERENCES TO AMERICAN INDIANS IN INTERCOLLEGIATE ATHLETICS (2005), available at http://www1.ncaa.org/membership/governance/assoc-wide/executive_committee/docs/2005/2005-08/s08a_eo-gender.htm (noting three prevalent “racial” issues at the time the NCAA decided to look into this matter: the use of the Confederate Battle Flag, St. Cloud State University President Roy Saigo’s request to the Executive Committee to consider a resolution denouncing the use of Native American insignia, and the United States Commission on Civil Rights’ Statements on the use of Native American images and nicknames as sports symbols).

\(^{60}\) Id. (the MOIC is merely a subcommittee of the NCAA’s Executive Committee).

\(^{61}\) Id. In addition to the self-evaluations, the MOIC specifically relied on three articles contained in the NCAA Constitution. Id. Under the Cultural Diversity and Gender Equity Article, “[i]t is the responsibility of each member institution to establish and maintain an environment that values cultural diversity and gender equity . . . .” NCAA CONST. art. 2.2.2, available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf. Pursuant to the
discourage the “use of racial/ethnic/national origin mascots, nicknames or imagery in intercollegiate athletics.”62

Upon receipt of the MOIC’s recommendations, the Subcommittee, while substantially agreeing with the MOIC’s decisions, offered its own views on the issue.63 The Subcommittee determined, among other things, that members utilizing “hostile or abusive racial/ethnic/national origin mascots, nicknames, or imagery” should be prohibited from hosting any NCAA national championship competition, and if already selected as a host site, should take reasonable steps to cover up any of these references during the championship event.64 The Subcommittee also concluded that offending members should remove all Native American imagery from their clothing and uniforms when participating in a national championship.65 Finally, the Subcommittee recommended that all member institutions take steps to improve the racial environment in which they compete, including refusing to schedule teams that make use of Native American imagery in their athletic programs, designing publications and campus materials without using hostile or abusive references, and providing education and outreach programs that emphasize an “understanding and awareness of the negative impact of hostile or abusive symbols.”66

In arriving at these recommendations, both the MOIC and the Subcommittee placed particular emphasis on the data collected from the November 2004 self-evaluations that the MOIC required the thirty-three member institutions with questionable mascots to complete.67 In conducting this survey, the MOIC asked these colleges and universities to comment on “how the institution educates student athletes, staff, fans, and spectators on sportsmanship related to American


62 NCAA EXECUTIVE COMM. SUBCOMM. ON GENDER AND DIVERSITY ISSUES, supra note 59.
63 Id.
64 Id.
65 Id.
66 Id. The educational component of this recommendation falls most heavily upon smaller schools with less successful athletic programs and fewer financial resources. See Rana L. Cash, The University of West Georgia: School Cases on Braves, ATLANTA J.-CONST., Oct. 3, 2005, at 1A (according to West Georgia Athletics Director Ed Murphy, given the yearly costs of offering the classes and programs, it would be almost impossible to comply with the educational component for less than $100,000 annually).
67 NCAA EXECUTIVE COMM. SUBCOMM. ON GENDER AND DIVERSITY ISSUES, supra note 59.
Indian mascots," as well as to describe their "educational programs and initiatives related to American Indian history and culture." After reviewing the results of these self-evaluations, the MOIC grouped each of the evaluatees into five separate categories: (1) institutions that required no further review; (2) institutions favored by the Native Americans in their community; (3) institutions having nicknames with offensive imagery; (4) institutions that provided very broad responses to the self-evaluations and indicated that they are not considering changing their mascot; and (5) one institution to which the NCAA granted an extension. To date, the NCAA has only granted exemptions to members in the second group of schools—those whose mascots were supported by neighboring Native American communities.

68 Cash, supra note 66.

69 NCAA EXECUTIVE COMM. SUBCOMM. ON GENDER AND DIVERSITY ISSUES, supra note 59. These institutions have either removed all references to Native American culture or never made use of them in the first place. Id.

70 Id. Institutions in this category fund outreach programs that service Native American communities in their areas. Id. They include: Alcorn State University (Braves); Central Michigan University (Chippewas); Catawba College (Indians); Florida State University (Seminoles); Midwestern State University (Indians); University of Utah (Utes); and University of North Carolina-Pembroke (Braves). Id.

71 Id. These institutions have deemphasized their Native American imagery. Indiana University of Pennsylvania, for instance, decided to retain their "Indian" nickname, but adopted a bear named "Cherokee" as their official mascot. Id. Similarly, Bradley University (Braves) and Carthage College (Redmen) decided to maintain their nicknames; however, they also designed new logos and mascots with only slight references to Native American culture. Id.

72 Id. The institutions planning to retain their current mascots and nicknames include: Arkansas State University (Indians); Chowan College (Braves); University of Illinois-Champaign (Illini); University of Louisiana-Monroe (Indians); McMurry University (Indians); Mississippi College (Choctaws); Newberry College (Indians); University of North Dakota (Fighting Sioux); Southeastern Oklahoma State University (Savages). Id.

73 Id. The NCAA granted an extension to the College of William & Mary (Tribe) in order for to accurately complete the self-evaluation. Id.

