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**NCAA v. BOARD OF REGENTS OF THE UNIVERSITY OF
OKLAHOMA: HAS THE SUPREME COURT
ABROGATED THE PER SE RULE OF
ANTITRUST ANALYSIS?**

I. INTRODUCTION

For years, avid college football fans have been deprived of watching their favorite local team compete live on television because another game, of greater national interest, was being televised by the networks who owned the exclusive rights to broadcast National Collegiate Athletic Association (NCAA)¹ football. However, college football fans may no longer have to stay up late to watch the television replays since the United States Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*.²

In *Board of Regents*, two member institutions of the NCAA, the Universities of Oklahoma and Georgia, challenged the NCAA's restrictive television plan,³ claiming that it violated section 1 of the Sherman Antitrust Act (Sherman Act).⁴ Although the NCAA television plan had been challenged previously under section 1 of the Sherman Act,⁵ *Board of Regents* was the first case in which the United States Supreme Court analyzed the plan in detail. The television plan essentially prohibited member institutions from individually negotiating their college football broadcast rights and limited the total amount of televised games in a season. It also limited the number of appearances any one institution could make on television.⁶

The Court held that the NCAA television plan was a violation of

1. The NCAA is a nonprofit organization that plays an important role in the regulation of amateur collegiate sports. For a complete discussion of the NCAA's regulation of college football, see *infra* notes 50-71 and accompanying text.

2. 104 S. Ct. 2948 (1984).

3. See *infra* notes 56-71 and accompanying text for an in-depth discussion of this plan.

4. Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

5. See, e.g., *Warner Amex Cable Communications, Inc. v. American Broadcasting Cos., Inc.*, 499 F. Supp. 537 (S.D. Ohio 1980) (court denied motion for preliminary injunction to restrain television network and the NCAA from preventing cable company telecasts of live football games not otherwise televised by the network).

6. 104 S. Ct. at 2957. For a complete discussion of the NCAA television plan, see *infra* notes 56-71 and accompanying text.

section 1 of the Sherman Act.⁷ The Court found that the NCAA plan was not more efficient than the free market, did not protect live attendance at college football games and did not further the NCAA's stated policy of maintaining a competitive balance among amateur athletic teams.⁸ In effect, the Court stated that even though the NCAA is an unincorporated, nonprofit educational association that promotes a valued tradition of society, it was not beyond the reach of the antitrust laws and thus could not institute price and output restrictions on competition.

The major problem with the *Board of Regents* decision is the type of antitrust analysis applied by the Supreme Court. By choosing the rule of reason doctrine to evaluate the price restrictions in the NCAA's television plan, the Court continued to erode traditional per se⁹ categories without explaining where this trend should stop.

This Note discusses the problems raised by the Court's rejection of the per se rule against price fixing and argues that the *Board of Regents* decision should be severely limited to avoid judicial confusion and protracted litigation.

II. THE SHERMAN ACT

The Sherman Act¹⁰ was designed to produce and maintain competition, the lifeblood of a free market economy.¹¹ Congress passed the Act to remedy growing public discontent with combinations of capital and trusts, which had monopolized major segments of the economy during the period of accelerated industrial growth following the American Civil War.¹² Because of the Act's broad language, it has been applied to a

7. 104 S. Ct. at 2971. In reaching this conclusion the Court stated that: The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports 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 . . . that 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.

Id. (emphasis in original).

8. *Id.* at 2967-70.

9. For discussion and definitions of the per se and rule of reason doctrines, see *infra* notes 16-49 and accompanying text. For the discussion regarding the trend in narrowing the per se doctrine, see *infra* text accompanying notes 220-38.

10. Codified at 15 U.S.C. §§ 1-7.

11. The Supreme Court has stated that the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while . . . providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

12. C. HILLS, *ANTITRUST ADVISOR* § 1.3 (2d ed. 1978). By 1890 these loose-knit combi-

number of situations not contemplated by the Act's drafters.¹³

Section 1 of the Sherman Act outlaws concerted activity that restrains trade.¹⁴ In order to prove a section 1 violation, a plaintiff must establish three elements regardless of the practice challenged: (1) a conspiracy, combination or contract among two or more separate entities (2) that unreasonably restrains trade and (3) affects foreign or interstate commerce.¹⁵

nations, or "trusts," existed in the petroleum, tobacco, linseed oil, cotton oil, whiskey, sugar, salt, cordage, envelope, oilcloth, paving pitch, cast-iron pipe, school-slate and paper industries. In December of 1889, Senator John Sherman first introduced his antitrust bill, which was later redrafted, passed by Congress and signed into law by President Benjamin Harrison on July 2, 1890. *Id.* For an additional discussion of the legislative history of the Sherman Act, see W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* (1965); H. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1964).

13. C. HILLS, *supra* note 12, § 1.3.

14. *Id.* § 1.4. Since its adoption by Congress, the Act has been shaped through interpretation by the courts. This interpretive power stems from the fact that "[t]he legislative history makes it perfectly clear that . . . [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

In the landmark decision of *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), Standard Oil of Ohio had acquired stock interest in many corporations in order to gain perpetual control of the movement of petroleum and petroleum products. The Court held that this practice unreasonably restrained trade in violation of the Sherman Act. *See infra* text accompanying notes 42-45. It interpreted § 1 to be a prohibition against both classes of contracts or acts which the common law deemed to be undue restraints of trade, and agreements which new economic times and conditions would make unreasonable. *Standard Oil*, 221 U.S. at 59-60.

The *Standard Oil* Court, after reviewing the legislative history of the Sherman Act and common law rules that related to restraints of trade, concluded that Congress did not intend to prohibit all contracts, or even all contracts which caused attenuated restraints of trade, but to prohibit only those agreements "which were unreasonably restrictive of competitive conditions." *Id.* at 58. The principle that § 1 of the Sherman Act is violated only by unreasonable restraints of trade has been repeatedly reaffirmed by the Supreme Court. *See, e.g.*, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-90 (1978); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977); *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

15. ABA ANTITRUST SECTION, *ANTITRUST LAW DEVELOPMENTS 2* (2d ed. 1984) [hereinafter cited as *ANTITRUST LAW DEVELOPMENTS*].

Since this Note focuses on unreasonable restraints of trade, a brief discussion of the unlawful conspiracy and interstate commerce requirements is in order. To establish an unlawful conspiracy or combination under § 1 of the Sherman Act, the complainant must present evidence that establishes that two or more parties have "knowingly participated in a common scheme or design." *Contractor Util. Sales Co. v. Certain-Teed Prods. Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981).

Another essential element of proving a § 1 violation is that the challenged restriction restrains trade or commerce among the states or with a foreign country. 15 U.S.C. § 1 (1982). To establish this element, the plaintiff must prove that "the defendant[s] activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd.*, 444 U.S. 232, 242

A. *The Per Se Rule*

There are currently two methods of analysis used to determine whether a particular act or agreement is an unreasonable restraint of trade. The first method delineates categories of per se violations. These include "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."¹⁶ The most well known per se violation is horizontal price fixing.¹⁷ Typically, this violation occurs when competing firms at the same level of the market make an arrangement which, in purpose or effect, inhibits price competition either directly or indirectly.¹⁸

The first glimpse of the per se doctrine came in the late 1890's when the Supreme Court decided *United States v. Joint Traffic Association*.¹⁹ In *Joint Traffic*, an association formed by thirty-one railroad companies for the purpose of fixing rates, charges and fares, was held to be an unreasonable restraint of trade.²⁰ The Court declared that arrangements which explicitly and purposefully stifled competition between firms, independently operated in the same market, were unlawful.²¹ The *Joint Traffic* Court held that the Act established a standard of competition, and that arrangements such as price fixing are invalid without the need for a detailed inquiry because they directly and significantly restrict competition.²²

The next important case in the development of the per se doctrine was *United States v. Trenton Potteries Co.*²³ There, manufacturing cor-

(1980) (citation omitted). Courts have held that the interstate commerce requirement has been established in a variety of circumstances and thus is not a difficult element for a plaintiff to prove. See ANTITRUST LAW DEVELOPMENTS, *supra* note 15, at 26-28. A discussion of restraints on trade or commerce with a foreign government is beyond the scope of this Note. See generally ANTITRUST LAW DEVELOPMENTS, *supra* note 15, Ch. IX.

16. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (association's canon of ethics prohibiting competitive bidding by members held to be an unreasonable restraint of interstate trade).

17. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) (conspiracy to fix an element of price per se unlawful); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (price fixing of sale of services held per se unlawful).

The other categories of restraints held to be per se unlawful are vertical price fixing, bid rigging and market division, certain group boycotts and some tying arrangements. ANTITRUST LAW DEVELOPMENTS, *supra* note 15, at 22.

18. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 74, at 198 (1977); ANTITRUST LAW DEVELOPMENTS, *supra* note 15, at 28-29.

19. 171 U.S. 505 (1898).

20. *Id.* at 577.

21. *Id.* See L. SULLIVAN, *supra* note 18, § 64, at 169.

22. 171 U.S. at 561-65. See also L. SULLIVAN, *supra* note 18, § 64, at 169.

23. 273 U.S. 392 (1927).

porations which controlled eighty-two percent of the pottery market formed a cartel that fixed prices and limited sales. In holding the cartel to be a per se unreasonable restraint of trade, Justice Stone stated that the reasonableness of price fixing agreements need not be considered. These agreements, he explained, create such potential power that they "may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable."²⁴

Thirteen years later, in *United States v. Socony-Vacuum Oil Co.*,²⁵ the Court declared that an arrangement whereby major oil producers agreed to a concerted program entering into the gasoline market to affect prices was a per se violation of section 1 of the Sherman Act.²⁶ The Court expanded its ruling in *Trenton Potteries* and stated that an arrangement to fix prices could not be justified by the argument that it was designed to diminish competitive evils.²⁷ In reaching its conclusion, the Court used the "per se" phrase for the first time, and stated that a price fixing agreement violated section 1 of the Act regardless of whether the conspirators possessed the market power to affect prices.²⁸

Under the per se analysis, inquiry into the alleged practice is unnecessary if two factors have been established.²⁹ First, a court must conclude that the practice almost always causes substantial injury to competition.³⁰ And second, it must find that an inquiry into the anticompetitive effect of the subject conduct would be unduly time consuming, complex, costly and uncertain.³¹ Thus, the per se doctrine is important for a number of reasons:³² It adds certainty to the marketplace by defining practices that are unquestionably unlawful; results in a high level of deterrence from prohibitive conduct because practices are known to be illegal; promotes judicial efficiency by reducing court costs and litigation costs to the parties; and reduces the possibility that an incorrect decision, approving conduct that should be condemned, will be reached.³³

24. *Id.* at 397.

