ANTITRUST—PRICE-FIXING—NCAA MAY NOT ESTABLISH PRICE AND OUTPUT LEVEL OF TELEVISED COLLEGE FOOTBALL GAMES—*NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

The National Collegiate Athletic Association (NCAA) was founded in 1905 to provide a framework for amateur intercollegiate athletics in response to a public outcry against the "commercialism, excessive physical injury to student athletes, and cheating by some participating schools."[1] NCAA membership was offered to four-year colleges and universities that met specific academic requirements.[2]

Since its inception, the NCAA has expanded its membership to approximately 850 colleges and universities, with voting members separated into three divisions according to the size of the institution and the extent of its athletic program.[3] Despite the fact that less than 500 schools play football and only 187 are classified as Division I programs,[4] each school has equal voting power.[5] The NCAA's self-governing authority is derived from a constitution and bylaws approved by the membership.[6] While its regulations affect members in all collegiate sports,[7] the NCAA has never attempted to regulate the television appearances of its athletic membership in any sport except football.[8]

In 1952, the NCAA, as part of a comprehensive plan,[9] began

---

1 Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656 (1978).

2 Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

3 NCAA v. Board of Regents, 104 S. Ct. 2948, 2954 (1984). The number of voting members reported by the courts has not been consistent. *See* Justice v. NCAA, 577 F. Supp. 356, 361 (D. Ariz. 1983) (NCAA made up of 960 members).

4 Board of Regents v. NCAA, 546 F.Supp. 1276, 1283 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984). Division I schools command the major collegiate football market. *Id.*

5 *See id.*

6 *Id.* at 1282. NCAA policies are instituted either at an annual convention or by a 22 member council when the convention is not in session. *Id.*

7 *See* NCAA v. Board of Regents, 104 S. Ct. 2948, 2954 (1984). It has been suggested that colleges and universities rely on the NCAA regulations "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." Gulland, Byrne & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, 52 FORDHAM L.REV. 717, 718 (1984).

8 NCAA v. Board of Regents, 104 S. Ct. 2948, 2954 (1984).

9 *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1284 (W.D. Okla. 1982),

restricting the number of television appearances that each college football team could make.[10] The NCAA claimed that a plan was necessary to prevent a decrease in live attendance at football games as a result of televised game exposure.[11] The plan basically provided that once a contract was made between the NCAA and a television network, the network sponsors would select the games that would be televised during a particular time.[12] The resulting fee would then be paid to the participating teams and the NCAA.[13] From 1952 until 1982, the NCAA contracted with only one network, which was selected through a bidding process.[14]

Dissatisfied with the position that the NCAA had assumed in negotiating the television contracts with the networks and sponsors, a considerable number of schools with major football programs and a group of football conferences joined together to form the College Football Association (CFA).[15] The University of Oklahoma (Oklahoma) and the University of Georgia (Georgia) were members of the CFA.[16] The CFA's initial purpose was to lobby within the NCAA on behalf of its own members for greater influence in the contractual negotiations with the networks and sponsors.[17] In 1979, however, the CFA members took a more aggressive approach and attempted to negotiate a sepa-

---

aff'd in part and remanded, 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984).

10 *See* NCAA v. Board of Regents, 104 S. Ct. 2948, 2954-55 (1984). In 1951, a committee appointed by the members of the NCAA reported that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system." *Id.* As a result of that report, the NCAA commissioned the National Opinion Research Center to conduct studies on the impact of televised football on gate attendance. *Id.* at 2955.

11 Board of Regents v. NCAA, 546 F.Supp. 1276, 1283 (W.D. Okla. 1982), *aff'd in part and remanded,* 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984).

12 *See id.* Originally, the proposed contractual agreement between the NCAA and the networks was submitted to the members of the NCAA. *Id.* Each member was then permitted to vote on the proposed plan regardless of whether they actually fielded a football team. *Id.* This practice was discontinued in 1977, and the NCAA adopted a series of negotiation principles for use in contracting with networks and sponsors. *Id.*

13 *Id.*

14 *See id.*

15 *Id.* at 1285. Of the nearly 100 largest and potentially most profitable football programs, 61 are members of the CFA. Board of Regents v. NCAA, 707 F.2d 1147, 1160 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984).

16 NCAA v. Board of Regents, 104 S. Ct. 2948, 2954 (1984).

17 *See id.*

rate contract with a television network.[18] The CFA took the position that the NCAA did not have the authority to act as the "exclusive bargaining agent on behalf of all [the NCAA's] members for the sale of television rights to college football games."[19] Two years later, the NCAA Council responded by adopting an "official interpretation" of a bylaw, which authorized the NCAA to act as the sole bargaining party for football television contracts for all its members.[20]

Nevertheless, on August 8, 1981, the CFA independently contracted with the National Broadcasting Corporation (NBC) for the rights to televise its members' football games for the 1982 through 1985 seasons.[21] The contract allowed more appearances and greater income per football team than the 1982-1985 NCAA contract.[22] The CFA contract was not to become binding until September 10, 1981, in order to allow the individual CFA members the choice of withdrawing from participation.[23] The NCAA administration responded publicly by indicating that any CFA member who chose to participate in the CFA-NBC contract would be subject to disciplinary action.[24] Oklahoma and Georgia then brought an action in the Western District of Oklahoma seeking, among other things, injunctive relief from the threatened NCAA sanctions.[25] Although the district court issued an injunction barring the NCAA from interfering in the CFA-NBC contract, the CFA was forced to withdraw from the proposed

---

18 Board of Regents v. NCAA, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

19 *Id.* The district court found that prior to 1971 there was no explicit provision in the NCAA's constitution and bylaws that empowered it to control the televising of college football. *See id.* at 1285-86.

20 *Id.* at 1285. The interpretation provided in part that "[a]ny commitment by a member institution with respect to the televising or cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season." *Id.* Nonetheless, the CFA members adopted their own television plan and authorized the CFA administration to negotiate a separate network contract. *See id.* at 1286.

