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# INTERCOLLEGIATE ATHLETICS AND TELEVISION CONTRACTS: BEYOND ECONOMIC JUSTIFICATIONS IN ANTITRUST ANALYSIS OF AGREEMENTS AMONG COLLEGES

EUGENE D. GULLAND,\* J. PETER BYRNE\*\*  
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## INTRODUCTION

THE Supreme Court, in *NCAA v. Board of Regents*,<sup>1</sup> will address for the first time the application of the antitrust laws to associational agreements among colleges and universities. Under review is a court of appeals decision holding that certain National Collegiate Athletic Association (NCAA) regulations and related exclusive contracts with two television networks and a cable system for televising college football games violate the Sherman Act,<sup>2</sup> whether judged by a per se rule or rule of reason analysis.<sup>3</sup>

Perhaps the most important—and surprising—aspect of the case is that both lower court decisions and the parties before the Supreme Court analyze the antitrust implications of the NCAA's contracts as if universities were profit-seeking firms competing in economic markets.<sup>4</sup> This unprecedented view overlooks the more humanistic goals of college education in general and amateur athletics in particular.

The potential impact of NCAA, moreover, is not limited to intercollegiate football. Courts that have entertained antitrust cases involving agreements among educational institutions have invariably determined either that the Sherman Act should not be applied, or that school practices having commercial aspects should be judged by a rule of reason standard.<sup>5</sup> If the per se rule applies to restrictions such as

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1. 546 F. Supp. 1276 (W.D. Okla. 1982), *aff'd in part and remanded in part*, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).

2. 15 U.S.C. §§ 1, 2 (1982).

3. 707 F.2d at 1157.

4. *See id.* at 1152-60; 546 F. Supp. at 1320-21; Petition for Writ of Certiorari at 10-16, NCAA.

5. *See infra* pts. II(A), (B). The "rule of reason" test for whether an agreement violates the Sherman Act requires examination of whether the agreement unreason-

those at issue in *NCAA*, courts may be foreclosed from considering in future antitrust cases the noncommercial interests of other educational associations whose challenged activities have commercial aspects and consequences.

This Article takes no position on whether, under application of a proper rule of reason analysis, the *NCAA* television contracts and regulations violate the Sherman Act. It does argue that the rule of reason is the appropriate analysis for determining the legality of such agreements, because it is flexible enough to take adequate account of the *NCAA*'s noncommercial educational objectives in regulating amateur athletics in addition to the economic criteria ordinarily applied to commercial professions or businesses. The *per se* rule, which by definition precludes any inquiry into the history and purposes of a challenged practice,<sup>6</sup> lacks this flexibility and must therefore be rejected.

## I. THE *NCAA* DECISIONS IN THE LOWER COURTS

### A. *Conflicting Goals of NCAA Members*

*NCAA* was brought by two universities that traditionally have fielded strong intercollegiate football teams, the Universities of Oklahoma and Georgia.<sup>7</sup> The defendant, the *NCAA*, is a non-profit organization of approximately nine hundred institutions of higher education that meet specified academic standards. For almost eighty years, colleges and universities have sought through the *NCAA* to promote intercollegiate athletics, preserve the ideals of amateurism, and ensure that school-sponsored athletic competition resists encroaching influences of commercialism and professionalism that are alien to the paramount educational objectives.<sup>8</sup>

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ably restrains competition in the particular circumstances of a case. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); *see Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 65-66 (1911). Certain practices—such as price fixing—are held to be unlawful “*per se*” because courts have concluded, after extensive experience with such practices, that they tend nearly always to suppress competition and have no redeeming virtue. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 7-8 (1979); *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 692 (1978); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Accordingly, practices that have been found to be unlawful *per se* are condemned in individual cases without extensive examination of their competitive effects. Deciding whether a practice in a particular industry falls under a *per se* category, however, can require analysis as extensive as that used in rule of reason cases. *See, e.g., Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 351-57 (1982); *Broadcast Music*, 441 U.S. at 19-24; *Professional Eng’rs*, 435 U.S. at 692-96.

6. *See National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

7. *See NCAA*, 546 F. Supp. at 1282.

