

THE NCAA’S “DEATH PENALTY” SANCTION—REASONABLE  
SELF-GOVERNANCE OR AN ILLEGAL GROUP BOYCOTT IN  
DISGUISE?

by  
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*On June 22, 1985, members of the National Collegiate Athletic Association (“NCAA”) voted to empower the NCAA Committee on Infractions to suspend any member’s athletic program for up to two years for the engagement in repeat, major violations of the NCAA bylaws. This newfound power to suspend athletic programs—albeit limited in duration to two years—has become colloquially known as the “death penalty” because “everyone, including [NCAA member] presidents, believes it could effectively kill a program for decades.”*

*This Article examines why the NCAA “death penalty,” although arguably benevolent in its intent, undermines the core principles of federal antitrust law. Part I of this Article discusses the history of college athletics, the NCAA, and the “death penalty” sanction. Part II provides an introduction to section 1 of the Sherman Act and its application to the conduct of both private trade associations and the NCAA. Part III explains why a future challenge to the NCAA “death penalty” could logically lead to a court’s conclusion that the “death penalty” violates section 1 of the Sherman Act. Finally, Part IV explains why Congress should not legislate a special antitrust exemption to insulate the NCAA “death penalty” from antitrust law’s jurisdiction.*

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## INTRODUCTION

On June 22, 1985, members of the National Collegiate Athletic Association ("NCAA") voted to empower the NCAA Committee on Infractions to suspend any member's athletic program for up to two years for the engagement in repeat, major violations of the NCAA bylaws.<sup>1</sup> This newfound power to suspend athletic programs—albeit limited in duration to two years—has become colloquially known as the "death penalty"

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<sup>1</sup> See *infra* notes 33–35 and accompanying text; see also Mark Asher, *NCAA Passes Most Severe Sanctions: Overwhelming Approval for Cheaters Penalties*, WASHINGTON POST, June 22, 1985, at D1 ("With much substance, even more symbolism and almost total unanimity, an NCAA special convention today approved the most severe penalties enacted against chronic cheaters. [¶] As a result of today's vote, if an institution found guilty of a major violation in any sport in the last five years commits a new major violation after Sept. 1, even in another sport, it would lose some or all of its games for up to two years in the offending program. Suspending a program for two years was referred to here as the 'death penalty.'").

because “everyone, including [NCAA member] presidents, believes it could effectively kill a program for decades.”<sup>2</sup>

Since implementing the “death penalty” in 1985, the NCAA Committee on Infractions has only enforced the penalty once at the Division I level—against the Southern Methodist University (“SMU”) football team for the 1987 season.<sup>3</sup> More than 25 years later, the SMU football program still has not fully recovered.<sup>4</sup>

Although the NCAA extols the “death penalty” as necessary to prevent an “integrity crisis” in college sports,<sup>5</sup> the penalty has thus far done little to improve outsiders’ assessment of the collegiate sports industry.<sup>6</sup>

<sup>2</sup> Doug Tucker, *Presidents Intent on Saving Amateur System*, LEXINGTON HERALD-LEADER, June 23, 1985, at C9, available at NewsBank, Inc., Record No. 8501240901; see also Linda Kay, ‘Death Penalty’ Hot Topic: Presidents Divided on Retroactive Penalties, CHI. TRIB., (June 21, 1985), available at [http://articles.chicagotribune.com/1985-06-21/sports/8502090745\\_1\\_presidents-interpretation-secondary-rules-violations](http://articles.chicagotribune.com/1985-06-21/sports/8502090745_1_presidents-interpretation-secondary-rules-violations) (noting that one Big Ten athletic representative said the sanction is being called the “death penalty” because “[i]t would kill your whole athletic program”); Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 759 n.60 (2007) (explaining that the term “death penalty” does not appear in the NCAA bylaws itself, but is “used colloquially to describe what is referred to in the [NCAA] Bylaws as program suspension for a defined time period”).

<sup>3</sup> Tim Layden, *The Loneliest Losers*, SPORTS ILLUSTRATED VAULT (Nov. 18, 2002), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1027478/1/index.htm> (explaining that since the NCAA enforced its “death penalty” sanction against Southern Methodist University, “20 other college programs . . . have qualified for the ultimate sanction, but all have been spared”).

<sup>4</sup> *Id.* (explaining that in 2002, more than 15 years after the NCAA punished SMU with the “death penalty,” “[t]he program still hasn’t recovered”); see also Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 67–68 (2013) (explaining that the NCAA’s punishment of Southern Methodist University with the “death penalty” led to “dramatic loss of football-related revenues, not only for that particular season but also for many years that followed”).

<sup>5</sup> NCAA OKs Stiffer Rules on Cheating: Offending School Might Have to Drop a Sport for Two Years, LEXINGTON HERALD-LEADER, June 22, 1985, at C1, available at NewsBank, Record No. 8501240754 (quoting John (“Jack”) Ryan, chairman of the NCAA presidents’ commission, about the NCAA’s purported need to maintain the “death penalty”).

<sup>6</sup> See, e.g., Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80, 82 (explaining that “[s]candal after scandal has rocked college sports” and that “the real scandal is . . . the noble principles on which the NCAA justifies its existence . . . are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes”); Joe Nocera, Op-Ed., *Standing Up to the N.C.A.A.*, N.Y. TIMES, Mar. 24, 2012, at A19 (pointing out that in his opinion the NCAA “terrorizes the parents of athletes it is investigating,” provides student-athletes with a “lack of due process,” and acts with “indifference to the most rudimentary concepts of fairness”); see also Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389 (2010) (discussing the inconsistent double standard underlying the NCAA position on alcohol advertising); Darren A. Heitner & Jeffrey F. Levine, *Corking the Cam Newton Loophole, a Sweeping Suggestion*, 2 HARV. J. SPORTS & ENT. L., 341, 342 (2011) (noting that “while the NCAA trumpets its philosophy of amateur competition, an increasing refrain points to the hypocritical

At the same time, the NCAA's "death penalty" raises bright red flags under section 1 of the Sherman Act—an act designed to safeguard important principles of economic freedom and free trade.<sup>7</sup> Not only does the NCAA "death penalty" exclude potential competitors from the college-sports marketplace, but its mere threat produces a chilling effect on member-colleges' independent decision making.<sup>8</sup>

This Article examines why the NCAA "death penalty," although arguably benevolent in its intent, undermines the core principles of federal antitrust law. Part I of this Article discusses the history of college athletics, the NCAA, and the "death penalty" sanction. Part II provides an introduction to section 1 of the Sherman Act and its application to the conduct of both private trade associations and the NCAA. Part III explains why a future challenge to the NCAA "death penalty" could logically lead to a court's conclusion that the "death penalty" violates section 1 of the Sherman Act. Finally, Part IV explains why Congress should not legislate a special antitrust exemption to insulate the NCAA "death penalty" from antitrust law's jurisdiction.

## I. THE HISTORY OF COLLEGE ATHLETICS, THE NCAA, AND THE "DEATH PENALTY"

### A. *The History of College Athletics and the NCAA*

College athletics in the United States date back to the late 1840s when regattas between Ivy League schools such as Harvard and Yale

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nature of the Association, as its financial success is built on the sweat of amateur athletes").

<sup>7</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (explaining that the Sherman Act is as important in preserving economic freedom "as the Bill of Rights is to the protection of our fundamental personal freedoms"); *see also* *E. States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614 (1914) (explaining that "[a]n act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed") (internal quotations omitted).

<sup>8</sup> *See* Layden, *supra* note 3 (quoting former Southern Methodist University football coach Phil Bennett as describing the NCAA "death penalty" as like an "atomic bomb" because "[t]he NCAA did it one time and created devastation beyond belief—and it's never going to be done again") (internal quotation marks omitted); *see also* Edelman, *supra* note 4, at 67–69. *See generally* Steve Ellis, *University Officials Approve Get-Tough Measures*, ORLANDO SENTINEL, June 22, 1985, available at [http://articles.orlandosentinel.com/1985-06-22/sports/0310070266\\_1\\_florida-death-penalty-college-athletics](http://articles.orlandosentinel.com/1985-06-22/sports/0310070266_1_florida-death-penalty-college-athletics) (quoting Clemson University's Bill Atchley as describing the "death penalty" sanction as a "deterrent"); NCAA COMMITTEE ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT 6–7 (Feb. 25, 1987) [hereinafter SMU INFRACTIONS REPORT] (explaining that the NCAA "death penalty" sanction was intended to have "deterrent value for others who might be tempted" not to comply with NCAA rules).

emerged as an important part of campus life.<sup>9</sup> By the late 1850s, many other colleges had launched competitive baseball teams.<sup>10</sup> Meanwhile in 1869, the College of New Jersey (now Princeton University) and Rutgers College met for the first official collegiate football game.<sup>11</sup>

In the early years of college sports, students governed their athletic activities in a *laissez-faire* style.<sup>12</sup> However, by the late nineteenth century some faculty members began to involve themselves in college athletics and called for the standardizing of college sports-eligibility rules.<sup>13</sup> To facilitate standardizing eligibility rules, some colleges also joined together into conferences.<sup>14</sup> For example, as early as 1895, a number of large Midwestern universities joined together to form what later became known as the Big Ten Conference.<sup>15</sup>

College sports became even more organized in 1905 when President Theodore Roosevelt called for a White House meeting among college presidents to discuss safety concerns related to collegiate football.<sup>16</sup> Roosevelt's efforts to preserve safety led to the charter of the National Collegiate Athletic Association ("NCAA") as the primary trade association for American colleges that compete in intercollegiate sports.<sup>17</sup> Shortly thereafter, the NCAA began to duplicate some of the college athletic conferences' functions on a national level.<sup>18</sup>

Initially, the NCAA had just 62 members and little formal authority.<sup>19</sup> However, in time, all of this changed.<sup>20</sup> Today, the NCAA is composed of

<sup>9</sup> Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988–89 (1987) (citing the beginning of college sports as in the 1840s); see also Robert N. Davis, *Academics and Athletics on a Collision Course*, 66 N.D. L. REV. 239, 243 (1990).

<sup>10</sup> See Davis, *supra* note 9, at 243 (mentioning the earliest collegiate baseball game, played between Amherst and Williams colleges in 1859).

<sup>11</sup> *Id.*

<sup>12</sup> See Davis, *supra* note 9, at 243 (explaining that even by the time college football was initiated in 1869, "sports were not sanctioned as a part of the higher education purpose" and students raised the funds for sporting events themselves); Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490 (1995) (explaining that "[u]ntil the 1870s there were no standardized [college] football rules").

<sup>13</sup> See Smith, *supra* note 9, at 989–90 & n.24.

<sup>14</sup> *Id.* at 990.

<sup>15</sup> See Davis, *supra* note 9, at 243–44 (explaining that the precursor to the Big Ten Conference was formed on January 11, 1895 at a meeting between seven university presidents in Chicago, Illinois).

<sup>16</sup> See Smith, *supra* note 9, at 990.

<sup>17</sup> *History*, NCAA, <http://web.archive.org/web/20130620003910/http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History>; see also Davis, *supra* note 9, at 244 (explaining that the NCAA was founded in 1905 under the name Intercollegiate Athletic Association of the United States and thereafter renamed as the NCAA in 1910).

<sup>18</sup> See *infra* notes 24–25 and accompanying text.

<sup>19</sup> See Smith, *supra* note 9, at 991.

<sup>20</sup> See *infra* notes 25–33 and accompanying text.

approximately 1,200 members, and it seeks to regulate almost every aspect of the college athletic experience.<sup>21</sup> Although the NCAA's self-purported mission is to promulgate playing rules, host championship events, and enforce standards of academic eligibility, today's NCAA is also involved in the overall commercial growth of college sports.<sup>22</sup> Indeed, the modern NCAA in many ways operates akin to a professional sports league—allocating among its members billions of dollars in revenues from ticket sales, broadcast rights, and licensing agreements.<sup>23</sup>

### B. NCAA Enforcement Authority Against Members

In its early years, the NCAA was a “minor force” in the governance of college athletics, with most of the decision-making in setting and enforcing rules left to the individual conferences.<sup>24</sup> Then, with the rapid boom in college athletics that coincided with the introduction of television, the NCAA began to expand its scope.<sup>25</sup> In 1948, the NCAA members enacted what has come to be known as the “Sanity Code”—a code that served to regulate member conduct by ensuring that all athletes at member institutions were bona-fide students at their respective schools.<sup>26</sup> The “Sanity Code” called for expulsion from the NCAA of any member that was found to have committed any infraction.<sup>27</sup>

In 1951, the NCAA lifted the “Sanity Code” and replaced it with a more complex enforcement code that established a Committee on In-

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<sup>21</sup> Edelman, *supra* note 4, at 64–65; *see also* Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 957 (6th Cir. 2004) (listing the NCAA's membership at over 1,200 colleges).