74 See, e.g., NCAA, supra note 11 (granting exemptions to Florida State and Central Michigan; NCAA, supra note 12 (granting exemption to the University of Utah). In denying North Dakota's appeal, the NCAA relied heavily on the fact that two of the three federally recognized Sioux tribes found the "Fighting Sioux" mascot offensive. Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005), available at http://www.ncaa.org/wps/portal (follow "Media & Events" hyperlink; then follow "Press Room" hyperlink; then follow "News Releases" hyperlink; then follow "2005" hyperlink; then follow "9/28/2005 - Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review" hyperlink).
III. ANTITRUST AND THE NCAA

A. THE SHERMAN ANTITRUST ACT

Under section 1 of the Sherman Antitrust Act (Act):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine . . . or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.75

The Act, named for Senator John Sherman of Ohio,76 was originally passed by Congress in 1890 to both promote and protect competitive markets in the United States.77 The Act is essentially Congress's attempt to codify already existing English78 and American common law79 in an effort to ease the hardships often faced by courts when trying to apply a myriad of different common law concepts to the voluminous litigation spurred by the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that

79 Chief Justice White summarized the American view: "'The dread of enhancement of prices . . . and other wrongs which it was thought would flow from . . . undue limitation on competitive conditions caused by contracts or other acts . . . led . . . to the prohibition, or treating . . . illegal, all . . . acts which were unreasonably restrictive of competitive conditions.'" Id. at 836 n.35 (quoting Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911)).
their power had been and would be exerted to oppress individuals and injure the public generally.\footnote{Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).}

As a result, the Act now reflects the legislative judgment that competition ultimately produces both lower prices and better goods and services.\footnote{Nat'l Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679, 695 (1978).}

One thing the Act is not is a government attempt to manipulate the American corporate structure; instead, Congress merely desired to regulate all contracts, combinations, and conspiracies entered into with the aim of restraining trade.\footnote{Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 n.10 (1940).} In other words, the Act is actually a means of facilitating free, competitive markets rather than simply another intrusive governmental burden on trade. Furthermore, Congress also manifested no intention to purge the American business landscape of all monopolies, as some monopolies, contracts, and combinations of trade can be desirable under certain circumstances.\footnote{See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (stating that to be in violation of the Sherman act, the defendant must both (1) possess monopoly power in the relevant market and (2) willfully acquire or maintain that power as distinguished from "growth or development as a consequence of a superior product, business acumen, or historic accident"); Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 363 (9th Cir. 1988) (emphasizing the importance of distinguishing a monopoly created by impermissible means verses a natural monopoly).} Congress set up the Act in such a way that a monopolist will not be subject to penalties under the Act if the monopolist creates the enterprise solely through superior skill and intelligence; the Act imposes penalties only upon individuals and businesses whose activities are unfairly competitive.\footnote{Senator Sherman himself admitted that many monopolistic combinations were actually integral to the rapid developments in American commerce. See 21 CONG. REC. 2457 (1890), reprinted in 1 EARL W. KINTNER, LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 116 (1978). In fact, Senator Sherman specifically commented that the act is only aimed "at unlawful combination. It does not in the least affect combinations in and of production where there is free and fair competition." Id.}

\section*{B. PENALTIES, REMEDIES, AND THE RULE-OF-REASON}

Under the Act, section 1 subjects a defendant to both civil\footnote{See 1 KINTNER, supra note 83, at 116, 292.} as well as criminal penalties.\footnote{Proponents of the bill, including Senator Turpie of Indiana, were adamant that it afford some type of remedy to injured parties. 21 CONG. REC. 2558 (1890), reprinted in HARRY AUBREY TOULMIN, ANTITRUST LAWS § 1.15 (1949).} Congress clearly desired to demonstrate how seriously it takes...
violations of the Act by providing multiple penalties for the same action. In addition to the Act's section 1 remedies, sections 4 and 16 of the Clayton Act allow courts to issue an injunction if the plaintiff is able to demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to recur." While the injunction standard is vague and ambiguous, injunctions are generally an appropriate remedy if a plaintiff is able to prove, even in the absence of present injuries, that a violation of the Act is imminent. In order for a plaintiff to be entitled to an injunction, the plaintiff must prove that the defendant "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market."

The first step for a court in an antitrust case is to determine whether to apply a per se or rule-of-reason standard. Courts will generally employ a per se analysis when the "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of challenged conduct." In other words, whenever agreements concerning such matters as price fixing, market divisions, group boycotts, or any other naked or obvious combination of restraints so flagrantly violate the Act, further inquiry into the specific circumstances of the case is unnecessary. Such activities have such a "pernicious effect on competition and lack of any redeeming virtue" that they are accordingly illegal as a matter of law.

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87 See discussion supra note 85 and accompanying text.
89 LiCalsi, supra note 78, at 838.
90 Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004).
91 LiCalsi, supra note 78, at 838.
93 Neeld v. Nat'l Hockey League, 594 F.2d 1297, 1299 (9th Cir. 1979) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)).
94 Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.
If, however, the alleged anticompetitive behavior is not so unreasonable as to
be illegal per se, courts will employ a rule-of-reason analysis. The finder of fact
must determine, under the rule-of-reason test, whether the practice at issue
"imposes an unreasonable restraint on competition, taking into account a variety
of factors, including specific information about the relevant business, its
condition before and after the restraint was imposed, and the restraint’s history,
nature, and effect."

