UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 83 | Number 2 Article 7

1-1-2005

Slam Dunk: The Case for an NCAA Antitrust Exemption

Adam R. Schaefer

Slam Dunk: The Case for an NCAA Antitrust Exemption

In July 2003, a United States District Court in Ohio ruled that the National Collegiate Athletic Association (NCAA) violated section 1 of the Sherman Act[1] by limiting the number of appearances by its members in "certified" basketball tournaments.[2] In *Worldwide Basketball and Sports Tours, Inc. v. NCAA*,[3] the court held that by restricting member institutions to two certified tournaments every four years, the NCAA's rule had a "substantially adverse effect on competition."[4] As a result, the court issued a permanent injunction, barring the NCAA from ever enforcing the rule.[5]

The decision in *Worldwide Basketball* was the latest in a pattern of federal court rulings that have a stifling effect on the NCAA in fulfilling its mission.[6] The legislation in debate in the Worldwide Basketball case was designed to limit the number of basketball games in a season "out of concern for student welfare, and [to give] lesser-known schools more opportunities to play in desirable tournaments."[7] In previous cases, courts have found the NCAA in violation of antitrust laws in regulating the salary of assistant basketball coaches[8] and the number of television appearances that a university can make during football season.[9]

During the twenty years since the Supreme Court last weighed in on the NCAA and antitrust, college athletics has taken a sharp turn away from its roots. Today, big-time college athletics is considered its own industry.[10] As the financial stake has been increased, institutions

---

1. 15 U.S.C. § 1 (2003), *amended by* Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004).

2. Worldwide Basketball and Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 273 F. Supp. 2d 933, 954–55 (S.D. Ohio 2003).

3. *Id.*

4. *Id.* at 954.

5. *Id.* at 955.

6. The first of the NCAA's self-avowed eight purposes is "[t]o initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit." *The Purposes of the NCAA*, *at* http://www.ncaa.org/about/purposes.html (last visited Sept. 14, 2004) (on file with the North Carolina Law Review).

7. *Worldwide Basketball*, 273 F. Supp. 2d at 936.

8. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1024 (10th Cir. 1998).

9. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

10. *See infra* notes 50–60 and accompanying text.

of higher learning have been increasingly willing to bend the rules or look the other way to increase the bottom line.[11] It is probably asking too much at this point for individual universities to take a stand for academic and institutional integrity—there is simply too much money involved. The NCAA, an association of 1,100 educational institutions that regulates the intercollegiate athletics of its members, is the most obvious candidate to restore integrity to intercollegiate athletics.[12] However, as long as federal antitrust laws apply, the NCAA will be unable to rein in college athletics.

This Recent Development argues that the correct decision was reached in *Worldwide Basketball* under current federal antitrust law, but that policy dictates that Congress should move to grant the NCAA an exemption in order to allow the organization to effectively promote a balance between athletics and academic/institutional integrity.

First, this Recent Development discusses the framework of antitrust law as it relates to the NCAA, highlighting previous case law. A short analysis of the *Worldwide Basketball* case will follow. Next, this Recent Development analyzes the state of college athletics and the NCAA's role in it. Finally, this Recent Development advocates the passage of an antitrust exemption for the NCAA in the interest of intercollegiate athletics.

Antitrust laws have twin goals of preventing collusion between competitors and preventing monopolistic and oligopolistic market structures.[13] The first two sections of the Sherman Act are structured to reflect these twin goals.[14] Section 2 deals with monopolistic market entities.[15] Because the NCAA is an unincorporated association of independent universities, section 2 does not apply.