21 *Id.*

22 NCAA v. Board of Regents, 104 S. Ct. 2948, 2957 (1984).

23 Board of Regents v. NCAA, 546 F. Supp. 1276, 1286 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

24 *Id.* The chairman of the NCAA Infractions Committee stated that the CFA members who participated in the proposed CFA-NBC contract would violate NCAA regulations. *Id.* The district court noted that the NCAA's executive director and assistant executive director declared that they "would seek expedited disciplinary procedures against [the] offending CFA schools." *Id.* The proposed sanctions would not be limited to the CFA members' football programs. *Id.*

25 *Id.*

contract because of inadequate member participation.[26] At trial, the plaintiffs alleged that the NCAA television plan violated sections 1 and 2 of the Sherman Antitrust Act.[27]

The NCAA plan brought before the district court was essentially the same as its predecessors.[28] The NCAA had contracted with the American Broadcasting Corporation (ABC), the Columbia Broadcasting System (CBS), and the Turner Broadcasting Service (TBS)[29] for a specific number of national and regional television exposures for each of its playing members during the 1982 and 1983 seasons.[30] The fee structure was based on the division to which the participating teams were assigned and whether the television appearance would be national or regional; the popularity of the participating teams with the viewing audiences was not a factor.[31] Thus, the individual college and university football teams had essentially no bargaining power over the fee that they would receive.[32] The networks had to insure only that the total amount paid to all participating teams would not fall below a "minimum aggregate fee" established by the NCAA.[33]

---

26 *Id.*

27 *Id.* at 1281.

28 NCAA v. Board of Regents, 104 S. Ct. 2948, 2955 (1984). According to the NCAA, the purposes of all its plans were essentially threefold:

> to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; [and] to reflect properly the image of universities as educational institutions.

Id. at 2955 n.6.

29 *Id.* at 2956 & n.9. TBS paid $17,696,000 for the exclusive right to broadcast NCAA college football games over cable television for a two-year period. *Id.* at 2956 n.9.

30 *See id.* at 2957. The plan required networks to schedule 82 different NCAA members for a televised appearance over the two-year life of the contract. Board of Regents v. NCAA, 546 F. Supp. 1276, 1293 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984). Each network was to televise a football game on a minimum of 14 different dates; seven of the broadcasts were to be nationally televised and six were to be regionally televised. *Id.* At least one network was required to broadcast a college football game every Saturday during the fall season. *Id.*

31 *See* NCAA v. Board of Regents, 104 S. Ct. 2948, 2956 (1984).

32 *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1289-90 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

33 *See id.* The district court found that the "minimum aggregate fee" was essentially the price per game recommended by the NCAA multiplied by the number of games played. *See id.* The NCAA's recommendations were based on the participat-

In an extensive opinion, the district court concluded that both Oklahoma and Georgia had suffered antitrust injury that was personal, direct, and substantial.[34] District Judge Burciaga agreed with the plaintiffs that the NCAA plan constituted illegal price-fixing and held that the television controls were "*per se* violation[s] of section 1 of the Sherman Act."[35] He further held that the NCAA's controls constituted an illegal group boycott against both the horizontal buyers (networks other than ABC, CBS, and TBS) and the horizontal competitors (nonmember college football teams).[36]

---

ing teams' divisional classifications and whether the games were televised nationally or regionally. *Id.* Both ABC and CBS agreed to pay "minimum aggregate fees" of $131,750,000 over four years. *Id.* at 1291.

[34] *Id.* at 1301-02. This injury gave the plaintiffs standing to sue under § 16 of the Clayton Act. *See id.* at 1302. This section provides as follows:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .

Clayton Act § 16, 15 U.S.C. § 26 (1982) (original version at ch. 323, § 16, 38 Stat. 730, 737 (1914)). The court found that both schools had demonstrated sufficient threatened action by the NCAA to warrant judicial intervention. *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1302 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

[35] *Id.* at 1304. The court found that as a result of the NCAA's plan, the prices paid to the participating teams did not reflect what would be paid to the same teams in the absence of controls. *Id.* at 1293. The court illustrated this finding with an example: the teams participating in a game carried by approximately 200 stations nationwide received the same compensation as the teams playing a game carried by only four local stations. *See id.* at 1291.

The court rejected the NCAA's argument that their controls had procompetitive effects. *Id.* at 1308. Judge Burciaga considered himself bound by the Supreme Court's position that "[t]he anticompetitive potential inherent in all price fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some." *Id.* (quoting Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982)). He also dismissed the defendant's contention that participation in the NCAA was voluntary. *See id.* at 1287-88. The court noted that "[a]s a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program." *Id.* at 1288. In addition, Judge Burciaga rejected the NCAA's argument that removal of its regulations would result in the creation of a "power elite" group of large teams that would dominate college football. *Id.* at 1310-11. He noted that several small colleges had recently achieved increases in their televised football exposure. *Id.* at 1310.

[36] *Id.* at 1312-13. The court found that the threat of expulsion from the NCAA effectively prevented the plaintiffs from selling their product to the highest bidder. *See id.* at 1312. Judge Burciaga compared the control that the NCAA exercised over its football program to a classic cartel:

Despite its finding of *per se* illegality, the court also examined the NCAA controls under the rule of reason.[37] Because of the unique market involved and the extensive inquiry already undertaken,[38] the court declared that the controls were "unreasonable restraints on competition and therefore illegal."[39] Furthermore, Judge Burciaga found the NCAA to be in violation of section 2 of the Sherman Act,[40] reasoning that the NCAA's role amounted to a monopolization of the college football television market.[41]

> Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for the various products.

Id. at 1300-01. The judge emphasized the NCAA's control over the available supply of football, its price, and its production limits. *See id.*

Judge Burciaga further determined "that the relevant market for testing whether the NCAA exercise[d] monopoly power [was] live college football television." *Id.* at 1297. In making this determination, the judge considered several factors, including the product's availability, the limited number of television networks, the feasibility of a substitute product, and the traits of the viewing audience. *Id.* at 1297-98. He noted that college football was available primarily on Saturday afternoons in the fall and that the viewing audience consisted mainly of males between the ages of 25 and 49. *Id.* at 1300. Judge Burciaga pointed out that advertisers were willing to spend considerably higher amounts in order to reach this audience. *See id.* He also recognized that college football was "a unique product because of its history and tradition, the color and pageantry of the event, and the interest of college alumni in the football success of their alma mater." *Id.* at 1299.

