Antitrust and Amateur Sports: The Role of Noneconomic Values†

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It is well established that the Sherman Act[1] prohibits unreasonable restraints of trade, and that its purpose is to promote competition.[2] Historically, courts have analyzed allegedly anticompetitive conduct in terms of economic factors, judging the reasonableness or unreasonableness of a restraint by its effect on the commercial marketplace.[3]

In recent years, courts have begun to address the question of how to apply the antitrust laws to nonprofit organizations and other entities which, although they operate in the commercial marketplace, assert "noneconomic" justifications for their behavior. This question is becoming increasingly important to the National Collegiate Athletic Association ("NCAA") and similar amateur sports organizations. Such groups frequently engage in activities which, if engaged in by most commercial competitors, could be deemed illegal per se.[4]

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1. 15 U.S.C. § 1-7 (1983).

2. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

3. Conduct deemed to be inherently anticompetitive, such as price-fixing, horizontal market division, or group boycotts, is illegal per se. *See, e.g.,* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927). Other allegedly anticompetitive conduct is subjected to a "rule of reason" analysis, in which the pro- and anticompetitive effects of the restraint are weighed to determine its reasonableness. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); *see also infra* notes 6-24 and accompanying text.

4. For example, amateur sports organizations arguably engage in price-fixing by placing limitations on the compensation of student athletes and regulating athletic scholarships. By restricting the numbers of coaches, and setting playing rules and schedules, they arguably facilitate market division. In addition, the enforcement of these and other rules through the exclusion of nonconforming member institutions can be viewed as a group boycott. *See* Koch, *A Troubled Cartel: The NCAA,* 38 LAW & CONTEMP. PROBS. 135 (1973).

Nevertheless, in most circumstances it just does not seem proper to treat amateur sports organizations like commercial, profit-making enterprises. The organizations themselves are nonprofit, and have legitimate noncommercial goals. For example, these organizations are dedicated to the preservation of amateurism, decreasing the incentive for powerful college teams to "go professional." The NCAA and other similar organizations are composed of colleges and universities whose primary mission is the education of students; these organizations arguably help to uphold the academic standards of such institutions by maintaining admissions standards and preventing the drain of funds from educational programs which might accompany the "professionalization" of college athletics. Moreover, some of the rules promulgated by amateur sports organizations are designed to protect the health and safety of athletes. Such noneconomic factors, along with the fact that these organizations provide a means for accomplishing the laudable goal of self-regulation, are arguably relevant in any antitrust analysis.

A court faced with the question of how to apply the antitrust laws to the activities of amateur sports organizations can take one of three approaches: (1) that noneconomic or "noncommercial" factors are not relevant at all; (2) that they justify a total exemption from the antitrust laws; or (3) that they justify application of the rule of reason in cases which would otherwise be subject to a per se test of illegality. In addition, if the court applies the rule of reason, it must determine what, if any, weight to give to noneconomic factors.

Although it was generally assumed prior to 1970 that noncommercial activities were entitled to a total exemption from the antitrust laws, cases decided over the past two decades clearly show that the existence of noncommercial goals will not totally shield the NCAA or any other amateur sports organization from antitrust liability. The relevant question, therefore, is to what extent, if any, courts will take noneconomic factors into account in applying the per se rule or the rule of reason. This article addresses how the federal courts have approached this question, and how the judicial approach in the future may be affected by the United States Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma,*[5] in which the Supreme Court held that the NCAA's television regulations violated the Sherman Act. After a brief overview in section I of the courts' historical approach to application of the per se rule versus the rule of reason, section II analyzes Supreme Court precedent on the relevance of noneconomic

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For a general discussion of antitrust issues arising in the amateur sports context, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS (1979); Weistart, *Antitrust Issues in the Regulation of College Sports,* J. COLL. & U.L. 77 (1977); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis,* 87 YALE L.J. 655 (1978).

5. 104 S. Ct. 2948 (1984). *See infra* notes 93-121 and accompanying text.

values to antitrust analysis in other (i.e., non-sports) contexts. Section III then traces the pre-*NCAA* cases involving amateur sports organizations. Finally, sections IV and V discuss the lower court and Supreme Court decisions in *NCAA* and the potential impact of that case on the application of the antitrust laws to amateur sports.

I. PER SE V. RULE OF REASON ANALYSIS

Because every contract can in some sense be considered a restraint of trade, the Sherman Act prohibits only "unreasonable restraints."[6] The starting point for analyzing whether conduct unreasonably restrains trade in violation of section 1 of the Sherman Act is to determine the appropriate test for legality: should the conduct be subject to the per se rule of illegality or to rule of reason analysis? If the challenged conduct is likely, in most cases, to cause substantial injury to competition, and further inquiry into its injurious effect on competition would be complex, time-consuming, costly, and ultimately uncertain, then courts will invoke the per se doctrine and find the conduct illegal without engaging in further analysis. A rule of per se illegality has been applied to certain categories of conduct which are "plainly anticompetitive."[7] Examples of per se illegal restraints include price-fixing agreements,[8] group boycotts, [9] horizontal divisions of markets between competitors,[10] and resale price maintenance.[11]

Other forms of concerted action, however, cannot be and are not so easily categorized as patently anticompetitive. Such conduct is subject to rule of reason analysis and is held illegal only if "it is such as may suppress or even destroy competition."[12] Under the rule of reason, courts examine the

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6. 104 S. Ct. at 2959 (1984); Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 612 (11th Cir. 1985).

7. Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 8 (1979); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980).

8. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 348 (1982) (fee schedule fixing maximum price is per se illegal); Catalano, Inc. v. Target Sales, Inc. 446 U.S. 643, 648 (1980) (elimination of short-term trade credit to wholesalers constitutes per se illegal price-fixing); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (major oil refiners' concerted program to purchase distressed gasoline to prop up market price constitutes per se illegal price-fixing).

9. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 214-18 (1959) (agreement not to sell to individual retailer constituted group boycott subject to per se rule); Associated Press v. United States, 326 U.S. 1, 12-15 (1945) (joint newspaper venture cannot expressly prohibit all transactions with non-members).

10. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 606-12 (1972) (market division arrangement imposed by subsidiary to allow small independent grocers to better compete with national chains held per se illegal, despite enhanced competition).

11. *See* Albrecht v. Herald Co., 390 U.S. 145, 151-53 (1968) (vertical agreements aimed at establishing maximum resale prices are per se illegal); Simpson v. Union Oil Co., 377 U.S. 13, 16 (1964) (sham consignment resulting in vertical price restraints held per se illegal).

12. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

challenged conduct to determine its purpose and likely effects on competition. They then balance the conduct's pro- and anticompetitive effects to determine its legality.[13]

Recently, courts have been more reluctant to apply the per se rule automatically to seemingly anticompetitive activity. Rather, they have carved out exceptions to the per se rule where there is evidence that either the nature of the industry or the form of the restraint might justify the conclusion that the challenged conduct is not anticompetitive.[14]

The doctrine of ancillary restraints is the earliest example of a court-fashioned exception which permits courts to uphold otherwise per se illegal restraints.[15] Under this doctrine, restraints on competition are permissible if they are merely ancillary to the main purpose of a lawful contract and are necessary to protect the promisee's enjoyment of his rights under the contract. An example of a legitimate ancillary restraint is an employee's covenant not to compete which is necessary to protect the employer's valuable trade secrets, confidential customer information, or right to access to the employee's unique services.[16]

Other exceptions to the per se rule relate to the nature of the industry involved. Courts have been unwilling, for example, to apply the per se rule when dealing with an unfamiliar industry.[17] In *Broadcast Music, Inc. v. Columbia Broadcasting System,*[18] the Supreme Court held that the rule of reason should be applied to a joint venture under which copyright holders joined together to grant only "blanket" music performance licenses, even though "the blanket license involve[d] 'price fixing' in the literal sense."[19] The Court found that the venture was not per se illegal because the blanket licenses were nonexclusive, i.e., individual copyright owners could grant individual licenses.[20] Furthermore, the agreement on price was necessary to market the "blanket" license as a separate and unique product.[21]

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13. *See, e.g.,* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 232 (1982); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

14. *See, e.g.,* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 21-25 (1979) (because a joint selling arrangement left open the possibility of individual competition with a concomitant increase in output, it did not violate the Sherman Act).

15. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *modified and aff'd,* 175 U.S. 211 (1899).

16. *See generally* Blake, *Employee Agreements Not to Compete,* 73 HARV. L. REV. 625 (1960).

17. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 9-10 (1979); United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

18. 441 U.S. 1 (1979).

19. *Id.* at 8.

20. *Id.* at 24.

21. *Id.* at 23.

By contrast, most conduct required by or intended to influence public legislation or regulation is entirely exempt from the antitrust laws. This includes otherwise anticompetitive conduct intended to influence the passage or enforcement of laws.[22] Conduct mandated by a state or federal regulatory scheme which conflicts with the federal antitrust laws is also exempt.[23] Courts also have recognized the need for private regulation of standards, quality, and practices.[24]

II. The Relevance of Noneconomic Values to Antitrust Analysis in Non-Sports Contexts

The Supreme Court has been less than clear in its guidance with respect to the relative merit of noneconomic values in antitrust analysis. In early cases, the Supreme Court emphasized that the antitrust laws were designed to regulate commercial activity and suggested that instances could arise in which the noncommercial aspects of anticompetitive conduct would exempt that conduct from antitrust scrutiny.[25] At the same time, the Supreme Court recognized that "nonprofit" and "noncommercial" are not synonymous.[26] It is now beyond question that nonprofit status alone does not confer an exemption for anticompetitive conduct.[27]

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22. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127, 136-38 (1961) (publicity campaign designed to foster adoption and retention of laws and law enforcement practices destructive of the trucking business exempt from antitrust laws); United Mine Workers v. Pennington, 381 U.S. 657, 669-72 (1965) (concerted effort to influence Secretary of Labor did not violate antitrust laws despite intent to eliminate competition).

23. *See* Silver v. New York Stock Exchange, 373 U.S. 341, 357-61 (1963) (stock exchange rules mandated by federal securities laws partially exempt from Sherman Act); Parker v. Brown, 317 U.S. 341, 368 (1943) (regulation of state industry of local concern exempt from antitrust laws).

24. *See* Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977) (system of standardized registration rules necessary to maintain integrity of the breed, therefore not anticompetitive on its face); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165, 170 (9th Cir.) (strict membership requirements necessary to promote athletic competition and to limit number of contestants in any one tournament), *cert. denied,* 385 U.S. 846 (1966).

25. *See, e.g.,* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959) ("the [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives"); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (anticompetitive union activity to further legitimate union goals of raising wages and improving working conditions held exempt from antitrust laws); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922) (baseball entitled to an exemption from the Sherman Act because "personal effort, not related to production, is not a subject of commerce").

26. *See* American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943) (Group Health was "engaged in business or trade" for purposes of the Sherman Act despite its nonprofit, cooperative nature).

27. In American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982), a nonprofit society of engineers was held liable under the antitrust laws for the acts of its agents

Given the lack of an exemption for nonprofit status alone, the more difficult question becomes to what extent noncommercial values such as safety and ethical norms may be taken into account in antitrust analysis. Although early Supreme Court cases suggested the possibility that the professions should be exempt from the antitrust laws,[28] recent Supreme Court decisions suggest that ethical rules which limit competition between members of the same profession or which restrain the professional's participation in another area of commerce are subject to antitrust scrutiny. In *Goldfarb v. Virginia State Bar,*[29] the Court struck down a state bar association rule which prescribed a minimum fee schedule for legal services. The bar association argued that it was exempt from the antitrust laws because it was not in trade or commerce.[30] The Court rejected this argument, concluding that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions."[31] However, the Court qualified its conclusion in its oft-cited footnote seventeen, leaving open the possibility of a "public service" defense:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which

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performed with apparent authority. And in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982), the Court found that a nonprofit foundation which set a maximum fee schedule committed a per se violation of section 1 of the Sherman Act. *See generally* Note, *Antitrust and Nonprofit Entities,* 94 HARV. L. REV. 802 (1981).