The first section of the Sherman Act implicates collusive activity between would-be competitors.[16] The literal language of the section implicates "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[17] However, "[b]ecause nearly every contract that binds the parties to an agreed course of conduct 'is a restraint of trade' of some sort, the

11. *See infra* notes 61–80 and accompanying text.
12. *Law*, 134 F.3d at 1012.
13. RAY YASSER, ET AL., SPORTS LAW: CASES AND MATERIALS 181 (5th ed. 2003).
14. *Id.*
15. Sherman Antitrust Act, 15 U.S.C. § 2 (2003), *amended by* Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004).
16. Sherman Antitrust Act, 15 U.S.C. § 1 (2003), *amended by* Pub. L. No. 108-237, § 215, 118 Stat. 661, 668 (2004).
17. *Id.*

Supreme Court has limited the restrictions contained in section 1 to bar only 'unreasonable restraints of trade.' "[18] Courts have held that there are two approaches for a plaintiff to show an "unreasonable restraint of trade": under the per se rule and the rule of reason.[19] Under the per se rule, courts look for conduct that clearly violates concepts of free trade. The Tenth Circuit Court of Appeals has defined it as "practices that 'are entirely void of redeeming competitive rationales.' "[20] In its only NCAA antitrust case, the Supreme Court used a per se rule that applied when " 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' "[21] In a rule of reason analysis, courts use a two-part test to determine whether action violates the Sherman Act. Under rule of reason analysis, first the plaintiff must show that the action has a "substantially adverse effect on competition."[22] If the plaintiff is successful, the defendant then shows any pro-competitive effects that could justify the agreement.[23] The court then determines whether, in light of those two showings, the agreement constitutes an unreasonable restraint on trade.

The NCAA had been involved in two other important section 1 cases in the twenty years before Worldwide Basketball. In *NCAA v. Board of Regents of the University of Oklahoma*,[24] the Supreme Court held that the Sherman Act implicated the NCAA's plan to televise football games with ABC, CBS, and TBS.[25] The agreement limited the total number of NCAA football games to be televised and the number of times that each member institution's games could be televised.[26] The NCAA's proffered reasons for the plan included: to limit adverse effects of live television on game attendance and gate proceeds; to expose a television audience to a variety of member institutions; and to "reflect properly the image of universities as

18. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984)).

19. *Id.*

20. *Id.* (quoting SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)).

21. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 (1984) (quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20 (1979)).

22. Worldwide Basketball and Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 273 F. Supp. 2d 933, 948 (S.D. Ohio 2003).

23. *Id.*

24. 468 U.S. 85 (1984).

25. *Id.* at 92 & n.9, 120.

26. *Id.* at 94.

education institutions," among others.[27] In *Law v. NCAA*,[28] the organization passed a rule limiting certain basketball coaches to a $16,000 annual salary.[29] The NCAA promulgated this rule in light of a report that showed that 42 percent of Division I schools had athletic departments operating in deficits.[30] Further, expenses at Division I schools rose more than 100 percent over a seven-year period, and basketball programs averaged a $145,000 annual loss.[31] At least part of the problem, the NCAA claimed, was the large staff that most programs kept—at the time, schools were allowed to have one full-time head coach, two full-time assistant coaches, and two-part time coaches.[32] In order to combat the shortcoming, the new rule limited schools to three full-time coaches and the $16,000 restricted-earnings coach.[33]

In *Worldwide Basketball*, the issue was certified basketball tournaments. The NCAA, permissibly, sets a limit for its members on the number of basketball games it can play during the regular season.[34] Certified tournaments (or exempt tournaments, under the previous vernacular) count as one game against the limit, regardless of how many games are played in the tournament.[35] For example, a team playing in the Preseason NIT could, potentially, play four games in the tournament. Those games would count on the team's record, but only one game would count against the number of games allowed by NCAA rule. Exempt tournaments were originally held at the beginning of the season and during holidays in Alaska, Hawaii, and Puerto Rico.[36] In 1990, the NCAA adopted a rule allowing a member institution to participate in any one exempt event every four years.[37]