37 *See id.* at 1313-14. "[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice [that is being examined] imposes an unreasonable restraint on competition." Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982) (footnote omitted).

38 Board of Regents v. NCAA, 546 F. Supp. 1276, 1314 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. C. 2948 (1984); *see supra* notes 35-36 and accompanying text.

39 Board of Regents v. NCAA, 546 F. Supp. 1276, 1314-15 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984). The court examined "whether the challenged restraint 'is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.' " *Id.* at 1314 (quoting Board of Trade v. United States, 246 U.S. 231, 238 (1918)).

40 *Id.* at 1323. Section 2 of the Sherman Act provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Sherman Act § 2, 15 U.S.C. § 2 (1982) (original version at ch. 647, § 2, 26 Stat. 209, 209 (1890)).

41 Board of Regents v. NCAA, 546 F. Supp. 1276, 1323 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

In light of his determination that the NCAA had violated both sections 1 and 2 of the Sherman Act, Judge Burciaga held that Oklahoma and Georgia were entitled to equitable relief under the Clayton Act because their injuries were the direct result of the regulations promulgated by the NCAA.[42] Therefore, he concluded that the contracts entered into by the NCAA on behalf of its members with the three networks were illegal and unenforceable.[43] As a result, the court enjoined the NCAA from acting as the members' sole bargaining agent with the networks and from enforcing the provisions of its contracts against either the NCAA members or the networks.[44]

The United States Court of Appeals for the Tenth Circuit affirmed the lower court's holding that the plaintiffs had standing to challenge the NCAA plans and regulations.[45] The court of appeals also affirmed the district court's determinations that the NCAA plan constituted illegal price-fixing under a *per se* analysis[46] and that the plan was unlawful under a rule of reason analysis.[47] The appellate court, however, reversed the lower court's finding that the NCAA's actual and threatened practices under its plan constituted an illegal group boycott against those networks that were not awarded contracts to broadcast college football games.[48] The court also remanded the case to the district court

The court based its conclusion on the NCAA's power to control prices, production, and competition within the college football market. *See id.*

[42] *See id.* at 1324.

[43] *Id.* at 1326.

[44] *Id.* at 1326-27.

[45] Board of Regents v. NCAA, 707 F.2d 1147, 1152 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

[46] *Id.* at 1156. The court found that "the plan contemplates an impermissible integration: a combination of virtually all the producers, actual or potential, of a differentiated product — commercially salable intercollegiate football." *Id.* The court deemed the restraints *per se* invalid because they were not narrow enough to achieve the alleged procompetitive goals. *Id.* at 1154.

[47] *Id.* at 1160. The court concluded that the NCAA's proffered justifications were insufficient in light of the restrictions placed on the colleges and the purchasing broadcasters. *Id.* at 1159. *But see id.* at 1167 (Barrett, J., dissenting) (procompetitive effects justified plan).

[48] *Id.* at 1160. The court observed that the relationship between the NCAA and the networks was vertical and that each network was given the opportunity to bid for television rights. *Id.* at 1160, 1161. Thus, the court concluded that there was no indication of a conspiracy among the NCAA and the selected broadcasters to "freeze out" other broadcasting networks. *Id.* at 1160.

The court also disagreed with the lower court's assessment that the sanctions available against a member who chose to violate the NCAA television plan amounted to a *per se* illegal boycott of the violating school. *Id.* at 1161. The court of appeals stated that unless the sanctions were "a naked attempt to exclude comon the grounds that the injunction issued below was potentially overbroad and vague.[49]

The United States Supreme Court granted certiorari[50] and affirmed the court of appeals.[51] The Court concluded that the NCAA's plan restricted both its members' output and their ability to respond to public preference.[52] Consequently, the Court held that the plan violated section 1 of the Sherman Antitrust Act.[53]

The evolution of *per se* analysis and the rule of reason began in 1897, seven years after Congress passed the Sherman Act.[54] The United States Supreme Court examined the legitimacy of an arrangement under which eighteen railroads agreed among themselves to establish the rates, rules, and regulations for carrying all of their freight traffic.[55] In *United States v. Trans-Missouri Freight Association*,[56] Justice Peckham determined that such an arrangement was proscribed by the Sherman Act as a restraint of trade[57] despite the railroads' contentions that their fixing of prices had resulted in reasonable rates.[58] The Court concluded

---

petition, the antitrust implications of an expulsion sanction turn on the competitive reasonableness of the rule being enforced." *Id.* The court refused to determine whether the sanctions were competitively reasonable because it held that the television plan was illegal *per se*. *See id.*

49 *Id.* at 1161-62. The court observed that the injunction could be read to impose sanctions on schools that violated NCAA regulations not involving the television plan. *Id.* at 1162. The court of appeals also directed the district court to reconsider the specificity of the injunction and reexamine the extent of the NCAA's power to bargain on behalf of its members. *Id.*

Judge Barrett dissented from the majority's holding, arguing that the television plan was justified under the rule of reason because of the NCAA's procompetitive effect on intercollegiate amateur athletics. *Id.* at 1166 (Barrett, J., dissenting).

50 NCAA v. Board of Regents, 464 U.S. 913 (1983).

51 NCAA v. Board of Regents, 104 S. Ct. 2948, 2971 (1984).

52 *Id.*

53 *See id.* at 2954.

54 Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

55 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 292-97 (1897). The government alleged that the Association's daily freight charges of over $1000 restrained trade and artificially enhanced freight rates. *See id.* at 310. The Association denied the illegality of its arrangement and contended that the established freight rate was reasonable and necessary to avoid financial ruin. *Id.* at 310-11.

56 166 U.S. 290 (1897).

57 *Id.* at 342. The phrase "'restraint of trade' . . . [has] the same meaning [under the Sherman Act] which [it] had at common law, namely, acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade." Pulp Wood Co. v. Green Bay Paper & Fiber Co., 168 Wis. 400, 405, 170 N.W. 230, 232, *cert. denied*, 249 U.S. 610 (1919).