C. DEVELOPMENT OF THE RULE-OF-REASON

Justice Brandeis, in Board of Trade of Chicago v. United States, formulated the rule-
of-reason test that courts most often apply in antitrust cases. In this famous
and classic comment, Brandeis wrote:

[T]he legality of an agreement or regulation cannot be determined
by so simple a test, as whether it restrains competition. Every
agreement concerning trade, every regulation of trade, restrains. To
bind, to restrain, is of their very essence. The true test of legality is
whether the restraint imposed is such as merely regulates and
perhaps thereby promotes competition or whether it is such as may
suppress or even destroy competition. To determine that question
the court must ordinarily consider the facts peculiar to the business
to which the restraint is applied; its condition before and after the
restraint was imposed; the nature of the restraint and its effect,
actual or probable. The history of the restraint, the evil believed to
exist, the reason for adopting the particular remedy, the purpose or
end sought to be attained, are all relevant facts. This is not because
a good intention will save an otherwise objectionable regulation or
the reverse; but because knowledge of intent may help the court to
interpret facts and to predict consequences . . . . [T]he evidence
admitted [must] make[ ] it clear that the rule was a reasonable
regulation of business consistent with the provisions of the Anti-
Trust Law.

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99 Id. (citing Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332, 343 & n.13 (1982)).
100 246 U.S. 231 (1918).
101 Id. at 238-39.
Thus, Justice Brandeis's rule-of-reason approach effectively involves the trier of fact in a complex balancing test.  

Courts should consider two important factors in striking this balance: the anticompetitive and procompetitive effects of the challenged conduct. The basic test to measure these effects is whether or not the alleged violator's conduct increases or decreases quality and output. The plaintiff in an antitrust action bears the initial burden of establishing that the defendant has engaged in behavior that produces an anticompetitive effect. If the plaintiff meets this initial burden, the burden shifts to the defendant, who must then demonstrate both the procompetitive effects and the reasonableness of the alleged restraint on trade. If the defendant is unable to meet this burden, then the plaintiff will prevail. On the other hand, if the defendant is able to demonstrate that the alleged restraint is reasonable and produces a procompetitive effect, the burden shifts back to the plaintiff to show that any procompetitive effects the defendant might claim can be similarly achieved by a substantially less restrictive alternative.


103 See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978) (stating that "the restraint is found to have legitimate business purposes whose realization serves to promote competition, the 'anticompetitive evils' of the challenged practice must be carefully balanced against its 'procompetitive virtues' to ascertain whether the former outweigh the latter").

104 See Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725 (1988) ("The availability and quality of such services affect a manufacturer's . . . competitiveness of his product."). In conducting this inquiry, courts will generally take into account "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 692. The plaintiff may establish an anticompetitive effect either indirectly by proving that the defendant possessed requisite market power within a market, or directly by showing actual anticompetitive effects, such as controlling output or prices. See Bahn v. NME Hosp., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) (discussing ways in which a plaintiff may satisfy the burden of proof).

105 Law v. NCAA, 134 F.3d 1010, 1021 (10th Cir. 1998).

106 Id.

107 Id.

Conduct involving a net procompetitive effect is legally permissible under the Act. Conduct resulting in a net anticompetitive effect violates antitrust law, as it is an unreasonable restraint on trade.

D. APPLYING THE RULE-OF-REASON TO THE NCAA

Courts have generally declined to apply a per se analysis when dealing with allegations of antitrust violations brought against the NCAA, opting instead for the rule-of-reason test. In applying this standard, however, the courts have been clear that they were not doing so merely because they believed the NCAA’s “academic” nature granted it a blanket immunity from antitrust law.

1. Oklahoma Fights Back. In Board of Regents of the University of Oklahoma v. NCAA, the Supreme Court issued its only opinion involving antitrust law as it relates to the NCAA. The NCAA entered into two separate agreements with the American Broadcasting Company and Columbia Broadcasting System which granted both networks television rights to fourteen live football games. Included in these agreements was a “specified minimum aggregate compensation to the participating NCAA member institutions” during a four-year period totaling $131,750,000. Because the contracts were not structured to take into account alternatives, the NCAA was held to be acting unreasonably.

See discussion infra Part II.D (examining NCAA policy regarding Native American mascots). Although restraints similar to those imposed by the NCAA have been held unreasonable as a matter of law, the Supreme Court declined to apply a per se analysis when the NCAA is a party to an action because horizontal restraints, at least to some extent, are necessary for intercollegiate athletics to exist. Bd. of Regents, 468 U.S. at 100-01. Thus, a general anticompetitive analysis under the rule-of-reason test would be more appropriate than a simple per se analysis to determine whether or not the NCAA’s recent policies regarding Native American imagery are impermissible horizontal restraints. In some instances, courts have adopted a quick look test, which is only slightly modified from the general rule-of-reason analysis. See Gary R. Roberts, The NCAA, Antitrust, and Consumer Welfare, 70 TUL. L. REV. 2631, 2638 (1996) (citing Bd. of Regents, 468 U.S. at 109-10, as the basis for the quick look rule-of-reason test). This reformulation of the general rule-of-reason test includes the idea that no proof of market power is required so long as there is a naked horizontal agreement fixing price and output at a point that deviates from the demands of a competitive market. Roberts, supra, at 2638-39.

In addition to ABC and CBS, the NCAA also entered into a contract with Turner Broadcasting System for the exclusive rights to cablecast NCAA football games for a minimum aggregate fee during a two-year period of $17,696,000. Id. at 93 n.9.
account the size of the viewing audience, the number of markets in which the game was telecast, nor the particular characteristics of the teams (that is, the contracts were not a factor of supply and demand) the networks effectively had the ability to fix the price each team was to receive in exchange for its television rights. Not only did the contracts allow the television networks to engage in price fixing, but the contracts also limited output by prohibiting any institution from appearing in more than six nationally televised games per year. The Supreme Court, because these television contracts involved both price fixing and a restriction on output, had no trouble finding that the contracts were a "restraint of trade" in the sense that they limit members' freedom to negotiate and enter into their own television contracts. The Court also noted that the details of these contracts bore a striking similarity to other activities that courts have generally deemed unreasonable. More specifically, the contracts were horizontal restraints—agreements that are almost always impermissible under the Act.