---

27. *Id.* at 91 n.6.
28. 134 F.3d 1010 (10th Cir. 1998).
29. *Id.* at 1014.
30. *Id.* at 1012.
31. *Id.* at 1012–13.
32. *Id.* at 1013.
33. *Id.* at 1013–14.
34. Worldwide Basketball and Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 273 F. Supp. 2d 933, 936 (S.D. Ohio 2003). Currently teams are limited to twenty-eight games in the regular season. *Id.* at 937. Conference tournaments (e.g. Atlantic Coast Conference Tournament or Big Ten Tournament) do not count against that total, nor do games played in the NCAA Tournament at the end of the season. *Id.* at 937 n.2.
35. *Id.* at 937.
36. *Id.* The NCAA later granted exempt status to a number of popular tournaments in the contiguous United States, including the Preseason NIT and the Coaches v. Cancer Classic. *Id.*
37. *Id.* For example, a team could compete in the Great Alaska Shootout once every four years, but in the other three years, could compete in the Maui Classic, the Rainbow Classic, and the Tipoff Classic. *See id.*

At the time the rule was adopted, there were a small number of exempt tournaments, so promoters had their pick from several high-profile basketball programs every year.[38] The number of events grew much larger during the 1990s.[39]

In 1999, the NCAA Board of Directors passed a rule limiting teams to two exempt tournaments in any four-year period.[40] The differences between the two rules were stark. Under the first, every Division I team could play in an exempt tournament every year, so long as it did not appear in the same tournament twice within four years. Under the new rule, teams were only allowed to play in an exempt tournament, essentially, every other year. Not only did the rule prevent teams from being able to play every year, it suddenly limited the available pool to tournament promoters. And the marketplace bore this out as the number of exempt tournaments went from twenty-six the year after the passage of the rule to seventeen just three years later.[41]

The court performed a rule of reason analysis on the NCAA legislation.[42] The court held that the NCAA rule resulted in a decline in the number of tournaments and games available to fans and that the decline constituted an adverse effect.[43] The court then looked for any pro-competitive virtues of the rule, but did not accept any of the NCAA's justifications.[44] Finally, the court held that the rule had a substantially adverse effect on competition and was in violation of section 1 of the Sherman Act.[45]

In his dissent in *NCAA v. Board of Regents of the University of Oklahoma*,[46] Justice White warned of the danger of not allowing the NCAA to tightly regulate intercollegiate athletics.[47] The NCAA

---

38. *See id.*

39. *Id.* at 938. During the 1996–97 season, there were sixteen exempt events. By the 1999–2000 season, there were twenty-six. *Id.*

40. *Id.*

41. *Id.* at 938.

42. *Id.* at 948.

43. *Id.* at 952.

44. *Id.* at 953–54.

45. *Id.* at 954–55.

46. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

47. *Id.* at 135–36 (White, J., dissenting). White felt that the fact that the NCAA is a non-profit body designed to uphold the integrity and amateurism of intercollegiate athletics was not given enough credence by the majority. *Id.* at 133–34. White perhaps had more insight into the realm of college athletics than his colleagues on the bench. In college, he was a football star at the University of Colorado, where he earned All-American honors and the nickname "Whizzer." He later played for Pittsburgh and Detroit in the National Football League and led the league in rushing in 1938. Joan

television agreement in question in *Board of Regents*, White wrote, "may well encourage students to choose their schools, at least in part, on the basis of education quality by reducing the perceived economic element of the choice."[48] Justice White seemed to know in 1984 that without broad NCAA oversight powers, college athletics was in danger of becoming over-commercialized.

Indeed, in the twenty years since the Supreme Court decided the *Board of Regents* case, college athletics has taken a sharp turn toward the paradigm that concerned Justice White. Today, big-time college athletics is considered its own industry for good reason. At the end of the 2003–04 college football season, the eight teams that took part in the Bowl Championship Series (BCS) were awarded $12 million each for their participation.[49] The total payout to the fifty-six teams taking part in twenty-eight 2003–04 bowls was $164 million.[50] And it is not just institutions that are "making money." During the 2003–04 season, the University of Oklahoma's head football coach, Bob Stoops, made more than $2.2 million.[51] Louisiana State University's head coach, Nick Saban, had a provision in his contract that he was to be the highest paid head coach, should LSU win the national championship, which it did.[52]