28. For example, in United States v. Oregon Medical Soc'y, 343 U.S. 326 (1952), the Court recognized a distinction between the professions and "ordinary commercial matters," noting that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." *Id.* at 336 (citations omitted). The Court noted that the defendants, which included eight county medical societies and a doctor-sponsored corporation engaged in the sale of prepaid medical care, "may engage in activities which violate the antitrust laws." *Id.* at 334.

In Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970), the United States Court of Appeals for the District of Columbia Circuit refused to apply the Sherman Act to the allegedly anticompetitive conduct of a regional accrediting association, stating that "the proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions." *Id.* at 654 (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961)). Although the *Marjorie Webster* decision suggested the possibility of an "educational exception" which could be applied to activities of the NCAA, subsequent decisions have declined to fashion a blanket exemption for educational institutions. *See generally* Kirby, *Federal Antitrust Issues Affecting Institutions of Higher Education: An Overview,* 11 J. COLL. & U.L. 345 (1984).

29. 421 U.S. 773 (1976).

30. *Id.* at 787.

31. *Id.* (citation omitted).

> could properly be viewed as a violation of the Sherman Act in another context, be treated differently.[32]

Thus *Goldfarb* suggests that even though noncommercial objectives may not exempt anticompetitive conduct from scrutiny under the Sherman Act, they might justify rule of reason analysis rather than the per se approach.

The *Goldfarb* decision was significantly limited by the Court's later decision in *National Society of Professional Engineers v. United States.*[33] In *Professional Engineers,* the Society's code of ethics prohibited engineers from competing with each other on the basis of price. The Society justified this restraint by claiming that it minimized the risk that competition would produce inferior engineering services endangering public safety.[34] The Court rejected the Society's "public safety" argument, taking a limited view of the relevance of noncommercial concerns: "[T]he cautionary footnote in *Goldfarb* . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions."[35] The Court stated that a rule of reason inquiry is limited to the impact of the challenged activity on competition, and such an inquiry "does not support a defense based on the assumption that competition itself is unreasonable."[36] Thus, *Professional Engineers* suggests that while professional self-regulation may appropriately be analyzed under the rule of reason, proffered noncommercial considerations may not be weighed in the balance.

In *Arizona v. Maricopa County Medical Society,*[37] the Court distinguished *Goldfarb* and *Professional Engineers* in applying the per se rule to a medical society's maximum fee schedule. Although the Court recognized the defendant's professional status, it noted that the defendant could not argue "that the quality of the professional service that their members provide [was] enhanced" by its otherwise anticompetitive activity or that the price restraints had anything to do with "public service or ethical norms."[38] Thus, the *Maricopa* decision suggests that only those activities of the professions or other "noncommercial" entities that are directly supported by public service or ethical considerations will be treated more leniently under the antitrust laws.

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32. *Id.* at 788 n.17.
33. 435 U.S. 679 (1978).
34. *Id.* at 684-85.
35. *Id.* at 696.
36. *Id.* The Court did suggest, however, that ethical norms which regulate and promote competition without having an anticompetitive effect—such as marketing restraints resulting from a seller's concern for safety—may fall within the rule of reason. *Id.* at n.22. Lower courts have interpreted this ambiguous language to mean that public interest considerations are irrelevant to a rule of reason analysis. *See NCAA,* 104 S. Ct. 2948, 2978 (1984) (White, J., dissenting), *aff'g* 707 F.2d 1147 (10th Cir. 1983), *aff'g in part, remanding in part,* 546 F. Supp. 1276 (W.D. Okla. 1982).
37. 457 U.S. 332 (1982).
38. *Id.* at 349.

At most, these Supreme Court cases suggest that conduct which would otherwise be held per se illegal may be analyzed under the rule of reason when it is directly related to legitimate noncommercial considerations. Prior to the Supreme Court's decision in *NCAA,* lower courts had adopted this general rule, finding that group boycotts or refusals to deal based on noncommerical goals either were not per se illegal or were lawful under a rule of reason analysis.[39]

III. PRE-*NCAA* LOWER COURT CASES APPLYING THE ANTITRUST LAWS TO AMATEUR SPORTS

Prior to 1977, lower courts followed the pattern established by the Supreme Court in non-sports cases and generally refused to apply the Sherman Act at all to the allegedly anticompetitive conduct of amateur sports associations. For example, in *Jones v. NCAA,*[40] the district court upheld an NCAA rule making ineligible any college athlete receiving compensation, concluding that the Sherman Act was inapplicable because no marketplace "competition" was involved.[41] After the Court's *Goldfarb* decision,[42] however, most lower courts began consistently to apply the rule of reason to the allegedly anti-

39. *See, e.g.,* Wilk v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983) (refusal to deal based on patient care motive required application of rule of reason rather than per se rule), *cert. denied,* 104 S. Ct. 2398 (1984); Neeld v. National Hockey League, 594 F.2d 1297, 1299-300 (9th Cir. 1979) (rule prohibiting players with vision in only one eye from playing was intended to promote safety, therefore per se rule did not apply); Kruezer v. American Academy of Periodontology, 558 F. Supp. 683, 684-85 (D.D.C. 1983) (regulations limiting membership to those who worked full-time in specialty served noncommercial purpose, therefore justifying application of rule of reason); *see also* Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981) (rule of reason applied to actions of private, nonprofit regulating body's ban of certain type of tennis racket from use in sanctioned tournament); Veizaga v. National Bd. for Respiratory Therapy, 1977-1 Trade Cas. (CCH) ¶ 61,274, at 70,870 (N.D. Ill. 1977) (court should apply rule of reason if it finds activity to be noncommercial).

40. 392 F. Supp. 295 (D. Mass. 1975).