25. 310 U.S. 150 (1940).

26. *Id.*

27. *Id.* at 221-23.

28. *Id.* at 224 n.59.

29. L. SULLIVAN, *supra* note 18, § 70, at 193.

30. *Id.*

31. *Id.*

32. For a full discussion of the importance of the per se rule, see *infra* text accompanying notes 230-38.

33. Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 694-95 (1979).

The first apparent erosion of the per se rule against horizontal price fixing occurred in *Broadcast Music, Inc. v. Columbia Broadcasting Systems*.³⁴ The Court held that although blanket licensing agreements for copyrighted music technically constituted price fixing, these agreements were essential to the survival of the publishing industry³⁵ and in fact created a new product.³⁶ The confusion following *Broadcast Music* was apparently eradicated by the Court's later decision in *Arizona v. Maricopa County Medical Society*,³⁷ where it firmly declared that price fixing is illegal per se.³⁸

B. The Rule of Reason

The majority of agreements or acts that restrain trade are not blatantly anticompetitive. Therefore, a more in-depth analysis of the impact of the restriction is required. This second method of evaluating whether an agreement is an unreasonable restraint of trade is known as the "rule of reason."

Five steps are normally used in the application of the rule of reason: (1) specific identification of the practice involved; (2) determination of the purpose of the restraint from the evidence presented; (3) identification of the likely effects of the challenged practice; (4) identification of any ways in which the challenged practice will alter competitive interaction; and (5) evaluation of whether the imposed restriction substantially impedes competition.³⁹

The rule of reason also had its origin in the early cases, such as *Joint Traffic*, which confirmed in dictum that certain competitive restraints must be reasonable.⁴⁰ However, in these early cases, the Supreme Court saw no need to question the reasonableness of agreements that directly

34. 441 U.S. 1 (1979). For a complete discussion of *Broadcast Music*, see *infra* notes 150-60 and accompanying text.

35. *Broadcast Music*, 441 U.S. at 20. The Court reasoned that the multitude of individual composers' copyright interests could only be protected through blanket license agreements. *Id.* at 19 n.32.

36. *Id.* at 21-22. The Court explained that a blanket license was a new product because it offered a product that no individual composer could offer. *Id.* at 22-23.

37. 457 U.S. 332 (1982); for a discussion of *Maricopa County*, see *infra* text accompanying notes 170-71 & 174.

38. 457 U.S. at 348.

39. L. SULLIVAN, *supra* note 18, § 68, at 187-88. Under the rule of reason, the burden of proving that a particular practice unreasonably restrains trade rests with the plaintiff. *Cowley v. Braden Indus., Inc.*, 613 F.2d 751, 754-55 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980) (plaintiffs failed to prove that defendant manufacturer's restraints placed upon its goods were unreasonable).

40. *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 572 (1898). The Court in *Joint Traffic* conceded, for example, that the exercise of the constitutional right to contract limited

restrained trade.⁴¹ Chief Justice White announced what has come to be known as the rule of reason in the landmark decision of *Standard Oil Co. v. United States*.⁴² There, Standard Oil had acquired the stocks of many other corporations to aggregate vast capital for the purpose of gaining perpetual control of the movement of petroleum and its products.⁴³ The Court used a reasonableness analysis rather than a per se rule because Standard Oil's actions were not naked agreements among competitors to restrain trade, but rather involved restraints that were secondary to otherwise lawful combinations.⁴⁴ Identifying its analysis as the rule of reason, the Supreme Court affirmed the appellate court's ruling that the acquisitions by Standard Oil were unreasonable because they were concerted efforts to gain monopoly power.⁴⁵

Despite consistent efforts to broaden the rule of reason, the settled approach follows the more conservative application of the rule as stated in *Standard Oil*.⁴⁶ Since the *Standard Oil* decision, the Court has been tempted to consider social factors that would validate arrangements otherwise detrimental to competition.⁴⁷ Litigants have argued that a challenged arrangement advanced the public interest even though the restraint substituted concerted economic regulation for free market competition.⁴⁸ These efforts to broaden the rule of reason have been largely unsuccessful, and the modern conception of the rule identifies the impact on competition as the sole variable measured in its application.⁴⁹

competition but was "essential and necessary for carrying out . . . lawful purposes." *Id.* See generally L. SULLIVAN, *supra* note 18, § 64.

41. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). In *Addyston*, the Court analyzed a price fixing agreement between major producers of iron pipe. Addressing the argument of the manufacturers that the agreement was reasonable, the Court stated, "we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract." *Id.* at 238.

42. 221 U.S. 1 (1911).

43. *Id.* at 31-43.

44. *Id.* at 7. The Court stated that analysis of a challenged restraint's reasonableness was allowed under the Sherman Act because the previous decisions of the Court that applied and interpreted the statute were based on reasoned analysis. *Id.* at 64-65.

45. *Id.* at 66, 74.

46. L. SULLIVAN, *supra* note 18, § 68. According to Professor Sullivan, the *Standard Oil* decision announced a "rigorous rule of reason" which made competition the rule of trade. *Id.* § 65, at 172. This rule should not be put aside, despite indications that it may be reasonable to do so. *Id.*

47. *Id.* § 66, at 175.

48. *Id.*

49. *Id.* § 68, at 186. In *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978), the Court indicated that the rule of reason "does not open up the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." The Court also stressed that an inquiry into the reasonableness of a chal-

When the Supreme Court decided to hear *NCAA v. Board of Regents of the University of Oklahoma*, the major controversy surrounding the rule of reason was what circumstances should implicate its use. Did *Broadcast Music* create a broad exception to traditional per se analysis, or did *Maricopa County* imply that *Broadcast Music* stands for a much narrower principle?

III. FACTS OF THE CASE

A. *The NCAA Regulation, Television Plan and Surrounding Controversy*

Since 1905, the NCAA has regulated amateur collegiate sports by adopting playing rules, standards of amateurism, recruiting regulations, and rules that govern athletic eligibility and the size of teams and coaching staffs.⁵⁰ Of all the sports played at the collegiate level, only football has been regulated with respect to television broadcasting.

There are approximately 850 voting member institutions in the NCAA, which are separated into divisions based on the size and scope of their athletic programs.⁵¹ Division I contains 276 colleges with major athletic programs. However, only 187 of those participate in intercollegiate football.⁵² These 187 teams are divided into various conferences according to geographic location and size of student body. Five major football conferences in Division I have joined with major football-playing independent institutions to form the College Football Association (CFA).⁵³ The purpose behind the formation of the CFA was the promotion of the interests of major football-playing institutions within the NCAA infrastructure.⁵⁴

lenged restraint "is confined to a consideration of impact on competitive conditions." *Id.* at 690 (footnote omitted).

50. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2954 (1984). The NCAA also conducts national tournaments for such sports as basketball, baseball, swimming, track and wrestling. However, there is no national tournament in the sport of football. *Id.*

51. *Id.* at 2954.

52. *Id.* Divisions II and III are comprised of approximately 500 colleges with less comprehensive athletic programs. For purposes of football, Division I has been subdivided into Divisions I-A and I-AA. *Id.*

53. *Id.* The CFA includes the Atlantic Coast, Big 8, Southeastern, Southwestern and Western Athletic conferences. Also included are the following independent colleges or universities: Notre Dame, Penn. State, Pittsburgh and the service academies. The only major football-playing conferences that are not members of the CFA are the Pacific 10 and Big 10 conferences. Membership in the CFA is restricted to football-playing schools meeting certain standards of size and importance. *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982), *aff'd*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

54. 546 F. Supp. at 1285. In 1979, CFA members began to advocate that institutions with

The television rights to intercollegiate football have been controlled by the NCAA since 1951, when the first television plan was implemented.⁵⁵ Until 1977, contracts with the television networks were for either one or two year terms, but in 1977 the contracts were extended to four year terms.

The NCAA adopted the television plan at issue in *Board of Regents* in 1981 for the 1982 through 1985 football seasons.⁵⁶ Like the plans that preceded it, this agreement was intended to reduce the effects of live television upon game attendance.⁵⁷ Additionally, the plan stated that “‘all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan.’”⁵⁸

Two “carrying networks,”⁵⁹ the American Broadcast Companies (ABC) and the Columbia Broadcasting System (CBS), were awarded the rights to negotiate and contract for football telecasting with members of the NCAA. Each network was granted the right to telecast fourteen live “exposures” as described in the plan.⁶⁰ In return, both networks agreed

major football programs should have a greater voice in the formulation of football television policy than they were afforded by the NCAA. Subsequently, the CFA investigated the possibility of negotiating its own television agreement and developed its own independent television plan. *Board of Regents*, 104 S. Ct. at 2957. See *infra* notes 69-74 and accompanying text.

55. *Board of Regents*, 104 S. Ct. at 2955. In January of 1951, a three person “Television Committee” appointed the previous year by the NCAA gave a report on their study of college football and television. They concluded that television had an adverse effect on college football and threatened the nation’s overall athletic system unless brought under some control. As a result, the NCAA obtained the National Opinion Research Center (NORC) to study television’s impact on game attendance and declared a moratorium on televised football games. *Id.* at 2954-55. This moratorium was lifted with the implementation of the first NCAA television plan later that same year. *Id.* In essence, the basic television plan has not changed in the last 30 years. See *infra* note 57.

56. *Board of Regents*, 104 S. Ct. at 2955.

57. The Television Committee’s 1981 briefing book states that:

The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:

1. To reduce, insofar as possible the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;
2. To spread television among as many NCAA member colleges as possible; and
3. To provide football television to the public to the extent compatible with the other two objectives.

Id. at 2955 n.4 (quoting NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1981 TELEVISION COMMITTEE (1982)).

58. *Id.* at 2956 (quoting NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1981 TELEVISION COMMITTEE (1982)).