Of course, big money is not limited to collegiate football. In 1999, the NCAA signed an eleven-year deal with CBS worth $6 billion to televise the NCAA Men's Basketball Tournament.[53] Signs of commercialism are everywhere in college athletics. North Carolina State University plays its home basketball games in the RBC Center, named for a Canadian bank.[54] The University of Louisville's football team calls Papa John's Cardinal Stadium home.[55] Bowl game names

---

Biskupic, *Ex-Supreme Court Justice Byron White dies*, USA TODAY, Apr. 15, 2002, *available at* http://www.usatoday.com/news/nation/2002/04/15/white-obit.htm (on file with the North Carolina Law Review).

48. *Board of Regents*, 468 U.S. at 136.

49. Ted Miller, *College Football: Scintillating bowl games a reason for holiday cheer*, SEATTLE POST-INTELLIGENCER, Dec. 12, 2003, *at* http://seattlepi.nwsource.com/cfootball/152181_bowl12.html (on file with the North Carolina Law Review).

50. *Id.*

51. *Id.*

52. *Id.*

53. *CBS renews NCAA B'ball*, Nov. 18, 1999, *at* http://money.cnn.com/1999/11/18/news/ncaa/ (on file with the North Carolina Law Review).

54. Sougata Mukherjee, *RBC Courted; arena name filed: Deal Calls for ESA to be 'RBC Center,'* TRIANGLE BUSINESS JOURNAL, Aug. 23, 2002, at 1.

55. The University of Louisville boasts that all of the 42,000 seats in "PJCS" are "of the chairback variety. No other university-owned and operated stadium in the nation can make that claim," lest it be said that selling out does not have its advantages. *Papa John's Cardinal Stadium*, *at* http://uoflsports.ocsn.com/trads/lou-papajohn.html (last visited Sept.

are also a popular target for anti-commercialism rants.[56] A generation ago, college bowl games were named for fruit, commodities or patriotic themes, such as the Peach Bowl, the Cotton Bowl, and the All-American Bowl.[57] Today, some have simply been modified—the Peach Bowl is now the Chick-Fil-A Peach Bowl and the Music City Bowl is now the Gaylord Hotels Music City Bowl.[58] Others have completely dropped any pretense of anything but commercialism—witness today's Capital One Bowl and Continental Tire Bowl.[59]

As the financial stakes have increased, many of the nation's institutions of higher learning have collectively pinched their noses, closed their eyes, and held out their empty palms. Some schools have gained reputations as those who push the envelope with admissions, graduation, and eligibility standards. The University of Cincinnati, for example, has often been criticized as a program that does things the "wrong way."[60] For several years, the basketball program under coach Bob Huggins did not graduate any of its players under NCAA measuring standards.[61] In 2000, The University of Minnesota's men's basketball program was implicated in a scandal in which a former tutor claimed to have written more than 400 assignments for men's basketball players over a six-year period.[62] At least one former Minnesota player claimed that the head coach, Clem Haskins, gave him money.[63] Haskins later admitted to funneling money to the academic tutor, to pay her for the assignments she was completing for

---

11, 2004) (on file with the North Carolina Law Review).

56. *See, e.g., Reactions: New Bowl Games*, *at* http://sportsillustrated.cnn.com/your_turn/news/2000/12/06/reactions_bowlnames/ (Dec. 6, 2000) (asking that consumers brainstorm possible names for their ideal bowls) (on file with the North Carolina Law Review).

57. *See 1980 Bowl Schedule*, *at* http://www.2cuz.com/bowls/bowl80.htm (last visited Sept. 11, 2004) (on file with the North Carolina Law Review).

58. *See 2004–05 Bowl Schedule*, *at* http://www.collegefootballnews.com/2004/Bowls/Bowl-Projections.htm (last visited Dec. 3, 2004) (on file with the North Carolina Law Review).