8. *See id.*; Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 *Yale L.J.* 655, 656-57 (1978) [hereinafter cited as *Tackling Intercollegiate Athletics*].

As NCAA amply demonstrates, it is not easy to strike a balance among the means for attaining these goals that fully satisfies all schools. Some take special pride in their identification with strong, nationally-ranked teams and resent NCAA rules that they believe hinder their teams' athletic prowess or interfere with their financial affairs. Other schools view college football programs as fostering qualities of cooperation and teamwork among student athletes, as well as providing a focal point for student and alumni identification with their college or university. These schools fear that uninhibited "big-time" football could undermine the traditional ideals of amateurism they believe are fundamental to NCAA football, and could place intercollegiate athletics on a collision course with broader educational goals.<sup>9</sup>

Television broadcasts of college football games are unquestionably a source of substantial revenues for the NCAA and many of its members. There is no unanimity among the schools, however, on such issues as the regulations, if any, that should govern television broadcasts, the allocation of broadcast revenues among schools, and the desirability of limitations designed to preserve athletic balance and to restrain commercial and professional influences.<sup>10</sup>

### B. *The Challenged NCAA Regulations*

The particular regulations challenged are the NCAA Television Plan (Plan) and the underlying NCAA contracts with CBS, ABC and Turner Broadcasting.<sup>11</sup> These regulations were adopted to protect live attendance at games and to preserve the balance of athletic competition.<sup>12</sup> Specifically, they limit the total number of college football games to be broadcast,<sup>13</sup> the maximum number of appearances by

9. See *Tackling Intercollegiate Athletics*, *supra* note 8, at 657 n.9.

10. See, e.g., *NCAA*, 546 F. Supp at 1285-87 (intercollegiate dispute regarding telecasting of football games); *Warner Amex Cable Co. v. ABC*, 499 F. Supp. 537, 543 (S.D. Ohio 1980) (intercollegiate dispute regarding cablecasting of football games).

11. *NCAA*, 707 F.2d at 1149.

12. *Id.* at 1153. The NCAA first promulgated controls on the televising of football games in 1953. 546 F. Supp. at 1283. Those rules, adopted in response to concerns that televising games limited gate attendance at other college football games, were quite restrictive. In the 1950's, only one game could be televised each Saturday afternoon, and a school could only appear once each season. *Id.*

13. ABC and CBS each can present 14 "exposures" of football each season, with multiple regional telecasts on one day considered a single exposure; the Turner cable network can present 19 evening games. Petition for Writ of Certiorari at 2, *NCAA*. The Plan and contracts also permit limited local "exception" telecasts of games that do not compete with personal or television attendance at other games. *Id.* at 3. The total number of games televised in 1982 was 228: 106 on the networks and 122 exception telecasts. *Id.*

individual schools,<sup>14</sup> and the amount of money a school can demand for telecasting its games.<sup>15</sup> In addition, the networks must televise a certain number of "small college" games, including the Division II and Division III championships.<sup>16</sup>

Major football powers, such as Georgia and Oklahoma, contend that they could command more network appearances per season and more money per appearance if they were not restricted by the contracts.<sup>17</sup> At the same time, they do not wish to resign from the NCAA because they would no longer be allowed to participate in NCAA-sanctioned competition in other sports.

The plaintiffs challenged the Plan and contracts under several anti-trust theories and sought a permanent injunction against the NCAA.<sup>18</sup> The district court agreed with the plaintiffs on all counts, holding that the Plan and contracts constituted per se illegal price fixing and boycotts, monopolized the market in Saturday afternoon college football telecasts and unreasonably restrained trade.<sup>19</sup> The court brushed aside considerations of the noncommercial goals of the television regulations on the premise that colleges are "big business" because they "are in competition for students, for faculty, for government grants, and for philanthropic support."<sup>20</sup> The court then voided the Plan and contracts, and enjoined the NCAA from making any contract of a similar kind in the future or from interfering with members' sales of television rights.<sup>21</sup>

The Court of Appeals for the Tenth Circuit affirmed on somewhat narrower grounds. The court characterized the limitation on the number of games that can be televised as a reduction of output, which