When presented with horizontal agreements that involve both price fixing and artificial limits on output, courts will generally find them to be illegal per se because the probability that these practices are anticompetitive is substantial. The Supreme Court in Board of Regents, however, declined to adopt a per se approach, opting instead for a rule-of-reason analysis.

Even though horizontal restraints do not ordinarily warrant an inquiry into the particular market contexts in which they exist because horizontal restraints are so obviously unreasonable, the Court determined that application of a per se legal doctrine was impractical given the NCAA's unique nature. Key in the Court's

116 Id. at 93.
117 Id. at 94.
118 Id. at 98. The District Court found that the minimum aggregate price operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1315 (W.D. Okla. 1982).
119 Bd. of Regents, 468 U.S. at 98.
120 Id. Horizontal restraints are characterized by agreements between competitors concerning the way in which they will compete with one another. Id. Because NCAA members voted to implement the anticompetitive television contracts, this is a situation where competitors are making decisions about the manner in which they will compete. Id. Thus, it is a horizontal restraint.
121 Id. at 100-01.
122 Id.
123 Id. at 100. See also Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered . . . ").
124 Bd. of Regents, 468 U.S. at 100-01. Similar cases involving professional sports leagues have also favored a rule-of-reason test over a per se analysis. See, e.g., M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 980 (1st Cir. 1984) (applying rule-of-reason standard to a rule requiring all auto racing participants to use the same tire).
decision was the fact that some horizontal restraints are necessary for amateur athletics to even exist. The Court went on to explain that this result was not due to a lack of judicial experience with this type of arrangement, nor was it because the NCAA is a nonprofit entity with a historic role in preserving and encouraging intercollegiate amateur athletics; rather, the Supreme Court concluded that amateur intercollegiate athletics would not be possible without horizontal restraints.

In support of the proposition that some horizontal restraints are permissible, the Court relied on its decision in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, a case in which the Court determined that a blanket license to perform music—essentially a price-fixing scheme—was so efficient that it led to a significant increase in aggregate output. In other words, the overwhelmingly large procompetitive effects in *Broadcast Music* allowed the Court to overlook the facially anticompetitive nature of the horizontal restraints. The Court in *Board of Regents*, following in the vein of *Broadcast Music*, held that because the NCAA's product is athletic competition among colleges and universities, and meaningful athletic competition cannot exist without rules to which the competitors themselves agree to adhere, the NCAA's use of horizontal restraints is not necessarily per se illegal. Rules affecting the nature of an athletic competition, such as the number of players on a team, the size of the field, equipment, and the like are obviously necessary in order to provide uniformity. Furthermore, not only are horizontal agreements important in preserving the quality and nature of athletic competition, but they also play a role in preserving the fundamental character of college athletics. Ensuring that member institutions do not pay their athletes a salary or requiring that student-athletes attend class are equally as important as are offsides penalties in football or fouls in basketball because these

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125 *Bd. of Regents*, 468 U.S. at 101.
126 "[T]he sweeping language of § 1 applies to nonprofit entities." *Id.* at 101 n.22 (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 786-87 (1975)). Amusingly, the Court even called into question the NCAA's nonprofit status, taking note that it was "questionable at best" because the NCAA and its member institutions are "in fact organized to maximize revenues." *Id.*
127 *Id.* at 100-01.
128 *See* 441 U.S. 1, 18-23 (1979).
129 *Id.*
130 *Bd. of Regents*, 468 U.S. at 101. The Court rested this conclusion on the language of Judge Bork: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." *Id.* (citing R. Bork, *The Antitrust Paradox* 278 (1978)).
131 *Bd. of Regents*, 468 U.S. at 101.
restrictions ensure that the NCAA and its members remain true to the goal of educating student-athletes.132

After casting a per se analysis aside, the Court still found, under a rule-of-reason approach, that the contracts were decidedly anticompetitive.133 Distinguishing Board of Regents from Broadcast Music, the Court noted that the defendant in Broadcast Music, although facially violating the act, merely acted as a selling agent who assisted in the marketing of broadcast rights, thus allowing holders of music copyrights to "reap otherwise unattainable efficiencies."134 In Board of Regents, however, the NCAA did not act as a selling agent; instead, the television networks dealt directly with member institutions to determine whether or not they would televise a particular game.135 The NCAA merely created the initial contract assuring the television networks the opportunity to fix prices and limiting the number of nationally televised games in which member institutions could compete to six.136 Implicit in the Court's finding that the NCAA had violated the Act is the theory that this regulation was invalid because the horizontal agreement in question was not essential to the character or nature of intercollegiate athletics.137

2. Law v. NCAA. In Law v. NCAA, the Tenth Circuit addressed whether placing a restricted earning status on certain college basketball coaches was an unreasonable restraint on trade.138 The crux of the litigation in Law was whether the NCAA, concerned over rising costs inherent in maintaining competitive athletic programs, could reduce its members' expenses by imposing salary restrictions on certain part-time coaching positions.139 The regulatory scheme,