41. *Id.* at 303. *See* Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377, 1380-81 (M.D.N.C. 1975) (court denied injunctive relief against rule limiting participation in any sport to four years over a consecutive five-year period, noting that conference should be free to regulate in order to accomplish noncommercial objectives of promoting intercollegiate athletics and strengthening the student athlete's physical condition and moral fiber); College Athletic Placement Serv., Inc. v. NCAA, 1975-1 Trade Cas. (CCH) ¶ 60,117, at 65,267 (D.N.J.), *aff'd,* 506 F.2d 1050 (3d Cir. 1974) (court held that a NCAA rule precluding students who used an athletic placement service from college eligibility "does not come within the purview of the Sherman Act"); *see also* Samara v. NCAA, 1973-1 Trade Cas. (CCH) ¶ 74,536, at 94,384 (E.D. Va. 1973) (court refused to apply Sherman Act to eligibility rule precluding athletes who partieipated in uncertified track and field events from competing in intercollegiate competition, finding that plaintiff failed to establish any injury); Amateur Softball Ass'n of America v. United States, 467 F.2d 312, 314-15 (10th Cir. 1972) (despite finding that baseball exemption did not apply to softball, court did not decide whether amateur sports were entitled to an antitrust exemption or were engaged in commerce). *See generally* Note, *National Collegiate Athletic Association's Certification Requirement: A Section 1 Violation of the Sherman Antitrust Act,* 9 VAL. U.L. REV. 193 (1974).

42. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1976); *see supra* notes 28-31 and accom-

competitive conduct of amateur sports organizations, although often with little or no explanation.[43]

In *Hennessey v. NCAA*,[44] the United States Court of Appeals for the Fifth Circuit specifically rejected the application of the per se rule to the activities of the NCAA.[45] In *Hennessey*, two assistant coaches challenged a bylaw limiting the number of assistant coaches a member school could employ at any one time.[46] The NCAA claimed that its status as a voluntary nonprofit organization with educational objectives and activites exempted it from scrutiny under the Sherman Act.[47] Relying on *Goldfarb*, the court held that the NCAA was not exempt from antitrust regulations on this ground,[48] and proceeded to analyze the challenged bylaw under the rule of reason.[49]

In *Warner Amex Cable Communications, Inc. v. American Broadcasting Co.*,[50] a cable company sought a preliminary injunction to restrain a commercial television network and the NCAA from implementing a plan to prevent the cable company from televising football games not televised by the commercial network. The defendants asserted that the plan promoted educationally important athletic events and limited profit maximization in college sports, thus fostering amateurism. Denying the preliminary injunction, the court noted that the rule of reason was the proper standard for examining the challenged plan because the plan did not arise in a "purely

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panying text.

43. *See infra* notes 44-55 and accompanying text. For example, in Tondas v. Amateur Hockey Ass'n, 439 F. Supp. 310 (W.D.N.Y. 1977), the plaintiff alleged that the defendant had unreasonably restrained and monopolized trade and commerce in amateur hockey. The defendant moved for summary judgment, asserting that it was exempt from the antitrust laws as a nonprofit athletic association formed to promote amateur athletics. *Id.* at 313. The district court denied summary judgment, noting that "a non-profit athletic association formed for the purpose of promoting amateur athletics . . . may be found to be engaging in conduct which results in an unreasonable restraint of trade or commerce," and that "an exemption for amateur athletics is unwarranted." *Id.* at 313-14. Thus, the court concluded that "[a]greements entered into by an amateur athletic association which restrict the activities of an amateur team should be judged by the rule of reason." *Id.* at 314.

Similarly, in Board of Regents of the Univ. of Okla. v. NCAA, 561 P.2d 499, 507-08 (Okla. 1977), the Supreme Court of Oklahoma overturned the trial court's finding that an NCAA bylaw which limited the number of coaches that a NCAA Division I member could employ was per se illegal, without any detailed analysis of its reasons.

44. 564 F.2d 1136 (5th Cir. 1977).

45. *Id.* at 1151.

46. This is the same bylaw that was at issue in the Oklahoma Supreme Court's decision in *Univ. of Okla.*, 561 P.2d 499. *See supra* note 43.

47. 564 F.2d at 1148.

48. *Id.* at 1148-49.

49. *Id.* at 1151. As part of its rule of reason analysis, the court in *Hennessey* took into account the NCAA's asserted noncommercial goal of preserving and fostering competition in intercollegiate athletics and found that the bylaw was not an unreasonable restraint. *Id.* at 1154. Following the Supreme Court's decision in *Professional Engineers*, however, it was difficult to determine what, if any, weight should be given to noncommercial values in a rule of reason analysis of allegedly anticompetitive conduct by amateur sports organizations. *See supra* notes 32-38 and accompanying text.

50. 499 F. Supp. 537 (S.D. Ohio 1980).

commercial" context, but rather in the context of a "singularly integrated commercial and educational activity with which no court has considerable experience."[51]

In *Justice v. NCAA*,[52] four members of a university's football team sought a preliminary injunction to prevent the NCAA from enforcing sanctions which rendered the football team ineligible to participate in post-season competition or to make television appearances for two seasons. The NCAA defended the sanctions as necessary to preserve amateurism in intercollegiate athletics.[53] Upholding the NCAA sanctions under a rule of reason analysis, the court noted that:

> [a] clear trend has emerged in recent years under which courts have been extremely reluctant to subject the rules and regulations of sports organizations to the group boycott *per se* analysis. This trend is "[b]ased in part upon the realization that in some sporting enterprises a few rules are essential to survival."[54]

The court recognized that the NCAA was engaged in two distinct kinds of rulemaking activity: "One type, exemplified by the rules in *Hennessey* and *Jones,* is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose."[55] Because the challenged sanctions had no anticompetitive purpose, were reasonably related to the noncommercial goal of preserving amateurism, and were not overbroad, the court held that they did not unreasonably restrain trade.[56]

Thus, most lower courts analyzing the activites of amateur sports organizations prior to the Supreme Court's *NCAA* decision either refused to apply the antitrust laws at all, or upheld the challenged activities under the rule of reason. Those courts that explained their decisions noted that the challenged activites lacked an anticompetitive purpose, were directly related to legitimate noncommercial goals, and did not have a significant anticompetitive impact on competition. In the *NCAA* case, however, the courts addressed a NCAA rule which had both discernible economic purpose and a significant impact on competition, and which arguably was less directly

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51. *Id.* at 545.