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14. A single team is limited to six appearances on network telecasts in any two seasons. 707 F.2d at 1150. Such appearances "must be divided evenly between ABC and CBS." *Id.* Turner Broadcasting is then "permitted to . . . cablecast . . . games not selected by ABC or CBS." *Id.*

15. The contracts establish a "minimum aggregate compensation" that the networks must pay for appearances over the life of the contract and eliminate bidding among the networks for specific games. *Id.* The current contracts require ABC and CBS each to pay \$131,750,000 in compensation to schools during the four-year term of the contract. *Id.*

16. *Id.* The NCAA divides member schools into divisions that reflect the school's size and the extent of its intercollegiate athletic programs. Division I consists of the approximately 275 schools with the largest athletic programs; for football, this division is subdivided into Divisions I-A and I-AA, with most major football powers grouped in Division I-A. Divisions II and III include approximately 500 schools with smaller athletic programs in terms of budget, scholarships and participants. 546 F. Supp. at 1287.

17. *Id.* at 1282, 1285-86.

18. *See id.* at 1281-82.

19. *Id.* at 1311, 1313, 1319, 1323.

20. *Id.* at 1288.

21. *Id.* at 1326-27.

it held to be tantamount to per se unlawful price fixing.<sup>22</sup> The court also held that, given the district court's finding that the NCAA possesses market power in Saturday afternoon telecasts of college football, the plan and contracts unreasonably restrained trade by eliminating competition for telecasts of single games.<sup>23</sup> Noting that "[n]oneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition,"<sup>24</sup> the court left the district court's injunction in effect, but remanded the case for reconsideration of the relief to possibly allow the NCAA a limited role in regulating television appearances by its members.<sup>25</sup>

Judge Barrett argued in his dissent that the challenged NCAA rules should be upheld under the rule of reason.<sup>26</sup> He recognized the inevitable tension that must accompany efforts to balance the interests of some schools in receiving "the additional monetary rewards that their excellent football programs command in national television" with other schools' concerns that "restraints . . . are necessary to maintain intercollegiate football as amateur competition."<sup>27</sup>

Judge Barrett stressed the noncommercial, educational character of the NCAA and its members, and the caution that must be exercised in applying to them antitrust doctrines that "have involved true competitive *business enterprises* . . . where the goal is exclusively that of seeking a profit from the product or service offered to the public."<sup>28</sup> He concluded that the fundamental noncommercial goals of the NCAA and its members fully justified the challenged "restraints."<sup>29</sup>

### C. *The Noncommercial Interests At Stake*

Both courts in NCAA expressly distinguished the NCAA rules that they deemed praiseworthy—requirements of amateurism, setting playing rules and schedules, regulating athletic scholarships, recruiting, and coaching staffs—from the television rules they condemned.<sup>30</sup> Moreover, the courts refused to consider the NCAA's argument that the television rules foster the preservation of amateurism.<sup>31</sup> Thus, left unaddressed were educational goals that the Plan and contracts seek

22. 707 F.2d at 1152-53.

23. *Id.* at 1158-60.

24. *Id.* at 1154.

25. *Id.* at 1162. Justice White, sitting as Circuit Justice for the Tenth Circuit, stayed the injunction pending review by the Supreme Court. NCAA v. Board of Regents, 104 S. Ct. 1 (White, Circuit Justice 1983). Justice White, coincidentally, was an All-American football player at the University of Colorado.

26. 707 F.2d at 1162-68 (Barrett, J., dissenting).

27. *Id.* at 1165.

28. *Id.* at 1167.

29. *Id.* at 1168 (emphasis in original).

30. *Id.* at 1153-54; 546 F. Supp. at 1288.

31. 707 F.2d at 1154; 546 F. Supp. at 1316.

to promote: spreading limited television revenues among many schools, in order to decrease incentives for strong football teams to become professional and to fund athletics at schools with weaker teams; requiring the telecasting of games between smaller schools in which students, alumni and friends take pride; and promoting competitive football among many and varied amateur teams nationwide.<sup>32</sup>

Before the Supreme Court, however, the NCAA has chosen not to argue the significance of the noncommercial interests of colleges in regulating telecasting of their athletes. Instead, it focuses upon economic-based antitrust arguments familiar from cases involving professional sports leagues and other businesses.<sup>33</sup> These arguments characterize the NCAA as a joint venture and stress the pro-competitive, output-enhancing character of the Plan and contracts.<sup>34</sup> Accordingly, a critical issue—whether the traditional goals and character of college football can survive without some restraints on television broadcast activities—may entirely elude judicial consideration.

