FROM REGULATING ORGANIZATION TO MULTI-BILLION DOLLAR BUSINESS: THE NCAA IS COMMERCIALIZING THE AMATEUR COMPETITION IT HAS TAKEN ALMOST A CENTURY TO CREATE

I. INTRODUCTION

The purpose of the National Collegiate Athletic Association (hereinafter "NCAA") is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[1] Over the years, this line of demarcation has faded as the NCAA has allowed its sports to enter the commercial marketplace. The focus of the NCAA is no longer on education and amateurism, as the NCAA professes, but is rather on making the most money out of the product that the original focus on amateurism created. The NCAA currently has very few rules in its bylaws to limit commercial influences on its member institutions. This has resulted in an uncertainty as to whether the NCAA can maintain a focus on education and amateurism while, at the same time, fulfilling the obligations of commercial sponsors. This comment argues that, in order to maintain its goals of amateurism and education, the NCAA needs to curb the commercial influences placed within its fields of athletic competition and restrict its own commercial activity by placing limits on itself.

1. NCAA CONST., art. 1, § 3.1.

Part II of this comment gives a summary of how and why the NCAA came into existence. Part III discusses how the original goals and purposes of the NCAA have changed over time and what the present NCAA sees as its objectives. Part IV gives an overview of the few NCAA rules that regulate commercial influences in sports and some critiques of these rules. Part V explains how the NCAA has had to defend its regulations over time specifically in relation to the Sherman Antitrust Act. Part VI explains how the increased commercialization of the NCAA has been both criticized and lauded and how the commercial influences may change the future of the NCAA.

II. FORMATION OF THE NCAA

Without an understanding of the history of the NCAA, it is hard to recognize how the NCAA has grown into an organization that is world-renowned and competes in a marketplace with professional sports leagues.

The NCAA was originally formed in order to reduce the violence in college football.[2] In 1905 alone, there were 18 deaths and 149 serious injuries in the sport of football.[3] Some schools were canceling the sport of football and others threatened to end their programs if the violence did not stop.[4] President Theodore Roosevelt, an ardent football fan, invited representatives from several colleges to the White House to discuss the problems and to come up with an immediate solution.[5] In late 1905, several schools met to come up with a plan to regulate the game of football.[6] A few weeks later, the first form of the NCAA was founded.[7] It was called the Intercollegiate Athletic Association of the United States.[8] The NCAA took its current name in 1910.[9]

When the founders discussed the role of the NCAA, they were particularly concerned with the violence in football, but they intended for

2. *See* Kay Hawes, *The NCAA Century Series – Part I: 1900-39*, NCAA NEWS, Nov. 8, 1999, *available at* http://www.ncaa.org.

3. *Id.*

4. *Id.*

5. Mark Clayton, *Welcome to College, Mr. Jones!*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2001, at 11.

6. *History of the NCAA: It Was the Flying Wedge, Football's Major Offense in 1905, That Spurred the Formation of the NCAA*, NCAA ONLINE, *at* www.ncaa.org/about/history.html (last visited Apr. 30, 2003).

7. *Id.*

8. *Id.*

9. *Id.*

the organization to set national standards for all sports.[10] The founders planned for the organization to promote education as the highest goal, in conjunction with regulating sports.[11] Consequently, the NCAA provided a means for colleges around the country to discuss current issues and to create a uniform set of rules to govern all intercollegiate athletics.

Although the original purpose of the NCAA was to protect the health and safety of its athletes, the focus quickly turned to the amateurism and education of student-athletes. In the NCAA Constitution, the founders clearly wanted athletics to be only a part of the educational experience of student-athletes.[12] In addition, the founders wanted a clear distinction between NCAA athletics and professional athletics.[13] In order to accomplish these goals, the association passed rules that would require student-athletes to go to class and would punish those who accepted money for their athletic participation.[14] The organization believed that

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10. Hawes, *supra* note 2. Hence, the founders omitted the word "football" from the organization's title. *Id.*

11. *Id.*

12. Nat'l Collegiate Athletic Ass'n, 2002-03 NCAA DIVISION I MANUAL art. 1, at 1 (2002) (hereinafter NCAA Bylaws) The Constitution's purposes as set out in Article 1.2 of this bylaw are in pertinent part:

> To 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; . . .
>
> To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism . . .

Id.

Article 1.3.1 also states:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

Id.

13. NCAA Bylaws, *supra* note 12, art. 1.3.1, at 1:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

Id.

See NCAA v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992); Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990). *See also*, NCAA Bylaws, *supra* note 12, art. 2.9, at 5, which states, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.*

14. NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85, 102 (1984).

rules such as these would sustain the amateur status of university athletic participants. It was the original intent of the association to foster an environment in which amateur athletics could flourish in the absence of commercial influences.[15]

III. THE CURRENT NCAA MISSION

The NCAA still maintains its goals of amateurism and education, but the NCAA has become a very large establishment that must deal with several influences and factors other than the health, safety, and education of its student-athletes.

Today, the NCAA has grown into a nationwide organization of approximately 1,100 colleges, universities, conferences and other educational institutions.[16] About half of the NCAA's organizations are public schools and half are private schools.[17] The NCAA remains both voluntary and unincorporated.[18] The main function of the NCAA remains as a rule-making body, as originally intended.[19] The NCAA governs all aspects of intercollegiate athletics, including recruiting, eligibility, and academic standards. In addition, the NCAA plans, supervises, and helps coordinate regular season competition for all its sports as well as sponsoring its athletics' post-season competitions and championships.[20]

The NCAA is celebrated for helping to provide higher education to many athletes who otherwise would not have had a chance to go to college.[21] In addition, the NCAA has helped foster pride in our nation's colleges and universities through the athletic competitions it supports. The NCAA has provided a forum for thousands of young athletes to benefit from the discipline, teamwork, and hard work required to compete in a sport while attending an institution of higher education. Cedric Dempsey,

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15. Cedric Dempsey, *The Will to Act Project: Amateurism Re-Examination*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org. This essay is one in a series of essays Cedric Dempsey wrote before ending his term as the NCAA president.
NCAA CONST. art. 2, § 9 states, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." *Id.*

16. Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097, 1099 (D. Kan. 1999).

17. Colorado Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 889 (D. Colo. 1976).

18. This is an important fact because *R.M. Smith v. NCAA*, 266 F.3d 152, 159 (3d Cir. 2001) has ruled that since the NCAA is a voluntary organization it cannot be sued as a state actor.

19. *History of the NCAA*, *supra* note 6; *R.M. Smith*, 266 F.3d at 154.