<sup>22</sup> Edelman, *supra* note 4, at 64–65.

<sup>23</sup> *See* Letter from Myles Brand, NCAA President, to William Thomas, Chairman, House Comm. on Ways & Means 16 (Nov. 13, 2006), available at [http://charitygovernance.blogs.com/charity\\_governance/files/20061115\\_response\\_to\\_housecommitteeonwaysandmeans.pdf](http://charitygovernance.blogs.com/charity_governance/files/20061115_response_to_housecommitteeonwaysandmeans.pdf) (noting that in November 2006, the NCAA revealed to Congress that its total annual operating revenues for all divisions was approximately \$7.8 billion, with \$4.2 billion annual revenues “generated from athletics sources such as ticket revenues, contributions and the like”); *see also* Complaint at 10, Pennsylvania v. NCAA, No. 1:13-cv-00006 (M.D. Penn. Jan. 2, 2013), ECF No. 1 (“In practice, however, the NCAA's primary function has been to maximize the revenue generated for its member institutions, primarily through college football and men's basketball. Approximately 90 percent of the NCAA's revenue is derived from its television contract for the men's basketball tournament, which the NCAA has successfully marketed as a major television event over three weekends each spring.”).

<sup>24</sup> Smith, *supra* note 9, at 991; *see also* Broyles, *supra* note 12, at 491 (explaining that “[i]n 1919, the NCAA took the first step toward [regulating college sports] by encouraging other schools to refuse to schedule those members not in conformity with NCAA regulations”).

<sup>25</sup> *See* Davis, *supra* note 9, at 246 (explaining how “[i]n the 1950's, television introduced a new dimension to college sports and created more business opportunities”).

<sup>26</sup> Smith, *supra* note 9, at 992.

<sup>27</sup> *Id.* at 992–93.

fractions to penalize member schools that committed rules violations.<sup>28</sup> NCAA members decided to lift the “Sanity Code” in part because they recognized it was not in their economic interest to ban all members that violated any aspect of the code.<sup>29</sup> Had the NCAA not sought to lift the Sanity Code, it would have quickly found itself without any membership.<sup>30</sup>

For more than the next 30 years, the NCAA operated pursuant to some variation of the enforcement procedures that were first promulgated in 1951—punishing members with fines and loss of television game broadcasts for non-compliance with rules, but rarely attempting to ban a member from maintaining an active athletic program.<sup>31</sup> Then, in January 1984, NCAA members again reversed course—forming the NCAA Presidents Commission to initiate dramatic changes to the trade association’s overall operating structure, including the potential for increased punishment of member schools, athletes, and coaches.<sup>32</sup>

Faced with the growing concern that some NCAA members were blatantly violating their bylaws, the NCAA Presidents Commission in June 1985 unveiled a seven-point plan to greatly expand the scope of its punishment power—a plan the NCAA members implemented by an overwhelming vote of 427 to 6.<sup>33</sup> The third point of this plan, which has become known colloquially as the “death penalty,” states that “any school

<sup>28</sup> *Id.* at 993; *see generally* Rogers & Ryan, *supra* note 2, at 754 (explaining that today the Committee on Infractions “consists of a ten-member panel, made up of NCAA member representatives and members of the general public”).

<sup>29</sup> *See* Smith, *supra* note 9, at 992–93.

<sup>30</sup> *Cf.* Broyles, *supra* note 12, at 492 (“[B]ecause the only punishment [under the Sanity Code] was termination of NCAA membership, over half of the member institutions voted to overturn the decision of the committee. If enforcement was to be effective, the NCAA needed more flexibility.”).

<sup>31</sup> *See id.*; Smith, *supra* note 9, at 993–94. Among the few notable instances during this period in which the NCAA Committee on Infractions attempted to ban a member athletic program included against the 1952–53 University of Kentucky basketball team for fixing games and the 1973–74 University of Southwestern Louisiana basketball team for violating amateurism rules. Broyles, *supra* note 12, at 498–99 (explaining that the NCAA Committee on Infractions recommended a one-year ban of the University of Kentucky basketball team for engaging in a point-shaving conspiracy; however, the University of Kentucky voluntarily cancelled their 1952–53 season before the penalty could be implemented); John Ed Bradley, *An Accidental Hero Beryl Shipley, 1926–2011*, SPORTS ILLUSTRATED VAULT (May 2, 2011) <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1184836/1/index.htm> (mentioning that the University of Southwestern Louisiana “was twice busted for cheating and received the NCAA’s death penalty [post-]1973”).

<sup>32</sup> *See* Smith, *supra* note 9, at 986–87.

<sup>33</sup> *See id.* at 987, 1010; *see also* Asher, *supra* note 1, at D1 (providing vote tally, and noting that only “Bryn Mawr (a women’s school), Texas, Texas A&M, Southern Methodist, Wisconsin and San Diego State dissented”); Tracy Dodds, *Strict Measures Win by Landslide at NCAA Meeting*, L.A. TIMES, June 22, 1985, at S1, *available at* [http://articles.latimes.com/1985-06-22/sports/sp-2172\\_1\\_voting](http://articles.latimes.com/1985-06-22/sports/sp-2172_1_voting) (colorfully quoting SMU President L. Donald Shields as describing the voting on the NCAA Presidents Commission plan as “a remarkable mass behavioral phenomenon in which dissent has been implied to be dishonorable”).

convicted of major violations of NCAA rules twice within five years can have its last-penalized program suspended up to two years.”<sup>34</sup> The “death penalty” moniker arises from the fact that “everyone, including [university] presidents, believes [this punishment] could effectively kill [an athletic] program for decades.”<sup>35</sup>

### C. *The NCAA’s Attempt to Order the “Death Penalty” Sanction*

Since instituting the “death penalty” in June 1985, the NCAA has only ordered this punishment once—against the Southern Methodist University football team for purportedly paying players monthly stipends ranging from \$50 to \$725.<sup>36</sup> This punishment shut down the SMU football program in its entirety for the 1987 season, and thereafter allowed the football team to play only a limited road schedule in 1988.<sup>37</sup> Although the sanction could have precluded SMU from playing football for the entirety of the 1988 season, the NCAA’s enforcement committee ultimately reduced the punishment to just a complete ban for one season in exchange for the school’s full cooperation with the NCAA’s decision, including its promise not to legally challenge it in the courts.<sup>38</sup>

The NCAA Enforcement Committee has also considered but rejected ordering the “death penalty” in at least 22 other instances.<sup>39</sup> For ex-

<sup>34</sup> Tucker, *supra* note 2; *see also* Smith, *supra* note 9, at 987.

<sup>35</sup> Tucker, *supra* note 2; *see also* Kay, *supra* note 2 (noting that one representative of a Big Ten school said the sanction is being called the “death penalty” because “[i]t would kill your whole athletic program”) (internal quotation marks omitted); Rogers & Ryan, *supra* note 2, at 759 n.60 (explaining that the term “death penalty” does not appear in the NCAA bylaws itself, but is “used colloquially to describe what is referred to in the [NCAA] Bylaws as program suspension for a defined time period”).

<sup>36</sup> *See* Layden, *supra* note 3; SMU INFRACTIONS REPORT, *supra* note 8, at 2 (concluding that “[d]uring the period September 1985 through December 1986, monthly payments ranging from \$50 to \$725 were made to numerous student-athletes in the sport of football from funds provided by an outside representative of the university’s athletics interests” and that “13 football team members received payments during the 1985–86 academic year that totaled approximately \$47,000, and eight student-athletes continued to receive payments from September through December 1986 that totaled approximately \$14,000”); *Time to Bench S.M.U.?* N.Y. TIMES, Dec. 6, 1986, at 26 (further noting that SMU was accused specifically of paying one student-athlete \$25,000 to sign a national letter of intent and arranging with another alumni to provide free housing for a student-athlete).

<sup>37</sup> *See* SMU INFRACTIONS REPORT, *supra* note 8, at 5; *cf.*, Layden, *supra* note 3 (explaining that the sanction crippled Southern Methodist University football so badly that ultimately “the school decided on its own not to play the following year as well”).

<sup>38</sup> *See generally* Randy Harvey, *SMU Banned from Playing Football in ‘87*, L.A. TIMES, Feb. 26, 1987, at S1, *available at* [http://articles.latimes.com/1987-02-26/sports/sp-5912\\_1\\_smu-officials](http://articles.latimes.com/1987-02-26/sports/sp-5912_1_smu-officials) (explaining that SMU could have been suspended for an additional year under the NCAA rules, and that “[t]he NCAA’s director of enforcement, David Berst, said the penalties might have been more severe if SMU officials had not cooperated with the NCAA investigation”).

<sup>39</sup> *See* Layden, *supra* note 3 (further discussing “the 10 most notable cases” in a chart to the far right of the article’s first page).



ample, the NCAA threatened to use its “death penalty” powers in 1990 after the University of Florida football coach admitted to having broken NCAA rules by “helping one of his players with child-support payments.”<sup>40</sup> In addition, the NCAA Committee on Enforcement mulled issuing the “death penalty” in 1999 against the University of Kansas men’s basketball team after the team coach admitted to buying a plane ticket for a recruit.<sup>41</sup> Meanwhile, the NCAA similarly mulled issuing the “death penalty” to the University of Alabama football team after it was revealed in 2002 that three boosters made payments exceeding \$150,000 to football recruits.<sup>42</sup> However, NCAA officials purported that “Alabama avoided the death penalty only by means of its own vigorous cooperation with investigators.”<sup>43</sup>

Most recently in late 2012, the NCAA again purportedly threatened to issue the “death penalty”—this time against Penn State University—unless the university agreed to sign a consent decree accepting unprecedented monetary penalties for its role in not safeguarding against child sex abuse in its football locker room.<sup>44</sup> According to a Complaint filed against the NCAA by the Commonwealth of Pennsylvania, the NCAA even suggested extending Penn State University’s “death penalty” to four years, even though the NCAA’s own bylaws explicitly limit the length of the “death penalty” sanction to just two.<sup>45</sup>

## II. AN INTRODUCTION TO ANTITRUST LAW AND ITS APPLICATION TO PRIVATE ASSOCIATION GROUP BOYCOTTS AND THE NCAA

### A. *Antitrust Basics*

Although the NCAA trumpets its “death penalty” sanction as a core element to a comprehensive self-governance scheme, the pragmatic effect of the NCAA’s “death penalty” raises red flags under federal antitrust laws.<sup>46</sup> Specifically, section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination . . . or conspiracy[] in restraint of

<sup>40</sup> Davis, *supra* note 9, at 240.

<sup>41</sup> See *N.C.A.A. Acts Against Kansas*, N.Y. TIMES, Nov. 2, 1988, at B9 (noting how the NCAA considered implementing the “death penalty” against the University of Kansas basketball team after basketball recruit Vincent Askew purportedly received improper benefits from the team coach); see also Dave Anderson, *Brown Skips Town, Again*, N.Y. TIMES, Nov. 11, 1988, at B11 (discussing how University of Kansas basketball coach Larry Brown “acknowledged that he had handed \$364 to [basketball recruit Vincent] Askew for a round-trip ticket to visit his ailing grandmother,” and that the same recruit also purportedly received money from boosters to help pay his aunt’s phone bill and for a second plane ticket).

<sup>42</sup> Layden, *supra* note 3.

<sup>43</sup> *Id.*

<sup>44</sup> See Complaint, *supra* note 23 at 23–24.

<sup>45</sup> See *id.* at 23; see also NAT’L COLLEGIATE ATHLETIC ASS’N, 2009–10 NCAA DIVISION I MANUAL § 19.5.2.3.2, at 294 (Repeat-Violator Penalties) (2009).