Even in the context of antitrust analysis, noncommercial values are worthy of consideration. Pursuit of television exposure and revenues can exert pressures having damaging consequences for educational institutions. Mounting commercial and professional influences increase the pressure to win, threatening a school's educational standards and practices. Increased emphasis upon success in intercollegiate football can adversely affect a school's admission standards, distribution of financial aid and scholarship funds among students, academic standards for promotion and athletic eligibility, and the allocation of the institution's resources among educational and extra-curricular programs. Concern about such consequences has long been a major factor underlying the efforts of colleges and universities to preserve the special amateur, noncommercial character of intercollegiate athletics.

## II. THE INAPPROPRIATENESS OF PER SE RULES

### A. *Agreements Among Educational Associations Beyond the Scope of the Sherman Act*

The decision of the lower courts in *NCAA* that the NCAA plan and contracts are per se unlawful represents a dramatic departure from precedent. The distinctive goals of educational institutions traditionally have been accorded special consideration by courts<sup>35</sup> and even by

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32. See Koch, *A Troubled Cartel: The NCAA*, 38 *Law & Contemp. Probs.* 135, 136-38 (1973-1974) (educational goals envisioned by NCAA).

33. See Brief for Petitioner at 8-10, *NCAA*.

34. *Id.*

35. See *infra* pts. II (A), (B).

Congress.<sup>36</sup> Agreements among such institutions that have been challenged under the antitrust laws have either been held to be outside the scope of the Sherman Act or have been analyzed under the rule of reason.<sup>37</sup>

In the former category, courts have rejected the view that associations of colleges are analogous to trade associations regulating competition in a commercial market. In the leading case of *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*,<sup>38</sup> for example, the defendant association refused to accredit any institution of higher education that was not "a non-profit organization with a governing board representing the public interest."<sup>39</sup> Despite the serious impact of the association's rules on proprietary schools, the Court of Appeals for the District of Columbia had little difficulty in upholding the restriction. Noting that the nature of the association's activities "require[s] a finer analysis"<sup>40</sup> than that appropriate for business organizations, the court held that the pursuit of educational objectives was not encompassed by the Sherman Act.<sup>41</sup> Moreover, restrictions on accreditation should be closely scrutinized under the antitrust laws only when it is plain that the regulations have a purely commercial motive.<sup>42</sup>

In holding that the antitrust laws do not apply to agreements among schools that have an educational purpose, the court relied on classic Supreme Court expositions of the limits to the coverage of the Sherman Act. For example, in declaring the Act inapplicable to most labor union activities, the Supreme Court had discerned an exclusive concern in the Act's legislative history for the effect of " 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing

36. See Education Amendments of 1980, 20 U.S.C. § 1001 (1982), which state: [I]t is the responsibility of the Federal Government, consistent with the rights, duties, and privileges of States and institutions of higher education, to promote . . . the efficient use of resources in postsecondary education, and the optimal allocation of human, physical and financial resources, through efficient planning and management to achieve these goals . . . .

*Id.* These amendments had as their goal full educational opportunity. The bill established and continued programs designed to afford students access to a multitude of post-secondary educational institutions and to encourage institutions to provide a wide range of educational opportunities. H.R. Rep. No. 96-520, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S. Code Cong. & Ad. News 3141, 3145. To the extent that the NCAA organizes and encourages collegiate athletic competition at all levels it supports these goals.

37. See *infra* pt. II(B).

38. 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

39. *Id.* at 652-53.

40. *Id.* at 653.