52. 577 F. Supp. 356 (D. Ariz. 1983).

53. *Id.* at 361.

54. *Id.* at 380 (quoting Brenner v. World Boxing Council, 675 F.2d 445, 454-55 (2d Cir. 1982); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977)).

55. *Id.* at 383.

56. *Id. Cf.* Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 557 (D.C. Cir. 1984), *aff'g* 558 F. Supp. 487 (D.D.C. 1983) *(AIAW).* In *AIAW,* the court applied the rule of reason because of the NCAA's and the AIAW's status as eleemosynary organizations, and found no antitrust violations. Citing *Professional Engineers,* the court indicated that the legality of a challenged practice would depend on the necessity and legitimacy of the asserted noncommercial goals and on the extent of the anticompetitive impact. 735 F.2d at 583-84. The court noted that "achieving [an] essential noncommercial objective may justify some anticompetitive impact." *Id.* at 584 n.8 (citations omitted).

related to legitimate noneconomic goals. The following section discusses how the courts applied the antitrust laws to condemn this rule.

IV. THE *NCAA* CASE

In *NCAA*,[57] the Universities of Oklahoma and Georgia contended that the NCAA's television plan and its underlying contracts with televion networks violated sections 1 and 2 of the Sherman Act.[58] The television plan at issue in *NCAA* empowered the NCAA to negotiate exclusive football television contracts with broadcast networks for the 1982-1985 football seasons.[59] Under the plan, the NCAA granted to ABC, CBS, and Turner Broadcasting the exclusive rights to negotiate with NCAA colleges for the right to televise their games.[60] The plan and contracts limited the number of games the networks could televise, the number of appearances by any one team, and the amount of money a school could demand for televising its games. The plan also required the networks to televise a certain number of games between small colleges and prohibited individual institutions from contracting separately to televise their games.[61] Plaintiffs raised four antitrust theories in challenging the NCAA plan: price fixing, horizontal limitations on production, group boycott, and monopolization.[62]

A. The Lower Court Decisions

The district and appellate courts concluded that the NCAA plan and

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57. 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part, remanded in part,* 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984). *See generally* Note, Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association: *Antitrust Violations in College Football,* 29 ST. LOUIS U.L.J. 207 (1984); Note, Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, *Application of the Per Se Rule to Price-Fixing Agreements,* 18 U. RICH. L. REV. 185 (1983).

58. This litigation was triggered by the unsuccessful efforts of the College Football Association (CFA), an organization of the more dominant football playing schools and conferences, to obtain for its members a greater voice in NCAA television policy—specifically, more network appearances and more money per appearance. 546 F. Supp. at 1285-86; 104 S. Ct. at 2957.

59. 546 F. Supp. at 1291; 707 F.2d at 1150; 104 S. Ct. at 2957.

60. 546 F. Supp. at 1291-92; 707 F.2d at 1150; 104 S. Ct. at 2957.

61. 546 F. Supp. at 1291-93; 707 F.2d at 1150; 104 S. Ct. at 2956-57.

62. Specifically, the plaintiffs contended that the NCAA had: (1) fixed prices by setting a "minimum aggregate fee" to be paid by networks for the right to telecast NCAA games, setting specific fees for national and regional telecasts, and by granting the carrying network the exclusive right to negotiate with NCAA schools to broadcast their games; (2) limited production of televised college football by granting networks exclusive national television rights and severely restricting local broadcasts; (3) engaged in a group boycott of networks not given exclusive rights to broadcast as well as a threatened boycott of schools who entered into television contracts not in accord with the NCAA plan; and (4) monopolized the market for televised college football. *NCAA,* 546 F. Supp. at 1293-97.

network contracts were per se violations of the Sherman Act.[63] At the outset, the district court characterized college football as "big business" and rejected the NCAA's contention that the noneconomic goals of the NCAA and its member institutions entitled the NCAA to special treatment under the antitrust laws:

> [I]t is cavil to suggest that college football, or indeed higher education itself, is not a business. The colleges of the nation are in competition for students, for faculty, for government grants, and for philanthropic support. It is a big business and millions of dollars are involved. The same is true of college football. . . . Like any business, the schools which play intercollegiate football seek to maximize revenue and minimize expense while at the same time maintaining the level of quality which makes their product attraetive to the buying public.[64]

Both lower courts agreed that the NCAA had literally fixed prices. The district court stated, however, that "the fact of literal price-fixing does not necessarily result in a finding of *per se* illegality."[65] Relying on *Broadcast Music, Inc. v. Columbia Broadcasting System,* [66] both lower courts noted that "if the activity increases efficiency and renders the market more competitive, it is not the type of activity which constitutes *per se* price-fixing."[67]

The NCAA argued that its television plan was analogous to the marketing scheme of the composer defendants in *Broadcast Music* in that the NCAA was a "joint venture" and member cooperation was necessary to market its product; thus, the per se rule was inappropriate. The lower courts rejected this argument for a variety of reasons.[68] The district court reasoned that, unlike the controls in *Broadcast Music,* the NCAA television restraints were not *necessary* to protect NCAA members' rights and their ability to sell their football games to networks.[69] To the contrary, the evidence indicated that both national networks and local stations would buy the right to televise many individual football games, and that more games would be televised in a free market than were televised under NCAA controls.[70] Moreover, both lower courts stressed that the marketing arrangement in *Broadcast Music* did not prevent individual composers from independently marketing their broadcast rights, whereas the NCAA prohibited its members from entering into television contracts with any network other than those with which the NCAA had contracted.[71]

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63. 546 F. Supp. at 1308-09; 707 F.2d at 1156.
64. 546 F. Supp. at 1288-89.
65. *Id.* at 1305.
66. 441 U.S. 1 (1979).
67. *NCAA,* 546 F. Supp. at 1305 (citing *Broadcast Music,* 441 U.S. at 21); *accord NCAA,* 707 F. 2d at 1152. See *supra* notes 20-23 and accompanying text for a discussion of *Broadcast Music.*
68. *See generally* 546 F. Supp. at 1306-08; 707 F.2d at 1153-56.
69. 546 F. Supp. at 1306.
70. *Id.* at 1307; 707 F.2d at 1156.
71. 546 F. Supp. at 1308; 707 F.2d at 1156.