<sup>46</sup> See *infra* notes 49–52 and accompanying text.

trade or commerce . . . is declared to be illegal.”<sup>47</sup> Thus, “[a]n act harmless when done by one may become a public wrong when done by many acting in concert.”<sup>48</sup>

If challenged on its merits, a court would determine the legality of the NCAA “death penalty” by applying a three-part test.<sup>49</sup> First, the court would determine whether the NCAA “death penalty” “involves ‘concerted action between at least two legally distinct economic entities’ in a manner that affects ‘trade or commerce among the several states’ (‘Threshold Requirements’).”<sup>50</sup> If these Threshold Requirements are met, the court would next determine whether the NCAA “death penalty” impermissibly suppresses competition within any relevant market (“Competitive Effects Test”).<sup>51</sup> Finally, if the Competitive Effects Test is also met, a court must determine whether any antitrust exemption or affirmative defense negates the finding of antitrust liability.<sup>52</sup>

In performing this three-part test, the most straightforward part of the analysis involves applying the Threshold Requirements.<sup>53</sup> The prerequisite of “concerted action between two legally distinct economic entities” requires simply an agreement, either written or implied, between entities that otherwise would lack a common objective.<sup>54</sup> Similarly, the prerequisite of an effect on “trade or commerce among the several states,” merely requires a showing that the restraint involves “the ex-

<sup>47</sup> Sherman Act of 1890, 15 U.S.C. § 1 (2012). Read literally, section 1 of the Sherman Act seems to prohibit all commercial contracts; 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 Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’” *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

<sup>48</sup> *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914) (quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440–41 (1910)).

<sup>49</sup> Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 *CATH. U. L. REV.* 631, 640 (2009).

<sup>50</sup> Edelman, *supra* note 4, at 71 & n.43 (quoting *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (requiring concerted action clause) and 15 U.S.C. § 1 (requiring that a contract or conspiracy must be “in restraint of trade or commerce among the several States”)); *see also* Edelman, *supra* note 49, at 640.

<sup>51</sup> *See* Edelman, *supra* note 4, at 71.

<sup>52</sup> *See* Edelman, *supra* note 49, at 640.

<sup>53</sup> *See infra* notes 54–55 and accompanying text.

<sup>54</sup> *See, e.g., Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2212 (2010); *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (finding that “[t]here is no question that all NCAA member schools have agreed to abide by the Bylaws[, and thus] the first showing of an agreement or contract is therefore not at issue”); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (finding that an agreement among all of the colleges in an athletic conference “fulfills the ‘contract, combination, or conspiracy’ prong”) (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984)).

change or buying and selling of commodities [especially] on a large scale and involving transportation from place to place.”<sup>55</sup>

The Competitive Effects Test, by contrast, is more nuanced, especially in the context of a restraint involving a joint venture.<sup>56</sup> Theoretically, a court may review a restraint’s competitive effects by applying a spectrum of tests.<sup>57</sup> On one end of the spectrum, if a restraint seems so nefarious that the probability is high that it lacks any redeeming value, a court may apply the *per se* test—a test that presumes the restraint suppresses competition without engaging in any further inquiry.<sup>58</sup> Meanwhile on the other end of the spectrum, if a restraint seems more benevolent a court will apply a full Rule of Reason test, in which the court investigates every aspect of a restraint including whether the parties to the restraint had the power to control any relevant market (“Market Power”), whether the restraint encourages or suppresses competition, and whether the restraint caused the marketplace “antitrust harm.”<sup>59</sup> In the context of a restraint imposed by a “joint venture” such as a sports league, courts always must

<sup>55</sup> See WEBSTER’S THIRD NEW INT’L DICTIONARY 456 (2002); see also *Agnew*, 683 F.3d at 338 (finding a commercial transaction to occur between a student-athlete and his college where “the student-athlete uses his abilities on behalf of the university in exchange for an athletic and academic education, room, and board”); *Bassett v. NCAA*, 528 F.3d 426, 431, 433 (6th Cir. 2008) (finding a rule inhibiting NCAA member schools from hiring coaches that had been previously sanctioned by the NCAA to be “anti-commercial”); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (implying that certain trade association rules may be deemed non-commercial if they are not based on business motives). See generally *Hairston*, 101 F.3d 1315.

<sup>56</sup> See *infra* notes 58–59 and accompanying text.

<sup>57</sup> See *infra* notes 58–59 and accompanying text.

<sup>58</sup> Marc Edelman, *Upon Further Review: Will the NFL’s Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat’l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 197 & n.84 (2011); see also *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (“Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*.”); *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506 (2d Cir. 2004) (explaining that conduct is *per se* illegal if it falls within “the narrow range of behavior that is considered so plainly anticompetitive and so lacking in redeeming pro-competitive value that it is ‘presumed illegal without further examination’”) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979)).

<sup>59</sup> See Edelman, *supra* note 58, at 198–99; see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing the Rule of Reason as “an inquiry into market power and market structure”); *Worldwide Basketball*, 388 F.3d at 959 (explaining that “[u]nder the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of ‘produces significant anticompetitive effects within the relevant product and geographic markets’”) (quoting *Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); cf. *Banks v. NCAA*, 977 F.2d 1081, 1087–88 (7th Cir. 1992) (noting, with respect to the requirement of showing “antitrust harm,” that “[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition” and “not only an injury to [one]self”).

apply something more than the per se test, and they most likely will extend as far as applying the full Rule of Reason test.<sup>60</sup>

Finally, affirmative defenses to antitrust liability are also nuanced and may involve complicated issues of the law such as preemption.<sup>61</sup> Some examples of potential affirmative defenses that the NCAA may argue with respect to its “death penalty” include a defense that the “death penalty” is overall procompetitive on its economic merits (a defense that may only be argued outside the context of the per se test) and that the “death penalty” is otherwise exempted by either a statutory or non-statutory exemption.<sup>62</sup>

### B. *Group Boycotts by Trade Associations*

On many past occasions, courts have held that private trade associations’ attempts to refuse to deal with horizontal market competitors violate section 1 of the Sherman Act.<sup>63</sup> This conclusion emerges from well-established public policy in support of free trade, as well as the view that individual entities may not surrender their freedom to choose business relationships to the will of a private trade association.<sup>64</sup>

The Supreme Court’s rejection of trade associations’ concerted refusals to deal dates all the way back to its 1926 holding in *Anderson v. Shipowners Association of the Pacific Coast*.<sup>65</sup> There, the Court concluded that it was illegal for a trade association to require its members to hire only seamen that formally registered with the trade association and were designated by the trade association as next in line for work.<sup>66</sup> The Court explained that the trade association’s rules were illegal as a matter of law because each member of the trade association had impermissibly “surrendered his freedom of action” by “agree[ing] to abide by the will of the associations.”<sup>67</sup> In other words, members of the trade association “put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and dis-

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<sup>60</sup> See, e.g., *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2216 (2010); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (holding that “pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is per se unlawful under § 1 of the Sherman Act”).

<sup>61</sup> See *infra* notes 195–200 and accompanying text.

<sup>62</sup> Marc Edelman, *How Young American Athletes Can Best Challenge a Bureaucracy that Prevents Them from Earning a Living*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 135, 137 (2013).

<sup>63</sup> See *infra* notes 64–77 and accompanying text.

<sup>64</sup> See, e.g., *Anderson v. Shipowners Ass’n of Pac. Coast*, 272 U.S. 359, 364–65 (1926) (noting that “it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations”).

<sup>65</sup> *Id.* at 359.

<sup>66</sup> See *id.* at 361, 365.

<sup>67</sup> See *id.* at 364–65.

cretion,” and they succumbed to collective governance by the will of a private majority.<sup>68</sup>

Thereafter, in *Fashion Originators' Guild of America v. Federal Trade Commission*, the Supreme Court upheld a Federal Trade Commission decree disallowing members of the nation's largest fashion trade association from agreeing to “destroy all competition from [manufacturers and retailers] of garments which are copies of their ‘original creations.’”<sup>69</sup> Although the fashion trade association had claimed that the copiers themselves were in violation of the law, the Court explained that two wrongs do not make a right, and that it was nevertheless illegal for the guild to form an extra-governmental agency to “prescribe rules for the regulation and restraint of interstate commerce.”<sup>70</sup> The problem with prescribing industry-wide rules, according to the Court, was that it “trench[e]d upon the power of the national legislature” and thus violated section 1 of the Sherman Act.<sup>71</sup>

Then, in *Associated Press v. United States*, the Supreme Court again upheld a decision that enjoined the members of a trade association from enforcing an agreement that prevented members from selling to non-members.<sup>72</sup> This time, the Court specifically held that the Associated Press, a trade association composed of daily newspapers, may not prevent the sale of news gathered by its reporters to non-members.<sup>73</sup> Reason being, such a practice had the economic effect of depriving non-members “from any opportunity to buy news from [the Associated Press] or any of its publisher members.”<sup>74</sup>

<sup>68</sup> See *id.* at 365.

<sup>69</sup> 312 U.S. 457, 461 (1941).

<sup>70</sup> *Id.* at 465.

<sup>71</sup> *Id.* (internal quotation marks omitted). The Court in *Fashion Originators' Guild* further explained that the fashion trade association's attempt to boycott purported “style pirates” harmed consumer markets in a number of ways. For example, “it narrow[ed] the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy.” *Id.* In addition, it “subject[ed] all retailers and manufacturers who decline[d] to comply with the Guild's program to an organized boycott.” *Id.* Whereas, finally, the restraint also “ha[d] both as its necessary tendency and as its purpose and effect the direct suppression of competition.” *Id.*

<sup>72</sup> 326 U.S. 1, 21–22 (1945); see also *id.* at 9 (explaining that according to Associated Press rules, “[a]ll members are prohibited from selling or furnishing their spontaneous news to any agency or publisher except to [Associated Press]”); *id.* at 8 (noting a section in the Associated Press bylaws, stating that an “offending member may . . . be expelled [from the Associated Press] by the members of the corporation for any reason which in its absolute discretion it shall deem of such a character as to be prejudicial to the interests . . . of the corporation and its members, or to justify such expulsion) (internal quotation marks omitted).

<sup>73</sup> See *id.* at 21–22 (upholding the lower court's finding that “sections of the [Associated Press] By-Laws violated the Sherman Act which prevented service of [Associated Press] news to non-members and prevented [Associated Press] members from furnishing spontaneous news to anyone not a member of the Association”).

<sup>74</sup> *Id.* at 9.

Later, in *Silver v. New York Stock Exchange*, the Supreme Court once again called into doubt a refusal to deal with potential competitors—explaining that actions taken by members of the New York Stock Exchange to take away a bond trader’s access to wires that were needed for trading purposes “would clearly be in violation of the Sherman Act,” if not preempted in part by the Securities Exchange Act of 1934.<sup>75</sup> The *Silver* Court explained that “[t]he private wire connection, which allows communication to occur with the flip of a switch, is an essential part of [the bond trading] process.”<sup>76</sup> Thus, by concertedly denying a trader continued access to his wire, an over-the-counter dealer is “hampered substantially” in his ability to compete in the marketplace in terms of his ability to buy bonds “at the lowest quoted price and sell at the highest quoted price.”<sup>77</sup>

More recently, the Supreme Court has softened its presumptions about concerted refusals to deal—backing away from the position that all group boycotts are per se illegal, and showing greater willingness to review those restraints under the full Rule of Reason test.<sup>78</sup> For example, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, the Supreme Court concluded that the exclusion of a member from a wholesale purchasing cooperative merited a full Rule of Reason review (rather than the presumption of illegality) based on the cooperative’s small market share and its unlikelihood of resulting in “predominantly anticompetitive effects.”<sup>79</sup> Meanwhile, in *Federal Trade Commission v. Indiana Federation of Dentists*, the Supreme Court again explained that applying the per se test to group boycotts should be “limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor,” and that “the category of restraints classed as [per se illegal] group boycotts is not to be expanded indiscriminately.”<sup>80</sup>

Nevertheless, even though the Supreme Court in both *Northwest Wholesale Stationers* and *Indiana Federation of Dentists* rejected applying the per se test to a particular group boycott, those cases and their progeny

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<sup>75</sup> 373 U.S. 341, 364 (1963); see also *id.* at 348 (explaining that “[the] important business advantages” that came along with wire access “were taken away from petitioners by the group action of the Exchange and its members,” and that “[s]uch concerted refusals by traders to deal with other traders . . . have long been in a forbidden category”) (third alternation in original) (internal quotation marks omitted).