41. See *id.* at 654-55.

42. *Id.*



of goods and services."<sup>43</sup> The Court later explained this holding as a recognition "that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."<sup>44</sup> The *Marjorie Webster* court thus had strong support for its conclusion that "the proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions."<sup>45</sup>

Constitutional considerations fortify the view that agreements among institutions of higher learning directed toward academic purposes should not be subject to the full potential reach of the Sherman Act. Courts have recognized that boycotts having commercial consequences, but arising from collective activities having noncommercial political and social objectives, require careful accommodation of the policies of the Sherman Act to first amendment freedoms of association and speech.<sup>46</sup> Similarly, in pursuing educational objectives and setting educational policies, colleges and universities enjoy the academic freedom fostered and protected by the first amendment.<sup>47</sup> Although these constitutional values are not so directly embodied in the commercial aspects of NCAA television rules that the antitrust laws cannot apply, neither are they so attenuated that educational policies concerning the role of athletics in college life should be ignored by application of a rigid per se rule.

### B. *The Proper Scope of Antitrust Analysis for Agreements Among Educational Institutions*

The "finer analysis" of the sort called for in *Marjorie Webster* has been performed by courts in evaluating collegiate athletic rules. One

43. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940), *quoted in Marjorie Webster*, 432 F.2d at 654.

44. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 n.7 (1959), *quoted in Marjorie Webster*, 432 F.2d at 654.

45. *Marjorie Webster*, 432 F.2d at 654 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)). The *Noerr* doctrine, that combinations to pursue political objectives do not violate the Sherman Act, 365 U.S. at 136, itself supports the general view that noncommercial objectives should be treated distinctly.

46. *See Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1312 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); *Henry v. First Nat'l Bank*, 595 F.2d 291, 304 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-15 (1982) (boycott to influence government action protected by first amendment).

47. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); *see generally Finkin, On "Institutional" Academic Freedom*, 61 Tex. L. Rev. 817 (1983) (discussing the interrelationship of the individual's right to be free to pursue academic goals and the right of institutions to pursue their own goals); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 Harv. L. Rev. 879, 882-84 (1979) (discussing the *Bakke* decision).

court, for example, held that NCAA rules governing eligibility and amateurism should not be regarded as business or commercial activity subject to the Sherman Act, even though application of the rules effectively barred the plaintiff from participating in intercollegiate sports events.<sup>48</sup>

When the commercial significance of joint educational regulation makes inappropriate any outright exemption from the Sherman Act's application, the courts have applied the rule of reason.<sup>49</sup> Indeed, several courts that have directly addressed NCAA regulations have followed a rule of reason approach in carefully assessing the relationship between noncommercial educational interests and the commercial aspect of the challenged restraints.<sup>50</sup> Only when colleges pursue agreements with purely commercial goals should the antitrust laws apply under the narrower, economically-focused standards appropriate to business enterprises.<sup>51</sup>

Instructive is *Hennessey v. NCAA*,<sup>52</sup> which upheld, against an antitrust challenge, an NCAA bylaw limiting the size of school coaching staffs.<sup>53</sup> The court first held that an educational exemption for NCAA activities would be inappropriate given that the NCAA's presentation of "amateur athletics to a ticket-paying, television-buying public [involves] a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises."<sup>54</sup> The court nonetheless rejected the per se approach in favor of a rule of reason evaluation, relying on the nature and purpose of the NCAA to protect the educational objectives of member institutions.<sup>55</sup> Balancing the commercial

48. *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975); see *College Athletic Placement Serv., Inc. v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117, at 65,267.

49. See *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977); *Justice v. NCAA*, No. 83-552, slip op. (D. Ariz. Nov. 18, 1983); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494-95 (D.D.C. 1983); *Board of Regents v. NCAA*, 561 P.2d 499, 505-06 (Okla. 1977); cf. *Gunter Harz Sports, Inc. v. United States Tennis Assocs., Inc.*, 511 F. Supp. 1103, 1114-15 (D. Neb.) (activities of amateur sports association examined under rule of reason), *aff'd*, 665 F.2d 222 (8th Cir. 1981); *Tondas v. Amateur Hockey Ass'n*, 438 F. Supp. 310, 314 (W.D.N.Y. 1977) (same).