59. *Id.*

60. *See, e.g.*, Derek Schultz, *What A Great Week*, WIUS SPORTS (June 14, 2004) (asserting that "Bob Huggins is a *classless* person that has run a *classless* program with *classless* players for years."), *available at* http://www.wius.org/sports/schultzarchive.htm (on file with the North Carolina Law Review).

61. *See* Jason Williams, *Prospect switches to OSU*, THE CINCINNATI POST, Aug. 12, 2003, *available at* http://www.cincypost.com/2003/08/12/uchoop08-12-2003.html (on file with the North Carolina Law Review).

62. *See Cheating Scandal Timeline*, MINNESOTA PUBLIC RADIO, *at* http://news.minnesota.publicradio.org/features/199903/11_newsroom_cheating/timeline.shtml (last visited Sept. 11, 2004) (on file with the North Carolina Law Review).

63. *Id.*

athletes.[64] Additional investigations showed that the university had a habit of intervening and showing favoritism when its athletes were accused of assault or sexual misconduct.[65] Many other prominent schools have been found to have committed "major" violations of NCAA rules, including St. Bonaventure, San Diego State University, Rutgers, and the Universities of Michigan, Hawaii, Maryland, Utah, Washington, Arkansas, Miami, California-Berkeley, Kentucky, Texas, Colorado, and Alabama—all in the last two years.[66]

Other programs are able to avoid detection and the resulting poor reputation for a number of years before trouble surfaces. After a former Baylor University basketball player killed his teammate in July 2003, the head coach encouraged the deceased player's teammates to denigrate his character in order to cover-up NCAA violations.[67] The University of Georgia had been found guilty of major NCAA violations five times since 1978 before hiring Jim Harrick as head basketball coach.[68] Before taking the job at Georgia, Harrick had been fired as coach at the University of California at Los Angeles (UCLA) for falsifying an expense report.[69] Harrick next coached at the University of Rhode Island, where he quickly gained a reputation for taking academically troubled players, was sued for sexual harassment by a secretary, and was accused of NCAA violations.[70] In March 2003, allegations of paying recruits, academic fraud, and improper benefits were made against Harrick and his son, Jim Harrick, Jr.[71] Subsequently, Harrick Jr. was fired by the university, and Harrick Sr. resigned under pressure.[72]

The University of Georgia provides a textbook illustration of the struggle for athletic superiority and academic integrity. Its undergraduate program was ranked fifty-eighth among national

64. *Id.*

65. *Id.*

66. *See* NCAA, "Infractions Releases," *at* http://www.ncaa.org/releases/makemenu.cgi?infractions (last visited Sept. 11, 2004) (on file with the North Carolina Law Review).

67. *'It was definitely wrong': Bliss reportedly wanted to make Dennehy out to be a dealer*, THE ASSOCIATED PRESS, Aug. 17, 2003, *available at* http://sportsillustrated.cnn.com/basketball/college/news/2003/08/15/bliss_reports_ap/ (on file with the North Carolina Law Review).

68. Dan Wetzel, *Harrick, Georgia, SEC have checkered past*, (Mar. 10, 2003), *available at* http://cbs.sportsline.com/collegebasketball/story/6243000 (on file with the North Carolina Law Review).

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Mark Schlabach, *Scandal Drives UGA's Harrick to Quit*, THE ATLANTA JOURNAL-CONSTITUTION, Mar. 28, 2003, at A1.

universities by U.S. News & World Report in 2004.[73] The same report places it among the top twenty-five public universities in the country.[74] Its law school was ranked thirty-first nationally in 2004.[75] Certainly it has a reputation as one of the nation's top public institutions. On the other hand, its athletics program has gained a reputation as a haven for cheating and questionable ethics, albeit a successful one. Vince Dooley was the head football coach when the Bulldogs won the 1980 National Championship.[76] Dooley won six conference titles and more than 200 games in his twenty-five years as head coach.[77] He was also head coach during three major violations of NCAA rules by the football program.[78] Instead of firing Dooley, the school promoted him to athletic director.[79] Thus, while Harrick was basketball coach at Georgia, the school had a coach who had been fired for falsifying an expense account and accused of sexual harassment and NCAA violations being supervised by an Athletic Director who himself was guilty of three of major NCAA violations while a football coach.