59. The “carrying networks” were the companies that were awarded the rights to negotiate and contract with NCAA member institutions for the opportunity to telecast their football games. *Id.*

60. *Id.* The plan also described the rights for a “supplementary series” of telecasts for the

to pay participating NCAA institutions a minimum aggregate compensation total of \$131,750,000 during the four-year period.⁶¹ Although the television plan authorized each carrying network to negotiate directly with member schools, the practice that developed over the years involved the setting of a recommended fee by an NCAA representative for different types of telecasts.⁶² National telecasts commanded the highest price, followed by regional telecasts and lower division games.⁶³ However, the amount received by any one team did not change with the size of the viewing audience, the number of markets reached by the telecast, or the particular characteristics of the game or the teams.⁶⁴ Therefore, the carrying networks obtained "the exclusive right to submit a bid at an essentially fixed price to the institutions involved."⁶⁵

The plan also contained appearance requirements and limitations. Both ABC and CBS were required to schedule appearances for at least eighty-two different member institutions during each two-year period the agreement was in effect.⁶⁶ No member institution was eligible to appear on television more than four times nationally, and six times totally, with the appearances divided equally between ABC and CBS.⁶⁷ Additionally, the television plan contained a limitation on the total number of games that could be broadcast and a prohibition against selling television rights not in accord with the plan.⁶⁸

Members of the CFA obtained a contract offer from the National

1982 and 1983 seasons along with a procedure for permitting "exception telecasts." *Id.* According to a separate article of the plan, the supplementary series could consist of no more than 36 exposures in each of the first two years and no more than 40 exposures in the third and fourth years. These exposures were to be scheduled at times that did not conflict with Saturday afternoon games which made up the principal series. *Id.* at 2956 n.7 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1981 TELEVISION COMMITTEE 86-92 (1982)). Exception telecasts were permitted in the home team's market if a game was sold out and in the visiting team's market if a game was played more than 400 miles from that team's campus and if the broadcast was not shown in an area where another college football game was being played. *Id.* at 2956 n.8 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1981 TELEVISION COMMITTEE 62-72 (1982)).

61. *Id.* at 2956.

62. *Id.*

63. ABC paid \$600,000 for each of its 12 nationally telecast games and \$426,779 for each regional telecast during the 1980 football season. Division I schools received 89.8% of the total 1980 football television revenue of \$27,842,185. Division II received \$625,195, or 2% of the total and the NCAA received \$2,147,425, or 6.9% of the total. *Id.* at 2956 n.10 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1981 TELEVISION COMMITTEE 251 (1982)).

64. 104 S. Ct. at 2956.

65. *Id.* at 2956-57 (citing *Board of Regents*, 546 F. Supp. at 1289-93).

66. *Id.* at 2957.

67. *Id.* (citing *Board of Regents*, 546 F. Supp. at 1293).

68. *Id.*

Broadcasting Company (NBC), which they signed in August of 1981.⁶⁹ This agreement was more liberal than the NCAA plan and allowed for a greater number of appearances and increased revenues for CFA members.⁷⁰ Subsequently, the NCAA announced that disciplinary action would be taken against CFA members who complied with the NBC contract.⁷¹

B. Procedural History

In response to the NCAA threat of sanctions, the Universities of Oklahoma and Georgia commenced an action in the United States District Court for the Western District of Oklahoma.⁷² The plaintiffs sought and obtained temporary injunctive relief "preventing [the] NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to complete its agreement with NBC."⁷³ Despite the entry of the injunction, the CFA did not ratify the NBC agreement because most CFA members were unwilling to commit to the contract in the face of the threatened sanctions.⁷⁴

69. *Id.* This contract was signed pursuant to the purposes and goals of the CFA. See *supra* note 54 and accompanying text. Additionally, "[t]he members of the CFA had adopted the position that nothing in the NCAA Constitution or Bylaws empowered NCAA to act as the exclusive bargaining agent on behalf of all its members for the sale of television rights to college football games." *Board of Regents*, 546 F. Supp. at 1285. In response to the CFA activities and before the CFA agreement was signed, the NCAA adopted the following "Official Interpretation" of Bylaw 11-3-(aa) on April 18, 1981, which stated in pertinent part:

The [National Collegiate Athletic] Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season The terms or principles of the control shall be set forth in a television plan . . . prepared by the Football Television Committee, approved by the NCAA . . . and approved by at least two-thirds of the members voting Any commitment by a member institution with respect to the televising or cablecasting of its football games . . . necessarily would be subject to the terms of the NCAA Football Television Plan

Id. (quoting the NCAA Official Interpretation of Bylaw 11-3-(aa)).

70. 104 S. Ct. at 2957. This contract was ratified at a special meeting of CFA members in Atlanta on August 21, 1981. Thirty-three members voted in favor of the contract, 20 voted against and 8 abstained. This vote, however, did not make the contract binding "because CFA members could still elect to opt out of the contract by written notice to that effect before September 10 [1981]." *Board of Regents*, 546 F. Supp. at 1286.

71. 104 S. Ct. at 2957. The NCAA also made it clear that the sanctions it intended to impose on the violative CFA schools were not limited to the football programs, but applied to other sports programs as well. *Id.* See also *Board of Regents*, 546 F. Supp. at 1286.

72. *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276 (W.D. Okla. 1982).

73. *Id.* at 1286.

74. "On the final extended deadline for CFA members to opt out of the NBC contract, few CFA members were willing to commit. Consequently, CFA advised NBC that it was unable to provide an adequate inventory of teams, and the arrangement was terminated." *Id.*

Notwithstanding the failure to ratify the CFA agreement, the district court held that the NCAA television plan violated the Sherman Act in three ways: (1) the NCAA had fixed prices for particular telecasts; (2) the NCAA's exclusive network agreements amounted to a group boycott of all potential broadcasters and its threat of sanctions against member institutions constituted a threatened boycott of potential competitors; and (3) the NCAA's television plan created an artificial limit on production of televised intercollegiate football.⁷⁵ Thus, the district court found that the television plan and the network contracts contained price fixing and group boycott agreements which it considered per se violations of the Sherman Act.⁷⁶ Additionally, the court analyzed the television plan under the rule of reason analysis,⁷⁷ and found that the limitations on price and output were not offset by any procompetitive justification.⁷⁸

The Court of Appeals for the Tenth Circuit agreed with the lower court's finding that the NCAA television plan constituted per se illegal price fixing.⁷⁹ However, the appellate court rejected the boycott holding of the district court, stating that the plan did not "constitute an attempt by competitors at one level to foreclose competition by traders at the same level."⁸⁰ This element is crucial and must be present if the alleged boycott is to be considered illegal per se under the Sherman Act.⁸¹ Finally, the court of appeals affirmed the holding of the district court that, even if the NCAA plan was not illegal per se, it would fail under the rule of reason analysis.⁸² The Supreme Court affirmed the Tenth Circuit decision.

75. *Id.* at 1293-96. In the district court, the NCAA offered two principal justifications for the television plan. First, it claimed that the television policies protected members' gate attendance. Second, the NCAA argued that the plan tended to maintain the competitive balance among the football programs of the various schools. The district court concluded that the evidence did not support the first claim. *Id.* at 1295. Similarly, the second claim was rejected because the evidence failed to show that other NCAA regulations, such as those applying to recruitment and the preservation of amateurism, were not sufficient to maintain the competitive balance. *Id.* at 1295-96.

76. *Id.* at 1311, 1313.

77. *Id.* at 1313-19.

78. *Id.* at 1319.

79. *Board of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1156 (10th Cir. 1983).

80. *Id.* at 1160-61.

81. *Id.* at 1160 (quoting L. SULLIVAN, *supra* note 18, § 91, at 260). See also L. SULLIVAN, *supra* note 18, § 83.

82. 707 F.2d at 1157-60. Thus, the court of appeals held that the NCAA television plan would not pass muster under the Sherman Act, even if a detailed analysis of the industry was undertaken. For a discussion of the differences between the per se and rule of reason analyses and the circumstances under which each is applied, see *supra* text accompanying notes 16-49.

IV. REASONING OF THE COURT

A. *The Majority Opinion*

In deciding *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court focused essentially on two issues. The threshold issue addressed by the Court was whether to apply the per se or rule of reason analysis to the NCAA's television plan.⁸³ After deciding to analyze the case under the rule of reason, the Court focused on the primary issue, the NCAA plan's impact on competition.⁸⁴

1. Per se test rejected

The Supreme Court concluded that the NCAA television plan constituted horizontal price fixing by creating a minimum aggregate price which precluded price negotiation between broadcasters and member institutions.⁸⁵ The Court also stated that the NCAA had created a horizontal limitation on output by rationing the quantity of televised college football available.⁸⁶

Although horizontal price fixing and output limitations are usually "illegal per se,"⁸⁷ the Supreme Court stated that it was inappropriate to apply the per se rule to the facts of *NCAA v. Board of Regents of the University of Oklahoma*.⁸⁸ This decision was not based on judicial inexperience in dealing with the NCAA agreement,⁸⁹ nor on the fact that the NCAA was a nonprofit entity,⁹⁰ nor out of respect for the NCAA's role

83. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2959-62 (1984).

84. *Id.* at 2962.

85. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2959-60 (1984).

86. *Id.*

87. *Id.* at 2960. The Court stated that horizontal price and output restrictions are generally anticompetitive and therefore "justify application of the *per se* rule without inquiry into the special characteristics of a particular industry." *Id.* at 2960 n.21. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 349-51 (1982) (medical foundation that established doctor's maximum fees for full payment of health services rendered to insured policy holders held per se unlawful under § 1 of Sherman Act); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 689-90 (1978) (engineer association's canon of ethics prohibiting competitive bidding by members held to be a per se violation of § 1 of Sherman Act).

88. 104 S. Ct. at 2960.

89. *Id.* The Court stated that judicial inexperience with a particular agreement "counsels against extending" use of the per se doctrine. *Id.* at 2960 n.21 (citations omitted). However, when horizontal price and output restrictions are involved, their anticompetitive nature "is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry." *Id.* (citing *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 349-51 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 689-90 (1978)).

90. 104 S. Ct. at 2960. Section 1 of the Sherman Act applies equally to nonprofit entities that engage in anticompetitive conduct. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786 (1975) (state bar prevented from placing restrictions on attorney advertising in newspaper);

in the encouragement and preservation of intercollegiate amateur athletics.⁹¹ Rather, the Court considered the critical determining factor to be that the NCAA plan regulated an industry "in which horizontal restraints on competition are essential if the product is to be available at all."⁹²

Because of college football's connection to academia, the Court felt that the uniqueness and integrity of the product could only be preserved by mutual agreement.⁹³ Thus, the Supreme Court found that the NCAA's role in the preservation of college football's character could be viewed as procompetitive.⁹⁴

In light of the finding that horizontal restraints were necessary for product promotion, combined with the possibility that the NCAA's role in college football was procompetitive, the Supreme Court used a rule of reason approach to evaluate the challenged television plan.⁹⁵ The deci-

American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (non-profit entity civilly liable for agents' antitrust violations committed with apparent authority). Additionally, the Supreme Court questioned the nonprofit character of the NCAA, based on the district court's finding that "the NCAA and its member institutions are in fact organized to maximize revenues." 104 S. Ct. at 2960 n.22. See also, Board of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1288-89 (W.D. Okla. 1982).