<sup>76</sup> *Id.* at 348.

<sup>77</sup> *Id.*

<sup>78</sup> See *Northwest Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 295 (1985) (recognizing that “not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences”).

<sup>79</sup> *Id.* Rather, the exclusion is one that may “increase economic efficiency and render markets more . . . competitive” so long as the members of the purchasing cooperative lack either “market power or exclusive access to an element.” *Id.* at 295–96.

<sup>80</sup> 476 U.S. 447, 458 (1986).

have held firm to the more general position that horizontal group boycotts, at a minimum, are subject to scrutiny under the Rule of Reason.<sup>81</sup> Thus, even in today's more tolerant environment toward certain horizontal restraints of trade, courts will continue to find that group boycotts violate section 1 of the Sherman Act if the boycotts are imposed by parties that collectively possess market power and unduly suppress competition in a manner that harms consumers.<sup>82</sup> Indeed, the only difference in the modern application of section 1 of the Sherman Act to trade association group boycotts is that under the modern view both the burdens of production and persuasion lie firmly with the plaintiffs.<sup>83</sup>

### C. Antitrust Litigation Involving the NCAA

Applying these core antitrust principles to the college sports marketplace, courts have reached varying conclusions about the legality of NCAA rules that govern horizontal market competition.<sup>84</sup> The litigation in *NCAA v. Board of Regents of the University of Oklahoma* ultimately led to the Supreme Court's only antitrust decision regarding college sports—one that points in the direction of finding that a wide range of NCAA practices violate section 1 of the Sherman Act.<sup>85</sup> Nevertheless, two subsequent decisions by lower courts have each failed to specifically overturn the NCAA "death penalty."<sup>86</sup>

#### 1. The Board of Regents Litigation

Three substantive court decisions in *Board of Regents of the University of Oklahoma*<sup>87</sup> provide meaningful precedent in favor of finding that certain horizontal agreements imposed by the NCAA may violate section 1 of the

<sup>81</sup> See *Ind. Fed'n of Dentists*, 476 U.S. at 458; *Northwest Wholesale Stationers*, 472 U.S. at 297.

<sup>82</sup> See Edelman, *supra* note 58, at 198–99; see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing the Rule of Reason as "an inquiry into market power and market structure"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (explaining that "[u]nder the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of 'produces significant anticompetitive effects within the relevant product and geographic markets'") (quoting *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); cf. *Banks v. NCAA*, 977 F.2d 1081, 1087–88 (7th Cir. 1992) (noting, with respect to the requirement of showing "antitrust harm" that "[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition" and "not only an injury to [one]self").

<sup>83</sup> See generally *supra* note 78 and accompanying text.

<sup>84</sup> See *infra* notes 85–105 and accompanying text.

<sup>85</sup> 468 U.S. 85, 108 (1984); see *infra* note 96 and accompanying text.

<sup>86</sup> See *infra* notes 98–105 and accompanying text.

<sup>87</sup> 468 U.S. 85 (1984); *Bd. of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147 (10th Cir. 1983); *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276 (W.D. Okla. 1982).

Sherman Act.<sup>88</sup> First, at the district court level, the U.S. District Court for the District of Oklahoma held that by attempting to enforce television quotas through the threat of the loss of NCAA membership, the NCAA's members had illegally "maintain[ed] mechanisms for punishing cartel members who [sought] to stray from these production quotas."<sup>89</sup> At the same time, the district court explained that "it is clear from the evidence that an institution which . . . is expelled from the NCAA could no longer operate a fully-rounded intercollegiate athletic program," and thus the NCAA's threat to ban particular members from its trade, in itself, would seem to violate section 1 of the Sherman Act.<sup>90</sup>

Thereafter, at the appellate level, the U.S. Court of Appeals for the Tenth Circuit upheld the district court's conclusion that "the [NCAA television] plan and contracts constitute per se illegal price fixing."<sup>91</sup> However, the appellate court reversed the lower court's finding that the NCAA's boycott of non-complying schools, in itself, would be per se illegal—holding instead that "an expulsion sanction does not by itself constitute a boycott" but rather is subject to full review under antitrust law's Rule of Reason.<sup>92</sup> Thereafter, the appellate court deemed such a full review of the expulsion sanction to be superfluous given the court's alternative affirmation that the television plan, in itself, must be overturned.<sup>93</sup>

Finally, upon granting certiorari the Supreme Court again concurred that the NCAA's output restraint on televised broadcasts violated antitrust law—finding that even if the television restraint was not per se illegal, it was still sufficiently troublesome to overturn under a "quick look" review.<sup>94</sup> The Supreme Court further explained that the NCAA's television plan clearly violated the law because it "eliminate[d] competi-

<sup>88</sup> See *infra* notes 89–96 and accompanying text; see also *Bd. of Regents of the Univ. of Okla. v. NCAA*, 601 F. Supp. 307, 309 (W.D. Okla. 1984) (explaining that in issuing an injunction against the NCAA subsequent to the Supreme Court's finding of an antitrust violation, the district court "[was] concerned by the lengths to which the NCAA ha[d] apparently gone in its zeal to impress upon its membership that somehow the NCAA prevailed in this action" and "wondered whether the membership [of the NCAA] was being given a report of a case different from the one [the district court] heard").

<sup>89</sup> *Bd. of Regents of the Univ. of Okla.*, 546 F. Supp. at 1301. The district court in *Board of Regents* furthermore found each of the other elements required under a full Rule of Reason analysis was met. It concluded that the universities of Oklahoma and Georgia suffered "antitrust harm" because they were able to show the likelihood of lost revenues due to the television broadcast restraints. *Id.* at 1301–02 (concluding that such injuries are "direct and substantial, and not indirect or derivative of injury alleged to have been suffered by the public at large").

<sup>90</sup> See *id.* at 1288.

<sup>91</sup> *Bd. of Regents of the Univ. of Okla.*, 707 F.2d at 1153.

<sup>92</sup> *Id.* at 1161 (further noting that "when, as here, the reasonableness of the practice cannot be assessed summarily, it is improper to affix the label 'boycott' and end all inquiry unless the proffered rule-enforcement justification appears to be merely a sham for some anticompetitive purpose").

<sup>93</sup> *Id.*

<sup>94</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85, 108, 117 (1984).



tors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete.<sup>95</sup> Nevertheless, much like the U.S. Court of Appeals for the Tenth Circuit, the Supreme Court in *Board of Regents* did not directly address the NCAA's threat to ban a member outside the scope of non-compliance with the trade association's television agreement.

## 2. Lower Court Antitrust Litigation Involving the NCAA "Death Penalty"

A detailed review of the *Board of Regents* case provides a reasonable possibility that upon full review the NCAA broadcasting rules would have been found illegal, not only based on their output restraints but also based on their threatened boycott of those members that would not succumb to the rules.<sup>96</sup> However, given that the Supreme Court never separately addressed the group boycott aspect of the restraint, lower courts are free to reach their own conclusions about the NCAA "death penalty" to the extent it does not relate to television restraints.

More recently, when lower courts have been asked to review the legal status of the NCAA "death penalty," two courts have indeed interpreted *Board of Regents* narrowly and thus found the "death penalty" to survive challenge under section 1 of the Sherman Act.<sup>97</sup> The first of these decisions, *McCormack v. NCAA*, rejected a challenge to the group boycott claims filed by a Southern Methodist University alumnus, college football players, and cheerleaders.<sup>98</sup> With respect to the alumnus and the cheerleader plaintiffs, the court concluded that they lacked sufficient standing to proceed with an antitrust challenge.<sup>99</sup> Meanwhile, with respect to the football player plaintiffs, the court held that Southern Methodist University's "death penalty" sanction survived under the Rule of Reason because it "enhance[d] public interest in intercollegiate athletics" and supported an "academic tradition" within the NCAA.<sup>100</sup>

Meanwhile, in *Commonwealth of Pennsylvania v. NCAA*, the U.S. District Court for the Middle District of Pennsylvania similarly dismissed an antitrust challenge to the NCAA's threatened use of the "death penalty" against Penn State University.<sup>101</sup> There, the court held that the NCAA's process by which it sought to punish Penn State University constituted

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<sup>95</sup> *Id.* at 108. Although the Supreme Court believed the restraint could not be deemed illegal under a mere per se test, it found the district court sufficiently analyzed the restraint under its "quick look" review. *See id.* at 117, 120.

<sup>96</sup> *Cf. Bd. of Regents of the Univ. of Okla. v. NCAA*, 601 F. Supp. 307, 309 (W.D. Okla. 1984) (noting that the district court, in issuing an injunction of the NCAA's illegal practices, would not "intrude into areas or activities which were not presented in the original litigation" nor would it "consider additional evidence").

<sup>97</sup> *See infra* notes 98–105 and accompanying text.

<sup>98</sup> *See McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988).

<sup>99</sup> *See id.* at 1341 (explaining that "[n]either McCormack nor any of the cheerleaders satisfies [the standing requirement]").

<sup>100</sup> *Id.* at 1344 (citing *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 117).

<sup>101</sup> *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 434 (M.D. Penn. 2013).

“non-commercial activity” based on Third Circuit precedent that had likened exclusion from the NCAA to being denied certification by a college-accrediting agency.<sup>102</sup> In addition, the court held that the Commonwealth of Pennsylvania’s substantive antitrust claim failed because it did not allege sufficient evidence of “concerted action” needed to prove a “contract, combination, or conspiracy.”<sup>103</sup> The court also found the plaintiff failed to “adequately allege[] anticompetitive effects in the markets identified in its complaint,”<sup>104</sup> as well as that the Commonwealth of Pennsylvania lacked standing to seek injunctive relief because the complaint alleged derivative injury to Pennsylvania citizens and not lessened competition in any relevant market.<sup>105</sup>

### III. WHY FUTURE CHALLENGES AGAINST THE NCAA “DEATH PENALTY” POTENTIALLY COULD SUCCEED

Despite the lower courts’ adverse rulings in *McCormack* and *Commonwealth of Pennsylvania*, a careful review of antitrust law and its general application to private associations indicates that a future challenge to the NCAA “death penalty” could reasonably succeed—especially if brought in a more favorable circuit or argued all the way to the Supreme Court.<sup>106</sup> The likelihood of a plaintiff ultimately obtaining a ruling that the NCAA “death penalty” violates section 1 of the Sherman Act would be strongest if suit is filed in a district court within the Tenth Circuit (the circuit in

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<sup>102</sup> See *id.* at 425 (citing *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds* 525 U.S. 459 (1999)); see also Edelman, *supra* note 4, at 83–84 (explaining that the Third Circuit’s view of the NCAA as not being a commercial actor can be traced all the way back to a citation to the U.S. Court of Appeals for the D.C. Circuit decision in *Marjorie Webster Junior College, Inc. v. Middle States Ass’n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 655–57 (D.C. Cir. 1970)—a decision that, in specificity, held that a college’s failure to obtain accreditation from a non-profit association did not give rise to antitrust harm because the denial of accreditation did not prevent that college from operating successfully).

<sup>103</sup> *Pennsylvania*, 948 F. Supp. 2d at 428; see also *id.* (rejecting what the court describes as a “conclusory allegation” that the NCAA’s actions, in themselves, constitute concerted activity).

<sup>104</sup> See *id.* at 430.

<sup>105</sup> *Id.* at 433–34. It is worth noting that neither *McCormack* nor *Commonwealth of Pennsylvania* provide the ideal case for testing the legality of the NCAA “death penalty” due to idiosyncrasies with both the plaintiffs and their arguments. In both cases, the plaintiffs challenging the NCAA “death penalty” were not the direct victims of either the boycott or attempted boycott—making the antitrust challenge seem remote and perhaps even spiteful. Additionally, in *Commonwealth of Pennsylvania*, the plaintiffs did not challenge the ramification of the “death penalty” if granted but rather only the effect of the alternative sanctions actually imposed by the NCAA after Penn State University reached a “consent agreement” with the NCAA as a way to avoid risk of the “death penalty”; see *supra* notes 98–105 and accompanying text.