50. See *infra* notes 52-63 and accompanying text.

51. See *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654-55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). The *Marjorie Webster* court gave an example: "[I]f accreditation were denied any institution purchasing textbooks from a supplier who did not provide special discounts for association members, it would be hard to imagine other than a commercial motive for the action." *Id.* at 655 n.21.

52. 564 F.2d 1136 (5th Cir. 1977).

53. *Id.* at 1154; accord *Board of Regents v. NCAA*, 561 P.2d 499, 505-07 (Okla. 1977).

54. 564 F.2d at 1149 n.14.

55. *Id.* at 1152-53. To be distinguished are the many cases in which a court determines that the rule of reason is appropriate because of the type of activity

impact of the restriction against its fundamental objectives of "pre-serv[ing] and foster[ing] competition in intercollegiate athletics" and "reorient[ing] the programs into their traditional role as amateur sports operating as part of the educational processes,"<sup>56</sup> the court determined that the bylaw was reasonable.<sup>57</sup>

Significantly, the only court to examine NCAA television rules prior to NCAA followed the *Hennessey* approach. In *Warner Amex Cable Communications, Inc. v. ABC*,<sup>58</sup> the plaintiffs sought to restrain the NCAA and ABC from preventing cablecasts of Ohio State University football games.<sup>59</sup> The court rejected a per se analysis, stating that "a practice that would be declared invalid per se if it occurred in a purely commercial context should not be subject to a per se rule in the context of singularly integrated commercial and educational activities with which no court has had considerable experience."<sup>60</sup> The court apparently borrowed this language from the Supreme Court's decision in *Broadcast Music, Inc. v. CBS*,<sup>61</sup> in which the Court cautioned that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations."<sup>62</sup> The *Warner*

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challenged. For example, although courts routinely apply the per se rule to price fixing agreements, *see, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam), they are often more reluctant to do so in group boycott situations, *see, e.g., United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1366 (5th Cir. 1980); *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). In *Hennessey*, by contrast, the court held that the rule of reason was proper not because of the specific nature of the practice, but on the basis that the important goals of the NCAA would be overlooked under a rigid, per se analysis. 564 F.2d at 1152-53.

56. 564 F.2d at 1153.

57. *Id.* at 1154.

58. 499 F. Supp. 537 (S.D. Ohio 1980).

59. *Id.* at 539.

60. *Id.* at 545.

61. 441 U.S. 1 (1979).

62. *Id.* at 9 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972)). In *Broadcast Music*, the Court held that blanket licenses granting broadcast and performance rights of copyrighted musical compositions must be analyzed under the rule of reason, despite the fact that the license fee was set by the licensing organization and thus appeared to be a form of per se illegal price fixing. *Id.* at 8-9, 24-25. The Court rejected the per se approach, holding that the blanket license was not on its face anticompetitive because: (1) it increased competition by creating a unique, different product; (2) it had received congressional approval when Congress provided for its use in the Copyright Revision Act of 1976, 17 U.S.C. §§ 101-810 (1982); (3) it resembled a joint venture; and (4) alternatives to the license existed. *Id.* at 15, 20-24.

The lower courts in *NCAA* rejected the argument presented by the NCAA that televised college football is a joint venture similar in nature to the one described in *Broadcast Music*. 707 F.2d at 1156; 546 F. Supp. at 1306. The joint venture aspect of *Broadcast Music*, however, raised only the procompetitive justifications that are generally included in a rule of reason analysis. *See* 441 U.S. at 22-23. In cases like

court properly focused upon the unique and integrated nature of the challenged activity, and concluded that a more flexible analysis than that available under a per se approach was required.<sup>63</sup>

### III. EDUCATIONAL VALUES IN RULE OF REASON ANALYSIS

The conclusion that the NCAA regulations "should be subjected to a more discriminating examination under the rule of reason"<sup>64</sup> does not resolve whether the challenged restraints will "ultimately survive that attack."<sup>65</sup> While the courts in *NCAA* purported to consider rule of reason questions, they did not undertake the "discriminating examination" that is required.<sup>66</sup> The court of appeals refused to consider what it called "noneconomic justification" for restraints that the NCAA contended were ancillary to its legitimate noncommercial objectives.<sup>67</sup> Relying on the Supreme Court's decision in *National Society of Professional Engineers v. United States*,<sup>68</sup> the court of appeals agreed with the district court that the NCAA's contentions boiled down to the argument that "competition will destroy the market."<sup>69</sup> Rejecting this contention, the court went on to state that "[t]he Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable."<sup>70</sup>

The focus of the parties and the courts in *NCAA* on the economic aspects of intercollegiate football seems to arise from the view that the Supreme Court in *Professional Engineers* implicitly forbade consideration of values of education or amateurism. This is a serious error that derives from a literal application of the Supreme Court's language to a context completely different from that involved in *Professional Engineers*.