91. 104 S. Ct. at 2960. The Court recognized that the motives of the NCAA would be accorded a presumption of validity but stated that "good motives will not validate an otherwise anticompetitive practice." *Id.* at 2960 n.23 (citations omitted). See generally *United States v. Griffith*, 334 U.S. 100, 105-06 (1948) (Sherman Act may be violated even in the absence of specific intent to restrain or monopolize trade).

92. 104 S. Ct. at 2961. This version of the horizontal restraint doctrine was first articulated by the Court in *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 444 U.S. 1 (1979). See *infra* text accompanying notes 150-56.

93. 104 S. Ct. at 2961. The Court stated that "[a] myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete." *Id.*

Before intercollegiate athletics were controlled by universities in the early twentieth century, only limited formal organization was provided, either by students or alumni. Excessive physical injury to athletes, commercialism and cheating by some participating schools were a few of the numerous abuses during this period. Comment, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656 (1978). These abuses sparked public agitation that led to the founding of the NCAA in 1905. 2 PRESIDENT'S COMMISSION ON OLYMPIC SPORTS, FINAL REPORT 1975-77, at 332. For a detailed discussion of the history of this early period of collegiate athletics, see A. FAITH, A HISTORY OF RELATIONS BETWEEN THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, (1905-1963), at 1-21 (1964).

94. 104 S. Ct. at 2961. The Court stated that the NCAA plays a vital role in preserving the amateur status of college football which in turn allows this product to be available in its unique form. As such, the Court acknowledged that the NCAA's "actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence [their actions] can be viewed as procompetitive." *Id.* (footnote omitted).

95. *Id.* at 2962.

sion was also based on prior holdings by the Court that: (1) joint selling agreements may increase efficiency and thus increase the seller's output, leading to greater competition,⁹⁶ and (2) restraints in a limited aspect of a market may in some cases lead to enhanced nationwide competition.⁹⁷ Therefore, the Court concluded that a rule of reason analysis was required to evaluate whether the NCAA television plan enhanced competition by increasing the amount of televised games over that which a free market normally demanded.

2. Television plan unreasonably restrains trade

Applying the rule of reason analysis, the Supreme Court held that the NCAA's television plan was an unreasonable restraint of trade under section 1 of the Sherman Act.⁹⁸ In reaching this conclusion the Court evaluated the effects of the NCAA's television plan on competition and rejected arguments that the plan was procompetitive.⁹⁹

The Court recognized that because the NCAA television plan restrained price and output, it had "a significant potential for anticompetitive effects."¹⁰⁰ The Court then stated that the anticompetitive nature of the television plan was realized because if NCAA members were free to sell their television rights, more college football games would be shown. However, because member institutions needed NCAA approval in order to compete in intercollegiate athletics, they had no choice "but to adhere to the NCAA's television controls."¹⁰¹ Thus, by fixing prices and restricting the competitive freedom of its members, the NCAA created a price structure that was unresponsive to consumer preference and not related to free market prices.¹⁰² According to the Court, this resulted in

96. *Id.* at 2961 (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 18-23 (1979)). For a discussion of *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, see *infra* text accompanying notes 150-56.

97. *Id.* at 2961-62 (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-57 (1977)). For a discussion of *Continental T.V., Inc. v. GTE Sylvania, Inc.*, see *infra* text accompanying notes 140-43.

98. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2954 (1984).

99. *Id.* at 2962-70.

100. *Id.* at 2962 (footnote omitted).

101. *Id.* at 2963 (footnote omitted).

102. *Id.* See also *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1318 (W.D. Okla. 1982), where the district court declared:

In a competitive market each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary . . . with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates . . . the telecaster would then be willing to pay larger rights fees . . . Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size

artificially higher prices and lower output for college football telecasts. The Court therefore held that the television plan was anticompetitive and not consistent with the "consumer welfare prescription" goal of the Sherman Act.¹⁰³

3. The Court's response to the NCAA's arguments

The NCAA defended its television plan by claiming that the plan did not have a significant anticompetitive effect. The NCAA argued that it had no market power and therefore could not alter the "interaction of supply and demand."¹⁰⁴ This argument was rejected by the Court for two reasons. First, the Court explained that even absent a detailed market analysis, naked price and output restrictions require some competitive justification as a matter of law.¹⁰⁵ Second, the Court found that the NCAA did indeed possess market power because of the college football audience's attractiveness to nationwide advertisers.¹⁰⁶ The Court concluded that college football broadcasts comprise a separate market over which the NCAA exercised monopoly power.¹⁰⁷ Because of this monop-

of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market.

Id.

Earlier in the opinion, the district court gave an example of the distortion created by the NCAA television plan by referring to a weekend in the fall of 1981 where the Universities of Oklahoma and Southern California were scheduled to play each other. This game was carried on more than 200 of ABC's stations due to its importance to the national college football rankings. Appalachian State and Citadel, two schools not as well-known for their football programs, also played each other on the same weekend. Only four of ABC's local affiliated stations carried this game. The district court noted with incredulity that all four teams received the same amount of money for their television broadcast rights. *Id.* at 1291.

103. 104 S. Ct. at 2964.

104. NCAA v. Board of Regents of the Univ. of Okla., 104 S. Ct. 2948, 2965 (1984).

105. *Id.*

106. *Id.* at 2966. The Court defined market power as "the ability to raise prices above those that would be charged in a competitive market." *Id.* at 2965 n.38 (citing *Jefferson Parish Hosp. v. Hyde*, 104 S. Ct. 1551, 1566 n.16 (1984)).

107. *Id.* at 2966-67. The Court relied on the findings of the district court that competitors of the carrying networks could not offer programming that attracted a similar audience. *Id.* at 2966. Therefore, because of the unique appeal of NCAA football telecasts, "there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute." *Id.* at 2966 n.49. The Court also noted that "[w]hen a product is controlled by one interest, without substitutes available in the market, there is monopoly power." *Id.* at 2967 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956)).

The finding of monopoly power is then dependent on the definition of the relevant market. In *Board of Regents*, the market could be defined from the standpoint of the advertisers, broadcasters or viewers. The Supreme Court agreed with the district court that college football created a separate market with no reasonable substitutes under any of the three possible market definitions. 104 S. Ct. at 2966-67 n.49. This made the NCAA television plan, on its face, a restraint of free market operation.

oly power, a heavy burden of proof was placed on the NCAA to establish an affirmative defense which justified its deviation from free market operations and satisfied the rule of reason.¹⁰⁸

After establishing the NCAA's burden of proof, the Court analyzed the arguments advanced to justify its television plan.¹⁰⁹ The NCAA argued that its plan was more efficient than the free market, protected live attendance at games and maintained a competitive balance.¹¹⁰ The Supreme Court rejected each of these arguments and concluded that the NCAA had restricted the place of intercollegiate athletics within society by curtailing output and restricting the ability of its member institutions to respond to consumer preference.¹¹¹

The Supreme Court distinguished *Broadcast Music, Inc. v. Columbia Broadcasting Systems*,¹¹² which the NCAA relied on as precedent, by stating that *Broadcast Music* did not involve the output restraints on sales that were present in the NCAA's television plan.¹¹³ Relying on the district court's finding that college football could be marketed as efficiently without the television plan, the *Board of Regents* Court rejected the NCAA's argument that the plan was a joint venture with the carrying networks and hence was both procompetitive and more efficient.¹¹⁴

108. *Board of Regents*, 104 S. Ct. at 2967. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692-96 (1978). In *Professional Engineers*, the engineer association's canon of ethics prohibiting competitive bidding by members was determined to restrain trade "within the meaning of § 1 of the Sherman Act." *Id.* at 693. The Society's affirmative defense was that the price restraint inured to the public benefit because production of inferior work was prevented and ethical behavior ensured. *Id.* at 693-94. The Court, however, stated that it "has never accepted such an argument." *Id.* at 694. Therefore, despite valid ethical considerations claimed by the Society, they did not meet the heavy burden of proof to justify deviation from free market operations. The Court stated that "petitioner's attempt to . . . [justify the price restraint] on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695.

109. 104 S. Ct. at 2967-70.

110. *Id.*

111. *Id.* at 2971.

112. 441 U.S. 1 (1979). For a complete discussion of *Broadcast Music*, see *infra* text accompanying notes 150-56.

113. *Board of Regents*, 104 S. Ct. at 2968. In *Board of Regents* the Court found that production (i.e., television broadcasts) had been limited, not enhanced. *Id.* Conversely, the blanket licenses involved in *Broadcast Music* enhanced the total volume of music that was sold. *Id.* See *infra* text accompanying notes 150-56.

114. 104 S. Ct. at 2967-68. The *Board of Regents* case would have had a different outcome if the "joint venture" rationale advanced by the NCAA had been accepted by the Court. A joint selling arrangement may be procompetitive in relation to a new product by "reaping otherwise unattainable efficiencies." *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 365 (1982) (Powell, J., dissenting). See *supra* note 87. The NCAA relied on *Broadcast Music*, see *infra* notes 150-56, and argued that the television plan was a joint venture. The Court, however, distinguished *Broadcast Music* by stating that the blanket licenses involved in

The Court also explained that the role of the NCAA was to define the restrictions of the television plan and not to act as a sales agent for its members.¹¹⁵

Protection of live attendance at college football games was another rationale offered by the NCAA to justify its television plan.¹¹⁶ The Court rejected this argument on two grounds. First, it reiterated the district court's finding that there was no evidence to support the theory that live attendance would suffer if unlimited television broadcasting was permitted.¹¹⁷ Second, the Court stated that the NCAA was not protecting attendance to promote amateurism, but instead to prevent potential competition, a rationale wholly inconsistent with the basic policy of the Sherman Act.¹¹⁸

Finally, the Court rejected the NCAA's argument that the television plan helped to maintain a competitive balance among amateur athletic teams.¹¹⁹ Although the Court determined that most of the NCAA regulatory controls were a justifiable means of fostering competition and enhancing public interest, it declared that the restrictions on football telecasting did not fit into this mold.¹²⁰ It pointed to the fact that no other NCAA sport employed a similar plan to maintain competitive bal-

that case dealt with rights to a large number of individual compositions, and the availability of this combined effort package enhanced the total volume of music sold. By contrast, *Board of Regents* involved uncombined rights sold on an individual basis in a noncompetitive market. Since no member institution could televise its football games without restraint, the NCAA plan also contained a production limitation not present in *Broadcast Music*. *Board of Regents*, 104 S. Ct. at 2967-68.