20. Trustees of the California State Univ. and Colleges v. NCAA, 147 Cal. Rptr. 187, 189 (Cal. Ct. App. 1978).

21. Cedric Dempsey, *The Will to Act Project: College Football and Ma Bell*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org.

the former president of the NCAA, wrote that the NCAA is successful still today because it allows its members to "accomplish as an organization what no individual member could do acting alone, a 'greater good' that serves student-athletes in their test of mind and body."[22]

IV. NCAA RULES LIMITING COMMERCIALISM

Having attained great power and influence over its member institutions and intercollegiate athletics in general, the NCAA has developed several rules that attempt to control commercial influences allowed to enter the playing fields, gyms, and arenas in which NCAA athletes compete.

Over the years, the NCAA has developed rules and regulations in order to maintain a uniform code for all participating organizations to follow. The NCAA proposes, passes, and enforces these rules so that the amateur nature of intercollegiate athletics is preserved and the focus remains on higher education. By joining, every member of the NCAA agrees to abide by its rules and suffer any consequences of a breach of those rules.[23] Member organizations are contractually bound by the terms in the NCAA Constitution; they must honor these terms absent a legal duty that is superior to the contractual obligation.[24] In return for adhering to the NCAA's strict rules governing eligibility, recruiting, admissions, and financial aid, member institutions are allowed to participate in NCAA-sanctioned regular season competitions and post-season championships.

The NCAA has argued that it can only achieve its goals of scholarship, good sportsmanship, and amateurism through the implementation of these national rules.[25] For example, Bylaw 12.5.4[26] of the NCAA bylaws regulates when, where, and how manufacturers can place logos on student-athletes' equipment and apparel. The rule currently limits all apparel and

22. Cedric Dempsey, *The Will to Act Project: The Will of the Membership*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org. He compares this test of mind and body to the concept the Greeks espoused hundreds of years ago. *Id.*

23. Regents of the Univ. of Minnesota v. NCAA, 560 F.2d 352, 355 (8th Cir. 1977) (referring to part of the NCAA constitution that reads in pertinent part: "Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation." NCAA CONST. art.1, § 3.2.

24. *Regents of Minnesota*, 560 F.2d at 365. *See also* NCAA v. R.M. Smith, 525 U.S. 459 (1999).

25. NCAA v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992).

26. This rule originally stated that a student-athlete could wear any manufacturer logo that is also available to the general public. However, in 1983 Patrick Ewing wore a shirt under his jersey that had two large Nike signs on either sleeve. The next year the NCAA Manual began limiting the size and number of manufacturer logos allowed. The Patrick Ewing incident is the only incident in which anyone has challenged this logo rule. Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275, 1277-80 (D. Kan. 1999).

uniform logos to a 2-¼ square inch area.[27] Conversely, the NCAA itself does not have to limit the size and use of its logo. Adidas[28] challenged this rule, but failed to show how it unnecessarily restrained Adidas' business.[29]

The NCAA has other rules governing sponsorship and endorsement of intercollegiate athletics that have not yet been challenged in a court of law. For instance, a corporate sponsor can put its logo on promotional items as long as the item is not itself a reproduction or does not include a reproduction of the product with which the corporate sponsor is associated.[30] In addition, a student-athlete's name or picture may appear on promotional items that also include a company's trademark as long as the trademark is that of the company that manufactured the item, and that company is not a co-sponsor of the event.[31] Sponsorship of events or promotional items is also limited to promotion of a whole team and cannot be utilized for the promotion of an individual athlete.[32] These are just a few examples of the NCAA rules governing the involvement of commercial entities in the promotion of NCAA teams, athletes, and events.

Of particular interest are a few rules that specifically govern title sponsors and professional sports teams. First, NCAA Bylaw 12.6 regulates donations from outside organizations.[33] However, the only

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27. NCAA Bylaws, *supra* note 12, art. 12.5.4(b), at 82. Adidas's trademark three stripes generally line its apparel down the side of the body. Adidas claims it cannot accomplish this same affect with a few square inches. *Adidas*, 40 F. Supp. 2d at 1280.

28. The brand name "adidas" begins with a lower case "a," but for ease of reading prose this paper will use an upper case "A."

29. Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999) (granting of summary judgment because Adidas did not identify a relevant market for Sherman Antitrust claims and the NCAA is an unincorporated association and not a legal entity capable of being sued under state law claims).

30. NCAA Bylaws, *supra* note 12, art. 12.5.1.10.1, at 80:

> Sale and Distribution of Promotional Items:
> Promotional items (e.g., posters, postcards, film, videotapes) bearing the name or picture of a student-athlete and related to these events may be sold or distributed by the national or international sports governing body sponsoring these events or its designated third-party distributors. It is not permissible for such organizations to sell player/trading cards that bear a student-athlete's name or picture, except as noted in Bylaw 12.5.1.1.3.1. Promotional items may include a corporate sponsor's trademark or logo but not a reproduction of the product with which the business is associated. The name or picture of the student-athlete may not be utilized by the distribution company or retail store on any advertisement to promote the sale or distribution of the commercial item.

Id.

31. *Legislative Assistance—Nonprinted Promotional Items*, NCAA NEWS, Feb. 18, 2002, *available at* http://www.ncaa.org. The rule is limited to nonprinted promotional items such as t-shirts, cups and bobble head dolls. *Id.*

32. NCAA Bylaws, *supra* note 12, art. 12.5.1.10.1.1, at 81.

33. *Id.*, art. 12.6.1.5, at 83:

organizations regulated by this bylaw are professional and nonprofessional sports organizations. Interestingly, this bylaw is limited to sports organizations because it allows all other individuals and organizations to donate to specific programs. Professional sports organizations cannot give money directly to specific collegiate competitions,[34] although they can give money to an institution for general use for all students at that institution.[35] The bylaws also mandate that nonprofessional sports organizations give an equal amount to all participants in an athletic event instead of basing any donation on the accomplishments of individual student-athletes or accomplishments of the schools in general.[36] This permits all other organizations to donate to a specific sport or event without being limited to donating to the school at large or donating to all schools participating in a particular event.

In addition, NCAA Bylaw 12.5.4.4 allows a corporate sponsor to include its name on a racing bib or uniform as long as it is the sole title sponsor for the event.[37] This should be of interest to commercial sponsors because it permits companies who are not the manufacturers of athletic apparel or equipment to get name recognition for their products through sports sponsorship.

As an example of the increased commercialism of intercollegiate sports, in 1996 Alltel, a technology and telecommunications company, bought the naming rights to a football stadium which hosts the University of Florida and University of Georgia football teams along with the Jacksonville Jaguars.[38] In addition, Alltel sponsored all the athletic teams

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To Institution, Nonpermissible:

A member institution shall not accept funds from a professional sports organization if:

(a) The funds are for the purpose of recognizing the development of a former student-athlete in a particular sport. The receipt of such funds by an institution would make additional moneys available that could benefit student-athletes and thus result in student-athletes indirectly receiving funds from a professional sports organization;

(b) The money, even though not earmarked by the donor, is received and credited to institutional funds for the financial assistance of student-athletes generally; or

(c) The money is placed in the institution's general fund and credited to the athletics department for an unspecified purpose.