58 *Trans-Missouri*, 166 U.S. at 310. The present version of § 1 of the Sherman Act differs from the 1890 version only in terms of the characterization of the viola-

that once a restraint of trade was established, the government was not required to demonstrate that the restraint was based on an illegal intent.[59]

This inflexible approach was radically altered fifteen years later by Chief Justice White's landmark decision in *Standard Oil Co. v. United States*.[60] In that case, the Court considered an alleged conspiracy between several individuals[61] and a large group of corporations "to restrain and monopolize trade and commerce in crude oil, refined oil and other petroleum products."[62] Chief Justice White suggested that a standard of reason[63] be the measure by which a contract or combination undergo evaluation in order to determine whether there was an illegal restraint of trade.[64] Thus, the Court's opinion in *Standard Oil* marked the formal adoption of the rule of reason[65] for analysis of alleged viola-

---

tion and the amount imposed for violation of the section. *Compare* 15 U.S.C. § 1 (1982) *with* Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890).

59 *Trans-Missouri*, 166 U.S. at 342. The Court demonstrated extreme deference to the legislative branch by refusing to interpet the Sherman Act beyond its plain meaning. *See id.* at 340-41. Commentators have noted that the Court's strict interpretation of the Act, in "fail[ing] to distinguish between reasonable and unreasonable restraints, was at odds with prior court pronouncements of what the public policy of the country had been prior to passage of the Act." 1 E. KINTNER, FEDERAL ANTITRUST LAW § 8.1, at 343 n.9 (1980); *cf. Trans-Missouri*, 166 U.S. at 344 (White, J., dissenting) (only unreasonable restraints of trade illegal under Sherman Act).

60 221 U.S. 1 (1911).

61 *Id.* at 31. John D. Rockefeller was among those individuals. 1 E. KINTNER, *supra* note 59, § 8.2, at 350.

62 1 E. KINTNER, *supra* note 59, § 8.2, at 350. The net result of the alleged conspiracy was impressive:

> Not only did the combination bring together previously competing parties, but it was also alleged that the combination engaged in discriminatory pricing and exacted discriminatory rates from railroads; that it controlled several pipelines and perpetrated unfair practices against competing pipelines; that it assigned certain districts to each of its subsidiaries and thereby destroyed competition among the subsidiaries; and that it had engaged in industrial espionage.

Id.

63 *Standard Oil*, 221 U.S. at 59-60. Chief Justice White posited that the standard of reason used and applied at common law prior to the enactment of the Sherman Act should be applied to post-Sherman Act violations. *Id.* at 60.

64 *See id.* Chief Justice White concluded that unreasonable restraints were made illegal in order to avoid the creation of artificial prices and to promote, rather than restrict, the "free flow of commerce." *Id.*

65 Justice Stevens has credited Justice Brandeis with defining the rule of reason. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 n.13 (1982). Justice Brandeis defined the rule as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the

tions of the Sherman Act.[66]

The application of the rule of reason to price-fixing agreements was considered and rejected in *United States v. Trenton Potteries Co.*[67] In that case, twenty individuals and twenty-three corporations were convicted of fixing prices and limiting the sales of sanitary pottery.[68] The lower court had withdrawn from the jury's consideration "the reasonableness of the particular restraints."[69] The Supreme Court approved the lower court's instructions and held that the alleged reasonableness of the prices was immaterial to the determination of whether a price-fixing agreement actually existed.[70] Justice Stone stated that the Court's opinion in *Standard Oil* should not be read to allow a "reasonableness" approach to illegal price-fixing arrangements.[71]

The use of *per se* and rule of reason analysis in antitrust actions has continued under the present Court. In *National Society of Professional Engineers v. United States*,[72] the Burger Court considered whether the establishment of rules that prohibited competitive bidding among the members of a professional society violated section 1 of the Sherman Act.[73] The code of ethics established by the National Society of Professional Engineers (Society) specifically prohibited the discussion of fees between an engineering firm and a client until a particular firm had been selected.[74] Under the Society's code of ethics, if a client continued

> business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade v. United States, 246 U.S. 231, 238 (1918).

66 *See* 1 E. KINTNER, *supra* note 59, § 8.2, at 354-55.

67 273 U.S. 392 (1927).

68 *Id.* at 393-94. The Court noted that Trenton Potteries controlled 82% of the sanitary pottery manufactured in the United States. *Id.* at 394.

69 *Id.* at 396.

70 *Id.* at 396, 401.

71 *See id.* at 399. One author has suggested that the Supreme Court in *Trenton Potteries* expressly adopted and applied the *per se* doctrine to price-fixing. 1 E. KINTNER, *supra* note 59, § 8.3, at 365; *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 345 (1982) (price fixing unlawful *per se*).

72 435 U.S. 679 (1978).

73 *See id.* at 681.

74 *Id.* at 682-83.

to request price information after the member disclosed that he was prohibited from divulging that information, the firm could no longer be considered for that job.[75]

The Government argued that the refusal to disclose price information to prospective clients prevented cost comparison and thereby restricted free competition.[76] Justice Stevens, writing for the majority, determined that although this requirement did not constitute price-fixing, it was sufficiently anticompetitive for the Court to forego a detailed market analysis.[77] The Court held that the agreement to refrain from price discussions was on its face a restraint of trade in violation of section 1 of the Sherman Act.[78]

The Society maintained that its code of ethics was not unreasonable under the rule of reason because "competitive pressure would adversely affect the quality of engineering."[79] Justice Stevens noted that this argument failed to take into account the fact that the Society's code in effect substituted the "Society's views of the costs and benefits of competition on the entire marketplace" and was inconsistent with the Sherman Act's underlying competitive philosophy.[80] The Court posited that the purpose of antitrust analysis, whether under the *per se* method or the rule of reason, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."[81] Consequently, the Court declared that an anticompetitive bidding policy could not be adopted.[82]

In 1979, the United States Supreme Court once again considered the legality of an alleged price-fixing arrangement.[83] In *Broadcast Music, Inc. v. Columbia Broadcasting System*,[84] the Court ex-

---

75 *Id.* at 683-84.

76 *Id.* at 684.