115. 104 S. Ct. at 2967. The NCAA did not act as a selling agent for any member institution or conference under the television plan. Rather, the NCAA plan simply defined the number of games to be televised, the basic terms of each contract between the carrying network and the home team, and established the price to be paid for each exposure. *Id.*

116. *Id.* at 2968-69.

117. *Id.* at 2968. The Court stated: "Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events." *Id.* at 2968-69.

118. *Id.* at 2969. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* (quoting *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978)).

119. 104 S. Ct. at 2969-70.

120. *Id.* at 2969. The Court declared that:

It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA had been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in intercollegiate football.

Id. at 2969 n.62. See also *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1310-11 (W.D. Okla. 1982).

ance.¹²¹ In support of this conclusion, the Court again relied on the district court's finding that consumption would increase if the television restrictions were removed.¹²² The Court explained that the maintenance of competitive balance is justified under the rule of reason only if equal competition maximizes consumer demand for the product.¹²³ Since the opposite was true of the television plan, the Court found no legitimate purpose for the NCAA's controls, and affirmed the decision of the district court.¹²⁴

B. Reasoning of the Dissenting Opinion

In dissent, Justice White, joined by Justice Rehnquist, did not take issue with the majority's use of the rule of reason analysis. However, the dissent argued that the NCAA television plan was neither anticompetitive,¹²⁵ nor invalidated by a rule of reason analysis.¹²⁶ Justice White concluded that the proper measure of output used to determine the plan's effect on competition was not the number of televised games, as used by the majority, but rather the concept of "total viewership."¹²⁷ Using this concept, the dissent reasoned that the television plan was not anticompetitive.¹²⁸

More importantly, Justice White argued that regardless of the measure of output used, the NCAA television plan would pass muster under a rule of reason analysis.¹²⁹ The dissent's rule of reason approach differed from that of the majority in two important respects. First, the dissent would have used a broader definition of the relevant market.¹³⁰

121. 104 S. Ct. at 2970. See 546 F. Supp. at 1284-85, 1299.

122. 104 S. Ct. at 2970.

123. *Id.* See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-57 (1977).

124. 104 S. Ct. at 2970. The Court relied on the district court's finding that consumption would increase if the restraints were removed and found this to be a "compelling demonstration that . . . [the controls] do not in fact serve any . . . legitimate purpose." *Id.* This statement applied to competition for athletes as well as television viewers. In the absence of the NCAA's plan, television exposure of all schools would increase. This would naturally increase the exposure of smaller institutions, thereby enhancing their ability to compete for student athletes. *Id.* at 2970-71 n.68.

125. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2976 (1984) (White, J., dissenting).

126. *Id.* (White, J., dissenting).

127. *Id.* at 2975 (White, J., dissenting). Justice White stated that because the NCAA television plan increased national network coverage at the expense of local telecasts, the total television audience across the country expanded. *Id.* (White, J., dissenting). Using this measure of output, the dissent concluded that the plaintiffs failed to prove that the plan had an "adverse effect on output and was therefore anticompetitive." *Id.* (White, J., dissenting).

128. *Id.* at 2976 (White, J., dissenting).

129. *Id.* (White, J., dissenting).

130. *Id.* at 2977 (White, J., dissenting). The dissent explained that if the quality of NCAA

Second, Justice White advocated consideration of noneconomic factors in analyzing the validity of the challenged NCAA restraints.¹³¹

V. ANALYSIS

A. Majority Opinion

1. Was the NCAA's television plan essential to the product of college football?

The Court's rejection of the per se rule against horizontal price fixing in *NCAA v. Board of Regents of the University of Oklahoma* was a startling departure from traditional antitrust analysis. The majority opinion, written by Justice Stevens, summarily dismissed the idea of using a per se analysis in a few short paragraphs.¹³² The Court stated that the critical fact that determined the choice of a rule of reason approach was that college football involved horizontal restraints on competition, which were essential to its continued availability in the marketplace.¹³³ In essence, the Court indicated that college football was an activity that could only be carried out jointly, through the imposition of horizontal restraints.

What the Court failed to recognize was that the restraints that are essential to the survival of college football are not antitrust threats at all, but merely restrictions or rules incidental to the formation of a cooperative league. Some of the football rules, for example those regulating the size of the field and those controlling violence, have been set by custom. Other rules, such as those limiting the number of players on a team and the number of coaches any one team may have, are relatively insignifi-

telecasts deteriorates, or the cost to the viewer rises, many fans would switch to another form of entertainment. *Id.* (White, J., dissenting). This "cross elasticity of demand" approach to market definition has consistently been used by the Court since its decision in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-96 (1956) (major producer of cellophane did not have monopoly power in flexible packaging material market). Justice White concluded that the NCAA plan should be evaluated with respect to its effect on the entertainment market rather than its effect on the limited market of sports or football. *Board of Regents*, 104 S. Ct. at 2977 (White, J., dissenting) (citing Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 34 n.156 (1983)).

131. *Id.* at 2978-79 (White, J., dissenting). According to Justice White, the fact that the challenged restraint was placed on a nonprofit educational institution rather than a business entity was relevant in determining whether the Sherman Act had been violated. *Id.* at 2978 (White, J., dissenting). In his view, the NCAA television plan insured the preservation of athletic programs at schools with weaker football teams. *Id.* at 2979 (White, J., dissenting).

132. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2960-62 (1984).

133. *Id.* at 2961.

cant restraints on competition.¹³⁴

The guidelines limiting the number of scholarships a school may award for any one sport arguably are the most troublesome rules with respect to restraint on competition.¹³⁵ Yet the Court failed to mention these rules. However, these guidelines should not be considered horizontal restraints either, because, like the other rules mentioned above, they are restrictions that are incidental to the maintenance of a viable, competitive league.

The main purpose of NCAA regulation of college football is to preserve a competitive environment. The NCAA maintained that television broadcast regulation was necessary to promote that end.¹³⁶ In this respect, the *Board of Regents* Court assumed that the NCAA television plan was essential to bringing the product of college football to the market. But the field rules and the broadcast regulations are fundamentally different. If the television broadcasts were to end, the rules and restrictions governing the game and its players would not.¹³⁷ Conversely, when the NCAA broadcast rules and regulations are strictly analyzed with respect to television promotion, they are not essential to competition in terms of price and output. The Court recognized as much when it held that competition would increase without the television plan.

2. The Court's use of precedent

The Court in *Board of Regents* relied on two of its prior decisions, *Continental T.V., Inc. v. GTE Sylvania, Inc.*¹³⁸ and *Broadcast Music, Inc. v. Columbia Broadcasting Systems*,¹³⁹ to justify the use of the rule of reason analysis in evaluating the competitive character of the NCAA's television plan. Both of these precedents are clearly distinguishable from *Board of Regents*.

Continental T.V. involved a suit brought by a retailer of television

134. Arguably, even if there were no restraints on the number of players and coaches, a team with 150 players and 50 coaches could still only play 11 members of that team at a time. Moreover, this 11 player rule is not a restraint on competition, but a rule established by custom.

135. Limitations on the number of scholarships allowed for intercollegiate football prevent wealthy schools from offering an unlimited number of scholarships. However, these limitations are necessary to promote competitive play, which ultimately is more attractive to the consumer.

136. 104 S. Ct. at 2967-70.

137. Even if this unlikely event were to take place, the rules would remain in place to promote spectator interest and to coincide with the NCAA's goal of preserving amateur athletics.

138. 433 U.S. 36 (1977); see *infra* text accompanying notes 140-44.

139. 441 U.S. 1 (1979); see *infra* text accompanying notes 150-60.

sets attacking GTE's plan to restrict the number of retail franchises granted in a certain area as being unlawful per se under the Sherman Act. The Court held that analysis of this vertical restriction¹⁴⁰ should be conducted under the rule of reason, not the per se doctrine.¹⁴¹ In reaching this result, the Court indicated that by using intrabrand vertical restrictions,¹⁴² which have the effect of restraining a limited aspect of the market, manufacturers could compete more effectively with other manufacturers.¹⁴³ Thus, the Court invoked a rule of reason approach to analyze vertical agreements not dealing with price.

In *Board of Regents*, therefore, the Court relied in part upon a case dealing with vertical nonprice restraints to justify application of the rule of reason to horizontal price fixing. Even though the teaching of *Continental T.V.* is that economic analysis is to be widely used and the per se approach is to be applied sparingly,¹⁴⁴ use of the rule of reason in *Board of Regents* was not justified.

The Court's reliance on *Continental T.V.* is puzzling given that *Continental T.V.* expressly reconfirmed that price fixing in the horizontal context is still a per se violation.¹⁴⁵ Vertical nonprice restraints often involve procompetitive aspects,¹⁴⁶ whereas horizontal price restraints are

140. *Continental T.V.*, 433 U.S. at 42-47. Vertical restrictions are applied at different levels of the market structure, for example restrictions placed on a distributor by its manufacturer. ANTITRUST LAW DEVELOPMENTS, *supra* note 15, at 2 n.6.

141. *Continental T.V.*, 433 U.S. at 59.

142. The term "intrabrand" refers to the same generic product. In *Continental T.V.*, the generic product involved was television sets. *Id.* at 52 n.19.

143. *Id.* at 55.

144. Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. REV. 265, 322 (1979).

145. *Continental T.V.*, 433 U.S. at 51 n.18. The Court stated that "we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Id.*

146. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 VA. L. REV. 879, 893 (1980). The Court in *Continental T.V.*, for example, noted that vertical nonprice restrictions are "widely used in our free market economy." 433 U.S. at 57. Furthermore, the Court stated that "there is substantial scholarly and judicial authority supporting their economic utility." *Id.* at 57-58.