<sup>106</sup> See *infra* notes 107–08 and accompanying text.

which *Board of Regents of the University of Oklahoma v. NCAA*<sup>107</sup> was filed), as well as if the plaintiff filing suit is an NCAA member that has actually been punished by the “death penalty” (differentiating a future case from *McCormack* and *Commonwealth of Pennsylvania*).<sup>108</sup>

### A. *Analyzing the Threshold Issues to a Challenge of the NCAA “Death Penalty”*

Analyzing a prospective challenge to the NCAA “death penalty” under section 1 of the Sherman Act, a reviewing court would most likely find the NCAA’s attempt to enforce the “death penalty” meets both of the Threshold Requirements needed to proceed to a Competitive Effects Test under section 1 of the Sherman Act.<sup>109</sup>

#### 1. *Concerted Action*

With respect to the first threshold issue—“concerted action”—the Supreme Court’s recent decision in *American Needle v. National Football League* is instructive.<sup>110</sup> There, the Court held that “concerted action” is inferable based on “how the parties involved in the alleged anticompetitive conduct actually operate.”<sup>111</sup> Thus, the law, as applied today, recognizes the possibility of concerted action even within a single corporate entity so long as that entity is “controlled by a group of competitors and serve[s] . . . as a vehicle for ongoing concerted activity.”<sup>112</sup>

Applying the Supreme Court’s holding in *American Needle*, the decision of the NCAA to ban a member seems to constitute “concerted action” even if the NCAA is structured as a single corporate entity.<sup>113</sup> The reason being the NCAA is both created and controlled by its individual member schools for the purposes of carrying out the collectively desirable activities of its members.<sup>114</sup> In this vein, much like the National Foot-

<sup>107</sup> *Bd. Of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147 (10th Cir. 1983); *Bd. Of Regents of the Univ. of Okla. v. NCAA*, 546 F.Supp 1276 (W.D. Okla. 1982).

<sup>108</sup> See Edelman, *supra* note 4, at 78 (explaining that an antitrust lawsuit brought against the NCAA under a “group boycott” theory is strongest if filed “by an NCAA member, given the well-established precedent that members of private associations have antitrust standing to sue their associations”); see also Edelman, *supra* note 62, at 140 (explaining that “[b]ased on the holdings of *Board of Regents [of the University of Oklahoma]* and *Law*, Tenth Circuit courts may provide the best forum to challenge the NCAA ‘no pay’ rules”).

<sup>109</sup> See *infra* notes 136–39 and accompanying text.

<sup>110</sup> *Am. Needle v. Nat’l Football League*, 130 S. Ct. 2201 (2010).

<sup>111</sup> *Id.* at 2209.

<sup>112</sup> *Id.*

<sup>113</sup> See *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 428–29 (M.D. Penn. 2013).

<sup>114</sup> See *About the NCAA*, NCAA (Aug. 13, 2012), <http://web.archive.org/web/20131105065922/http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW> (“The NCAA is a member association composed mostly of higher education institutions.”); see also Steve Berkowitz, *NCAA Fires Back at Lawyer in Ed O’Bannon Legal Case*, USA TODAY (July 10, 2013), available at <http://www.usatoday.com/story/sports/college/2013/07/10/ed-obannon-%20lawsuit-ncaa-name-likeness/2506777> (quoting the plaintiffs’ lawyer in the *O’Bannon v. NCAA* class action explaining

ball League, the NCAA is clearly “a vehicle for ongoing concerted activity.”<sup>115</sup>

It is worth further noting that one recent antitrust decision points in the opposite direction—the U.S. District Court for the Middle District of Pennsylvania’s June 2013 ruling in *Commonwealth of Pennsylvania*.<sup>116</sup> There, the court held that a plaintiff’s generalized allegations about punishment by the NCAA were insufficient to meet the burden of pleading the “concerted action” needed to survive a motion to dismiss.<sup>117</sup> Nevertheless, that decision seems to miss a critical point that has been either expressly stated or implied by numerous Supreme Court antitrust decisions involving professional sports leagues.<sup>118</sup> That point being: sports leagues are controlled by horizontal competitors that choose to allocate some of their decision-making powers to a central body.<sup>119</sup> Thus, sports league decisions—even those made by individual officers of the league—are by their very nature “concerted.”<sup>120</sup>

## 2. Interstate Commerce

With respect to the second threshold issue—interstate commerce—the law in most circuits is just as certain.<sup>121</sup> The Supreme Court’s decision in *Board of Regents* “identified the NCAA’s restraint on television broadcasts as being commercial without even addressing the issue”—a result that implies recognition that at least some NCAA rules affect interstate commerce.<sup>122</sup> Meanwhile, the Supreme Court’s earlier decision in *McLain v. Real Estate Board of New Orleans*, explained that the threshold requirement for interstate commerce is determined from an association’s effect on interstate commerce based on its generalized business activities—a definition that naturally leads to a presumption that the Supreme Court’s

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that “if you go to the NCAA’s website, it says it’s not a top-down organization, it’s a bottom-up organization—it’s the members that comprise the association”)

<sup>115</sup> *Am. Needle*, 130 S. Ct. at 2209.

<sup>116</sup> 948 F. Supp. 2d 416.

<sup>117</sup> *See id.* at 428–29.

<sup>118</sup> *See infra* notes 119–20 and accompanying text.

<sup>119</sup> *See* Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 904 (2008) (explaining that most professional sports leagues today are structured as a “mixed-mode property system,” which is composed of “individual club owners that recognize some cooperation amongst clubs is needed to produce a saleable output”).

<sup>120</sup> *See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99 (1984) (“By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another.”).

<sup>121</sup> *See infra* note 123 and accompanying text.

<sup>122</sup> Edelman, *supra* note 4, at 87 (citing *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102).

recognition of interstate commerce in *Board of Regents* would carry over to subsequent antitrust challenges against the NCAA.<sup>123</sup>

At the same time, the scope of the NCAA's current business practices indicates that the NCAA is directly and extensively involved in a wide range of interstate business practices.<sup>124</sup> For example, in the year 2010, the NCAA received more than \$750 million in revenue from CBS Sports and Turner Broadcasting in exchange for permission to broadcast the NCAA Men's Basketball Tournament across state lines.<sup>125</sup> In addition, the NCAA has received extensive royalties from corporate partners such as the videogame maker Electronic Arts in exchange for the rights to use NCAA names, marks, and perhaps even player names on a national basis.<sup>126</sup>

Nevertheless, a limited but seemingly conflicting line of cases from the First, Third, and Sixth Circuits have concluded the opposite.<sup>127</sup> These decisions have either found that all NCAA conduct should be construed as "non-commercial" based on the unique nature of the NCAA or, in the alternative, that certain NCAA conduct should fall within a non-commercial carve out because the conduct relates primarily to eligibility standards rather than a particular business transaction.<sup>128</sup>

Two of these seemingly conflicting cases were decided before the Supreme Court's ruling in *Board of Regents*—thus rendering their precedential value in doubt.<sup>129</sup> The first of these cases was the U.S. District Court for the District of New Jersey's 1974 ruling in *College Athletic Placement Service, Inc. v. NCAA*, which held that a legal challenge to a rule preventing student-athletes from paying companies to help them find scholarships did not fall under the purview of the Sherman Act because the rule served merely "the purpose of preserving educational standards in its member institutions."<sup>130</sup> Meanwhile, the second of these holdings was the U.S. District Court for the District of Massachusetts's decision in *Jones v. NCAA*, which held that a prospective collegiate hockey player could not use antitrust law to challenge an NCAA eligibility rule because the plaintiff failed to show that "the action of the NCAA in setting eligi-

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<sup>123</sup> 444 U.S. 232, 244 (1980); see generally Edelman, *supra* note 4, at 88 & n.146 (explaining that "[w]hile the disputed issue in *McLain* primarily related to the 'interstate' aspect rather than the 'commerce' aspect of 'interstate commerce,' the inquiry was nevertheless performed together, leading to the logical result that the court intended a review of both components in the gestalt rather than based on just a single bylaw").

<sup>124</sup> See *infra* notes 125–26 and accompanying text.

<sup>125</sup> See Branch, *supra* note 6, at 93.

<sup>126</sup> See Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 558–59 (2013).

<sup>127</sup> See *infra* notes 130–35 and accompanying text.

<sup>128</sup> See *infra* notes 130–35 and accompanying text.

<sup>129</sup> See *infra* notes 130–31 and accompanying text.

<sup>130</sup> Civ. Action No. 74-1144, 1974 WL 998, at \*1, \*4 (D.N.J. Aug. 22, 1974).

bility guidelines ha[d] any nexus to commercial or business activities in which the defendant might engage.”<sup>131</sup>

In addition, six other lower court decisions have found NCAA conduct to be non-commercial even after *Board of Regents*—all decisions reached by courts within either the Third Circuit or the Sixth Circuit.<sup>132</sup> Among these more recent decisions, the U.S. Court of Appeals for the Third Circuit held in *Smith v. NCAA* that a challenge to an NCAA bylaw that prohibited student-athletes from participating in intercollegiate sports while attending a graduate school different from the one where they attended college was non-commercial because it related to athlete eligibility rather than the business functions of the NCAA.<sup>133</sup> Meanwhile, the U.S. Court of Appeals for the Sixth Circuit held in *Bassett v. NCAA* that an NCAA mandate requiring any college that wanted to hire a coach who previously engaged in recruiting violations to first seek the association’s permission was non-commercial even though the NCAA itself was a commercial actor.<sup>134</sup>

Most recently, the U.S. District Court for the Middle District of Pennsylvania even found in *Commonwealth of Pennsylvania v. NCAA* that the NCAA’s process by which it sought to financially punish Penn State University for its failure to properly investigate child abuse by one of its football coaches constituted non-commercial activity based on Third Circuit precedent from *Smith* and its progeny.<sup>135</sup> Nevertheless, the court’s ruling in *Commonwealth of Pennsylvania* is dubious based on the more compelling interpretation of *Board of Regents* adopted by most other circuits.<sup>136</sup> In addition, the ruling seems to conflict with the fine language of *Smith*, given that the NCAA’s threat of issuing the “death penalty” to Penn State University was not an issue related to player eligibility, but rather an issue related to which colleges could host football games for profit—a business rule that even *Smith* seemed to acknowledge lied outside of its carve-out.<sup>137</sup>

Based upon the forgoing, it is strongly suggested that a plaintiff challenging the NCAA “death penalty” would survive the “interstate commerce” threshold in all circuits.<sup>138</sup> However, it may be advisable for any potential plaintiff that seeks to avoid obstacles with this threshold issue to

<sup>131</sup> 392 F. Supp. 295, 303 (D. Mass. 1975).

<sup>132</sup> See *infra* notes 133–35 and accompanying text.

<sup>133</sup> See *Smith v. NCAA*, 139 F.3d 180, 183–85 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

<sup>134</sup> See *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008).

<sup>135</sup> *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 427–28 (M.D. Penn. 2013).

<sup>136</sup> See *supra* notes 107–26 and accompanying text.

<sup>137</sup> See *Smith*, 139 F.3d at 185–86 (explaining its recognition that federal antitrust law applies to the “NCAA’s commercial or business activities” but concluding that NCAA eligibility rules are different from other NCAA rules because they “primarily seek to ensure fair competition in intercollegiate athletics” and thus have “principally noncommercial objectives”).

<sup>138</sup> See *supra* notes 121–26 and accompanying text.

avoid filing suit in the Third Circuit (extremely elevated risk), Sixth Circuit (somewhat elevated risk), and perhaps even the First Circuit (elevated risk) given these circuits' iconoclastic past rulings.<sup>139</sup>

### B. *Analyzing the Competitive Effects of the NCAA "Death Penalty"*

Presuming a plaintiff is able to meet both threshold issues required to proceed with an antitrust challenge, the legal analysis of the NCAA "death penalty" next shifts to an assessment of the competitive effects, with the applicable test almost certainly being the full Rule of Reason inquiry.<sup>140</sup> Applying the full Rule of Reason test, a plaintiff would bear the initial burden of presenting evidence that the NCAA maintains market power, and that the NCAA "death penalty" suppresses competition in a manner that harms consumers.<sup>141</sup> This is a burden that, in most circuits, a plaintiff would be able to meet.<sup>142</sup>

#### 1. *Market Power*

Market power, the first element of the Rule of Reason test, is typically defined as "the power to control prices or exclude competition."<sup>143</sup> Courts may assess whether defendants have market power by either looking at actual marketplace conditions or analyzing secondary economist data.<sup>144</sup> Typically, a market share of more than 33% represents the minimum threshold for market power.<sup>145</sup> Meanwhile, a relevant market share of greater than 50% presents an extremely strong presumption of market power.<sup>146</sup>

<sup>139</sup> See *supra* notes 127–35 and accompanying text.