Id.

34. *Id.*, art. 12.6.1.2, at 82.

35. NCAA Bylaws, *supra* note 12, art. 12.6.1.4, at 83.

36. *Id.*, art. 12.6.2, at 83.

37. *Id.*, art. 12.5.4.4, at 82: "Title-Sponsor Recognition—Racing bibs and similar competition identification materials (e.g., bowl-game patches) worn by participants may include the name of the corporate sponsor of the competition, provided the involved commercial company is the sole title sponsor of the competition." *Id.*

38. http://www.jaxevents.com/internal/alltel.html (last visited Apr. 25, 2003) (the cite describes the facility: "[h]ome of the NFL Jacksonville Jaguars, this 76,000 seat facility also hosts the annual NCAA University of Florida vs. University of Georgia and Gator Bowl football games").

at the University of Florida.[39] Alltel agreed to provide cellular service to Florida's coaches in return for the connection with one of the country's most successful athletic programs. A spokesman for Alltel explained that the sponsorships were to boost the company's name recognition: "Nobody knew our name and now everybody knows the name Alltel."[40] Another example is Ohio State's Value City Arena at the Jerome Schottenstein Center. In 1995, the family of Jerome Schottenstein, "late Columbus businessman, philanthropist and founder of Schottenstein Stores," bought the naming rights for $12.5 million.[41]

Defenders of the movement toward commercialization point out that universities have repeatedly accepted money to fund research projects, academic buildings, professorships, and other academic pursuits.[42] These people argue that it is not wrong for athletic departments to look for corporate sponsorship for athletics because member institutions have leaned on this kind of sponsorship for academic support for some time.[43] In addition, university presidents do not seem phased by the implication that corporate sponsors may start infecting intercollegiate athletics.[44] When a person gives money to an athletic team, department, or competition, the donor expects signage and other recognition in the form of advertisement.[45] The donation is usually business-oriented because, like Alltel, companies sponsor athletics mainly to get name recognition.

Supporters of the NCAA's acceptance of corporate money argue that the sponsors become involved with the NCAA because they believe in the NCAA's mission of higher education mixed with athletic

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39. Earl Daniels, *Alltel Gets Bang for Sponsor Buck*, FLORIDA TIMES-UNION, Nov. 22, 1998, at D-13.

40. *Id.* Currently, Alltel does not appear on Florida's list of corporate sponsors (*at* http://www.gatorzone.com/ (last visited on Apr. 30, 2003)) and Alltel only lists the Make-A-Wish Foundation on its list of community partners. *See* http://www.alltel.com/communityprograms/index.html (last visited on Apr. 30, 2003).

41. *See* http://www.schottensteincenter.com/venue_info/default.htm. *See also*, Scott Powers, *Naming of Arena Requested to Honor Late Philanthropist*, COLUMBUS DISPATCH, Feb. 4, 1998, at 2A.

42. Cedric Dempsey, *The Will to Act Project: The Funding Dilemma*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org.

43. *Id.*

44. *CEOs Don't Blink on Corporate Tag*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org.

45. Arguably, the motivations behind donations to colleges for buildings or professorships differ from donations to athletic programs. With research and building grants, the donor's purpose is usually philanthropic with perhaps long-term benefits while with sports the link to near-term marketing is more apparent.

amateurism.[46] These people applaud corporate sponsors who are willing to support intercollegiate athletics and help advertise the NCAA's goals.[47] They compare the relationship to that of PBS and its sponsors because those sponsors are helping to get out a message that is de-commercialized and in good taste.[48] However, the NCAA should not be compared to PBS; there are no office pools in March to bet on what will be the next song they sing on Sesame Street. Mark Kidd, President and CEO of Host Communications until January of 2003,[49] explained, "[t]he reality is that corporations and athletics are intertwined. The right partners can help you advance your message and what you're trying to accomplish."[50]

The flaw in the logic that assumes these companies will advance the NCAA's mission is that corporations are in the business of making money. The companies who invest in the NCAA (or NCAA members and their teams) will require recapture of their investment. Consequently, sponsors place signs in stadiums and digitally enhance television productions to ensure they are receiving advertising time. Kevin Weiberg, commissioner of the Big 12 Conference, recognizes that the recipient of the funds may be the one to blame because the recipient should certainly expect the sponsors to get their money's worth.[51] The commissioner of the Big East conference, Michael Tranghese, also warned that acceptance of corporate funds may be a sort of deal-with-the-devil.[52] He explains a basic idea of business that "[y]ou can't take the money and then say you don't want some of the things that come with it. If you don't want something, then don't take the money."[53]

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46. *NCAA to Use Fewer and Bluer Corporate Partners to Foster Mission*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org; Gary T. Brown, *The $6 Billion Plan: NCAA Wants TV Contract to Increase Revenue, Decrease Tension Between Scholarly Mission and Commercial Image*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org (quoting a faculty athletics representative: "There's nothing wrong with money and making it, especially if you can use it to further your mission. The problem comes when the money diverts you from what you're supposed to be doing. I may be too optimistic, but I believe you can accept corporate financial support and still maintain your integrity").

47. Brown, *supra* note 46. In that article, Dempsey, former president of the NCAA, explains, "We still have clean championships venues. We've done nothing to add to the commercial atmosphere. We don't have sponsors for championships." *Id.*

48. *CEOs Don't Blink on Corporate Tag*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org.

49. Mark Kidd left Host Communications to start his own consulting group. *See* www.hostcommunications.com/0,6032,1_1410_0_26204,00.html (last visited on Apr. 30, 2003).

50. *NCAA to Use Fewer and Bluer Corporate*, *supra* note 46.

51. *See* Kevin Weiberg, *Opinions—Too Much Corporate Fruit Around to Reduce the Harvest*, NCAA NEWS, Oct. 22, 2001, *available at* http://www.ncaa.org.

52. Brown, *supra* note 46.

53. *Id.*

V. THE NCAA'S HISTORY WITH THE SHERMAN ACT[54]

Several groups and individuals have attempted to overcome the NCAA's regulations by suing the NCAA under the Sherman Antitrust Act. NCAA bylaws change as our courts expand and contract the NCAA's rule-making authority. Many have tried, but few have succeeded in thwarting the power and dominance of the NCAA. Courts have generally ruled that the NCAA is, for the most part, not in violation of the antitrust laws because they regulate an industry and do not enter any marketplace.[55] The purpose of the NCAA would be frustrated if it were not allowed to implement and enforce strict rules for all of its members.[56] As these cases have evolved over the past thirty years, however, courts have increasingly warned the NCAA that the courts leniency in respect to regulation of intercollegiate athletics only applies when the court is considering eligibility rules and not when the case involves the NCAA entering the commercial market.