The reputations of an institution and its athletic program would not be such a cause for concern if the images of the two were not so strongly tied together. For years, the public image of Indiana University was Bobby Knight—whether throwing a chair, making offhand comments about rape on television, or apparently choking one of his players on videotape. Conversely, after tiny Valparaiso University made the Sweet Sixteen of the NCAA Tournament, freshman enrollment the following year reached a ten-year high.[80] As Gonzaga went from unknown to fan favorite during its recent NCAA Tournament success, its applications for admission increased seventy-

73. U.S. NEWS & WORLD REPORT, AMERICA'S BEST COLLEGES 84 (2004 ed.).

74. *Id.* at 87 (ranking the University of Georgia 20th among public universities).

75. U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 22 (2005 ed.), *available at* http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.ph (on file with the North Carolina Law Review).

76. Wetzel, *supra* note 68.

77. *Football Through The Years 1964–88*, *at* http://georgiadogs.ocsn.com/football/history/coaches/dooley_vince.shtml (last visited Sept. 7, 2004) [hereinafter *Football 1964–88*] (providing chronology of Dooley's career at UGA and a biography) (on file with the North Carolina Law Review).

78. Wetzel, *supra* note 68 (enumerating occurrence of violations in 1978, 1982, and 1985).

79. *Football 1964–88*, *supra* note 77 (chronicling Dooley's 1979 promotion to athletic director).

80. *First-Year Enrollment at 10-Year High*, VALPARAISO UNIVERSITY ALUMNI AFFAIRS (Winter/Spring 1999) (suggesting that NCAA coverage was a "plus" in boosting application rates), *available at* http://www.valpo.edu/oia/valpo_w99/p4a.html (on file with the North Carolina Law Review).

two percent.[81]

Many universities struggle to walk the line between providing encouragement to athletic success and the overemphasis of athletics. The University of North Carolina at Chapel Hill recently engaged in very public hand-wringing over the issue of in-arena advertising.[82] Ultimately, the school decided to allow the corporate presence in the basketball and football venues in order to make up for skyrocketing tuition costs.[83] In 2003, Gordon Gee, the Chancellor of Vanderbilt University, announced that he was reorganizing the athletics department at that school, to make it more a part of the rest of the university, saying, "it's a return to the first principles of why we started playing games at universities in the first place—for a confluence of mind and body and spirit."[84] And current NCAA President Myles Brand, probably best known as the man who fired Knight at Indiana, has spoken for years about the "risk of becoming captives of commercialism and the entertainment culture."[85] All this is to say that college and athletics administrators are realizing that there needs to be greater oversight—the integrity of their institutions depends on it.

If one accepts the premise that the dual images of a university and its athletic department are strongly interrelated, the question for institutions is how to preserve academic integrity. Expecting individual universities to scale back their athletics programs is probably asking too much—the public outcry (and more importantly, the outcry from the big donors) would be too much for most schools to stomach.[86] The NCAA is perfectly situated to serve this purpose.

---

81. Brody Greenwald, *'Flutie factor' still up for debate*, THE CHRONICLE (Duke University), Mar. 21, 2001, (stating that many schools attribute sports publicity for an increase in applications), *available at* http://www.uwire.com/content/topsports032101001.html (on file with the North Carolina Law Review).

82. *See* Aaron Beard, *Tightening budget leads North Carolina to look at arena advertising*, July 23, 2004, *available at* http://www.charlotte.com/mld/charlotte/sports/colleges/9228272.htm (on file with the North Carolina Law Review).

83. *See* Dennis Rogers, *UNC outprices itself*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 7, 2004, at B1.