132 Id. at 102.
133 Id. at 120-21 (allowing equal competition for broadcasting rights will maximize consumer demand for televised intercollegiate football games, thus viewership, that is consumption, will increase if the NCAA removes its artificial constraints). The district court further found that, although studies in the 1950s support the NCAA's primary procompetitive argument that unlimited television access to college football would decrease live attendance, there is no reason to believe that this same theory holds true in today's market for college football. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1295-96, 1315 (W.D. Okla. 1982).
135 Id.
136 Id. at 94.
137 See id. at 101 (noting that some horizontal agreements are required to sustain the nature of competitive college athletics).
138 134 F.3d 1010, 1015 (10th Cir. 1998). In the NCAA commissioned Raiborn Report, forty-two percent of NCAA member institutions reported average budget deficits of $824,000 per school in 1985. Id. at 1012. Furthermore, all athletic expenses at Division I schools rose more than one hundred percent during an eight year period from 1978 to 1985. Id. at 1012-13.
139 Id. Under the NCAA's restrictions, earnings of part-time positions were significantly restricted, volunteer coaches were not allowed to receive any compensation, and graduate assistants

officially adopted by majority vote in January 1991, restricted the earnings of part-time basketball coaches who would otherwise be participants in a competitive labor market. By agreeing to limit the price which NCAA members must pay for the services of restricted-earnings coaches, the Rule fixes the cost of one of the component items used by NCAA members to produce the product of Division I basketball.

The Tenth Circuit found under a rule-of-reason analysis that the NCAA’s horizontal price fixing agreement violated the Act. Rather than declaring the restraint illegal per se, however, the Tenth Circuit took note of the Supreme Court’s decision in NCAA v. Board of Regents of the University of Oklahoma. Seizing on the language in Board of Regents, the Tenth Circuit concluded that “because horizontal agreements are necessary for sports competition, all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis.” Thus, the agreements in Law would not have violated the Act if they had affected only the nature and quality of collegiate basketball. Because the salaries of part-time basketball coaches were not intimately connected with the quality and nature of intercollegiate competition, the Tenth Circuit deemed the restraints at issue to be impermissible under the Act. The anticompetitive effects of the price-fixing scheme

had to be currently enrolled in a graduate studies program of the member institution and could not receive compensation greater than the value of the cost of their education. Id. at 1013.

Id. at 1015.

Id. at 1017.

See also FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 436 n.19 (1990) (“[H]orizontal price-fixing… has been consistently analyzed as a per se violation for many decades.”); United States v. Saco-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (prohibiting uniform price fixing).

Law, 134 F.3d at 1016, 1024.


Law, 134 F.3d at 1018-19.

Id. at 1018 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984)).

Compare Bd. of Regents, 468 U.S. at 101-02 (implying that the proposed television contracts do not affect the nature or quality of amateur athletics), with Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 957-58 (6th Cir. 2004) (limiting number of non-NCAA tournaments in which a basketball team may compete); Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318-19 (9th Cir. 1996) (finding that sanctions for violations of NCAA recruiting rules did not violate antitrust laws); Banks v. NCAA, 977 F.2d 1081, 1088-94 (7th Cir. 1992) (upholding rule rendering student-athletes with agents and those who have entered the draft ineligible for NCAA competition); Hennessey v. NCAA, 564 F.2d 1136, 1141-42 (5th Cir. 1977) (per curiam) (denying challenges by assistant football and basketball coaches to an NCAA bylaw limiting the number of coaches member institutions can employ at one time); Justice v. NCAA, 577 F. Supp. 356, 379-82 (D. Ariz. 1983) (finding NCAA sanctions of member institutions that had violated rules against compensating student-athletes were permissible). In each case where courts have found NCAA horizontal
overwhelmed its procompetitive effects; as a result, the regulation was an illegal restraint on trade under a rule-of-reason analysis.\textsuperscript{148}

IV. ANTITRUST AND NATIVE AMERICANS

The NCAA policy directed toward "hostile and abusive" mascots rests on a questionable legal base because this policy is clearly distinguishable from other cases in which courts have permitted the NCAA to impose horizontal restraints, as the restraints in those cases affected the quality and nature of intercollegiate athletics.\textsuperscript{149} A member institution's decision to adopt a particular mascot, regardless of whether or not the mascot is socially acceptable, has nothing to do with either the quality of education that a student-athlete receives, nor does it affect the quality and nature of athletic competition. Thus, this policy appears to fail the "quality and nature" test so often employed by courts in NCAA antitrust cases.\textsuperscript{150} The legal issues surrounding this policy, however, are not so easily disposed of because the quality and nature test is not dispositive.\textsuperscript{151} Determining whether or not the NCAA's mascot policy violates the Act requires a rule-of-reason analysis.\textsuperscript{152}

A. ANTICOMPETITIVE EFFECTS

Under the rule-of-reason test, an institution that desires to challenge the NCAA's mascot policy must first meet its initial burden of proof by demonstrating that the alleged violation produces significant anticompetitive

\textsuperscript{148} \textit{Law}, 134 F.3d at 1023. \textit{Law} is distinguishable from \textit{Hennessey}, first of all, because \textit{Hennessey} predates the Supreme Court's decision in Board of Regents. \textit{Id.} at 1021. Had \textit{Hennessey} been decided post-\textit{Board of Regents}, the outcome may very well have been different, as the Supreme Court seems less deferential to the NCAA than the \textit{Hennessey} court. \textit{Id.} Second, limiting the number of coaches a team may employ, as was the case in \textit{Hennessey}, has a direct effect on maintaining proper competitive balance; however, limiting the salaries of part-time coaches will not produce such an effect. See \textit{id.} at 1023-24 (discussing the effect of the facts on competitive balance).