In *CAPS v. NCAA*,[57] a recruiting agency that feared having to shut down its business because of newly enacted NCAA rules argued that the NCAA violated the Sherman Act because the rules restrained trade and would force CAPS out of business.[58] The court agreed with the NCAA that its efforts were not anticompetitive and that its purpose was to uphold the academic standards and amateur status of the member institutions' student-athletes.[59] The court believed the NCAA rule in question affected

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54. 15 U.S.C. §1. The Act states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.*

55. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 232 (1943).

56. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922) The Court held that baseball is not subject to antitrust laws. *Id.* Congress has subsequently overruled this decision by enacting the Curt Flood Act that mandates baseball players be covered by antitrust laws. 15 U.S.C. § 26(b) (2003). However, the Act "does not apply to other antitrust issues such as franchise relocation, Major League expansion, franchise ownership, marketing and licensing, and the minor league system." Morgen A. Sullivan, *"A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1266 (1995).

57. College Athletic Placement Service, Inc. v. NCAA, 1974 U.S. Dist. LEXIS 7050, at *1 (D.N.J. Aug. 22, 1974).

58. *Id.* The bylaw at issue reads (in its current form):

> An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

NCAA Bylaws, *supra* note 12, art. 12.3.1, at 75.

59. *CAPS*, 1974 U.S. Dist. LEXIS 7050, at *8.

only the "noncommercial aspects of the liberal arts and the learned professions" so protection in the business world was not necessary.[60] However, even in this 1974 case, the court recognized the power and dominance of the NCAA in the governance of intercollegiate athletics.[61]

Less than one year later, a hockey player challenged the NCAA's eligibility rules after he was not allowed to play because he received living expenses from an amateur hockey team in Canada while playing for them.[62] The NCAA rules forbid athletes to choose both professional and college sports following high school.[63] The court gave deference to the NCAA's enduring mission of upholding education and amateurism as integral parts of intercollegiate athletics.[64] The NCAA seems to have used its societal benefits to shield it from an antitrust violation. The result is that athletes are forced to decide which line of business to enter, the business of college athletics or the business of professional and semiprofessional sports.

In *Association for Intercollegiate Athletics for Women v. NCAA*, a court again found that the NCAA's promotion of college sports had nothing to do with "realizing maximum return on it as an entertainment commodity."[65] The court focused on the NCAA's intent and decided the NCAA did not intend to put the AIAW out of business.[66] The appellate

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60. *Id.* at *12.

61. *Id.* at *4.

62. Jones v. NCAA, 392 F. Supp. 295, 296-97 (D. Mass. 1975). The bylaw at issue reads (in its current form):

> An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:
> Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
> Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
> Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
> Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations;
> Competes on any professional athletics team (per Bylaw 12.02.4), even if no pay or remuneration for expenses was received;+
> Subsequent to initial full-time collegiate enrollment, enters into a professional draft
> Enters into an agreement with an agent.

NCAA Bylaws, *supra* note 12, art. 12.1.1, at 70-71.

63. NCAA Bylaws, *supra* note 12, art. 12.2.3.2, at 74: "Competition with Professionals—An individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team (per Bylaw 12.02.4) in that sport. . ."

64. *Jones*, 392 F. Supp. at 304.

65. Ass'n for Intercollegiate Athletics for Women (AIAW) v. NCAA, 558 F. Supp. 487, 494 (D.D.C. 1983).

66. *Id.* at 506.

court disagreed with the district court's focus on the NCAA's intent, but upheld the ruling because it determined that the NCAA had not in fact put the AIAW out of business.[67]

The same year the *AIAW* appellate court case was decided, the Supreme Court found the NCAA in violation of the Sherman Act in *NCAA v. Board of Regents of the University of Oklahoma* because it unreasonably prohibited college football teams from broadcasting their games.[68] At the time, the NCAA limited the number of football games television stations could broadcast.[69] The NCAA carried out this plan by restricting the televising of NCAA football games to two television stations that were to carry fourteen games apiece.[70] The court found that the restraints put on NCAA's member institutions were anticompetitive because, unlike NCAA antitrust cases that preceded this decision, there was no reasonable procompetitive reason for restricting the viewing of football games on television.[71]

In analyzing the television broadcast plan used by the NCAA, the Court in *Board of Regents* first recognized that the plan was an unreasonable restraint on trade because it placed an artificial limit on output.[72] The Court considered this a price-fixing agreement.[73] Although the Court usually finds a policy *per se* unconstitutional when price-fixing is involved, the Court did not apply the *per se* rule in this case because the NCAA is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[74]

The Court next recognized that the NCAA had in fact entered a market.[75] The Court felt that the NCAA had crossed the line from promoting its goals of education and amateurism to entering the marketplace.[76] The NCAA argued "that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market."[77] The Court rejected this argument for two reasons. First, it

67. Ass'n for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 590 (D.C. Cir. 1984).

68. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104-13 (1984). This case is the only case involving antitrust laws and the NCAA to reach the Supreme Court.

69. *Id.* at 91-92.

70. *Id.* at 92.

71. *Id.* at 119-20.

72. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 99-100.

73. *Id.* at 100.

74. *Id.* at 100-01.

75. *Id.* at 101, 109.

76. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 112-13.

77. *Id.* at 109.

pointed out that the lack of proof that a market exists does not warrant unreasonable restrictions on price and output.[78] Second, the Court noted that college football is certainly a distinct market because "advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is [sic] vivid evidence of the uniqueness of this product."[79]

The Court then turned its analysis to the NCAA's control of the market because "when a product is controlled by one interest, without substitutes available in the market, there is monopoly power."[80] In analyzing the market control, the Court used the rule of reason, weighing the procompetitive benefits against the anticompetitive harms of high cost and low output produced by the plan.[81] The Court systematically denied all of the procompetitive benefits proffered by the NCAA: efficiency of marketing for all of NCAA football,[82] guarantee of greater live attendance,[83] protection of a competitive balance in amateur athletics.[84] Having rejected all of the NCAA's arguments, the Court found the NCAA in violation of the Sherman Act.[85]

The Court acknowledged in *Board of Regents* that the NCAA produces a product—that product being competition itself.[86] This decision changed the Court's view of the NCAA from a philanthropic regulatory agency to an association managing high-level athletes on a national stage. The Court acknowledged that the NCAA still regulates the education, eligibility, and amateurism of its athletes, but also pointed out that the result of the regulation is a highly marketable product.[87] In addition, the Court admitted that member institutions have "no real choice but to adhere to the NCAA's. . .controls."[88] In the end, the Court found that the NCAA had introduced its "product" to the marketplace and, thereafter, could not restrain the control of it.[89]