84. *See* Michael Cass, *Vanderbilt Scraps, Restructures Athletics Department*, THE TENNESSEEAN, Sept. 9, 2003, at 1A.

85. Myles Brand, *Presidents have cause, means to reduce arms*, THE NCAA NEWS, Feb. 12, 2001, at 4.

86. The Vanderbilt reorganization went fairly smoothly, but its most prominent athletics programs had been non-competitive for many years, and the chancellor made it clear that he was not scaling back the program: "Let there be no misunderstanding of our intention: Vanderbilt is committed to competing at the highest levels in the Southeastern Conference and the NCAA...." Amber McDowell, *Vanderbilt Eliminates Athletic*

The NCAA "is a voluntary unincorporated association of approximately 1,100 educational institutions."[87] Since its inception in 1905, the organization has been the driving force behind the successes and changes in intercollegiate athletics. The NCAA has set up rules of the games, standards relating to amateurism, academic eligibility and recruitment, and conducted championship tournaments for most sports.[88] The success and popularity of intercollegiate athletics is due, in large part, to the organization's involvement. Today, the organization and its members face a growing challenge—how to maintain successful athletics programs without compromising institutional integrity. The organization is in the best position to handle the problem from a historical and practical perspective. However, it seems that under the existing paradigm of antitrust laws and applicability to NCAA actions, the organization will not be able to effectively confront this challenge.

The NCAA has three divisions of members. The Division I level is where most schools that are known for their athletics programs compete. The Division I Manual, which contains the rules, called bylaws, for member institutions is currently 504 pages long.[89] Rules infractions are designated "secondary" violations or "major" violations.[90] Secondary violations are low-level infractions that can often be dealt with internally.[91] Major violations usually indicate a lack of institutional control and result in an official NCAA investigation.[92] The investigators then present evidence to the enforcement staff, which makes findings and metes punishment.[93] An

Department in Major Restructuring, THE CINCINNATI ENQUIRER, Sept. 9, 2003, *available at* http://www.freerepublic.com/focus/f-news/979272/posts (on file with the North Carolina Law Review).

87. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1012 (10th Cir. 1998).

88. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984).

89. *2004–05 NCAA Division I Manual* (2004), *available at* http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (on file with the North Carolina Law Review).

90. *Id.* at 451.

91. *Self-Reporting Secondary Violations*, *at* http://www1.ncaa.org/membership/enforcement/secondary_violations/index (last visited Sept. 7, 2004) (explaining the reporting process for Level I and Level II violations) (on file with the North Carolina Law Review). In fact, some secondary violations have been deemed so minor that they only need to be presented to the NCAA enforcement staff as an annual report. *Id.*

92. *See generally Frequently Asked Questions about the NCAA Enforcement Process*, *at* http://www.ncaa.org/enforcement/faq_enforcement.html (last visited Sept. 12, 2004) (answering common questions about NCAA's enforcement of major and minor violations) (on file with the North Carolina Law Review).

93. *Id.*

institution found guilty of violations can appeal the punishment.[94] Punishments can range from virtually nothing (a promise not to do it again or re-education about the rules) to the so-called "death penalty."[95] While the rules are numerous and strict and penalties harsh, it is important to realize that the NCAA is an entirely voluntary organization and that other athletic associations exist, most notable of which is the National Association for Intercollegiate Athletics.[96]