*Professional Engineers* reaffirmed, in the context of a total ban on competitive bidding imposed by an association of engineers engaged

*NCAA*, the court should not concern itself solely with whether the alleged restraints are anticompetitive or procompetitive, but also should address whether any impairment of competition is justified by more educational values.

63. 499 F. Supp. at 545-46.

64. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 24 (1979).

65. *Id.* at 24; cf. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918) ("test of legality is whether the restraint . . . merely regulates and . . . promotes competition . . . or destroy[s] competition").

66. See 707 F.2d at 1157-60; 546 F. Supp. at 1313-19.

67. 707 F.2d at 1154 (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-96 (1978)). "Ancillary" restraints are those which are "merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenant in the legitimate fruits of the contract." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

68. 435 U.S. 679 (1978).

69. 707 F.2d at 1154; 546 F. Supp. at 1306-08.

70. 707 F.2d at 1154.

in standard commercial activities,<sup>71</sup> the principle that rule of reason analysis ordinarily focuses on "competitive conditions" and "economic conceptions."<sup>72</sup> Such a focus ensures that courts do not consider generalized arguments that economic competition is not in the public interest, which are inappropriate because a contrary "policy decision has been made by the Congress"<sup>73</sup> through the antitrust laws. Thus, the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint,"<sup>74</sup> even if, as in *Professional Engineers*, the restraint is purportedly adopted to minimize the risk that competition would produce work endangering the public safety.<sup>75</sup>

Reliance on *Professional Engineers* to forbid noneconomic justifications for athletic agreements among educational institutions, however, is misplaced. Although the petitioner in *Professional Engineers* could assert laudable and ethical justifications for its restraint on price competition, it could not categorize the engineering profession as anything other than a profit-motivated business.<sup>76</sup> This overriding commercial purpose of their day-to-day activities is what distinguishes engineers, as well as lawyers,<sup>77</sup> doctors<sup>78</sup> and businessmen,<sup>79</sup> from educational institutions.

71. 435 U.S. at 692, 696.

72. *Id.* at 690 & n.16.

73. *Id.* at 692.

74. *Id.* at 688.

75. *Id.* at 693. The Society argued that the purpose of the ban on competitive bidding was a fear that selection of engineering services on the basis of price would tempt engineers to lower costs by doing "inferior work" thus endangering "public safety and health." *Id.*

76. *See id.* at 696.

77. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court held subject to the Sherman Act a minimum fee schedule for lawyers published and enforced by county and state bar associations, stating that "[i]t is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect." *Id.* at 788. The Court, however, cautioned:

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

*Id.* at 788 n.17. This caveat applies with even greater force to institutions of higher education, which are not conducted on a profit-making basis and which execute social duties of the highest importance—advanced education of young adults and disinterested scholarship—that cannot practically support themselves financially.

78. In *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982), the Supreme Court held per se illegal maximum fee agreements among member-physicians of two foundations offering "alternative" medical services. *Id.* at 356-57. The

Moreover, courts have not insisted after *Professional Engineers* that all organizations, regardless of their character and objectives, must pass muster under the same competitive criteria and economic tests.<sup>80</sup> The Supreme Court itself has recently acknowledged that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."<sup>81</sup> Such cases recognize that noncommercial values must be given weight in analyzing the practices of noncommercial institutions and organizations that have some commercial consequences.