77 *Id.* at 692. The determination of the relevant market for the purpose of market analysis "involves inquiries into a number of factors, including such characteristics of the industry as the geographic area in which it is available, the time at which it is available, special characteristics of the buyers and sellers of the product, and special characteristics of the product itself." Board of Regents v. NCAA, 546 F. Supp. 1276, 1297 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

78 *Professional Engineers*, 435 U.S. at 693.

79 *Id.*

80 *Id.* at 695.

81 *Id.* at 692. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

82 *See Professional Engineers*, 435 U.S. at 696-97, 699.

83 *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 4 (1979).

84 441 U.S. 1 (1979).

amined the difference between "literal" price-fixing and price-fixing that was illegal *per se* under section 1 of the Sherman Act.[85] The arrangement under scrutiny involved the issuance of blanket licenses[86] by Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors and Publishers (ASCAP) for copyrighted musical compositions.[87] By granting licenses and distributing royalties, BMI and ASCAP functioned as middlemen between the musical copyright owners and the potential buyers.[88] In return, they were paid "a percentage of total revenues or a flat dollar amount."[89] The Columbia Broadcasting System (CBS) claimed that the blanket license was an illegal price-fixing arrangement because the composers and middlemen had joined together to determine a set price.[90]

The district court dismissed CBS's complaint.[91] The court of appeals reversed, finding the arrangement to be illegal *per se*.[92] Justice White, writing for the Supreme Court, rejected the *per se* analysis as improper, stating that an examination under that rule must focus on "whether the [disputed] practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[93] Concluding that the blanket license should instead be examined under the rule of reason,[94] the Court emphasized the procompetitive aspects of the blanket license in the contractual relationship between copyright owners and purchasers.[95] In particular, the majority recognized that simplified negotiations between copyright holders and potential users, substantially lower costs resulting from fewer negotiations, immediate use of applicable compositions once a license had been granted, and an expansive choice of compositions were

---

85 *See id.* at 9-10.

86 *Id.* at 5-6. Blanket licenses "[gave] the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire[d] for a stated term." *Id.* at 5. Typical licensees included radio and television stations. *Id.*

87 *See id.* The Court noted that "[a]lmost every domestic copyrighted composition" was held by either BMI or ASCAP. *Id.*

88 *See id.* at 4-5, 10.

89 *Id.* at 5.

90 *Id.* at 6, 8.

91 *Id.* at 6.

92 *Id.* at 6-7.

93 *Id.* at 19-20. The Court noted in passing that the *per se* rule should not be employed unless there has been "considerable experience with the type of challenged restraint." *Id.* at 19 n.33.

94 *Id.* at 24-25.

95 *See id.* at 20-24.

all advantages attributable to the use of the blanket license.[96] Inasmuch as the use of a fixed price in a blanket license was determined to be "a necessary consequence of an aggregate license,"[97] the Court reversed and remanded the blanket license arrangement for consideration under the rule of reason.[98]

Three years after the *Broadcast Music* decision, the Supreme Court once again examined an alleged price-fixing arrangement.[99] In *Arizona v. Maricopa County Medical Society*,[100] the Court considered whether the setting of fees by physicians for a particular group of patients constituted illegal price-fixing *per se*.[101] In *Medical Society*, competing physicians agreed by a majority vote to charge certain fees to patients holding insurance policies of particular insurers.[102] The Maricopa Foundation for Medical Care (Medical Society), a nonprofit corporation organized to provide an alternative to standard health insurance plans, "establishe[d] the schedule of maximum fees that participating doctors agree[d] to accept as payment in full for services performed for patients insured under plans approved by the [Medical Society]."[103] The State of Arizona alleged that the establishment of the maximum fee schedules constituted an illegal price-fixing conspiracy.[104]

Justice Stevens, writing for the majority, reasoned that "economic prediction, judicial convenience, . . . business certainty," and respect for the statutory language chosen by Congress mandated the application of the *per se* rule rather than the rule of reason.[105] He found that "the [*per se*] rule is violated by a price

---

96 *Id.* at 20-22.

97 *Id.* at 21.

98 *Id.* at 24-25. In a dissenting opinion, Justice Stevens argued that the majority should have analyzed the blanket license under the rule of reason. *See id.* at 25 (Stevens, J., dissenting). He contended that the blanket license represented economic discrimination in that a user was required to purchase the entire repertoire of ASCAP and BMI even though they were actually interested in only a few selections. *Id.* at 30-32 (Stevens, J., dissenting).

99 *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 335-36 (1982).

100 457 U.S. 332 (1982).

101 *Id.* at 335-36.

102 *Id.*

103 *Id.* at 339. The maximum fees were determined by the multiplication of relative values (a specific number for each medical service) and conversion factors (the dollar amount used to determine the cost of a specific medical specialty). *Id.* at 340. The participating doctors were not restricted to treating only foundation-insured patients, nor were they obligated to charge the maximum scheduled fee. *See id.* at 341.

104 *See id.* at 336. Approximately 40 attorneys general filed briefs of *amicus curiae* in support of Arizona's position. *See id.* at 334.

105 *See id.* at 354. The Medical Society urged the application of the rule of reason

restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases."[106] Consequently, the Court concluded that the Medical Society's arrangement clearly constituted illegal horizontal price-fixing.[107]

In *NCAA v. Board of Regents*,[108] the Court again determined whether an agreement that literally fixed prices could be sustained because of the nature of the industry involved.[109] The majority of the Court in *Board of Regents* adopted a two-step approach in analyzing the validity of the NCAA's television plan.[110] The Court first examined whether the restraints on price and output imposed by the plan were unreasonable.[111] Because the plan permitted an artificially limited number of television appearances[112] and usurped the individual college teams' bargain-

---

and argued that the fee schedules were procompetitive because they enabled the sale of "a uniquely desirable form of insurance coverage that could not otherwise exist." *Id.* at 351. The Court held that these justifications were insufficient to overcome the *per se* rule. *See id.* Justice Stevens noted that it was "a misunderstanding of the *per se* concept" to argue that the Medical Society's price-fixing scheme could be validated by a procompetitive argument. *Id.*

106 *Id.* at 348. The Court determined that the Medical Society's reliance on the "literal price fixing" argument offered in *Broadcast Music* was misplaced because the result of the Society's fee schedules was that a distinct group of individually competing doctors had agreed to render services at fixed prices irrespective of skill and experience. *See id.* at 355-57. The Court pointed out that the blanket license sold in *Broadcast Music* "was entirely different from the product that any one composer was able to sell by himself" and did not interfere with the individual copyright holder's rights to negotiate separately with potential buyers. *Id.* at 355.