<sup>140</sup> See *supra* notes 47–60 and accompanying text.

<sup>141</sup> See Edelman, *supra* note 58, at 198–99; see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing the Rule of Reason as "an inquiry into market power and market structure"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (explaining that "[u]nder the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of 'produces significant anticompetitive effects within the relevant product and geographic markets'") (quoting *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (2003)); cf. *Banks v. NCAA*, 977 F.2d 1081, 1087–88 (7th Cir. 1992) (noting, with respect to the requirement of showing antitrust harm, that "[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition" and "not only an injury to [one]self").

<sup>142</sup> See *infra* notes 146–92 and accompanying text.

<sup>143</sup> E. THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 27 (3d ed. 1998) (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)) (internal quotation marks omitted). For alternative definitions of market power, see also Edelman, *supra* note 58, at 200 n.106.

<sup>144</sup> Edelman, *supra* note 58, at 200–01.

<sup>145</sup> DANIEL A. CRANE, *ANTITRUST* (2014).

<sup>146</sup> *Id.*

Before calculating market shares, courts must first define the relevant market based on both product and geographic dimensions.<sup>147</sup> A relevant product market is defined as the range of products that a customer would consider to be substitutes and thus would reasonably be chosen by consumers instead of each other if owners of one product agreed to a small but significant increase in price.<sup>148</sup> In addition, within these broad product markets, “well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.”<sup>149</sup> In the case of college sports, the Supreme Court previously held in *Board of Regents* that televised collegiate sports broadcasts represent their own distinct product market that is separate from even televised broadcasts for professional sports.<sup>150</sup> Reason being, college sports “generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.”<sup>151</sup>

Meanwhile, a relevant geographic market is “the market in which the seller operates and to which the purchaser can turn for supplies.”<sup>152</sup> The criteria used to determine an appropriate geographic market is essentially the same as that used to determine the relevant product market.<sup>153</sup> Thus, although the geographic market in some instances may encompass the entire United States and beyond, it is still feasible for submarkets to exist that are as small as a single metropolitan area.<sup>154</sup>

In the context of an antitrust claim brought by a boycotted member of the NCAA, the NCAA members collectively seem to exert market power in the product market for collegiate sports broadcasts and live college sports events—both throughout the United States and in various local geographic submarkets.<sup>155</sup> Thus, the NCAA’s ban of any particular mem-

<sup>147</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 7–8 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

<sup>148</sup> See *id.* at 7–9; see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (explaining that “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it”).

<sup>149</sup> See *Brown Shoe Co.* at 370 U.S. at 325.

<sup>150</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85, 101–02, 111 (1984).

<sup>151</sup> *Id.* at 111.

<sup>152</sup> Edelman, *supra* note 49, at 645–46 (quoting SULLIVAN & HARRISON, *supra* note 143, at 33) (internal quotation marks omitted).

<sup>153</sup> *Brown Shoe Co.*, 370 U.S. at 336.

<sup>154</sup> *Id.* at 337.

<sup>155</sup> See *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982) (explaining that “it is clear from the evidence that an institution which withdraws or is expelled from the NCAA could no longer operate a fully-rounded intercollegiate athletic program” and that “[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program”); cf. *Coll. Athletic Placement Serv. v. NCAA*, Civ. Action No. 74-1144, 1974 WL 998, at \*2 (D.N.J. Aug. 22, 1974) (describing the NCAA as “the largest and most prestigious association of colleges and athletic



ber from any given sport could theoretically produce anticompetitive effects on both the national and local level.

To illustrate this point, in late 2012 the NCAA members considered giving Penn State University's football team the "death penalty."<sup>156</sup> Had they done so, Penn State would have been precluded from competing in football games against rival colleges on national television.<sup>157</sup> In addition, Penn State would have lost the ability to host football games, given that all other NCAA members would have concertedly agreed not to play football games against Penn State.<sup>158</sup> In the absence of Penn State providing live football entertainment, fans thus would have been left with a limited number of alternative football games within driving distance from which to choose.<sup>159</sup> Thus, the concerted removal of Penn State football from their regional college football marketplace would have increased gate revenues at other large football universities within driving distance from Penn State's campus, such as revenues at football contests hosted by the University of Pittsburgh (located 136 miles away), Temple University (located 193 miles away), and the University of Maryland (199 miles away).<sup>160</sup>

Similarly, the loss of SMU's football team for the 1987 football season may have been a boon to the attendance of some other Division I college football teams in the region.<sup>161</sup> For example, the home football attendance at Texas A&M University—a team that played in the same conference as SMU and was based approximately three hours away—increased from 59,662 in 1986 to 66,623 in 1987.<sup>162</sup> Meanwhile, the average home football game attendance for Texas Christian University increased from 29,211 to 32,758, and the average home football attendance

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conferences in the United States"); Jeffrey L. Kessler, *Tournament Has Become March Monopoly Madness*, N.Y. TIMES, Mar. 28, 2004, at SP9 (comparing the NCAA's control of the college basketball market to "a 7-foot center playing in a fixed game in which no one else is allowed to be taller than 6 feet").

<sup>156</sup> See *Death Penalty Possible for Penn State*, NCAA (Jul. 17, 2012), <http://www.ncaa.com/news/football/article/2012-07-17/emmert-won-t-rule-out-death-penalty-penn-st> (noting that "[t]he president of the NCAA says he isn't ruling out the possibility of shutting down the Penn State football program in the wake of the Jerry Sandusky child sex abuse scandal," and that "President Mark Emmert said he doesn't want to 'take anything off the table' if the NCAA determines penalties against Penn State are warranted").

<sup>157</sup> See *supra* notes 31–45 and accompanying text.

<sup>158</sup> See *supra* notes 31–45 and accompanying text.

<sup>159</sup> See *infra* note 160 and accompanying text.

<sup>160</sup> See Driving Distance from State College, PA to Pittsburgh, PA, TRAVELMATH, <http://www.travelmath.com> (search "Get" for "driving distance"; then enter "State College, PA" for "From" and "Pittsburgh, PA," "Philadelphia, PA," and "College Park, MD," respectively for "To"; then follow "Calculate" hyperlink) (noting the driving distance from State College, PA to Pittsburgh, PA is 136 miles, to Philadelphia, PA is 193 miles, and to College Park, MD is 199 miles).

<sup>161</sup> See *infra* notes 162–63 and accompanying text.

<sup>162</sup> See e-mail from Alan Cannon, Assoc. Athletic Dir. for Media Relations, Tex. A&M Univ., to Michelle Gregory, Research Assistant for Prof. Marc Edelman (Aug. 15, 2013, 10:21 EST) (on file with author).

for the University of North Texas increased from 12,730 to 13,764 during that same period.<sup>163</sup> These findings leave open a reasonable possibility that some previous consumers of SMU football games shifted their Saturday consumption activities during this period to support one of the other local football programs.<sup>164</sup>

## 2. Evidence of Anticompetitive Effects

The second stage in a Rule of Reason analysis—the showing of anti-competitive effects—also involves legal analysis, as well as both economic and empirical evidence.<sup>165</sup> A classic argument against the NCAA “death penalty” is that its function is akin to those group boycotts that the Supreme Court has long deemed to be illegal based on their exclusion of horizontal competitors from the marketplace.<sup>166</sup> For example, there are many strong overlaps between the NCAA’s enforcement of its “death penalty” sanction and the collective practices that the Supreme Court found to be illegal in *Shipowners Association of Pacific Coast*.<sup>167</sup> Among them, NCAA eligibility rules limit members’ “freedom of action” about the selection of their playing schedule and forces them to adhere to “the will of the association” regarding the scheduling of games against certain schools.<sup>168</sup> Moreover, the NCAA’s self-governance prevents individual members from scheduling games against punished schools, no matter how strongly consumers signal their preference for such games.<sup>169</sup>

Likewise, the NCAA’s enforcement of its “death penalty” is akin to the illegal practice in *Fashion Originators’ Guild* of refusing to do business

<sup>163</sup> See e-mail from Deanna Damon, Admin. Assistant, Athletics Mktg. and Media Relations, Tex. Christian Univ., to Michelle Gregory, Research Assistant for Prof. Marc Edelman (Aug. 26, 2013, 17:31 EST) (on file with the author).

<sup>164</sup> See *supra* notes 161–63 and accompanying text. But see e-mail from Nicholas A. Joos, Exec. Assoc. Athletic Dir. External Affairs, Baylor Univ., to Michelle Gregory, Research Assistant for Prof. Marc Edelman (Aug. 15, 2013, 15:24 EST) (on file with author) (noting that another major Texas football program, Baylor University, saw its average home game attendance decline from 37,317 in 1986 to 30,353 in 1987 despite the NCAA ban of SMU during that season).

<sup>165</sup> See, e.g., Edelman, *supra* note 58, at 211 & nn.170–71 (discussing the use of both empirical and economic evidence in Rule of Reason review).

<sup>166</sup> See *infra* notes 167–80 and accompanying text; see also Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 329 (2007) (explaining that “[s]ome view the NCAA as a protector of all that is pure and decent in the world of college sports” meanwhile “[o]thers, perhaps more realistically, characterize the organization as a facilitator of anticompetitive practices among its constituent”).

<sup>167</sup> See *Anderson v. Shipowners Ass’n of Pac. Coast*, 272 U.S. 359, 361, 365 (1926) (explaining that it was illegal for a trade association to require its members to only hire seamen that formally registered with the trade association, received a trade association number, and were designated next in line for work by the trade association).

<sup>168</sup> See *id.* at 364–65.

<sup>169</sup> See *supra* note 158–167 and accompanying text.

with any manufacturer or retailer that copied original designs.<sup>170</sup> Much as the Court held that the Fashion Originators Guild is not permitted to form an extra-governmental regulatory agency to ban members engaged in the potentially illegal act of copying,<sup>171</sup> the same finding should hold with respect to the NCAA and use of its “death penalty” sanction. If NCAA members are violating the law, the punishment for their actions should come from the American legal system, and not a private association proclaiming that role for itself.<sup>172</sup> Indeed, much like the Fashion Originators Guild’s attempt at private self-governance, the NCAA’s attempt to do the same is especially troubling in light of its near 100% market power and thus its ability to control the fate of an entire market.<sup>173</sup>

Along those same lines, the NCAA’s practice of prohibiting current members from scheduling games against schools that have been punished with the “death penalty” can be likened to the Associated Press’s illegal practice of refusing to allow members to sell gathered news to non-members.<sup>174</sup> For example, both the Associated Press’s refusal to allow members to cooperate with non-members and the NCAA’s refusal to allow members to organize games against “death penalty” schools yields much the same effect—precluding a potential competitor from the marketplace.<sup>175</sup> Of course, the NCAA “death penalty” can be distinguished from the Associated Press’s refusal to deal with non-members based on the fact that the boycotted NCAA members had engaged in purported bad acts. Nevertheless, as the Supreme Court explained in *Fashion Originators’ Guild*, such distinctions are irrelevant because the power to determine bad acts is one reserved for the courts and legislature, and not one bestowed on private trade associations.<sup>176</sup>

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<sup>170</sup> *Fashion Originators’ Guild of Am. v. Fed. Trade Comm’n*, 312 U.S. 457, 461 (1941).

<sup>171</sup> *Id.* at 465.

<sup>172</sup> *Id.* (noting that the problem with a trade association’s industry-wide rules was that they “trench[e]d upon the power of the national legislature”) (internal quotation marks omitted).