\textsuperscript{149} See discussion supra note 147 (comparing cases in which NCAA rules affect the very nature of collegiate athletics with those in which they do not).

\textsuperscript{150} See id. (discussing cases in which the courts looked to the NCAA's regulations as they related to the "quality and nature" of intercollegiate athletics).

\textsuperscript{151} See Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918) (formulating the rule-of-reason test).

\textsuperscript{152} See discussion supra Part III.D (discussing the Act as it applies to the NCAA).
effects. A college or university should easily be able to meet this burden, as the NCAA’s mascot policy results in numerous anticompetitive effects.

First, an institution pressured into changing their mascot as a result of the NCAA’s policy would face significant monetary costs. A wholesale mascot change would require the institution to replace the old mascot, as well as any references to it, with the new mascot in the institution’s gyms, hockey arenas, football and soccer stadiums, locker rooms, athletic department offices, and any other building containing references to the allegedly offensive mascot. The institution would also have to obtain new apparel for its players, coaching staff, cheerleaders, and band. This would not, of course, be a cheap endeavor. Arguing that this money would not be better spent providing educational services to students rather than repainting the athletic facilities and shopping for new uniforms is a tenuous proposition indeed. After all, the quality of education a university provides has little to do with the images on team uniforms.

In addition to the more readily identifiable costs of updating an institution’s infrastructure and uniforms, choosing a new mascot would potentially result in losses of millions in licensing and merchandising revenues due to the fact that institutions have spent years building brand identification through their mascots. Total sales of licensed collegiate merchandise, for instance, were estimated at approximately $1.5 billion in 1992.

Aside from the obvious monetary losses arising from removal of a well-known mascot from the marketplace, the loss of a college’s brand identification also includes intangible economic costs. One of the reasons that colleges and

153 See discussion supra note 104 and accompanying text (commenting on a plaintiff’s burden of proof).
154 See Two Schools Dropping Indian Nicknames, CHI. TRIB., Nov. 10, 2005, at C8 (“Midwestern State, nicknamed the Indians, was given an extension to remove its nickname and imagery from its basketball court until after the season ends because of cost.”).
156 Bill Vilona, FSU to Sue Over Mascot, PENSACOLA NEWS J., Aug. 6, 2005, at 1A (changing mascots would “cost millions in licensing and merchandising”).
universities have spent so much time, effort, and money building brand identification is to enhance the visibility of their athletic programs, which in turn might lead to additional merchandise sales in the future,\textsuperscript{158} as well as increased fan interest. If the NCAA’s policy places its member institutions in a position where they feel compelled to adopt new mascots, such a change would entail a break in the synergy created by brand identification, stripping the affected colleges and universities of the innumerable benefits of an established brand.\textsuperscript{159}

The NCAA would most likely counter this argument by asserting that any anticompetitive effects are insignificant because the mascot policy does not require institutions to abandon Native American imagery;\textsuperscript{160} rather, the policy merely reflects the NCAA’s determination that “these mascots [are] unacceptable for NCAA championship competition.”\textsuperscript{161} In reality, however, the policy’s effects are not as innocuous as the NCAA might contend because the mascot policy precludes the NCAA from considering offending members as hosts for any NCAA championship.\textsuperscript{162} In other words, by automatically removing certain institutions from the pool of potential host sites, the policy limits both these institutions’ ability to vie for lucrative NCAA host distributions, as well as the pool of available host sites.

During the 2002-2003 fiscal year, the NCAA spent a total of $5,266,879 on payments to hosts and sponsors of Division I men’s championship events.\textsuperscript{163}


\textsuperscript{159} Although the anticompetitive effects relating to loss of brand identification may only apply to larger Division I institutions that earn significant amounts of revenue from merchandise sales, the mascot policy will still produce significant anticompetitive effects for smaller institutions by depriving them of the opportunity to receive distributions for hosting a championship event. See discussion infra note 165 (discussing host distributions for NCAA championships).

\textsuperscript{160} Gary T. Brown, Policy Applies Core Principles to Mascot Issue, NCAA NEWS ONLINE, Aug. 15, 2005, http://www.ncaa.org/wps/portal (follow “Media & Events” hyperlink; then follow “The NCAA News Online Archive” hyperlink; then follow “2005” hyperlink; then follow “August 15” hyperlink; then follow “Policy applies core principles to mascot issue)” hyperlink).

\textsuperscript{161} Michelle Kaufman, FSU to Fight Ban on Indian Mascot, MIAMI HERALD, Aug. 6, 2005, at A1.

\textsuperscript{162} See Matt Doucet, For NCAA, an Offensive-line Switch, BOSTON HERALD, Aug. 6, 2005, at 6 (“In addition to the costs of ridding uniforms and facilities of logos, schools using Indian nicknames will also be banned from hosting postseason events, cash cows counted upon to benefit the entire university.’’); Andy Staples et al., FSU to Fight NCAA Mascot Ban, TAMPA TRIB., Aug. 6, 2005, at 1 (noting the new NCAA rule could “cost FSU berths in NCAA postseason play and could prevent the school from hosting lucrative NCAA postseason events”).