107 *Id.* at 357. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented. *See id.* at 357 (Powell, J., dissenting). He contended that the Medical Society's plan did not prohibit the participating doctors from associating with other insurance plans or treating uninsured patients and therefore "foreclose[d] *no* competition." *Id.* at 360 (Powell, J., dissenting). The dissent found the majority's attempt to distinguish *Broadcast Music* unconvincing and argued that the insurance plan involved literal as opposed to illegal price-fixing. *Id.* at 363-64 (Powell, J., dissenting).

108 104 S. Ct. 2948 (1984).

109 *See id.* at 2960-61.

110 *See id.*

111 *Id.* The Court noted that the Sherman Act "prohibit[s] only *unreasonable* restraints of trade." *Id.* at 2959 (emphasis added); *see Medical Society*, 457 U.S. at 341-43; *Professional Engineers*, 435 U.S. at 687-88.

112 *Board of Regents*, 104 S. Ct. at 2959-60. As a result of the limitation, the quantity of college football available to the viewing audience was unresponsive to consumer demand. *Id.* at 2963-64. Artificial limitations on output have consistently been found by the Court to be unreasonable restraints of trade. *Id.*; *see, e.g.*, United States v. Topco Assocs., 405 U.S. 596, 608 (1972) (finding horizontal restraint *per se* violation of the Sherman Act).

ing positions for the price of television rights,[113] the Court concluded that both price-fixing and horizontal restraints on output were clearly evident.[114]

The Court then decided whether to apply a *per se* analysis, noting that "[h]orizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high."[115] Determining that the *per se* approach was inappropriate in this instance,[116] Justice Stevens posited that the NCAA was in "an industry [where] horizontal restraints on competition are essential if the product is to be available at all."[117] The majority noted that the NCAA rules and regulations, which required athletic and academic integration, preserved the unique character of college football.[118] In the Court's view, the NCAA's role in college football could be construed as potentially procompetitive in that its existence actually expanded both the viewing opportunities for sports fans and the athletic opportunities for participants.[119] This recognition required an analysis of

---

[113] *See Board of Regents*, 104 S. Ct. at 2960; *see also supra* note 36 (colleges were unable to sell their product to the highest bidder).

[114] *Board of Regents*, 104 S. Ct. at 2963. The court noted that horizontal price-fixing is "perhaps the paradigm of an unreasonable restraint of trade." *Id.* at 2960. *See generally Medical Society*, 457 U.S. at 344-48 (tracing development of judicial analysis of horizontal price-fixing).

[115] *Board of Regents*, 104 S. Ct. at 2960; *see also Broadcast Music*, 441 U.S. at 19-20 (circumstances which on their face show potential for curbing competition and output command application of *per se* rule).

[116] *Board of Regents*, 104 S. Ct. at 2960.

[117] *Id.* at 2961. The decision to disregard the *per se* approach was "*not* based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on [the Court's] respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *Id.* at 2960 (emphasis added) (footnotes omitted).

[118] *See id.* at 2961. The Court also stated that not all of the NCAA's regulations were objectionable. *See id.* All of the courts involved in this case consistently praised the NCAA's "requirements of amateurism, setting playing rules and schedules, regulating athletic scholarships, recruiting, and coaching staffs." Gulland, Byrne & Steinbach, *supra* note 7, at 721.

[119] *Board of Regents*, 104 S. Ct. at 2961. The measure of whether a regulation is procompetitive is whether it has the tendency to "increase economic efficiency and render markets more, rather than less, competitive." United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978); *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) (focus should be on "challenged restraint's impact on competitive conditions").

The Court noted that the increased television exposure that each college team would have if the NCAA controls were lifted would benefit not only the television viewer, but also the student athlete. *Board of Regents*, 104 S. Ct. at 2970 n.68. Absent the controls, the athlete would receive more local exposure. *See id.*

the price and output restraints under the rule of reason.[120] Justice Stevens stated that whichever approach the Court chose, the focus should be on whether the restraint enhanced competition.[121]

The majority observed that the NCAA's pricing and output restrictions were not responsive to consumer preference.[122] The NCAA's interference with the distribution and allocation of college football according to the actual desires of the viewing audience was fundamentally inconsistent with the goals of the Sherman Act.[123] The Court projected that, absent the television plan, a greater number of football games would be shown in response to pockets of local interest.[124] Unrestricted televising would also allow local advertisers to determine the price for the product based on local consumer interest.[125] Justice Stevens rejected the NCAA's contention that the plan lacked market power[126] and was therefore not anticompetitive,[127] observing that the NCAA had assumed the sole bargaining position on be-

---

120 *See id.* at 2961-62. The Court examined the NCAA's justification because restraints on competition could be mitigated by sufficient procompetitive grounds. *See id.* at 2961. *See generally* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 23-24 (1979); Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977).

The reasonableness of the NCAA restraints would be determined "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *Board of Regents*, 104 S. Ct. at 2962 (quoting *Professional Engineers*, 435 U.S. at 690).

121 *Board of Regents*, 104 S. Ct. at 2962.

122 *Id.* at 2963-64. The Court relied heavily on the district court's determination that the NCAA's establishment of a fixed price usurped the ability of the product to react in conjunction with free market forces. *Id.* at 2963 & n.30.

123 *Id.* at 2964. Witnesses testified "that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." *Id.* at 2964 n.34 (quoting Board of Regents v. NCAA, 546 F. Supp. 1276, 1319 (W.D. Okla. 1982), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984)).

124 *Id.* at 2963 n.29.

125 *Id.* at 2963 n.30.

126 *Id.* at 2965. The Court indicated that the NCAA's contention was mistaken as a matter of law because "the absence of proof of market power does not justify a naked restriction on price or output." *Id.* An entity with market power can raise prices above those that would be set in a competitive market. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1566 n.46 (1984).