Vertical nonprice restrictions can be used in a number of procompetitive ways. For example, established manufacturers use such restrictions to induce retailers to provide the service and repair facilities necessary to properly promote their products. *Id.* at 55. New manufacturers can use these restrictions when entering new markets to induce "aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *Id.* Thus, by establishing a vertical nonprice restriction, such as limited regional distributorships, new manufacturers can enter the market and established manufacturers can provide services that "might not be provided by retailers in a purely competitive situation." *Id.*

usually "naked"¹⁴⁷ agreements to restrict competition and are therefore illegal per se.¹⁴⁸ Additionally, the *Board of Regents* Court summarily approved the district court's finding that the NCAA had monopoly power.¹⁴⁹ This indicates that the Court never really believed that the NCAA television plan was a restraint in a limited segment of the market, a fact that had been important to the Court in *Continental T.V.*

Following in the judicial footsteps of *Continental T.V.* came *Broadcast Music*,¹⁵⁰ the second precedent relied upon by the *Board of Regents* Court to apply the rule of reason.¹⁵¹ In *Broadcast Music*, Columbia Broadcasting System, Inc. (CBS) brought an action under copyright and antitrust laws against the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), their members and affiliates. CBS alleged that the issuance of only blanket licenses¹⁵² by ASCAP and BMI to CBS of copyrighted musical compositions was price fixing per se, a practice that is unlawful under the Sherman Act.¹⁵³ The blanket license fee was the same regardless of the number or type of compositions actually played by a licensee.¹⁵⁴ The Court held that the blanket licenses issued by BMI and ASCAP were not illegal per se under the Sherman Act because the licenses served to prevent unauthorized use, eliminated complicated fee schedules and reduced costs.¹⁵⁵ Furthermore, the Court held that the blanket licenses comprised a different product from that provided by individual composers.¹⁵⁶

Broadcast Music is clearly distinguishable from *Board of Regents*. The Supreme Court itself recognized that, unlike *Board of Regents*, the *Broadcast Music* blanket licenses did not involve limitations placed on

147. A naked restraint is one that has "no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

148. *Louis*, *supra* note 146, at 895.

149. 104 S. Ct. at 2966.

150. *Broadcast Music* was decided two years after *Continental T.V.* and further limited the application of the per se approach. See *infra* notes 153-56 and accompanying text.

151. See *supra* note 96 and accompanying text.

152. Blanket licenses give the licensee the right to perform compositions, owned by others, as often as the licensee desires for a stated period. *Broadcast Music*, 441 U.S. at 5.

153. *Id.* at 4.

154. *Id.* at 5. The price of the blanket license was either a flat dollar amount, or a percentage of the licensee's total revenues. *Id.*

155. *Id.* at 19-23. The Court also stated that "[j]oint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23.

156. *Id.* at 21-23. The Court believed that the value of the blanket license was greater than the sum of its individual parts. *Id.* at 21-22. The blanket licenses "allow[ed] the licensee[s] immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material." *Id.* at 22.

sales volume or individual sales rights to the product.¹⁵⁷ Conversely, the NCAA plan limited both the number of times a member institution could appear on television and prohibited individual negotiation of broadcast rights. Furthermore, the blanket licenses in *Broadcast Music* increased output and created a new product,¹⁵⁸ whereas the NCAA plan did neither, nor did it enable the NCAA to penetrate the market through an attractive package sale.¹⁵⁹ These findings about the NCAA plan were made in *Board of Regents* at the appellate court level using a per se approach.¹⁶⁰

Other recent precedents indicate that the Court should have applied a per se rule to the NCAA television plan. In *Goldfarb v. Virginia State Bar*,¹⁶¹ a minimum fee schedule adopted by the Virginia Bar Association was found to be per se illegal under section 1 of the Sherman Act.¹⁶² Thus, the per se approach has been applied to nonprofit entities that engaged in horizontal price fixing. *Goldfarb* was a landmark decision in that professional associations, once exempted from liability under federal antitrust laws, now would be subjected to regulation with only limited exceptions.¹⁶³

Like the rules and restrictions pertaining to college football in *Board of Regents*, the state bar association in *Goldfarb* also promulgated certain restraints to protect the availability of its product.¹⁶⁴ The bar association's fee schedule in *Goldfarb* operated as a fixed rigid price floor, rather than an advisory rate.¹⁶⁵ Similarly, the NCAA television plan in *Board of Regents* set prices for broadcast rights by establishing a minimum aggregate price to participating member institutions.¹⁶⁶ The only difference between the facts in *Board of Regents* and the professional association in

157. *Board of Regents*, 104 S. Ct. at 2968.

158. *Broadcast Music*, 441 U.S. at 21-22.

159. *Board of Regents*, 104 S. Ct. at 2968.

160. *Board of Regents of the Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1156 (10th Cir. 1983).

161. 421 U.S. 773 (1975).

162. *Id.* at 781-83, 793.

163. Sullivan & Wiley, *supra* note 144, at 308-09; see also Monroe, *Trade and Professional Associations: An Overflow of Horizontal Restraints*, 9 U. DAYTON L. REV. 481, 497 (1984). The *Goldfarb* Court did note, however, that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, may be treated differently." *Goldfarb*, 421 U.S. at 788 n.17 (emphasis added). This language however, has provided the professions few exceptions from antitrust liability. Monroe, *supra*, at 497.

164. These restrictions consisted of ethical restraints on Virginia Bar Association members to promote the integrity of the legal profession. 421 U.S. at 789.

165. *Id.* at 781-83.

166. 104 S. Ct. at 2956.

Goldfarb is that *Board of Regents* involved an association regulating amateur collegiate athletics. According to the Court's decision in *National Society of Professional Engineers v. United States*,¹⁶⁷ this is an insignificant difference in antitrust analysis.¹⁶⁸

In *Professional Engineers*, the Supreme Court refused to apply the rule of reason to analyze the society's canon of ethics that prohibited competitive bidding by its members.¹⁶⁹ *Professional Engineers*, like *Goldfarb*, is difficult to distinguish from *Board of Regents*. Both cases involved nonprofit institutions engaged in horizontal price fixing. Like the restrictions and rules of college football in *Board of Regents*, the society in *Professional Engineers* also promulgated certain horizontal restraints essential to the continued availability of the product. The code of ethics restricted the manner in which its members could compete by imposing ethical considerations upon them and therefore protected the availability of their product—sound engineering practices to insure public health and safety. Unlike *Board of Regents*, however, the Court in *Professional Engineers* applied a per se analysis. This per se approach was later upheld in *Arizona v. Maricopa County Medical Society*.¹⁷⁰

The Court in *Maricopa County* stated that horizontal maximum price fixing agreements were still within the realm of condemnation under the per se rule.¹⁷¹ *Maricopa County* adds further justification for applying the per se analysis to *Board of Regents* because the fees set by the NCAA for broadcast rights should come under the per se doctrine. Even though the NCAA television plan purported to set a minimum aggregate price for member institutions,¹⁷² it also functioned as a price ceiling. The carrying networks had no intention of bidding the price above the set fee, and the schools could not threaten to sell their right to another network, because to do so would have violated NCAA rules.¹⁷³ Because both *Board of Regents* and *Maricopa County* involved horizontal

167. 435 U.S. 679 (1978).

168. According to Professor Sullivan, the Court in *Professional Engineers* clarified its position with regard to professional organizations by stating that professional status had very little significance in the determination of legal conduct under the antitrust laws. Sullivan & Wiley, *supra* note 144, at 309.

169. *Professional Engineers*, 435 U.S. at 687-93. The Court stated that "[e]thical norms may serve to regulate and promote . . . competition, and thus fall within the Rule of Reason. But the Society's argument . . . is a far cry from such a position." *Id.* at 696 (footnote omitted).

170. 457 U.S. 332 (1982); see *infra* text accompanying note 171.

171. *Maricopa County*, 457 U.S. at 348.

172. *Board of Regents*, 104 S. Ct. at 2956.

173. *Id.* at 2957 n.11 (citing *Board of Regents of the Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1292-93 (W.D. Okla. 1982)).

price fixing of maximum prices by entities attempting to provide the public with a viable product,¹⁷⁴ the cases should have been treated in a like manner. As the *Maricopa County* Court stated, “[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.”¹⁷⁵

Justice Stevens’ opinion in *Board of Regents* is inconsistent with his approach taken in *Professional Engineers* and *Maricopa County*.¹⁷⁶ First, in *Professional Engineers*, Justice Stevens emphatically denied consideration of any argument that unrestrained rivalry does not work well in a particular commercial context.¹⁷⁷ Yet this was the basis of the NCAA’s argument in *Board of Regents*: Unrestrained competition does not produce good football contests, and there is a necessity to balance the competitive forces of member institutions.¹⁷⁸ Second, in *Maricopa County*, Justice Stevens wrote a strident opinion refusing to consider the doctors’ arguments that their organization had social justifications for restraining competition.¹⁷⁹

B. Dissenting Opinion

Justice White’s dissenting opinion was properly rejected by the majority for three reasons. First, his “total viewership” measure of output¹⁸⁰ does not necessarily cure the NCAA television plan’s anticompetitive effects. Without the NCAA plan, it is likely that total viewership would increase. By broadcasting more games of regional interest, negotiated by individual members with local stations, viewership would eventually increase in each region, thereby increasing total viewership.

Second, despite Justice White’s assertion that the market should include all entertainment,¹⁸¹ an antitrust problem still exists. The NCAA, as controller of the product, did not allow all competitors for broadcast

174. In *Board of Regents*, the viable product was amateur intercollegiate football, *id.* at 2961; in *Maricopa County*, the viable product was fee-for-service medicine and a competitive alternative to existing health insurance plans. *Maricopa County*, 457 U.S. at 339.

175. *Maricopa County*, 457 U.S. at 351 (footnote omitted).

176. Baxter, *Supreme Court Update—Horizontal Cases*, 53 ANTITRUST L. J. 423, 426-27 (1984). Although Professor Baxter stated that he had no quarrel with the *Board of Regents* opinion or its outcome, he did acknowledge that a tension exists between *Board of Regents* and these other two opinions. *Id.*

177. *Id.* at 426.

178. *Id.*

179. *Id.* at 427. See *supra* text accompanying notes 171-75.

180. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2975 (1984) (White, J., dissenting). See *supra* notes 127-28 and accompanying text.

181. *Id.* at 2976 (White, J., dissenting). See *supra* note 130.

rights to enter the market, but required that the rights for the entire NCAA college football season be purchased as a whole. This effectively excluded all but the largest competitors from the market. Therefore, the price of the product—exclusive broadcast rights—remained artificially inflated.