During the same fiscal year, hosts and sponsors of Division I women's championships received total distributions of $707,561.\(^{164}\) Imposing a ban on certain members that precludes them from hosting an NCAA championship merely because they utilize Native American imagery would clearly deprive such institutions of the opportunity to acquire revenues that could be used to increase the quality of both their educational and athletic programs.\(^{165}\) In economic terms, the NCAA's mascot policy negatively effects the quality and nature of intercollegiate athletics. Given that host distributions have increased by 622% in less than ten years, schools unable to host an NCAA championship due to the NCAA's mascot policy will find themselves at an ever increasing competitive disadvantage with institutions that are able to collect this additional revenue.\(^{166}\) The anticompetitive effects of the mascot policy are readily apparent, as the mascot policy automatically precludes certain colleges and universities from hosting a championship event and receiving host distributions and significantly impairs the value of the brand name these colleges and universities have worked so hard to acquire.

B. PROCOMPETITIVE EFFECTS

Potential plaintiffs alleging that the NCAA's mascot policy violates antitrust law should easily be able to meet their initial burden of demonstrating the mascot policy's anticompetitive effects. The burden will then shift to the NCAA to demonstrate any procompetitive effects.\(^{167}\) The NCAA, however, would probably

\(^{164}\) NCAA, \textit{supra} note 163.

\(^{165}\) For instance, payments to hosts and sponsors of the Division I men's baseball and basketball tournaments totaled $1,211,396 and $3,129,043, respectively. \textit{Id.} Although Division II and III schools receive less money for hosting a championship event, this does not necessarily mean that these smaller host distributions are any less valuable to these schools, especially given the relatively small operating budgets of colleges and universities in these lower divisions compared to Division I institutions. \textit{Compare} NCAA, \textit{Revenues/Expenses: 2002-03 NCAA Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs Report 13} (Daniel L. Fulks, ed. 2005), available at http://www.ncaa.org (follow “About the NCAA” hyperlink; then follow “Budget & Finances” link; then follow “Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs” hyperlink) (detailing expenses for NCAA Division I programs), \textit{with} NCAA, \textit{Revenues/Expenses: 2002-03 NCAA Revenues and Expenses of Division III Intercollegiate Athletics Programs Report 11} (Daniel L. Fulks, ed. 2005), available at http://www.ncaa.org (follow “About the NCAA” hyperlink; then follow “Budget & Finances” link; then follow “Revenues and Expenses of Divisions III Intercollegiate Athletics Programs” hyperlink) (detailing the expenses for NCAA Division III programs). The total payments to hosts and sponsors for Division III men's championships totaled $132,192, while host institutions of women's championships received $103,731. \textit{Id.}

\(^{166}\) See \textit{id.} (providing data with which to calculate this increase).

\(^{167}\) Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) (discussing the shifting burdens). Should
be unable to meet this burden because the procompetitive effects of sanctioning member institutions utilizing Native American imagery are virtually nonexistent. The primary basis for this conclusion is that the NCAA does not focus its policy on producing any procompetitive effects; rather, the NCAA seems to have implemented this horizontal agreement almost entirely for the purpose of curtailing the use of hostile or abusive mascots among its members.\textsuperscript{168}

One possible procompetitive effect that the NCAA might claim is that discouraging the use of Native American insignia might make the general public, as well as the Native American community, more willing to support college athletics. One of the NCAA's major concerns in adopting this policy was whether or not a particular tribe agreed to have its imagery associated with the NCAA member institution.\textsuperscript{169} The desire to induce Native Americans into becoming consumers of intercollegiate athletics is implicit in this rationale. Such a goal, however, not only has virtually nothing to do with either the quality or the nature of the NCAA's product—athletic competition—but the NCAA's policy fails to achieve even the NCAA's implied objective.\textsuperscript{170} In 2002, eighty-one percent of Native Americans did not believe college or high school teams should discontinue their use of Native American mascots, logos, and names, while eighty-three percent saw nothing wrong with the Native American insignias adopted by professional sports teams.\textsuperscript{171} According to this data, the NCAA's mascot policy would do little to encourage the Native American community to be more receptive toward intercollegiate athletics. Thus, the NCAA's mascot policy is merely an attempt by the NCAA to cater to a small but vocal contingency within the Native American community as well as the growing trend of political
correctness. Since a majority of Native Americans find Native American mascots inoffensive, their interest or lack thereof would remain unaffected by the NCAA pressuring teams with Native American mascots to adopt a different mascot and would be equally as unlikely to have a significant impact on Native American preferences for intercollegiate athletics. As such, any procompetitive effects the NCAA might claim in this respect are virtually nonexistent.

Of course, the NCAA could argue that by catering to activist groups opposed to the use of Native American imagery, the mascot policy preemptively curtails any negative effects that might arise should the general public become sympathetic to the claims of these groups. Concededly, this might be a valid argument. After all, were consumers of intercollegiate athletics to turn against institutions utilizing Native American imagery, enrollment might decline, fewer people would watch those institutions compete, and merchandise sales would suffer. However, by analyzing professional sports one can surmise that opposition from small, albeit vocal, groups of Native Americans is unlikely to have any negative impact on the overall market for college athletics. The Washington Redskins, for instance, a professional football team currently involved in controversial litigation brought with the aim of canceling Washington's "Redskins" trademark, has continued to draw strong attendance at its home games despite its mascot controversy.

Even assuming consumers of intercollegiate athletics are somehow different from professional football consumers and that protests would have a negative impact on their desire to attend and purchase a particular college's merchandise, individual institutions should be free to engage in their own cost-benefit analyses in order to determine whether or not they should adopt a new mascot. If colleges and universities are rational economic actors, the negative financial effects resulting from their native American mascots should be sufficient to create change without the NCAA's interference. If any substantial procompetitive effect was to be achieved by the NCAA's mascot policy, assuming relatively efficient markets and rational actors, colleges and universities that currently employ Native American mascots in a manner that is inoffensive to the majority of Native Americans should be free to continue doing so.