<sup>173</sup> See Lazaroff, *supra* note 166, at 329 (noting that “[t]he National Collegiate Athletic Association . . . dominates contemporary regulation of intercollegiate sports”); see also *Bd. of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982) (noting that “[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program”).

<sup>174</sup> See *Associated Press v. United States*, 326 U.S. 1, 21–22 (1945); see also *id.* at 9 (explaining that according to Associated Press rules, “[a]ll members are prohibited from selling or furnishing their spontaneous news to any agency or publisher except to [Associated Press]”); *id.* at 8 (noting a section in the Associated Press bylaws stated that an “offending member may . . . be expelled [from the Associated Press] by the members of the corporation for any reason which in its absolute discretion it shall deem of such a character as to be prejudicial to the interests and welfare of the corporation and its members, or to justify such expulsion”) (internal quotation marks omitted).

<sup>175</sup> *Id.* at 9, 13.

<sup>176</sup> *Fashion Originators’*, 312 U.S. at 465, 468.

Moreover, the Supreme Court's language in *Silver v. New York Stock Exchange* further buttresses the conclusion that taking away a member's ability to compete in sporting events is anticompetitive because it substantially hampers the boycotted school's ability to compete in the marketplace.<sup>177</sup> This is because much like removing wire connections from a bond trader, removing the ability to schedule games from a college sports program in essence forecloses any ability to compete within the marketplace.<sup>178</sup> Similarly, dicta from the Supreme Court's decisions in *Northwest Wholesale Stationers v. Pacific Stationary and Printing Co.* and *Federal Trade Commission v. Indiana Federation of Dentists* is helpful because the NCAA's imposition of the "death penalty" is done by member schools that collectively possess market power (as discussed above) and which have access to a factor that is critical to marketplace competition—the ability to schedule games against competitors.<sup>179</sup> Thus, neither of the two potentially mitigating factors discussed in those cases would seem to save the NCAA's practices.<sup>180</sup>

Nevertheless, two subsequent lower court decisions have concluded that the NCAA's use (or threatened use) of the "death penalty" does not yield sufficiently anticompetitive effects to make a prima facie showing of anticompetitive conduct under the Rule of Reason.<sup>181</sup> First, the U.S. Court of Appeals for the Fifth Circuit explained in *McCormack v. NCAA* that the NCAA "death penalty" was not sufficiently anticompetitive based on language from the Supreme Court's *Board of Regents* decision that noted "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams . . . because they enhance the public interest in intercollegiate athletics."<sup>182</sup> In addition, the U.S. District Court for the Middle District of Pennsylvania concluded in *Commonwealth of Pennsylvania* that the Commonwealth failed to sufficiently allege in its complaint anticompetitive effects related to the NCAA's threatened issuance of the "death penalty" against Penn State.<sup>183</sup> Among other reasons, the court in *Commonwealth of Pennsylvania* noted that "even assuming that Penn State will face difficulty in competing for Division I football players as a result of the sanctions, the antitrust laws are not implicated."<sup>184</sup>

<sup>177</sup> 373 U.S. 341, (1963).

<sup>178</sup> See Lazaroff, *supra* note 166, at 329 (explaining that it is "virtually impossible for colleges and universities to engage in high quality interscholastic competition without complying with the myriad requirements [the NCAA] promulgates").

<sup>179</sup> See *supra* notes 78–82 and accompanying text.

<sup>180</sup> See *supra* notes 78–82 and accompanying text.

<sup>181</sup> See *infra* notes 182–88 and accompanying text.

<sup>182</sup> See *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988) (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)) (internal quotation marks omitted).

<sup>183</sup> See *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 431 (M.D. Penn. 2013).

<sup>184</sup> See *id.*

Both of these lower court decisions, however, do not seem to comport with the Supreme Court's holding in *Board of Regents*.<sup>185</sup> Specifically, the court in *McCormack* misconstrued the meaning of the dicta from *Board of Regents* to which it cited.<sup>186</sup> Indeed, it is an absurdity of construction to presume that the Supreme Court's statement that "most of the regulatory controls of the NCAA are justifiable means of fostering competition" is equivalent to a finding that NCAA conduct cannot yield an anticompetitive effect—especially in light of the fact that the Supreme Court in *Board of Regents* ultimately found the NCAA's broadcasting rules to be illegal.<sup>187</sup>

Meanwhile, the court in *Commonwealth of Pennsylvania*—perhaps hampered by a complaint that was focused more on alleged harms emanating from Penn State University's actual punishment rather than the "death penalty"—overlooked the implied, albeit not outright stated, anticompetitive effects that the threatened "death penalty," if enforced, would have yielded on Penn State's ability to compete in the markets to sell college football game tickets and college football game telecasts.<sup>188</sup> Although the plaintiffs' lawyers clearly were to blame for drafting a poorly worded complaint, these seemingly obvious anti-competitive effects could still have been inferred if the court had adopted a more flexible approach.

### 3. Antitrust Harm

Finally, the Rule of Reason's requirement that a plaintiff show "antitrust harm" means the plaintiff must prove that the restraint diminishes competition within an entire marketplace, and not just for a single competitor.<sup>189</sup> This prong of the analysis, which often conflates both the market power and Competitive Effects Test, requires a finding that the restraint in question actually reduces consumer choice.<sup>190</sup> This is based on the fact that "[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition" and not simply "an injury to [one]self."<sup>191</sup>

<sup>185</sup> See *infra*, notes 186–88 and accompanying text.

<sup>186</sup> See *supra* note 98 and accompanying text.

<sup>187</sup> *Bd. of Regents of the Univ. Okla.*, 468 U.S. at 117.

<sup>188</sup> See *Pennsylvania*, 948 F. Supp. 2d at 430–31.

<sup>189</sup> Edelman, *supra* note 58, at 219 (discussing the required showing of antitrust injury).

<sup>190</sup> See *infra* notes 191–92 and accompanying text; Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Age/Education Policy from a Legal, Cultural and Ethical Perspective*, 3 Nw J.L. & Soc. POL'Y 1, 22 (2008) (explaining that in certain circumstances the elements of anticompetitive effects and consumer harm conflate with one another).

<sup>191</sup> *Banks v. NCAA*, 977 F.2d 1081, 1087–88 (7th Cir. 1992); see also *Pennsylvania*, 948 F. Supp. 2d at 422 ("To establish its Section 1 antitrust claim under the Sherman Act, Plaintiff cannot allege just *any* harm, but must point to harm directed at commercial activity of the type the Sherman Act is designed to address.").

There is a strong argument that the NCAA “death penalty” not only causes generalized harm to the parties excluded from competition in sporting events but also specifically harms consumers by stripping away their ability to express a preference for sporting events that include the “boycotted” team as a competitor.<sup>192</sup> For example, if the NCAA had not punished Southern Methodist University’s football team with the “death penalty” in the 1987 season, college football fans might have been willing to pay more money to watch football games in which Southern Methodist University was an opponent. Thus, absent the group boycott, some NCAA members would have likely elected to continue to schedule football games against Southern Methodist University even in spite of their conduct leading to their NCAA-wide suspension.

*C. Analyzing Potential Affirmative Defenses to the NCAA “Death Penalty”*

Based on the foregoing, there are a few circuits in which a plaintiff’s antitrust challenge to the NCAA “death penalty” would likely fail the second stage of analysis.<sup>193</sup> However, in the majority of other circuits (including, of course, the Tenth Circuit, where precedent is most favorable to an antitrust challenge), the analysis next shifts to a review of the NCAA’s potential affirmative defenses, if any.<sup>194</sup>

Presuming the courts apply a full Rule of Reason review, one affirmative defense that remains for the NCAA is the argument that the anti-competitive effects of its “death penalty” are more than offset by pro-competitive benefits of the restraint within the same market—the market for collegiate sporting events within any given sport.<sup>195</sup> In addition, the NCAA might also attempt to argue that there exists a broader antitrust defense that insulates aspects of the NCAA’s self-governance from scrutiny, even where the conduct could not otherwise be saved based on traditional procompetitive benefits.<sup>196</sup>

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<sup>192</sup> See *supra* notes 159–64 and accompanying text.

<sup>193</sup> See *supra* notes 181–88 and accompanying text.

<sup>194</sup> See *supra* note 52 and accompanying text.

<sup>195</sup> See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827 (2009) (explaining that, based on the author’s review of nearly 500 Rule of Reason cases, most courts follow a “burden-shifting approach” that in the first stage requires the plaintiff to show a significant anticompetitive effect in a relevant market, and then, if the plaintiff makes such a showing, allows the defendant to “demonstrate a legitimate procompetitive justification” that more than offsets the anticompetitive effect); see also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (noting that “[c]ontrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason,” and that the rule “focuses directly on the challenged restraint’s impact on competitive conditions”); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (noting that “[a] restraint on competition cannot be justified solely on the basis of social welfare concerns”); Edelman, *supra* note 58, at 216 (explaining that “most courts have long disallowed weighing pro-competitive benefits that do not emanate from economic benefits in the same market as the alleged anticompetitive conduct”).

<sup>196</sup> See *infra* notes 203–16 and accompanying text.

### 1. *Offsetting Procompetitive Benefits in the Same Market*

Under the Rule of Reason, the primary affirmative defense to a restraint that is shown to produce an anticompetitive effect is that this effect is more than offset by a procompetitive benefit within the same economic market. In the early days of antitrust law, some courts allowed defendants to intermingle social policy with economic analysis when arguing in favor of procompetitive benefits.<sup>197</sup> However, today a proper procompetitive effects analysis focuses exclusively on the challenged restraint's impact on competitive conditions.<sup>198</sup> Thus, a court is instructed to entirely disregard arguments based on "intuitive judgment of whether a particular practice seems sensible and equitable."<sup>199</sup>

For the NCAA to successfully show that the "death penalty" produces a more-than-offsetting procompetitive benefit, the NCAA would need to show that enforcing the NCAA "death penalty" actually increases the number of competitors in the college sports marketplace, or protects the marketplace from ceasing to operate in its entirety.<sup>200</sup> Perhaps the best argument to that point would be that without a "death penalty" no NCAA member would want to play in championship events that include schools that have engaged in conduct they find repugnant.

Nevertheless, it seems like a stretch to argue that the NCAA needs its "death penalty" for the college sports marketplace to operate efficiently, or even at all.<sup>201</sup> To the contrary, empirical evidence shows that college sports thrived in the United States both in the period between 1905 and 1948, and again between 1951 and 1985—both periods of time in which the NCAA did not have the ability to issue a credible threat of banning a member school.<sup>202</sup> Moreover, teams that have received the "death penal-

<sup>197</sup> See Edelman, *supra* note 49, at 646.

<sup>198</sup> *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688.

<sup>199</sup> PAUL C. WEILER & GARY R. ROBERTS, *SPORTS & THE LAW: TEXT, CASES, AND PROBLEMS* 42 (3d ed. 2004).

<sup>200</sup> See Edelman, *supra* note 49, at 651 (explaining that "[c]ourts, applying the 'necessary to make any competition available' argument, have long upheld otherwise anticompetitive agreements that were necessary to allow any degree of competition to exist in a particular marketplace"); see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (explaining that a blanket license among competitors "was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided") (emphasis added); John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 707 (1977) (explaining that "[i]t would be a rather startling notion if the antitrust laws meant that a business operation such as a league could not protect itself against actions of participants which might seriously injure, if not destroy, the enterprise").

<sup>201</sup> See *infra* note 202 and accompanying text.

<sup>202</sup> See Kay Hawes, 'Its Object Shall Be Regulation and Supervision' NCAA Born from Need to Bridge Football and Higher Education, NCAA (Nov. 8, 1999), <http://fs.ncaa.org/Docs/NCAANewsArchive/1999/19991108/active/3623n27.html> (noting that the NCAA enjoyed a "boom time" after World War I); see also Lazaroff, *supra* note 166, at 332 n.15 (citing ARTHUR A. FLEISHER III ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 42–45 (1992)) (referring to the 1920s–

ty” sanction such as SMU have not acted in a manner that has harmed overall consumer interest in collegiate sports. Furthermore, even without an NCAA “death penalty,” individual colleges enjoy the free will not to schedule games against specific opponents that they consider unseemly, as well as to deny conference membership to such schools.