Finally, the dissent's argument that noneconomic factors should be considered in a reasonableness inquiry¹⁸² is an ill-advised departure from settled antitrust principles. Since the decision in *Standard Oil Co. v. United States*,¹⁸³ the Court has been tempted to consider social factors that would validate arrangements detrimental to competition.¹⁸⁴

Justice White in *Board of Regents* would have the Court invoke this reasoning to condone conduct that significantly restrained price and output in order to support competing social values. Recognizing that such volatile political considerations would bring inconsistency to antitrust analysis, the Court has concluded that the sole consideration in a rule of reason analysis is the impact on competition.¹⁸⁵ Therefore, even though the Supreme Court has never held that associations of nonprofit educational institutions have to defend their horizontal restraints solely in terms of their competitive impact,¹⁸⁶ this would seem to be the case.

VI. IMPACT OF *Board of Regents*

A. Economic and Legal Impact on the NCAA and Member Institutions

A survey of the economic impact of *NCAA v. Board of Regents of the University of Oklahoma* on the output and price of college football

182. *Id.* at 2978 (White, J., dissenting). See *supra* note 131 and accompanying text.

183. 221 U.S. 1 (1911) (acquisition of stock of many corporations by Standard Oil to aggregate vast capital in order to gain perpetual control of movement of petroleum and its products held to be an unreasonable restraint of trade). See *supra* notes 42-47 and accompanying text.

184. See L. SULLIVAN, *supra* note 18, § 66, at 175.

In *Board of Trade v. United States*, 246 U.S. 231 (1918), the Court rejected the government's contention that the Board's rule, which forbade certain purchases of grain after business hours, was a § 1 violation. Justice Brandeis' opinion elaborated upon the rule of reason of *Standard Oil* by including in the restraint of trade consideration several social factors, such as the purpose a restriction sought to attain. *Id.* at 238. In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), coal producers joined to organize the defendant as their exclusive selling agent and the government challenged this arrangement on the ground that it eliminated competition. The Supreme Court held that the restraint of trade arrangement was reasonable considering the economic conditions in the industry which were caused by the Depression. *Id.* at 372.

185. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 690 (1978). See also L. SULLIVAN, *supra* note 18, § 68, at 186.

186. 104 S. Ct. at 2978 (White, J., dissenting). See *Professional Engineers*, 435 U.S. at 696 (considerations that are not related to the effect of the restraint on competition are irrelevant).

telecasts reveals the extent to which the NCAA television plan had artificially affected the market. With member institutions of the NCAA able to negotiate their own contracts, various networks have increased their coverage of intercollegiate football dramatically. All of the University of Notre Dame's home games, for example, are telecast on the Turner Broadcasting, Inc. network. The Entertainment and Sports Programming Network (ESPN), and the USA, CBS and ABC networks carry a myriad of games on Saturday afternoons. In many instances the programming will start early in the morning with games on the east coast and will end with the west coast games shown during the early evening.¹⁸⁷ Also, replays of various college games are shown more frequently to more viewers during the week by the various cable stations.

Despite the increase in coverage, total revenue received by the nation's colleges and universities from broadcasts of college football is less than that received in 1983.¹⁸⁸ Carol Barnes, University of Oklahoma Accounting Manager, stated that the total television revenues the University received in 1984-85 were \$753,000 as compared to \$1,000,000 in 1983-84.¹⁸⁹ Don Jimmerson, Oklahoma Assistant Athletic Director, felt that the drop in revenue was not a direct result of the decision, but due to market saturation, an indirect effect of the ruling.¹⁹⁰ Ralph Beard, Dean of the University of Georgia Law School, indicated that while the NCAA television plan produced higher revenues than those received from the 1984-85 football season, the timing of the *Board of Regents* decision did not give CFA members adequate time to negotiate their contracts.¹⁹¹ Dean Beard also felt that the decision was a positive one for the "have

187. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT OF THE 1984 NCAA FOOTBALL TELEVISION COMMITTEE, 18 (1985). The Committee stated that:

Most major markets that were wired for cable television received about eight games each Saturday, while there were probably 15 to 20 games simultaneously being televised throughout the country. On a typical Saturday in Boston, for example, there were at least five games in the early time period, two in the late afternoon and one in the evening.

Id.

188. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 187, at 18. "Had the NCAA contracts with ABC, CBS and ESPN remained in effect for the 1984 season, they would have generated \$73.6 million. It is estimated that all of the current contracts will gross less than \$50 million." *Id.*

189. Telephone interview with Carol Barnes, University of Oklahoma Accounting Manager (Sept. 19, 1985) (synopsis of interview on file at the Loyola of Los Angeles Law Review).

190. Telephone interview with Don Jimmerson, University of Oklahoma Assistant Athletic Director (Sept. 1985) (synopsis of interview on file at the Loyola of Los Angeles Law Review).

191. Telephone interview with Ralph Beard, Dean of the University of Georgia Law School (Sept. 20, 1985) (synopsis of interview on file at the Loyola of Los Angeles Law Review).

not" schools.¹⁹² He explained that many colleges with regional or local followings were never chosen by the NCAA or the national networks to be on television. Now, as a result of *Board of Regents*, these colleges will appear on television, establish a closer relationship to their alumni and hopefully build up contributions to academic programs.¹⁹³

The Pacific 10 Conference has also felt the economic impact from *Board of Regents*. Michael McGee, Athletic Director at the University of Southern California (USC), indicated that television revenues are now less certain.¹⁹⁴ Under the former NCAA television plan, revenues were set in advance and the whole package worked "like clockwork."¹⁹⁵ Now, the supply of college football broadcasts is no longer controlled and advertising prices are reduced, which makes revenues from individually negotiated contracts less certain. Thus, with football schedules set ten years in advance, and broadcast rights contracts lasting only two years in duration, a risk cushion must be incorporated into the long-range football budget.¹⁹⁶ According to McGee, appearance fees for nationally televised games have dropped significantly.¹⁹⁷ Although a school may make up for lost fees with more national television appearances, it ultimately loses because gate receipts are affected. This also occurs because the college football fan now has more incentive to stay home and watch the large number of games broadcast on television rather than to purchase the season tickets of his favorite college team.¹⁹⁸

Glen Toth, Director of Marketing at the University of California, Los Angeles (UCLA), indicated that UCLA's fiscal 1984-85 football budget, projected to be balanced before the *Board of Regents* ruling, had a deficit of \$1,100,000.¹⁹⁹ He felt that the decision put the national networks in the "driver's seat" and put the "squeeze" on syndication companies who marketed local broadcast rights. Toth stated that the national networks, who are no longer regulated by the NCAA minimum fee agreement, can purchase broadcast rights virtually on a take it or leave it basis. For example, the revenue UCLA was to receive from the

192. *Id.*

193. *Id.*

194. Telephone interview with Michael McGee, University of Southern California Athletic Director (Aug. 12, 1985) (synopsis of interview on file at the Loyola of Los Angeles Law Review).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Telephone interview with Glen Toth, University of California, Los Angeles Director of Marketing (Sept. 1985) (synopsis of interview on file at the Loyola of Los Angeles Law Review).

national telecast of its game with Nebraska was \$1,200,000. After the *Board of Regents* decision, however, UCLA received only \$700,000.²⁰⁰

Conversely, Toth explained, because of market saturation and lower advertising prices for national games, local advertising has become less appealing to the advertiser. Syndication companies which market the school's local or regional television broadcast rights are put in a financial bind. For example, Metro Sports, Inc. contracted with UCLA for its local television and radio broadcast rights for a flat fee of \$800,000 per year.²⁰¹ After *Board of Regents* and the subsequent reduction in national television advertising prices, Metro Sports could not make enough money selling its advertising spots and thus defaulted on the contract with UCLA. Because Metro Sports also had contracted with the Pacific 10 Conference to acquire the syndication rights to basketball, it defaulted on that contract as well.²⁰²

The resulting economic impact of *Board of Regents* may lead to a revised NCAA television plan that would pass muster under the Sherman Act. In fact, the NCAA has already attempted to amend the plan. However, at a joint meeting of both the Division I-A and II-A schools on July 10, 1984, the amended plan was not ratified.²⁰³ Ultimately, the NCAA, like professional associations, may have to learn to live with the results of competition.

As a result of the *Board of Regents* decision, members of the CFA signed their own agreement with ABC and ESPN for broadcast rights to the 1984 college football season.²⁰⁴ The Pacific 10 and the Big 10 conferences, which are not members of the CFA, jointly entered into a one-year agreement with CBS for network television coverage.²⁰⁵ Additionally, the individual conferences, both CFA and non-CFA, have signed independent contracts with sports syndication networks. These contracts allow the syndication network to televise conference games not shown nationally.

A legal problem arises when different conferences, for example the Pacific 10 and the Big 8, play each other: Which network has the televi-

200. *Id.*

201. *Id.*

202. *Id.*

203. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *supra* note 187, at 7. Division I-A defeated the amended plan by a vote of 66 opposed, 44 in favor. Since the plan required the majority approval of both the Division I-A and II-A members voting separately and voting jointly, the plan was not submitted for a combined vote.

204. *Regents of the Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511, 513-14 (9th Cir. 1984).

205. *Id.* at 513.

sion rights to the game? This dispute recently came to a head when USC and UCLA were to play the University of Notre Dame and the University of Nebraska, respectively.²⁰⁶ Both USC and UCLA are Pacific 10 Conference schools whose broadcast rights belong to CBS.²⁰⁷ Notre Dame and Nebraska are CFA schools whose broadcast rights belong to ABC.²⁰⁸ The CBS contract contained a provision which stated that in the event of an interconference game, the CBS broadcast contract controlled.²⁰⁹ The ABC contract contained a similar crossover provision.²¹⁰

Therefore, ABC did not want to allow CBS to broadcast the Notre Dame at USC or the Nebraska at UCLA games and attempted to prevent CBS coverage of the games through enforcement of the CFA crossover restrictions.²¹¹ Subsequently, USC and UCLA sued ABC for the right to broadcast. Justice Ferguson of the Court of Appeals for the Ninth Circuit affirmed a preliminary injunction granted by the district court. The injunction barred ABC from refusing to allow CBS to broadcast the two games in question.²¹²

The principal complaint of the plaintiffs and the premise behind the district court's preliminary injunction was that the ABC-CFA contract violated section 1 of the Sherman Act.²¹³ Neither the district court, nor the court of appeals reached any final conclusions regarding the merits of the plaintiffs' contention.²¹⁴

After reviewing *Board of Regents*, the court distinguished the restrictions involved in the NCAA television plan with those in the ABC-CFA contract.²¹⁵ The Ninth Circuit found that the NCAA's important role, as the guardian and protector of amateurism, was not transferable to the CFA.²¹⁶ This belief was based on the court's findings that the ABC-CFA contract had no relationship to the quality and character of college football.²¹⁷ The essential ingredients of product integrity and industry uniformity were still found to be maintained by one entity—the

206. *Regents of the Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511 (9th Cir. 1984).