In *Board of Regents*, the Supreme Court warned the NCAA that it must preserve the tradition of amateurism in intercollegiate athletics in

78. *Id.* at 109.
79. *Id.* at 111.
80. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).
81. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 113.
82. *Id.* at 113.
83. *Id.* at 115-16.
84. *Id.* at 117-19.
85. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 120.
86. *Id.* at 101-02.
87. *Id.* at 101-02, 120.
88. *Id.* at 106.
89. *Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. at 120.

order to guard against antitrust violations.[90] Soon after, a federal district court[91] in *Gaines v. NCAA*[92] examined the issue of an athlete wanting to return to intercollegiate competition after declaring for the National Football League draft unsuccessfully.[93] The court found no violation of antitrust laws but emphasized that the application of antitrust laws to the NCAA in this context came within a very narrow exemption.[94] The court stated "the NCAA, with its multimillion dollar annual budget, is engaged in a business venture and is not entitled to a *total* exemption from antitrust regulation on the ground that its activities and objectives are educational and are carried on for the benefit of amateurism."[95] In other words, the NCAA could be subject to antitrust liability if the NCAA crosses the line into professionalism.

Justice White in his dissent in *Board of Regents* argued that the NCAA could secure its product only by allowing the continued regulation of NCAA sports in all areas, including their broadcasting.[96] He felt that the commercialization of the sport and the greed of each individual school would eventually tarnish the educational product the NCAA has fought hard to construct.[97] In Justice White's opinion, the Court should still give deference to associations like the NCAA and the regulation of events and procedures in non-profit organizations should be left to the organizations themselves.[98] However, non-profit organizations are no longer given antitrust exemptions.[99] In addition, the NCAA is not a typical non-profit organization. For example, National Public Radio's "All Things Considered" is not able to sell pay-per-view tickets; whereas, the NCAA had all the major television networks competing for its latest NCAA

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90. *Id.* The Court stated in pertinent part:

> 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. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die. . .

Id.

91. Although not binding on many other courts, any cases dealing with antitrust violations and the NCAA are significant because the NCAA is such a unique organization.

92. 746 F. Supp. 738 (M.D. Tenn. 1990)

93. Id. at 740. The case dealt with NCAA Bylaws, *supra* note 12, art. 12.1.1, at 70-71. For specific language of the bylaw, see *supra*, note 62.

94. *Gaines*, 746 F. Supp. at 744.

95. *Id.*

96. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 122.

97. *Id.* at 133.

98. *Id.* at 135.

99. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975).

championship television rights package.[100]

In the fifteen years following *Board of Regents*, the federal courts decided several more antitrust cases in favor of the NCAA. One of these cases involved alumni, cheerleaders, and players suing for sanctions placed on a school's football team.[101] Others involved student-athletes trying to return to their colleges after attempting to play professional sports in violation of NCAA bylaws.[102] Still others brought cases fighting the hardships certain NCAA rules and regulations place on individuals.[103] All of these cases involved players or teams facing ineligibility due to a violation of NCAA rules. The plaintiffs used the Sherman Act in an attempt to convey that the NCAA is too powerful, but the courts refused the argument because the eligibility rules did not affect, in the courts' opinions, competition in the marketplace.

In contrast to the other cases following *Board of Regents*, the NCAA was found in violation of the Sherman Act by setting maximum assistant coach salaries.[104] The NCAA promulgated a rule limiting the salary of some entry-level coaches to $16,000.[105] The NCAA's purpose for the rule was to leave a position available for younger and inexperienced coaches and to reduce the costs of hiring coaches for NCAA schools.[106] However, the court felt that the rule unreasonably restrained trade and was anticompetitive.[107] In this case, the court again kept the NCAA in check and told that NCAA its power is not impregnable.

VI. COMMERCIALIZATION OF THE NCAA

Since the Court has established that the NCAA has entered the marketplace of selling athletics to audiences, the NCAA cannot unreasonably restrain trade in that market. At the same time the NCAA exposes itself to market commerce, it is trying to maintain its status as an

100. Howard Manly, *It's Madness: CBS Pays $6.2B for NCAA Event*, BOSTON GLOBE, Nov. 19, 1999, at E2.

101. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).

102. *See generally* Gaines v. NCAA, 746 F. Supp. 738, 738 (M.D. Tenn. 1990); Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992).

103. *See* Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998) (describing how the NCAA forbid a student from competing while completing her masters at a school different than her undergraduate school); *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998) (holding that the NCAA's minimum academic requirements did not violate the Americans with Disabilities Act or the Sherman Act); Hairston v. Pacific 10 Conference, 101 F.3d 1315 (9th Cir. 1996) (discussing the punishment of the University of Washington football program for recruiting violations).

104. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), *cert. denied*, 525 U.S. 822 (1998).

105. *Id.* at 1014.

106. *Id.* at 1021-22.

107. *Id.* at 1024.

amateur sports organization concerned primarily with education and good sportsmanship.

The NCAA urges that its rules try to help student-athletes by maintaining a distinction between amateurism and professionalism.[108] As explained earlier, the NCAA has strict guidelines regulating the exploitation by commercial entities of its member's student-athletes.[109] In *Adidas*, the court concluded that the rules implemented by the NCAA were not intended to give the NCAA any kind of commercial advantage because the NCAA was not directly competing with Adidas.[110] However, instead of conceding loss, Adidas will, as they argued in the case, just expend more money to buy billboards and other signage to ensure their trade name is synonymous with intercollegiate athletics.[111] For this kind of commercialization, the NCAA has no restrictions.

Some critics urge that the NCAA should not contract with commercial entities because any mixing with corporate money would compromise the amateur status of the NCAA. The rationale is that once the NCAA and its members start thinking of intercollegiate athletics as a product or business, there is no turning back and the competition will be fierce.[112] However, it may be too late for the NCAA to consider these ramifications.[113] In 2000, the NCAA signed a $6.2 billion deal with Columbia Broadcasting Service ("CBS").[114] The contract, which went into effect in 2002, grants CBS television rights to the men's NCAA basketball tournament for eleven years and, in return, the NCAA gets $6.2 billion.[115] The NCAA defends this deal by explaining that the funds will help subsidize the $4 billion

108. Adidas America, Inc. v. NCAA, 40 F. Supp. 2d 1275, 1284 (D. Kan. 1999).

109. *See infra* Part IV.

110. *Adidas*, 40 F. Supp. 2d at 1286.

111. Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097, 1100 (D. Kan. 1999).

112. Jay Weiner, *College Football 2002; Arms Race: Gophers Trail in 'Arms Race,'* STAR TRIBUNE (Minneapolis), Aug. 18, 2002, at 8C.