## 2. *Non-Statutory Exemption as a Matter of Law or Fundamental Public Policy*

Beyond this general procompetitive effects defense, several other decisions based primarily in the Fifth and Seventh Circuits seem to imply the existence of a far broader antitrust defense that favors protecting amateurism on policy grounds, rather than based purely on “competitive conditions.”<sup>203</sup> While the early versions of this special amateurism-based defense emerged during an era in which courts would more readily blur social policy with procompetitive effects under the Rule of Reason, more recent versions of this defense cite to dicta from the Supreme Court’s decision in *NCAA v. Board of Regents* that explains that amateurism rules “can be viewed as procompetitive” because “[i]n order to preserve the character and quality of [college sports], athletes must not be paid, must be required to attend class, and the like.”<sup>204</sup>

The more recent decisions to use preservation of amateurism as an antitrust defense include the U.S. Court of Appeals for the Fifth Circuit’s ruling in *McCormack* and the U.S. Court of Appeals for the Seventh Circuit’s ruling in *Banks v. NCAA*.<sup>205</sup> In *McCormack*, the Fifth Circuit specifically rejected an antitrust challenge to the “death penalty” brought by a college football player because his school was punished with the “death penalty” based on its violation of the principle of amateurism, and thus the “death penalty” was needed to preserve the amateur nature of the NCAA “in the face of commercializing pressures.”<sup>206</sup> Meanwhile in *Banks*, the Seventh Circuit rejected a challenge to the NCAA bylaws that prevented student–athletes from exploring professional opportunities while in college. There, the Court noted that “the NCAA does not exist as a minor league training ground for future [professional athletes] but rather to provide an opportunity for competition among amateur students pursuing a collegiate education.”<sup>207</sup>

Nevertheless, the language that is cited extensively in both *McCormack* and *Banks* does not truly mean what either of these courts purport it

1950s as the “golden age” of college football); *History, supra* note 17 (discussing the dramatic growth of NCAA football during the period from 1950 to 1979).

<sup>203</sup> *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 688; see also *Banks v. NCAA*, 977 F.2d 1081, 1089–90 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1344–45 (5th Cir. 1988); *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977); cf. *Justice v. NCAA*, 577 F. Supp. 356, 372 (D. Ariz. 1983).

<sup>204</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984).

<sup>205</sup> *Banks*, 977 F.2d at 1089–90; *McCormack*, 845 F.2d at 1344–45.

<sup>206</sup> *McCormack*, 845 F.2d at 1345.

<sup>207</sup> *Banks*, 977 F.2d at 1089–90.



to mean.<sup>208</sup> A closer inspection of the *Board of Regents* decision indicates that the language cited by these cases came from a section of the decision that explained why NCAA conduct should be reviewed under the Rule of Reason rather than the per se test.<sup>209</sup> In addition, the language cited specifically states that NCAA amateurism rules “can be viewed as procompetitive” and not that they “must” be viewed in such a light.<sup>210</sup> By using the word “can” rather than “must,” and using it in context of determining the proper Competitive Effects Test for reviewing NCAA conduct, it is clear that the Supreme Court in *Board of Regents* never actually reached any legal conclusion in favor of specially preserving NCAA amateurism.<sup>211</sup> All it did was note that the argument could have been broached by the NCAA as a defense under the Rule of Reason.<sup>212</sup>

Furthermore, by recognizing a special exemption for NCAA amateurism without explicitly tying the exemption to procompetitive effects within any relevant market, these courts seem to emasculate the Sherman Act’s ability to serve its core purpose of preserving free trade.<sup>213</sup> As the U.S. Supreme Court cogently explained in *United States v. Topco Associates, Inc.*, “[i]mplicit in such freedom [of free trade] is the notion that [this freedom] cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”<sup>214</sup> In other words, “[t]he importance of the antitrust laws to every citizen must not be minimized.”<sup>215</sup> These laws are just as important

<sup>208</sup> See *infra*, notes 209–216 and accompanying text; see also Edelman, *supra* note 4 at 95 (discussing a bench memorandum on whether to grant certiorari in *Banks*, 977 F.2d 1081, on which Justice Harry Blackmun wrote by hand that the U.S. Court of Appeals for the Seventh Circuit “got this one dead wrong”).

<sup>209</sup> Edelman, *supra* note 4 at 94 (citing *McCormack*, 845 F.2d at 1343–44).

<sup>210</sup> *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984) (emphasis added).

<sup>211</sup> See Edelman, *supra* note 4 at 94 (citing *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 102). It is interesting to note that *Board of Regents* is not the only sports antitrust case in which Justice Stevens discusses the possibility of a non-economic benefit being argued as an affirmative defense under the Rule of Reason; he does this again in his 2010 opinion, *American Needle, Inc. v. National Football League* stating that “[o]ther features of the NFL may also save agreements amongst the teams. We have recognized, for example, ‘that the interest in maintaining a competitive balance’ among ‘athletic teams is legitimate and important.’” 130 S. Ct. 2201, 2217 (quoting *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 117). Nevertheless, much as in *Board of Regents of the Univ. of Okla.*, Stevens seems to merely be explaining that these allegedly offsetting benefits merit review, if at all, only during the Rule of Reason analysis. See *generally id.* He is not indicating the arguments will prevail at that stage. See *generally id.*

<sup>212</sup> See *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 102; *supra* note 203 and accompanying text.

<sup>213</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (explaining that if businesses were allowed to restrain trade as a means of saving money, “the Sherman Act would . . . be emasculated”).

<sup>214</sup> 405 U.S. 596, 610 (1972).

<sup>215</sup> *Flood v. Kuhn*, 407 U.S. 258, 292 (1972) (Marshall, J., dissenting).

to collegiate athletes and their athletic programs “as they are to . . . lawyers, doctors, or members of any other class of workers.”<sup>216</sup>

#### IV. WHY CONGRESS SHOULD NOT PASS SPECIAL LEGISLATION TO PROTECT THE NCAA “DEATH PENALTY”

Nevertheless, even if a reviewing court were to find the NCAA “death penalty” to be illegal, Congress still has the power to pass a statute granting the NCAA a special statutory exemption from antitrust law.<sup>217</sup> The unique nature of the NCAA as a bottom-up organization composed of politically powerful universities makes it into a prime candidate to seek special legislation in its favor.<sup>218</sup> Furthermore, the overwhelming support for the NCAA “death penalty” at the time it was implemented indicates the likelihood that NCAA members would likely take a unified approach in petitioning Congress for such an exemption.<sup>219</sup>

However, even though Congress has the power to pass a statute that safeguards the NCAA “death penalty,” it would be misguided for Congress to do so.<sup>220</sup> Insulating the NCAA “death penalty” from antitrust scrutiny would not only enable the NCAA to disassociate from truly bad acts of individual members, but it would also chill individual NCAA members’ ability to make independent decisions from the NCAA majority and thus would prevent gradual reform movements within the institution.<sup>221</sup> For example, allowing the NCAA to preserve its “death penalty” would likely slow (if not freeze) the process of individual member schools implementing stipends to improve the standard of living for student-athletes.<sup>222</sup>

<sup>216</sup> *Id.*

<sup>217</sup> Edelman, *supra* note 49, at 659 (explaining that independent businesses may concertedly petition Congress to change the law without risking an antitrust violation for doing so based on the *Noerr-Pennington* Doctrine, “which allows competing businesses to join in combination for the purpose of influencing government action . . . even if the underlying goal is to restrain competition”) (footnote omitted); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition.”).

<sup>218</sup> See generally Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 176–80 (2013) (discussing how the NCAA used its power to influence Congress to pass the Sports Agent Responsibility and Trust Act).

<sup>219</sup> See *supra* note 33 and accompanying text.

<sup>220</sup> See *infra*, notes 221–222 and accompanying text.

<sup>221</sup> See generally *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914) (explaining that “[a]n act harmless when done by one may become a public wrong when done by many acting in concert”).

<sup>222</sup> See generally Edelman, *supra* note 4, at 67 (explaining that “[o]ne way that the NCAA enforces [its principle of amateurism] is by levying penalties against members that provide student-athletes with benefits beyond the NCAA permitted amount,” and that “the NCAA’s most severe penalty—colloquially known as the ‘death penalty’—empowers the association to shut down any repeat violator’s athletic program [for up to two full seasons]”).

In addition, there are reasonable ways of preserving equitable competition and decorum within college sports that are far less restrictive than an industry-wide “death penalty.” For example, if the colleges that compose the Big Ten Conference sought to ban Penn State University’s football program from their conference, such a decision would likely be permissible even under current laws, as it would not yield a substantially anticompetitive effect on the overall market for hosting college football games. This is because Penn State could still seek to join another conference or schedule its games independently.

Given these less restrictive ways in which the college sports industry could maintain competitive balance and decorum without needing to resort to a nation-wide ban of a particular athletic program, there does not seem to be any bona fide reason for Congress to take the unconventional step of providing the NCAA with a special exemption from antitrust law. Moreover, based on the overwhelming political power already exercised by the NCAA, consumers are arguably best protected as a class by maintaining the important checks and balances of antitrust scrutiny.

## V. CONCLUSION

The NCAA has long used the threat of the “death penalty” as a way to ensure that its members follow collective business rules rather than pursue their own independent course of action. Although the NCAA’s actual enforcement of its “death penalty” has been exceedingly rare, the mere threat of the “death penalty” has yielded a chilling effect on member colleges’ independent decision-making. Any NCAA member that is punished with the “death penalty” loses the ability to compete in a given sports marketplace for up to two years—a substantial penalty not only in terms of lost opportunities for student-athletes, but also in terms of lost revenues for the punished school.

Even though the NCAA “death penalty” has some virtues in terms of encouraging uniform business practices, its “death penalty” tramples on the rights of its members to make independent business decisions and quashes important free-market mechanisms for determining who gets to host and televise certain college sporting events. For these reasons, the NCAA “death penalty” sanction is subject to reasonable scrutiny under section 1 of the Sherman Act.

One notable Supreme Court decision pointing in the direction of finding the NCAA “death penalty” to be illegal is the 1984 decision, *NCAA v. Board of Regents*.<sup>223</sup> There, the Supreme Court held that limiting the number of games that an NCAA member may broadcast on national television violated section 1 of the Sherman Act because it “eliminates

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<sup>223</sup> 468 U.S. 85 (1984); *Agnew v. NCAA*, 683 F.3d 328, 339 (7th Cir. 2012) (citing *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 117).

competitors from the [broadcast television] market.”<sup>224</sup> Additionally, the Court acknowledged that the NCAA’s collective ban of a member school for any period of time is subject to a competitive review under antitrust law’s Rule of Reason.<sup>225</sup>

Although dicta in *Board of Regents* preserves the argument that the NCAA’s “death penalty” might be permissible in circumstances unrelated to the overturned television policy, such an argument does not seem tenable as a matter of more general antitrust policy. Indeed, federal antitrust law is primarily concerned with protecting consumers from group boycotts that are effectuated by private trade associations with extensive market power. The NCAA is a private trade association that has nearly 100% power over the college sports marketplace. Further, its “death penalty” sanction has the power to exclude from the marketplace even those college sports teams that consumers find most desirable.

Despite its humble beginnings as a non-commercial trade association aimed at protecting the health and safety of student-athletes, the NCAA today operates as a revenue-producing cartel, with most member decisions driven by the bottom line. Although the NCAA and its members appreciate the flexibility in rule-setting that comes with avoiding the need to follow antitrust laws, such flexibility functions to the detriment of individual member schools, student-athletes, fans, and even the free market.

If the NCAA and its “death penalty” sanction are shielded from antitrust law, it would create a shelter for numerous rules that contradict well-founded American business norms and fundamental public policies. Thus, courts must reject the NCAA’s argument that the “death penalty” is a form of reasonable self-governance. In the same vein, it is imperative that American law recognizes the NCAA “death penalty” not for the way it is disguised but rather for the manner in which it actually operates—as an illegal group boycott that violates the spirit of section 1 of the Sherman Act and that serves no reasonable place within any free market economy.

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<sup>224</sup> *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 108. Along those same lines, the Supreme Court found that the NCAA television policy had no offsetting procompetitive benefit because it neither increased output of televised games nor reduced the price of televised games. *Id.* at 113.

<sup>225</sup> *Id.* at 99–100.