Under the Sherman Act, any action taken by the NCAA that restricts competition is in danger of being struck down on antitrust grounds, regardless of the motivation behind the action. For example, many college basketball games have 9 p.m. tip-offs in order to accommodate television broadcasts. This is bad enough for the home team—if everything goes smoothly, the student-athlete may be back in his dorm room or apartment around midnight. For the road team, it can be extremely counter-productive to academic pursuits. If the game ends at 11 p.m., the best a player can hope for is that the airplane will leave at midnight. An hour or two flight home, a bus ride back to the arena, and a car ride home mean that the players are not even returning home until sometime in the middle of the night—to say nothing of study opportunities. Imagine the student-athlete trying to make a class in the morning (scheduled for 8 a.m. so as not to conflict with basketball practice in the afternoon). If the NCAA wished to address this from an academic concern, it is conceivable to imagine a rule that no basketball game can start later than 7:30 p.m. on a weeknight. Unfortunately, there is no sort of "rational basis" review in an antitrust analysis; the only "defense" that the NCAA could offer would be one based on pro-competitive virtues.[97] It would be difficult to come up with pro-competitive virtues for an action that limits the time when the market could be accessed. This type of

94. *Id.*

95. *Id.* (explaining the range of punishments). The "death penalty," where the NCAA temporarily shuts down a sport at a university, has only been meted once—in 1987 to the Southern Methodist University football program. Tom Farrey, *NCAA's once-rabid watchdog loses its bite*, *at* http://espn.go.com/ncf/s/2001/1126/1284940.html (Nov. 28, 2001) (on file with the North Carolina Law Review). Many commentators, such as Farrey, believe that it appears the NCAA has backed away from using the death penalty, citing the academic scandal at Minnesota as the sort of institutional lapse that might have brought the punishment a decade earlier. *Id.*

96. *See generally* http://www.naia.org/campaign/history/history/html (last visited Sept. 7, 2004) (explaining the history and mission of the NAIA) (on file with the North Carolina Law Review).

97. Worldwide Basketball and Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 273 F. Supp. 2d 933, 948 (S.D. Ohio 2003).

legislation is exactly the type that the NCAA needs to have the ability to promulgate.

If the NCAA were concerned about commercialism invading college sports—a legitimate interest, for sure—it could write legislation designed to limit corporate sponsors from advertising on college campuses. Again, this would surely be seen as an unlawful restraint of trade with no pro-competitive virtues to turn the tide in favor of the NCAA. Another area of concern is spending.[98] It makes sense that the NCAA could impose spending caps on schools in order (1) to ensure an even playing field and (2) to allow athletic departments a chance to turn operating deficits into balanced budgets. But under the rationale expressed in *Law*,[99] where the NCAA tried to limit one type of spending on one type of coach, it would still violate antitrust laws, despite the pro-competitive aspects.

This Recent Development does not argue that existing antitrust laws in section 1 of the Sherman Act were applied incorrectly. The argument is that public interest and common sense require an antitrust exemption for the NCAA to effectively regulate collegiate athletics.[100] There seems to be some support from the Supreme Court for the spirit of this argument, if not the letter. In *Board of Regents*, the Supreme Court recognized that:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."[101]

---

98. The Knight Foundation Commission on Intercollegiate Athletics, a group set up to study the state of athletics on college campuses today, calls it the "Arms Race," where schools feel that in order to be competitive, they need to spend and build more than their competitors. THE KNIGHT FOUNDATION, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 16–18 (2001), *available at* www.knightfdn.org/LC/LC/LCpublications/kcia_2001/KCfinal_6-2001.pdf (on file with the North Carolina Law Review). The report lists three major areas of concern: Academics, the Arms Race, and Commercialism. *Id.*

99. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998).

100. The idea of Congress moving to provide an antitrust exemption is not without precedent. The Statutory Labor Exemption makes many organized labor activities exempt from federal antitrust. *See* Act of October 15, 1914, ch. 323, 38 Stat. 731 (codified as amended at 15 U.S.C. § 17 (2004)). The McCarran-Ferguson Act exempts the "business of insurance" from federal antitrust laws. *See* McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. § 1011 (2000)).

101. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

The Court is right. The NCAA needs ample latitude in order to fulfill its critical role. Under existing antitrust law, that latitude does not currently exist and the NCAA is ineffectual in dealing with these serious issues. The responsibility here now lies with Congress, which needs to grant the NCAA a special antitrust exemption to allow it to effectively serve its members.

ADAM R. SCHAEFER