113. Welch Suggs, *College Presidents Urged to Take Control of College Sports*, CHRONICLE OF HIGHER EDUCATION, July 6, 2001, at 35 (quoting the Knight Commission report, *available at* http://www.ncaa.org/databases/knight_commission/2001_report). The report provides that "[the NCAA's] dual mission of keeping sports clean while generating millions of dollars in broadcasting revenue for member institutions creates a near-irreconcilable conflict." *A Call to Action: Knight Commission 2001 Report*, *available at* http://www.ncaa.org/databases/knight_commission/2001_report/.

114. Brown, *supra* note 46; *NCAA Should Just Go Pro*, PRESS-ENTERPRISE, Apr. 2, 2000, at C02.

115. Scott Schultz, *New NCAA Regulations Called for by Commission*, UNIVERSITY WIRE, July 3, 2001.

spent every year by NCAA member institutions.[116] In addition, the NCAA contends that the advantage gained by the popularity of the men's basketball tournament will benefit other NCAA sports because the television deal brings recognition to all sports' competitions and championships.[117]

The NCAA focuses on the benefits that the CBS deal will bring to its members,[118] while the networks insist that they will not sacrifice the NCAA's amateur and educational missions.[119] Sean McManus, the CBS Sports President who compared the men's Division I championship to beachfront property, said that both CBS and ESPN "would work to support the NCAA's educational mission."[120] George Bodenheimer, president of ESPN, also says, "we're very sensitive to [the educational initiatives the NCAA promotes] and we want to work with the NCAA as partners. There are a lot of great stories that come out of college sports, and we can certainly highlight the educational side to those stories."[121] Important in these comments, however, are the words "would" and "can." The president of the University of Tulsa and the immediate past chairman of the NCAA's Executive Committee, Bob Lawless, acknowledges that with the receipt of money is the understanding that companies will somehow find a way to create revenue in order to accomplish their contract goals.[122]

Even before the NCAA signed this deal, two federal courts acknowledged that intercollegiate athletics is "clearly business, and big

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116. Cedric Dempsey, *The Will to Act Project: Reputation and Clean Rooms*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org. The NCAA says "94 cents of every dollar that comes to the NCAA goes back to member schools in direct dollars, championships or services." *Id.*

117. Brown, *supra* note 46. This article points out that CBS and ESPN did not buy only the basketball championship. Both networks agreed to figure out a way to guarantee airtime for all 87 NCAA championships. *Id.*

118. *Id.* The author explains that:

> [T]he bundle. . .includes radio broadcasting and Web-casting rights and access to NCAA marks. It includes an NCAA corporate-partner program and the Association's popular Hoop City events. It includes opportunities that enable CBS and ESPN to cross-promote their NCAA events on the other's airtime. The bundle also benefits the NCAA in that the Association receives almost 200 promotional messages annually on CBS and its Viacom family of channels, and 150 messages annually on radio. There will be nightly 30-minute programs during March Madness that focus strictly on basketball, and monthly 30-minute shows year-round that focus on intercollegiate sports issues of the day.

Id.

119. *Networks Say 'Count On Us' to Advance NCAA's Educational Mission*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org.

120. *Id.*

121. *Id.*

122. *CEOs Don't Blink on Corporate Tag*, NCAA NEWS, Mar. 18, 2002, *available at* http://www.ncaa.org.

business at that."[123] Critics claim that the NCAA no longer regulates athletics as recreational activities, but markets a product.[124] The product is the athletic competition.[125] The most valuable of these products is the athletics at the "powerhouse schools," for which the NCAA has become a "trade association."[126] Even V. Lane Rawlins, president of Washington State and a past member of the NCAA Executive Committee, argues that the NCAA "can't do quality intercollegiate athletics on an Association-wide scale without putting out the 'for sale' sign... If you don't commercialize at least to some extent, the revenue won't be there and you can't do a first-class job."[127]

Many have tried to refocus the NCAA's power and mission since universities seemingly have no other regulating body to which they can turn. Member institutions all say that they can accomplish nothing more with the sharp, steady increase of budgets at Division I schools.[128] The myth is that the huge programs can pay for themselves through football revenue and merchandise sales.[129] However, the number of schools that have money remaining after paying their expenses has dropped significantly in the past few years to its current rate of 40 percent.[130] In

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123. NCAA v. Miller, 795 F. Supp. 1476, 1482 (D. Nev. 1992); Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977).

124. *See Miller*, 795 F. Supp. at 1482. *See also*, Brown, *supra* note 46.

125. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101. This Court acknowledges that the NCAA "enables a product to be marketed which otherwise might be unavailable" through its governance. *Id.*

126. Robert Lipsyte, *Backtalk; Time's Right to Lose One For the Gipper*, N.Y. TIMES, May 10, 1998, at 11. Lipsyte thinks the NCAA should concentrate more on issues like "pushing for compliance of gender equity laws, spotlighting the racial discrepancy between white and black coaches, particularly in sports dominated by black players." *Id.*

127. Brown, *supra* note 46.

128. Dempsey, *Reputation and Clean Rooms*, *supra* note 116. From research aimed at gauging the image and reputation of the NCAA: "When asked to identify the most important issues facing intercollegiate athletics, external constituents named student-athlete academic performance. Internal constituents (member institutions) named money and funding." *Id.*

129. Weiner, *supra* note 112. This article states: "[F]or all the talk of the economic engine that football is, 36 percent of Division I programs suffered deficits in 1999, the last year for which the NCAA has analyzed data." *Id. See also, Letters to the Editor—Title IX Clear, Both Now and In the Past*, NCAA NEWS, June 9, 1997, *available at* http://www.ncaa.org.

130. Dempsey, *The Funding Dilemma*, *supra* note 42. *See also* Dempsey, *College Football and Ma Bell*, *supra* note 21:

> A total of 64 percent of Division I-A presidents and 84 percent of those in Division I-AA see the financial status of college football as a significant concern. In fact, less than 10 percent of the Division I-A CEOs see the long-term financial outlook for Division I football as 'solidly positive,' and none of the Division I-AA presidents responded affirmatively. Included in the responses were these comments:
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> - 'We spend way too much money.'
> - 'It's expensive, and few of us have revenues that even begin to cover the expenses.'