127 *Board of Regents*, 104 S. Ct. at 2965. The Court further indicated that the NCAA had clearly demonstrated the ability to set prices above those that would be established in a free market. *Id.* at 2966; *see also id.* at 2967 ("When a product is controlled by one interest, without substitutes available in the market, there is mo-

half of the college football programs, which collectively were responsible for the existence of a unique product and a unique audience.[128] Given the NCAA's self-created controlling position, Justice Stevens concluded that the NCAA had the "heavy burden of establishing an affirmative defense which [would] competitively justif[y] [the] apparent deviation from the operations of a free market."[129]

The NCAA attempted to justify its position by arguing that the television plan was procompetitive under *Broadcast Music*.[130] In distinguishing the procompetitive benefits found in *Broadcast Music* from the NCAA's television plan, the majority focused on the product at issue in both instances.[131] The Court noted that while the contested blanket license in *Broadcast Music* could not have been marketed by an individual musical composer, college football could be marketed by the individual schools absent NCAA control.[132] Thus, the majority determined that the price and product restrictions imposed by the NCAA plan were unnecessary to market college football successfully.[133] Justice Stevens reasoned that the plan was effective only in protecting the sale of tickets to live football games from the competition that would result from unrestricted television contracting.[134] The Court deemed this protection to be inconsistent with the concept that " '[T]he Rule of Reason does not support a defense based on the

---

nopoly power.") (quoting United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 394 (1956)).

128 *See Board of Regents*, 104 S. Ct. at 2966-67.

129 *Id.* at 2967.

130 *Id.*

131 *See id.* at 2967-68.

132 *Id.* The Court stated: "Unlike *Broadcast Music's* blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a non-competitive market." *Id.* at 2967. The Court also indicated that unlike the NCAA plan, the blanket license imposed "no limit of any kind . . . on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint." *Id.* at 2968.

133 *Id.* at 2967-68. The Court refused the NCAA's argument that the plan was necessary "to penetrate the market through an attractive package sale." *Id.* at 2968. The Court reasoned that because college football was a unique market, the NCAA did not need a package to compete against imaginary competitors. *Id.* The majority also indicated that if ready substitutes were actually available, "then certain forms of collective action might be appropriate in order to enhance [the NCAA's] ability to compete." *Id.* at 2968 n.55.

134 *See id.* at 2968. Because of the plan's structure, many major television markets would have to broacast nine hours of college football within a nine to twelve hour period on nearly every Saturday during the football season. *Id.* at 2969 n.59. The Court noted that such a plan was "not even arguably related to a desire to protect live attendance." *Id.* at 2968 n.56.

assumption that competition itself is unreasonable.' "[135]

The NCAA next contended that the overall regulations it had enacted provided a balance between the competing college football teams.[136] Justice Stevens acknowledged that some of the NCAA's regulations were responsible for sustaining the character and integrity of college football.[137] He maintained, however, that the regulations before the Court were simply restraints on output and pricing.[138] Furthermore, Justice Stevens noted that the television plan was not designed to equalize competition;[139] the plan did "not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs."[140]

Justice Stevens observed that college football was the only NCAA sport that employed a television plan; all other NCAA sports were able to maintain a basic competitive equality despite the absence of price and output restrictions.[141] Justice Stevens agreed with the district court that output would increase absent the NCAA regulations and rejected the NCAA's rationale that "equal competition [would] maximize consumer demand for the product."[142] The Court therefore concluded that the NCAA plan limited output and fixed prices without regard to consumer preference and without offsetting procompetitive benefits.[143]

Justice White wrote a dissenting opinion in which Justice Rehnquist joined.[144] The dissent opined that the majority erred in finding that the NCAA plan constituted price and output limitations.[145] Justice White determined that the NCAA plan was justified in its maintenance of an integration between college athletics and academics.[146] He posited that the product pro-

---

[135] *Id.* at 2969 (quoting *Professional Engineers*, 435 U.S. at 696).

[136] *Id.*

[137] *Id.*

[138] *See id.* at 2969-70.

[139] *Id.*

[140] *Id.* at 2970.

[141] *See id.*; *see also* Board of Regents v. NCAA, 546 F. Supp. 1276, 1284-85 (W.D. Okla. 1982) (NCAA basketball maintained competitive equality without such restrictions), *aff'd in part and remanded*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 104 S. Ct. 2948 (1984).

[142] *Board of Regents*, 104 S. Ct. at 2970.

[143] *Id.* at 2971. Justice Stevens observed that "the NCAA ha[d] restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." *Id.*

[144] *See id.* (White, J., dissenting).

[145] *See id.*

[146] *Id.* at 2971-72 (White, J., dissenting).

duced by adhering to the NCAA regulations could not exist in a perfectly competitive market, where "integrity" and "character" would have to be sacrificed in the quest for the profits.[147]

The dissent contended that the majority used an improper measure of output and that no showing of an anticompetitive increase in price had been demonstrated.[148] Justice White observed that the NCAA's restrictions and regulations had resulted in the creation of a new product—"exclusive television rights"—which was "more valuable to networks than the products that [the NCAA's] individual members could market independently."[149] He maintained that the manner in which the NCAA chose to redistribute the revenues produced by participating members was justified by the need to maintain a competitive equality between football programs.[150]

Justice White also stated that under the rule of reason, the NCAA plan was sufficiently procompetitive to justify its deviation from free market competition.[151] He posited that the noneconomic goals for which the NCAA tailored its regulations—the integration of academics and athletics, the maintenance of a competitive equality between the competing teams, and the continued viability of athletic programs through the influx of football revenues—were all results that should have led the majority to find the NCAA plan and regulations reasonable.[152]

An examination of the majority's reasoning in the *NCAA v. Board of Regents* opinion discloses a combination of reliance on traditional economic principles in concert with a recognition of the important administrative role that the NCAA has historically

147 *Id.* at 2972 (White, J., dissenting). In criticizing the majority's holding, Justice White averred that the majority had "trap[ped] itself in commercial antitrust rhetoric and ideology [while] ignor[ing] the context in which the restraints have been imposed." *Id.* at 2974 (White, J., dissenting).