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172 See generally Kevin Flynn, Tomahawk Chop Irks Local Tribes, DAILY NEWS (New York), Oct. 19, 1996, at 4 ("American Indian leaders said they'll be outside Yankee Stadium before Sunday's game to protest the spectacle of feather-bonneted Braves fans engaging in World Series war whoops and tomahawk chops.").


174 See generally Edward Lee, Redskins Make It Worse for Eagles; Pick of McNabb Pass Clinches Win Over Team in Turmoil; Redskins 17 Eagles 10; Gameday, BALT. SUN, Nov. 7, 2005, at 1E ("Many of the 90,298 in attendance—the second-largest crowd in FedEx Field history—stayed until the very end to watch Redskins strong safety Ryan Clark intercept a pass by quarterback Donovan McNabb intended for wide receiver Greg Lewis at Washington's 3-yard line with 25 seconds left in the game.").
American images would have already adopted a new mascot to capture this economic benefit. Since few colleges and universities have done so, it would appear that adopting non-Native American themed mascots carries with it almost no procompetitive effect.\textsuperscript{175} As such, it seems as if the NCAA would almost certainly fail to meet its burden of proving a procompetitive effect resulting from its mascot policy and would consequently be in violation of the Act. The plaintiff would accordingly prevail at this point without having to undertake the final burden of providing a less restrictive alternative that would be able to achieve the same procompetitive effects.\textsuperscript{176}

V. CONCLUSION

The NCAA, in its attempt to rid the world of all hostile and abusive mascots, has violated antitrust law in the process. First, its mascot policy is overtly inconsistent in practice. The NCAA, for example, reaffirmed its decision to sanction such schools as Alcorn State University for using “Braves” as its mascot,\textsuperscript{177} but at the same time has permitted the University of North Carolina-Pembroke to continue its use of “Braves.”\textsuperscript{178} As justification for its disparate treatment of the two schools, the NCAA claims that the term “Braves” is not offensive in the case of UNC-Pembroke merely because UNC-Pembroke was founded as a school for Native Americans and twenty-one percent of its present student body are Native Americans.\textsuperscript{179} This rationale is illogical. The term “Braves,” when used to identify a mascot, is either hostile and abusive or it is not. Granted, context does play a role in determining the connotations of a particular word; however, the average Native American living in Wyoming or South Dakota probably has no idea that twenty-one percent of UNC-Pembroke’s student body is Native American. Claiming that the “Braves” mascot is any less offensive to the Native American community merely because twenty-one percent of the student body is Native American makes little sense. UNC-Pembroke’s use of the “Braves” mark is in exactly the same context as Alcorn State’s use of that very

\textsuperscript{175} See NCAA, supra note 6 (listing the colleges and universities that employ Native American mascots).

\textsuperscript{176} See discussion supra note 108 (discussing when to look for a “less restrictive” alternative).

\textsuperscript{177} See Leilana McKindra, NCAA Committee Reaffirms Support for Mascot Decision, NCAA News Online, Oct. 24, 2005, http://www.ncaa.org/wps/portal (follow “Media & Events” hyperlink; then follow “The NCAA News Online Archive” hyperlink; then follow “2005” hyperlink; then follow “October 24” hyperlink; then follow “NCAA committee reaffirms support for mascot decision” hyperlink) (reaffirming the Executive Committee’s decision to implement the policy).

\textsuperscript{178} See Brown, supra note 160 (differentiating UNC-Pembroke from other member institutions with Native American mascots).

\textsuperscript{179} Id.
same mark. As such, the two schools should be treated in a similar manner. The NCAA, however, fails to understand this logic.

Logical inconsistencies aside, the NCAA’s mascot policy is also clearly violative of antitrust law. In order for free markets to function efficiently, the actors must have some degree of autonomy. This is, of course, the basic premise underlying antitrust legislation.\(^{180}\) If a significant number of market participants deem a mascot to be truly offensive, then the demand for that particular institution’s licensed products will decline, fewer students will choose to enroll, or fewer people will choose to watch (that is, consume) its athletic competitions. The market will thus inflict a much more efficient economic penalty than the NCAA could impose. Because a majority of Native Americans have no problem with colleges and universities using images from their culture, demand as a factor of hostility towards Native American mascots remains largely unaffected and the present market does not call for such a change.\(^{181}\)

Analyzing the NCAA’s mascot policy under a rule-of-reason test reveals numerous anticompetitive effects of this policy. The sanctions imposed by the policy effectively prevent some teams from hosting championship events and receiving the accompanying host distributions.\(^{182}\) The mascot policy also limits the output of championship sites, as well as restricts the value of each offending team’s intellectual property.\(^{183}\) The procompetitive effects, on the other hand, are virtually nonexistent.\(^{184}\) Thus, because the anticompetitive effects far outweigh the procompetitive effects, the NCAA’s mascot policy is illegal and amounts to an impermissible restraint on trade.

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\(^{180}\) See discussion supra Part III.A (discussing the purposes behind the Act).

\(^{181}\) See discussion supra note 171 and accompanying text (noting a majority of the Native American community is not offended by athletic organizations adopting Native American images).

\(^{182}\) See discussion supra Part IV.A (discussing the anticompetitive effects of the NCAA’s mascot policy).

\(^{183}\) See id.

\(^{184}\) See discussion supra Part IV.B (discussing the procompetitive effects of the NCAA’s mascot policy).