The NCAA also argued that rule of reason analysis was proper because its television controls had procompetitive features: they protected the gate attendance of NCAA members and they tended to preserve a competitive balance among the football programs of the various schools.[72] The district court rejected both arguments, stating that the evidence failed to show either that television football reduced gate attendance,[73] or that competitive balance could not be maintained "without NCAA acting as the exclusive bargaining agent for its members."[74] In the district court's view, "NCAA regulations on recruitment, the limitations on the number of scholarships each team may award, and the other standards for preserving amateurism . . . [were] sufficient to achieve this goal."[75] Accordingly, both the district court and the appellate court concluded that under the Supreme Court's decision in *Arizona v. Maricopa County Medical Society,*[76] the per se rule could be applied, even though the NCAA alleged procompetitive justifications for its television plan.[77]

Finally, the NCAA argued that the "ancillary restraint" doctrine prevented the application of the per se rule because the television controls were directly related to the NCAA's overall regulatory duty.[78] The district court agreed that the NCAA regulations had legitimate noneconomic goals, such as preserving amateurism and competitive balance in college athletics. Nevertheless, the court found the ancillary restraint doctrine inapplicable because the NCAA had failed to present any credible evidence to show how its television plan was necessary to achieve these goals.[79] Although the Tenth Circuit did not directly address this argument, it took a narrower view of the role of noneconomic justifications in discussing the NCAA's argument that the television controls promoted athletically balanced competition. Relying on *National Society of Professional Engineers v. United States,*[80] the court appeared to reject the NCAA's noneconomic justifications out of hand:

> [T]his appears on its face to be a noneconomic justification. Noneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition. . . . Furthermore, as the district court noted, the argument that the restraints are necessary to promote athletic balance

72. 546 F. Supp. at 1295-96; 707 F.2d at 1154.
73. 546 F. Supp. at 1295-96.
74. *Id.* at 1296.
75. *Id.*
76. 457 U.S. 332 (1982). *See supra* text accompanying notes 36-37.
77. *NCAA,* 546 F. Supp. at 1308; 707 F.2d at 1156 n.15. Additionally, the NCAA urged application of the rule of reason because it was a voluntary association whose television policies were implemented through a democratic process. The district court summarily rejected this argument, noting that the NCAA was not "voluntary" in any meaningful way, and that even if it were, this fact would have no significance under the antitrust laws. 546 F. Supp. at 1308-09. This argument was not addressed by the court of appeals.
78. 546 F. Supp. at 1309.
79. *Id.* at 1309-10.
80. 435 U.S. 679 (1978). *See supra* notes 32-35 and accompanying text.

> shades into the argument that competition will destroy the market. . . . The Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable. . . . And, even if we assume the justification to be legitimate, the district court found on adequate evidence that any contribution the plan made to athletic balance could be achieved by less restrictive means.[81]

Having found the television controls to be per se illegal, both the district and appellate courts nevertheless performed a rule of reason analysis as well and held that the controls were unreasonable. In doing so, the district court focused on the commerical purpose and nature of the television regulations, distinguishing *Hennessey v. NCAA*[82] and other lower court decisions that had upheld "noncommercial" NCAA regulations:

> The Court would agree . . . that the NCAA regulations at issue in those cases were valid under the Rule of Reason. However, none of these cases dealt with the commercial activities of NCAA. These activities are far different from regulations governing the size of coaching staffs or rules on academic eligibility. There is only a tenuous relationship between such non-commercial regulations and the marketplace. Moreover, the non-commercial regulations relate more directly and effectively to the preservation of competitive balance.

In this case, the commercial activities of NCAA have a direct and substantial anti-competitive effect on the marketplacc, and contribute only indirectly, if at all, to the legitimate non-commercial goals of NCAA.[83]

Both courts repeated their earlier conclusions that the restraints were overbroad and not necessary to accomplish the procompetitive goals of the NCAA, i.e., protection of gate attendance and preservation of competitive balance between schools.[84]

The district court also found for plaintiffs on their boycott and monopoly claims. The court held that the NCAA's exclusive contracts were tantamount to a group boycott of other potential broadcasters and that the NCAA's threat of sanctions against its own members constituted a threatened boycott of potential competitors.[85] The appellate court rejected this holding, however, on the grounds that all broadcasters were free to negotiate for a contract, and the NCAA's "expulsion" sanction could not be considered a boycott unless it was a sham for an anticompetitive purpose.[86] The Tenth Circuit did not address the district court's further holding that the NCAA violated section 2 of the Sherman Act by monopolizing the intercollegiate football broadcasting market.[87]

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81. *NCAA*, 707 F.2d at 1154 (citations omitted).
82. 564 F.2d 1136 (5th Cir. 1977). *See supra* notes 43-48 and accompanying text.
83. *NCAA*, 546 F. Supp. at 1316.
84. 546 F. Supp. at 1316; 707 F.2d at 1159-60.
85. 546 F. Supp. at 1311-12.
86. 707 F.2d at 1160-61.
87. 546 F. Supp. at 1292-93, 1319-23.