2000, spending for 970 of NCAA's member schools was about $4 billion while revenues fell short at about $3 billion.[131] These shortfalls are due to the competition among colleges and universities to supply the best facilities, the best coaches, and the most luxurious amenities to their current and prospective student-athletes.[132] The Knight Foundation Commission on Intercollegiate Athletics ("Knight Commission") was formed to assess the current state of the NCAA. The Commission concluded that "in too many respects, big-time college sports today more closely resemble the commercialized model appropriate to professional sports than they do the academic model."[133] The focus has shifted to the ability of the athletes and how good they look instead of what kind of grades they get.[134] Schools that choose not to participate in this "race" to have the best of everything have found themselves losing even more money, along with community support and recruiting advantage.[135] Therefore, schools are forced to choose between the evils that come with highly commercialized, high-priced athletics and the disadvantages that come with abstention from the race.

There is a reasonable fear that without the significant revenue commercial enterprises bring to the NCAA, athletics in the NCAA may deteriorate or cease to exist. Schools are already losing programs from increasing revenue costs and subsequent budget constraints.[136] However, one team has figured out a way to reinstate its program. Princeton University's wrestling team lost funding and its varsity status in 1993.[137] Within four years, the Friends of Princeton Wrestling had raised $513,000

- 'If there is a threat hanging over football, it is the multi-million dollar stadium, locker rooms and the $2 million paid for a football coach. Only a handful of schools in this country can afford this madness. . .'

Dempsey, *College Football and Ma Bell*, *supra* note 21.

131. Clayton, *supra* note 5.

132. Suggs, *supra* note 113, explains that one of the main concerns for the Knight Commission Foundation is "the explosive growth of costs of teams and facilities." *See also A Call to Action: Knight Commission 2001 Report*, *available at* http://www.ncaa.org/databases/knight_commission/2001_report/.

133. *Id.*

134. Schultz, *supra* note 115. *See also*, *A Call to Action: Knight Commission 2001 Report*, *available at* http://www.ncaa.org/databases/knight_commission/2001_report/.

135. Weiner, *supra* note 112. Weiner explains that the University of Minnesota is currently losing the race because it does not want to compete at the same level (financially) as other schools. *Id.* Prof. Daniel Fulks, author of the NCAA's financial analyses, commented, "Either get into it or get out of it. The truth is, if you're not going to keep up, then Minnesota should get out of the Big Ten." *Id.*

136. Karen Rosen, *Title IX at XXX: Tough to Make Up for 100 Football Players*, ATLANTA J.-CONST., June 23, 2002, at 6D.

137. H.Clay McEldowney, *Guest Editorial – Men Treated Unfairly by Title IX Application*, NCAA NEWS, Jan. 20, 1997, *available at* http://www.ncaa.org.

in cash and pledges and $721,000 in life trusts.[138] The university reinstated the wrestling program by using the funds raised in this enormous endowment effort.[139] Other teams are looking to this model as a way to bring back their own sacrificed programs. Princeton's wrestling program cleared a wide path for athletic programs to appeal to outside sources as a way to fund their programs.

The Princeton model is one way of seeking outside revenue streams, but others look to the example of the NCAA in trying to cushion their budgets through commercializing their athletics. Trying to offset budget deficits with corporate money worries Cedric Dempsey who finds tension between "the impact that pursuing those new streams has on such things as self-sufficiency, competitive equity, academic mission, and even diversity hiring."[140] Those who support NCAA's national regulation of sports and its commercialization might join Justice White in his dissent in *Board of Regents* when he warned that individual schools might not be as noble as the NCAA has tried to be in minimizing commercial influence.[141] For example, contracts between sports equipment/apparel manufacturers and universities have become commonplace.[142] Not only is it common, these deals have become the pinnacle of achievement for most universities. School names are now synonymous with their apparel sponsor, and no school can compete at the elite level without the financial and advertising support these contracts bring.

To obtain the best facilities, coaches, and athletes, schools turn to outside sources of income like corporate sponsorships and apparel deals. However, financial advantages of corporate apparel deals do not necessarily make them right or good for intercollegiate athletics. Member

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138. *Id.* At the time this article was written, this was the only program to save itself from budget cuts in this way. Other programs have looked to private donations to fund such things as European tours. In addition, a Dartmouth student jokingly put the Dartmouth men's and women's swim teams up for auction on eBay after the university cut the programs for budgetary reasons. The item was taken off eBay because the sale by auction was "not in line with school policy." *Sports Beat*, SPORTS ILLUSTRATED, Dec. 16, 2002, at 48.

139. McEldowney, *supra* note 137.

140. Dempsey, *The Funding Dilemma*, *supra* note 42.

141. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 123 (quoting Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983)).

142. Schultz, *supra* note 115. Adidas has signed multi-year, multi-million dollar deals with Arizona State University, the University of Nebraska, UCLA, the University of Notre Dame, Northwestern University, the University of Wisconsin, and the University of Tennessee, *available at* http://usa.adidas.com (last visited Apr. 30, 2003). Nike has done the same with several colleges including Penn State University, the University of Oregon and the University of Michigan, *available at* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=collegiate (last visited Apr. 30, 2003). As an example the Nike deal with the University of Michigan is a seven-year contract worth $25 million. Schultz, *supra* note 115.

institutions all say that they have limited alternatives for generating the revenue necessary to sustain ballooning Division I budgets.[143] Cedric Dempsey has admitted that the NCAA and its form of leadership and regulation is working much better for Divisions II and III than it is for Division I.[144] Perhaps this is because the majority of the schools in these divisions refuse to advertise corporate sponsors at their sporting events; however, this is not to say that sponsors are knocking on the doors of Division II and III athletic programs requesting to do so. Nonetheless, the corporate presence is not felt in their venues. As one Division III athletic director put it, "We can't get enough of (corporate involvement) here. Small colleges are always looking for corporate help, and every dollar counts. But our campus rule is we don't advertise corporations in stadiums or arenas. In Division III, you can do that when it fits your educational mission."[145]

With the vast amounts of money clothing manufacturers are putting into universities, a return on their investment is expected and a power struggle ensues. The *Adidas* case is a good example of how concern is growing over the immense power of the NCAA. Adidas lost the case because it could not prove that the NCAA bylaws gave the NCAA a commercial advantage, but the fact remains that apparel sponsors cannot put a large logo on their clothes and the NCAA is not similarly restricted. In addition, in *Smith v. NCAA,* the concurring judge[146] warned that the NCAA is a very powerful "controlling authority."[147] This judge noted that the members of the NCAA do not really have a choice of whether to join or not because not being a member greatly affects the national athletic reputation of any institution.[148] Consequently, member institutions cannot avoid the rules and limitations the NCAA places on them. Although some courts have concluded that there is no undue restraint on member institutions because membership is voluntary,[149] there is still dissension

143. Dempsey, *Reputation and Clean Rooms*, *supra* note 116. From research aimed at gauging the image and reputation of the NCAA: "When asked to identify the most important issues facing intercollegiate athletics, external constituents named student-athlete academic performance. Internal constituents (member institutions) named money and funding." *Id.*

144. Cedric Dempsey, *The Will to Act Project: Governance Process: Does Form Follow Function?*, NCAA NEWS, Sept. 16, 2002, *available at* http://www.ncaa.org.