207. *Id.* at 513.

208. *Id.* at 512-13.

209. *Id.* at 514.

210. *Id.* at 513.

211. *Id.*

212. *Id.* at 521-22.

213. *Id.* at 514-15.

214. *Id.* at 515-16.

215. *Id.* at 517-18.

216. *Id.* at 517.

217. *Id.*

NCAA.²¹⁸ The Ninth Circuit concluded that a per se approach to the ABC-CFA agreement was appropriate.²¹⁹

B. Legal Impact on Per Se Analysis: A Suggested Standard

The Supreme Court's opinion in *NCAA v. Board of Regents of the University of Oklahoma* leaves antitrust analysis in a state of confusion. In the past, the Court has blurred the distinctions between the per se and the rule of reason approaches; this decision further erodes those distinctions.²²⁰ The Court's failure to recognize that it had applied an enhanced per se analysis²²¹ in *Board of Regents*, gives little guidance to lower courts in deciding difficult characterization problems. The decision also makes it easier for defendants to invoke the rule of reason unnecessarily. This Note proposes an enhanced per se approach that comports with the spirit of *Broadcast Music* and *Board of Regents* without inviting the total erosion of per se theory.

Under the per se doctrine, some form of "preliminary analysis . . . is always necessary prior to characterizing conduct as price fixing."²²² When this characterization is difficult, the per se standard entails something more than the simple yes/no answer as to whether an alleged price agreement is found to be anticompetitive.²²³ Where, as in *Board of Regents*, the Court elaborates on this characterization process without undertaking a burdensome rule of reason analysis, a third level of antitrust inquiry is constructed.²²⁴ Professor Sullivan identifies this analysis as "the analytically enhanced" per se approach.²²⁵

In *Board of Regents*, the Court applied this approach. Professor Sullivan stated that a court using enhanced per se analysis weighs the values of competitive injury versus competitive benefit as it would under the rule of reason, but narrows the scope of inquiry.²²⁶ This analysis focuses on the court's familiarity with the suspect practice and the possibility that the court can make an early, reliable judgment concerning net competitive effect.²²⁷ In *Board of Regents* the Court noted that it had

218. *Id.*

219. *Id.* The court did not apply the per se analysis because it found that the trial court had not abused its discretion in granting the preliminary injunction.

220. *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 255-56 (1984).

221. *See infra* text accompanying notes 222-27.

222. Sullivan & Wiley, *supra* note 144, at 332.

223. *Id.*

224. *Id.* at 332-33.

225. *Id.* at 332.

226. *Id.* at 332-33.

227. *Id.* at 333.

judicial familiarity with price-fixing agreements, like the NCAA's, which involved nonprofit entities.²²⁸ It also implied that an early judgment regarding the net competitive effect would be reliable, because the television plan's anticompetitive effects and consequences were apparent.²²⁹ By failing to identify that it actually had applied the analytically enhanced per se approach, the *Board of Regents* Court failed to explore the doctrine's limitations.

Identification of this heightened per se approach would help reestablish the distinctions between the per se and rule of reason theories and preserve the advantages of the per se rule.

Left unexplained, *Board of Regents* will limit application of the per se rule and lead to less predictability in the marketplace, less deterrence from antitrust violations, increased costs to courts and litigants and greater risk of incorrect decisions.²³⁰ The per se rule's most significant advantage is predictability.²³¹ In the complex world of business decision making, it is important for business executives, and the lawyers who counsel them, to know what activity is allowed under the antitrust laws. The per se rule removes much of the speculation about how the trier of fact will view the nature and effect of a proposed activity.²³²

The per se approach also results in a higher level of deterrence. When conduct is known to be absolutely prohibited, a company or organization will hesitate to engage in activity that remotely resembles that conduct.²³³ Additionally, borderline conduct which should be deterred, but which might go unchallenged for some time, would less likely be undertaken.²³⁴ Because the rule of reason permits a defendant to show that his conduct is ultimately procompetitive, *Board of Regents* may encourage firms to engage in conduct that resembles traditional horizontal restraints on price and output.

Furthermore, the plaintiff's cost of establishing the illegality of particular conduct is much greater under a rule of reason approach.²³⁵ The trier of fact will have to admit and analyze a substantial quantity of evi-

228. *NCAA v. Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948, 2960 & n.22 (1984).

229. *Id.* at 2963.

230. Bauer, *supra* note 33, at 694-95. Professor Bauer identified the advantages of the per se approach in his analysis of the per se rule and concerted refusals to deal. However, his article did not discuss horizontal price fixing restraints like those contained in *Board of Regents*.

231. *Id.* at 694.

232. *Id.* at 694-95.

233. *Id.* at 695.

234. *Id.*

235. *Id.* The plaintiff, whether an individual or an administrative agency, will have to go to great trouble and expense to amass evidence relating the history, nature and purpose of the alleged activity. *Id.*

dence, thus expending more of the court's time.²³⁶ This result seems particularly inappropriate considering the traditional characterization of horizontal price and output restraints, like those in *Board of Regents*, as a naked restraint on competition.

Use of the per se approach also reduces the possibility that a judge or a jury will approve conduct that should have been condemned.²³⁷ This seems to be especially true in cases, such as *Board of Regents*, that involve maximum price agreements.²³⁸ Thus, *Board of Regents* may be creating dangerous precedent in that other horizontal price restraint cases may be wrongly decided using a rule of reason approach rather than a per se rule.

The *Board of Regents* decision has been notably cited in two opinions. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*,²³⁹ a wholesale office supply purchasing cooperative expelled a member of the group without explanation, notice or hearing. The expelled member brought suit against the cooperative alleging that the expulsion without procedural safeguards was a group boycott and a per se violation of section 1 of the Sherman Act.²⁴⁰ The Supreme Court disagreed and cited *Board of Regents* for the proposition that the per se approach should be used only "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."²⁴¹ The Court held that arbitrary exclusion from a wholesale purchasing cooperative is not presumptively unreasonable.²⁴² Hence, following the lead of *Board of Regents*, the Court substantially weakened the per se approach to group

236. *Id.*

237. *Id.*

238. The United States, in its amicus curiae brief in *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982), stated that:

[J]udicial inquiry into the effect on prices of maximum price agreements would be virtually impossible as a practical matter, for it would force antitrust courts to immerse themselves in voluminous price and output data without ascertainable standards for analysis. They would have to make the kind of judgments that rate regulating agencies make, but without statutory guidance, rulemaking power, or specialized expertise and staff.

Brief for United States as *Amicus Curiae* at 17 (footnote omitted), *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982), cited in Note, *Antitrust—Agreements Among Competing Physicians Establishing Maximum Fee Schedules for Their Services Are Per Se Violations of the Sherman Act*, 57 TUL. L. REV. 994, 1008 n.69 (1983).

239. 105 S. Ct. 2613 (1985).

240. *Id.* at 2614. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341, 348-49 (1963) (rule of reason appropriate only where cooperative had provided procedural safeguards sufficient to prevent arbitrary expulsion).

241. *Id.* at 2617 (quoting *Board of Regents*, 104 S. Ct. at 2968).

242. *Northwest Wholesale Stationers*, 105 S. Ct. at 2620.

boycotts.²⁴³

Conversely, in *United States v. Capital Service, Inc.*,²⁴⁴ various motion picture exhibitors agreed to split or allocate motion picture rights for films released by distribution companies. The Court of Appeals for the Seventh Circuit held that *Board of Regents* did not preclude application of the per se rule because the challenged conduct was not essential to the survival of the industry.²⁴⁵

It is foreseeable that defendants, especially lawful associations, will use the *Board of Regents* decision to attempt to erode other traditional per se categories, such as vertical price fixing, bid rigging, market division and tying arrangements. Anytime a challenged restraint is remotely essential to an industry's survival, or has some connection to the economic availability of a product, a defendant will argue for a rule of reason analysis. To be sure, the *Board of Regents* Court ignored this possibility when it used protection of amateurism as a reason to reject the per se rule, even though it held that the amateurism issue was irrelevant under the rule of reason. In addition, lower courts may be reluctant to apply a per se analysis if they read *Board of Regents* as signifying a general trend away from labeling antitrust violations without further inquiry.

In *Board of Regents*, the Court failed to recognize that *Broadcast Music, Inc. v. Columbia Broadcasting Systems* implies that the challenged restraint, without more, must be essential to the survival of an industry or the creation of a new product in order to reject application of the per se rule.²⁴⁶ The enhanced per se rule is best suited to make this determination. If a defendant fails to prove that the challenged conduct is essential to one of these purposes, traditional per se analysis should be strictly applied. If the defendant prevails on this issue, courts should then apply a rule of reason analysis with a presumption that the conduct is procompetitive. A court need not relitigate this issue, which should eliminate the need for an expansive trial under the rule of reason.

VII. CONCLUSION

In *NCAA v. Board of Regents of the University of Oklahoma*, the

243. The Court, however, did not challenge the validity of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and its progeny because these cases involved direct efforts to deny, persuade, or coerce suppliers or customers into not dealing with competitors. *Northwest Wholesale Stationers*, 105 S. Ct. at 2619.

244. 756 F.2d 502 (7th Cir. 1985).

245. *Id.* at 506 n.1. The district court also cited *Broadcast Music, Inc. v. Columbia Broadcast Systems*, 441 U.S. 1 (1979), and applied a similar distinguishing rationale. *Id.*

246. See *supra* notes 150-58 and accompanying text.

Supreme Court had the opportunity to clarify the proper application of the per se rule in antitrust analysis. The Court applied an analytically enhanced per se approach but failed to recognize it as such. This further blurred the distinctions between the per se and rule of reason doctrines. In a traditional per se case, when a defendant claims that his actions are essential to the creation of a new product or the survival of an industry, courts should apply an enhanced per se analysis. Unless the challenged conduct, by itself, is essential to either of these purposes, traditional per se analysis should control. This approach retains the benefits of the per se doctrine without forbidding those restraints that are truly essential.

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