Judge Barrett dissented from the Tenth Circuit's decision, arguing that the per se rule was inapplicable and that the television restraints were justified as necessary to maintain college football as an amateur sport.[88] Preliminarily, the dissent took issue with the trial court's characterization of college football as "a business operated by professionals to maximize revenue and minimize expense",[89] and the district court's failure to recognize or address the non-commercial purposes and objectives of the NCAA:

> [T]he NCAA television plan's primary purpose is not anti-competitive. Rather it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors. These are the "redeeeming virtues" which did not impress the trial court or the majority. They are so compelling . . . that under the "rule of reason" analysis the public interest and that of the parties is served by sustaining the restraint as reasonable.[90]

The dissent noted that all reported cases applying the per se rule "have involved true competitive *business enterprises* operating in the interstate market where the goal is exclusively that of seeking a profit from the product or service offered to the public."[91] NCAA television contracts do not fall within this category "because they are not designed to render the greatest profit for a *business purpose.*"[92] Rather, the restraints ensure that colleges confine programs "within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement."[93] In addition to amateurism, the NCAA television restraints "promote competition and enhance viewership," because they increase live attendance at games.[94] Given the noncommercial legitimate goals of the NCAA, the dissent concluded, the television controls did not violate the antitrust laws.

B. The Supreme Court Decision

The Supreme Court affirmed the decisions of the lower courts that the NCAA's television plan and contracts unreasonably restrained trade because the restraints limited "output" and eliminated price competition among individual schools, without enhancing overall competition for the televising of college football. [95] In so holding, the Supreme Court rejected the lower courts' more extreme conclusion that the plan and contracts were per se

88. 707 F.2d at 1162-68.
89. *Id.* at 1163.
90. *Id.*
91. *Id.* at 1167 (emphasis in original).
92. *Id.* (emphasis in original).
93. *Id.*
94. *Id.* at 1167-68.
95. 104 S. Ct. at 2959-60.

violations of the Sherman Act, and instead employed a rule of reason analysis.[96] However, in both its decision to apply the rule of reason and in its application of this rule, the Court effectively disregarded noneconomic justifications for the television restraints and applied pure economic reasoning to the NCAA plan.[97]

In explaining why it refused to condemn the NCAA television plan as a per se violation of the antitrust laws, the Court acknowledged the noneconomic goals of the NCAA, but expressly disclaimed any reliance on the NCAA's status as a nonprofit organization or on the NCAA's efforts to preserve and foster noneconomic educational goals as the basis for its decision.[98] Nonprofit status, the Court noted, does not exempt from antitrust liability a nonprofit entity engaged in anticompetitive conduct.[99] Moreover, the Court stated,

> [t]he economic significance of the NCAA's nonprofit character is questionable at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize revenues . . . it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competetive market than would be a for-profit entity.[100]

As for the NCAA's role in preserving and encouraging intercollegiate amateur athletics, the Court recognized that "as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity . . . ."[101] Nevertheless, the Court concluded "it is . . . well-settled that good motives will not validate an otherwise anticompetitive practice".[102]

"Critical" to the Court's decision to apply the rule of reason was that the very nature of the industry rendered "horizontal restraints on competition . . . essential if the product is to be available at all."[103] The product—college football contests between competing institutions—could not be marketed, the Court reasoned, absent mutual agreement among the colleges on a myriad of rules, such as size of the playing field, number of players on a team, and the extent of physical violence to be tolerated.[104] Moreover, the unique value of the NCAA's "product" arose from its amateur status and association with academic tradition; these *economic* attributes could be preserved only through restraints on competition:

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96. *Id.* at 2960-62.
97. *See infra* notes 99-119 and accompanying text.
98. *NCAA*, 104 S. Ct. at 2960.
99. *Id.* at 2960 n.22 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-87 (1975); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982)).
100. *Id.* at 2960 n.22 (citation omitted).
101. *Id.* at 2960 n.23.
102. *Id.*
103. *Id.* at 2961.
104. *Id.*

> The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . . . In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice . . . and hence can be viewed as procompetitive.[105]

Given the fact that even the respondents conceded that the great majority of NCAA regulations enhanced competition, the Court determined that "despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints."[106]

In applying the rule of reason, the Court did not examine the noneconomic justifications for the NCAA television plan, but focused narrowly on whether the restraints were sufficiently tailored to meet the NCAA's economic, procompetitive justifications. Initially, the Court rejected the NCAA argument that, like the composers in *Broadcast Music,* it was engaged in a "joint venture" which assisted in the marketing of broadcast rights and was therefore procompetitive. The Court accepted the factual finding of the district court that the NCAA plan produced no economic efficiencies that enhanced the competitiveness of college football television rights and that NCAA football could be marketed just as effectively without the NCAA plan.[107] Thus, unlike *Broadcast Music,* the Court concluded that "it cannot be said that 'the agreement on price is necessary to market the product at all' ".[108] *Broadcast Music* was further distinguished because in that case no limit was placed on the volume that might be sold in the market and each individual remained free to sell his own music without restraint.[109]

Second, the Court addressed the NCAA's argument that the television restraints were necessary to protect live attendance at games not being televised. The Court noted that the plan in fact did not accomplish this purpose since it provided for games to be shown on television during all hours that live games were played.[110] However, stated the Court, "a more fundamental reason for rejecting this defense" is that it "is not based on a desire to

105. *Id.*
106. *Id.* at 2962.
107. *Id.* at 2967.
108. *Id.* at 2967-68 (quoting *Broadcast Music,* 441 U.S. at 23).
109. *Id.* at 2968.
110. *Id.*

maintain the integrity of college football as a distinct and attractive product," but on the fear that live college football could not compete with televised college football.[111] The Court concluded that such a justification is not acceptable because "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[112]

Finally, the Court agreed in part with the NCAA's argument that the television regulations were justified by the need to maintain a competitive balance among amateur athletic teams. Noting that its decision not to apply a per se rule rested in large part on its recognition of the need for cooperation among member institutions to preserve the type of competition the NCAA and its member colleges sought to market, the Court stated that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[113] Nevertheless, the Court concluded that the television restraints were "not even arguably tailored" to serve the NCAA's interest in competitive balance: "The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others . . . [without] produc[ing] any greater measure of equality throughout the NCAA."[114]

Although rejecting television restraints as a means of preserving amateurism and competitive balance, the Court suggested that other NCAA regulations are well tailored for these purposes:

> [A]s the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance . . . and which are 'clearly sufficient' to preserve competitive balance to the extent it is within the NCAA's power to do so.[115]

In its conclusion, the Court again acknowledged the need for restrictions to preserve amateurism:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that . . .