148 *Id.* at 2975 (White, J., dissenting). Justice White believed that the Court should have examined the effects of the plan on total viewership as opposed to viewership on a local and regional level. *Id.* He stated that "it seems likely . . . that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football." *Id.* Furthermore, Justice White urged that the college football market "should not be equated to the markets for wheat or widgets." *Id.*

149 *Id.* at 2976 (White, J., dissenting). Justice White reasoned that because a larger audience would watch nationally televised games, advertisers would be willing to pay more money for fewer televised football games. *Id.*

150 *Id.*

151 *See id.*

152 *Id.* at 2977-79 (White, J., dissenting).

played in the regulation of college football.[153] The Court acknowledged the NCAA's need for broad latitude in pursuing its administrative goal and observed "that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."[154] The simple fact, clearly documented by the district court, is that the NCAA television plan placed an artificial cap on the number of games televised and usurped the individual college teams' ability to bargain for the price of television rights.[155] For teams in the CFA, such as Oklahoma and Georgia, this meant a significant loss of income.[156]

A college or university that fields a football team that commands a greater viewer participation should not be penalized by having its potential earnings slashed through price-fixing. Much more to the point, however, is that the viewers of college football should be able to determine what games will be televised and in what location. More local and regional games would be televised absent the NCAA controls; thus, when the NCAA controls are removed, the price received by each team and the number of games televised nationally, regionally, and locally will be dependent on consumer preference.[157]

While the NCAA's control of the prices that could be paid by the networks for the television rights constituted price-fixing, the majority correctly applied the rule of reason.[158] College football could not exist without horizontal restraints on competition.[159] The Court noted that the NCAA rules designed to maintain the integrity of college football "preserve its character, and as a result [enable] a product to be marketed which might otherwise be

---

[153] *See id.* at 2959-61.

[154] *Id.* at 2971.

[155] *See* Board of Regents v. NCAA, 546 F. Supp. 1276, 1308 (W.D. Okla. 1982), *aff'd in part and remanded,* 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984). The district court stated: "In short, the NCAA controls are a repeal of the laws of supply and demand. Competition is eliminated, and the pernicious effects of non-competition are present in abundance in the market of college football television." *Id.*

[156] *See* Note, *Breaking Away from the NCAA: The Deregulation of College Football Television,* 1984 ARIZ. ST. L.J. 581, 596 (*Board of Regents* decision will result in additional fees to CFA members).

[157] *See Board of Regents,* 104 S. Ct. at 2964-65 & n.37.

[158] For a thorough discussion of the inappropriateness of *per se* analysis to the NCAA, see Gulland, Byrne & Steinbach, *supra* note 7, at 722-31. For a general discussion of why the rule of reason rather than the *per se* approach should be applied to price-fixing, see Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach,* 92 YALE L.J. 706 (1983).

[159] *Board of Regents,* 104 S. Ct. at 2961.

unavailable."[160] Therefore, the Court correctly examined the restraints on price and output under the rule of reason. This disproves the dissent's claim that the majority treated the NCAA's control "as a purely commercial venture."[161]

The majority properly rejected the NCAA's attempt to rely on *Broadcast Music* as a procompetitive justification for the restraints on output and price. The NCAA plan was unnecessary to market the individual college football teams' television rights.[162] Unlike *Broadcast Music*, in which both parties recognized the necessity of a licensing arrangement, in this case the individual teams, exemplified by Oklahoma and Georgia, believed that they would receive more for their television rights if price controls were lifted.[163]

The NCAA's claim that the control over television rights was essential to protect live ticket sales and maintain competitive equality among teams was also correctly refused by the majority as unjustified in law and in fact.[164] Under current Sherman Act analysis, the NCAA could not seek to insulate live ticket sales from the competitive effect of televised games because competition *per se* is not unreasonable.[165]

The fact that no other NCAA sport requires the imposition of restraints to maintain a competitive equality undermined the NCAA's purported procompetitive justification. This justification was further eroded by the fact that more games would be televised according to consumer preference without the controls that were imposed by the NCAA.[166] Thus, the NCAA's position was inconsistent with the basis of the rule of reason: "equal competition will maximize consumer demand for the product."[167]

The dissent's attempt to uphold the NCAA's controls over the price and output of college game television rights was based substantially on the idea that the NCAA's regulatory role permits "the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere."[168] The dissent, however,

[160] *Id.*
[161] *See id.* at 2971 (White, J., dissenting).
[162] *See Board of Regents*, 104 S. Ct. at 2967-68; Note, *supra* note 156, at 592.
[163] *See* Note, *supra* note 156, at 593.
[164] *See Board of Regents*, 104 S. Ct. at 2968-69.
[165] *Id.* at 2969.
[166] *Id.* at 2970.
[167] *Id.*
[168] *Id.* at 2972 (White, J., dissenting).

failed to separate the NCAA's role in regulating the conduct of members prior to the televised game from its role in restricting the price and output level of that game for the purpose of television rights. In contrast, the majority was careful not to implicate the NCAA's maintenance of academic and competitive standards in its holding.[169] These rules and regulations are wholly distinct from the regulation of a college team's ability to bargain for its television rights with the networks. While college football games are a unique product because of their ties with the historical traditions associated with academic institutions, the revenues produced from the sale of television rights are an important resource, which should be regulated through consumer preference and a freely competitive market.[170]

David Michael Fabian

---

169 *See id.* at 2961, 2971.

170 *See id.* at 2965, 2971. District Judge Burciaga stated that

> it is cavil to suggest that college football, or indeed higher education itself, is not a business. The colleges of the nation are in competition for students, for faculty, for government grants, and for philanthropic support. It is a big business and millions of dollars are involved. The same is true of college football. It is a business, and it must behave in a businesslike manner to insure its future viability. . . . Like any business, the schools which play intercollegiate football seek to maximize revenue and minimize expense while at the same time maintaining the level of quality which makes their product attractive to the buying public.

Board of Regents v. NCAA, 546 F. Supp. 1276, 1288-89 (W.D. Okla. 1982), *aff'd in part and remanded,* 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 104 S. Ct. 2948 (1984).