145. Bob Bonn, *Opinions—Too Much Corporate Fruit Around to Reduce the Harvest*, NCAA NEWS, Oct. 22, 2001, *available at* http://www.ncaa.org. Bonn is the athletic director for Carthage College. *Id.*

146. *See* Smith v. NCAA, 266 F.3d 152, 164 (3d Cir. 2001) (McKee, J., concurring).

147. Smith v. NCAA, 266 F.3d 152, 164 (3d Cir. 2001).

148. *Id.* (commenting on the decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988)).

149. *See Tarkanian*, 488 U.S. at 199 n.19; *R.M. Smith*, 266 F.3d at 159.

among members who believe they are being unduly constrained and constrictively regulated.

VII. CONCLUSION

The NCAA maintains that its rules will prevent over-commercialization.[150] The court in *Gaines* concluded:

> The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme—to prevent commercializing influences from destroying the unique 'product' of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.[151]

These rules referred to in *Gaines* govern the student-athlete. However, the NCAA and its members are not similarly constrained. The only limitation placed on member institutions regarding who can sponsor an event is the bylaw restricting professional and nonprofessional sports teams from contributing directly to athletic programs.[152] No other trade is restricted in such a way. In Cedric Dempsey's final essays addressing the status of the NCAA, he urged "the values we have adopted in our bylaws guide all final decisions."[153] Since, conveniently, there are no rules constraining corporations other than outside sports teams, corporations can contribute to any collegiate sport team or program without limitations imposed by the NCAA.[154]

One critic observed that while our universities honor great teachers and scholars, schools today turn coaches and athletes into celebrities.[155] When universities treat coaches like celebrities, their notoriety overshadows the work of the professors at their schools who are of equivalent education and training within their fields, but are paid much less than coaches. In order to keep top athletes at their schools, schools

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150. Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990). *See also State of the Association Address*, NCAA NEWS, Jan. 20, 2003, *available at* http://www.ncaa.org.

151. *Gaines*, 746 F. Supp. at 744. The rule at issue in this case states that an athlete loses his amateur status and right to compete at an NCAA member institution if he enters into a professional draft. NCAA Bylaws, *supra* note 12, art. 12.1.1(f), at 70-71.

152. *See supra* note 33. *See also*, NCAA Bylaws, *supra* note 12, art. 12.6.2, at 83 (restricting institutions' abilities to accept funds from nonprofessional sports organizations).

153. Cedric Dempsey, *The Will to Act Project: Introduction*, NCAA NEWS, Sept. 2, 2002, *available at* http://www.ncaa.org.

154. The author was told by an NCAA compliance officer that this means a team can introduce themselves as the "Nowhere State soccer team brought to you by XYZ corporation" if they want.

155. John Walda, *Comment—Trustee Link Can Stem 'Tide of Separation,'* NCAA NEWS, May 21, 2001, *available at* http://www.ncaa.org.

expend even more money and sacrifice the primary mission of providing a good education to students.[156] This vicious cycle is worrisome to many observers who urge that higher education should be the primary focus.[157] In *Board of Regents*, Justice White warned in his dissent that universities' concerns for taking care of their elite athletics will "overshadow educational objectives."[158]

The goal should be for the NCAA to restrain itself, so that it may be a model for all of its member institutions. The NCAA sells its athletics for billions of dollars while maintaining "student-athletes should be protected from exploitation by professional and commercial enterprises."[159] By entrenching itself further in a marketplace filled with commercial influences, the NCAA threatens its ability to mandate what its members can and cannot do.

Critics of the increased commercialism in the NCAA would quickly point out that the educational mission Division II and III schools still espouse is the educational mission that the NCAA was originally intended to protect. Other than enjoying the sight of an expanding pocket book, there is no reason why Division I of the NCAA cannot avoid corporate pressures as well, thereby reducing exposure into a marketplace that could subject the NCAA to more antitrust liability. Of course, there are excellent athletes out there and, yes, these athletes are fun to watch, but there is little reason to bring an athlete into an institution of higher learning simply because she is a good athlete if she has no interest in receiving an education. Some propose that if athletes and coaches want to concentrate solely on athletics in hopes of acquiring fame, they can simply go to the professional or semiprofessional level.[160] The Knight Commission, which views escalating commercialism as one of the greatest threats to intercollegiate athletics, proposed that school presidents take drastic measures to curb this commercialism.[161] The Knight Commission admits that any steps toward reversing the trend of commercialism might

156. Michael O'Keefe, *When AAU Comes Before the ABCs: Critics Say Summer Programs Stress Hoops, Overlook Education*, DAILY NEWS (New York), Apr. 1, 2001, at 60; Clayton, *supra* note 5; Weiner, *supra* note 112.

157. Clayton, *supra* note 5 (citing Ellen Staurowsky, professor of sport sciences at Ithaca College). Prof. Staurowsky stated, "For far too long, it has been the requirements of winning that have shaped the way sports are handled in higher education. . .When we talk about sports in higher education, it must be the 'higher education' that drives our visions, rather than sports." *Id.*

158. NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85, 123 (1984) (quoting Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377 (MDNC 1975)).

159. NCAA Bylaws, *supra* note 12, art. 2.9, at 5:

160. Schultz, *supra* note 115.

161. Gary T. Brown, *Knight Commission Calls for Tighter Presidential Grip*, NCAA NEWS, July 2, 2001, *available at* http://www.ncaa.org.

bother even people angered by athletes' misconduct, but the Commission insists that apathy toward the current excesses is dangerous.[162]

The NCAA has fought for almost a hundred years to maintain amateurism and education as the primary goals for intercollegiate athletics. Now, the commercialization of the NCAA threatens to ruin this century of hard work. Not only will education be forsaken in the name of big money, but also the NCAA could be subject to severe antitrust sanctions. Despite the warnings given to the NCAA by the courts in *Board of Regents*, *Gaines*, and *Miller*, the NCAA continues to expand its reach into the commercial marketplace.[163] The $6.2 billion deal between CBS and the NCAA is not preserving the NCAA's tradition of "intercollegiate athletics as an integral part of the educational program."[164] If the current NCAA does not listen to the Knight Commission's recommendations for reversing the trend of commercialization, the NCAA will lose its respect, its amateurism, and inevitably its deferential antitrust treatment.

Lindsay J. Rosenthal

162. *Id.*

163. NCAA v. Bd. of Regents of the Univ. of Oklahoma, 468 U.S. 85, 120 (1984); Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990); NCAA v. Miller, 795 F. Supp. 1476, 1482 (D. Nev. 1992).

164. NCAA CONST. art. 1, § 3.1.