The insistence on conducting an analysis of college athletic regulations solely in the cant of economic antitrust analysis produces incongruous statements and murky thinking clothed with the false precision of jargon.<sup>82</sup> Thus, the court of appeals in *NCAA* described the choice by television executives of which game to televise as interbrand competition in the network programming market.<sup>83</sup> Northwestern or Princeton graduates, just to choose examples, would perhaps be surprised to learn that their universities are brands; they would need to puzzle out whether they themselves are consumers or products.

This single-minded pursuit of competitive criteria results in error as well as comedy. The court of appeals, for example, implicitly approved the district court's economic-based conclusions<sup>84</sup> that the existing "power elite" among college football teams must be accepted as a *fait accompli*, that nothing prevents other teams from "break[ing] into this elite group," and that "the free market should and will resolve the

Court rejected the contention that the agreements were reasonable because they were entered into by professionals performing a public service. Rather, the Court noted that "the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services." *Id.* at 349.

79. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam) (agreement among competing wholesalers to refuse to extend credit is unlawful *per se* because such a practice is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing").

80. See *supra* note 46.

81. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 56 n.20 (1982) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978)); see *Unity Ventures v. County of Lake*, 5 Trade Reg. Rep. (CCH) ¶ 65,883, at 67,718 (Dec. 16, 1983).

82. Every market by definition embraces consumers whose welfare can be maximized. Pure economic analysis suggests that the consumers in the *NCAA* case are the television viewers. See Brief for the United States as Amicus Curiae at 17, *NCAA*. Thus enthroned, the interests of television viewers will inevitably prevail in the economic calculus over the interests of the athletes, students, faculty or school administrators. By such a process of reasoning, the economic analysis supercedes all other substantive considerations.

83. 707 F.2d at 1155.

84. *Id.* at 1154.

problem" if competitive balance and amateurism are threatened by growing commercialization and professionalism among the "power elite."<sup>85</sup> Those courts, in other words, equated competition on the gridiron with commercial competition in holding that the Sherman Act applies with full vigor to athletic competition among schools. Other courts have clearly recognized that "[t]he 'competition' which the [NCAA] seeks to protect does not originate in the market place or as a sector of the economy but in the [stadium] as part of the educational program of a major university."<sup>86</sup>

The effect of the Sherman Act simply cannot be to force all concerted human action to justify itself solely in terms of allocative efficiency.<sup>87</sup> Such a reading ignores Supreme Court decisions specifying that the Sherman Act is "tailored . . . for the business world,"<sup>88</sup> and that it aims "primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives."<sup>89</sup> Moreover, such a reading would most certainly expand the Sherman Act far beyond the arena in which the Fifty-first Congress thought it would operate.<sup>90</sup>

#### CONCLUSION

The Supreme Court should adopt the "finer analysis" that heretofore has governed application of the Sherman Act to educational

85. 546 F. Supp. at 1310-11.

86. *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); see *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977); *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494-95 (D.D.C. 1983).

87. One student commentator has argued that noncommercial values should not be weighed by courts in evaluating NCAA regulations under the rule of reason because the Sherman Act does not provide guidance to courts as to how to balance economic and noneconomic values. See *Tackling Intercollegiate Athletics*, *supra* note 8, at 668. The Sherman Act, however, provides little guidance as to how different economic values should be balanced, and courts routinely balance complex social values in numerous legal contexts, including constitutional cases. Moreover, ignoring educational values in antitrust analysis of agreements among colleges is socially unrealistic and destructive.

88. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961), *quoted in* *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

89. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959), *quoted in* *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); see *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); Ponsoldt, *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S. Cal. L. Rev. 1, 10 (1981).

90. See *supra* notes 43-45 and accompanying text. See generally W. Thornton, *The Sherman Anti-Trust Act 1-31 (1913)* (congressional debates prior to enactment of Sherman Act).

entities. Courts must weigh in the balance the financial and commercial pressures that “threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many.”<sup>91</sup> It is important to recognize that NCAA regulations such as those challenged in *NCAA* do not arise in a “purely commercial context” and that special consideration must be accorded to the “singularly integrated commercial and educational activities” at issue. Perhaps such an analysis would conclude that the NCAA’s regulations do transgress the rule of reason; such a decision, however, would be based on a carefully considered weighing of all the important economic and noneconomic values that are at stake.

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91. *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977).