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111. *Id.* at 2969.
112. *Id.* (quoting *National Soc'y of Professional Eng'rs,* 435 U.S. at 696).
113. *Id.*
114. *Id.* at 2970.
115. *Id.* at 2970 (quoting *NCAA,* 546 F. Supp. at 1296, 1309-10).

> by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life.[116]

Despite the Court's language quoted above, praising the goals of amateurism, the Court in *NCAA* considered amateurism to be relevant only insofar as it fit within the Court's purely economic analysis of the challenged restraint. Although the majority did not expressly reject a role for noneconomic justifications in all cases, such justifications played no role in its analysis in *NCAA*. In contrast, the dissenters disagreed sharply with this approach.

Justice White, joined by Justice Rehnquist, dissented in *NCAA* primarily on the ground that the NCAA's television plan promoted the legitimate noneconomic goal of "preserving amateurism and integrating athletics and education."[117] The importance of this goal, in the dissenters' view, overrode any minimal anticompetitive impact the NCAA plan might have on televised college football.

According to the dissent, the majority erred in treating NCAA athletics "as a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits."[118] To the contrary, "[t]he NCAA . . . 'exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.' "[119] Thus, the NCAA seeks to provide a "public good" that could not be provided in a perfectly competitive market:

> By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.[120]

Additionally, the dissent took issue with the Court's conclusion that the NCAA television restraints differed fundamentally from the numerous other NCAA controls (e.g., student eligibility rules, limits on compensation to student athletes, and limits on the number of coaches a school can hire) which are intended "to keep university athletics from becoming profession-

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116. *Id.* at 2971 (emphasis in original).

117. *Id.* at 2973. *See generally* 104 S. Ct. at 2971-73, 2977-79. The dissenters also took issue with the district court's findings that the NCAA plan limited total output and created a noncompetitive price structure unresponsive to viewer demand. *Id.* at 2975-76.

118. *Id.* at 2971.

119. *Id.* at 2971-72 (quoting Assocation for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 494 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (1984)).

120. *Id.* at 2972.

alized to the extent that profit making objectives would overshadow educational objectives."[121]

The dissent strongly disagreed with the lower courts' refusal to consider the noneconomic justifications urged by the NCAA in support of its television controls: "[I]t is important to remember that the Sherman Act 'is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives.' "[122]

The dissent further contended that the lower courts erred in interpreting *Professional Engineers* to preclude reliance on noneconomic factors in analyzing the television restraints—an error that the Court had not "in so many words" repeated.[123] Although statements in *Professional Engineers* could be broadly read to suggest that the noneconomic justifications urged by the NCAA could not save the NCAA television plan from invalidation under the Sherman Act,

> these statements were made in response to "public interest" justifications . . . in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily noneconomic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen . . . and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.[124]

When the noneconomic goals of the NCAA are considered, the dissent concluded, the NCAA's plan was reasonable in that it "foster[ed] the goal of amateurism by spreading revenues among various schools and reduc[ed] the financial incentives toward professionalism."[125] These contributions, the dissent reasoned, "sufficient[ly] . . . offset any minimal anticompetitive effects of the television plan."[126]

CONCLUSION

The courts suggested in early cases that the assertion of noncommercial

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121. *Id.* (quoting Kupec v. Atlantic Coast Conference, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975)).

122. 104 S. Ct. at 2977 (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959)).

123. 104 S. Ct. at 2978.

124. *Id.* (quoting Gulland, Byrne & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges,* 52 FORDHAM L. REV. 717, 728 (1984)).

125. *Id.* at 2978.

126. *Id.* at 2979.

objectives in defense of anticompetitive behavior would exempt the challenged behavior from the antitrust laws. Subsequently, it became clear that noneconomic or noncommercial considerations would not exempt anticompetitive conduct from antitrust scrutiny. The question then became whether the presence of such considerations automatically would call the rule of reason into play. Read literally, *Professional Engineers* sugggested that they would not. The *NCAA* decision, however, leaves this question open because the Court, while specifically not relying on educational considerations and the goal of amateurism, did use "noncommercial considerations" as part of its *economic* analysis in deciding to apply the rule of reason. Subsequent cases have followed *NCAA* in this regard.[127]

Assuming that the rule of reason is to be applied, either because the challenged restraint falls within an "exception" to the per se rule or because the rule of reason is otherwise appropriate, the question of the proper weight to be accorded to noncommercial factors in that analysis remains unanswered. Again, the decision in *Professional Engineers* suggests that noncommercial factors should not be considered as part of the rule of reason analysis because only competitive considerations are relevant. This conclusion is unlikely to be taken literally, however—even the *NCAA* decision gave noncommercial factors some deference. For example, noneconomic considerations may be used to define a relevant market or otherwise to define a unique "product" or the economic character of an industry.

At the very least, to withstand antitrust scrutiny, the challenged restraint must be reasonably related to the asserted noncommercial goal. A more substantial anticompetitive impact will require a more tenable link between the restraint and the noncommercial justification. Similarly, the greater the number of noncommercial justifications that can be applied to a given restraint, the greater the likelihood that the courts will find a way to uphold it.

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127. In Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 614 n.9 (11th Cir. 1985), the court recognized a "sports regulation exception" which "generally applies in a situation where a regulatory organization sets forth rules and proccdures essential to the existence of or survival of a sport." Similarly, in Regents of the Univ. of Cal. v. American Broadcasting Co., 747 F.2d 511, 516-18 (9th Cir. 1984), the court referred to the "essential entity argument" of *NCAA* and decided that per se analysis of the challenged agreement was appropriate because, unlike the challenged agreement in *NCAA*, this agreement was not essential to the nature of college football. *See also* Ashley Meadows Farm v. American Horse Shows Ass'n, 609 F. Supp. 677, 680 (S.D.N.Y. 1985) (challenged rules analyzed under the rule of reason because, as in *NCAA*, the rules were necessary "to guarantee the continued quality of horse competition").