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# *NCAA v. Board of Regents*: Supreme Court Intercepts Per Se Rule and Rule of Reason

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## I. INTRODUCTION

Throughout its history,[1] the National Collegiate Athletic Association (NCAA)[2] has exercised various forms of control over amateur collegiate sports.[3] As a self-regulatory organization,[4] the NCAA has included, among its controls, regulations concerning the televising of college football games.[5] Because these regulations do

1. The National Collegiate Athletic Association is a private nonprofit association organized in 1905. Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982). "The fundamental purpose of the NCAA is to preserve distinctively amateur athletics as part of the academic program of the nation's institutions of higher education." Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656-57 (1978) (footnote omitted).

2. "The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 play intercollegiate football." NCAA v. Board of Regents, 104 S. Ct. 2948, 2954 (1984).

3. The NCAA "has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. . . . With the exception of football, the NCAA has not undertaken any regulation of the televising of the athletic events." *NCAA*, 104 S. Ct. at 2954.

4. Note, *supra* note 1, at 655.

5. Based on a series of National Opinion Research Center Studies, which concluded that televised college football decreased live gate attendance for games that were not televised, the NCAA instituted a program of controls on televised college football games in 1953. *NCAA*, 546 F. Supp. at 1283. For the 1982-1985 seasons, the NCAA, on behalf of its member institutions, granted the right to telecast 14 football games per season to ABC and CBS.

The "television plan" required the two networks to "schedule appearances for at least 82 different member institutions during each 2-year period." *NCAA*, 104 S. Ct. at 2957. The plan entitled each member institution to a maximum of four national and six total appearances. *Id.* These restrictions on television appearances only applied to schools in Division I. *NCAA*, 546 F. Supp. at 1290. "Division II and III schools are allowed unlimited freedom in televising their regular season games." *Id.*

In return for their television rights, the networks agreed to pay a "minimum aggregate

not allow member institutions the freedom to negotiate their own television contracts,[6] the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association[7] brought an action challenging the NCAA television regulatory program as violative of the Sherman Act.[8] The United States District Court for the Western District of Oklahoma held that, under section 1 of the Sherman Act, the television plan was illegal both per se and under the rule of reason, because it constituted a group boycott as well as a horizontal agreement among the NCAA's member institutions to fix prices and restrict output.[9]

The Tenth Circuit Court of Appeals affirmed the district court's holding that the television plan constituted both illegal price fixing and restriction of output;[10] however, it reversed the district court's determination that the NCAA regulations consti-

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compensation" of $131,750.00 for the four-year period. Each member institution receives compensation based on a recommended fee that a representative of the NCAA sets. The amount of this fee depends on the geographical extent of the telecast and the school's division. *NCAA*, 104 S. Ct. at 2956. "[C]ompetitive bidding for game rights is not contemplated under the . . . contracts." *NCAA*, 546 F. Supp. at 1292. The NCAA also awarded the Turner Broadcasting System (TBS) the exclusive right to cablecast NCAA football games for a minimum aggregate fee of $17,696,000. *NCAA*, 104 S. Ct. at 2956 n.9.

6. Board of Regents v. NCAA, 707 F.2d 1147, 1149 (10th Cir. 1983).

7. Both the University of Oklahoma and the University of Georgia are members of the College Football Association (CFA). The CFA consists of major football conferences and independents, including "the Big 8, Southeastern, Southwestern, Atlantic Coast and Western Athletic Conferences—and major football-playing independents such as Notre Dame, Penn State, Pittsburgh, and the service academies." *NCAA*, 546 F. Supp. at 1285. "The original purpose of the CFA, which is itself a member of NCAA, was to lobby and promote the interests of major football playing schools within the NCAA structure." *Id.*

Unhappy with the restrictive NCAA television plan and the power of nonmajor and nonplaying football schools within the NCAA structure, the CFA negotiated a television agreement of its own with NBC in 1981. The television agreement never came to fruition, because the NCAA announced that it would take disciplinary action against any school that complied with it. In addition, "[t]he NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well." *NCAA*, 104 S. Ct. at 2957.

8. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)). "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." United States v. Topco Assocs., 405 U.S. 596, 610 (1972). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

9. Board of Regents v. NCAA, 546 F. Supp. 1276 (1982). The district court also held that the NCAA exercised monopoly power over the market of college football television in violation of section 2 of the Sherman Act. *Id.* Both the Tenth Circuit and the Supreme Court, however, "found it unnecessary to reach this issue." *NCAA*, 104 S. Ct. at 2957-58 n.12.

10. Board of Regents v. NCAA, 707 F.2d 1147 (10th Cir. 1983).

tuted a group boycott.[11] On certiorari, the Supreme Court of the United States *held*, affirmed: Although horizontal restraints on competition that are potentially essential to the availability of a product are not illegal per se, the NCAA restrictions on televised college football violate section 1 of the Sherman Act under the rule of reason. *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

The *NCAA* holding manifests the Supreme Court's effective "blurring" of the per se rule/rule of reason dichotomy.[12] As the Court stated: "[T]here is often no bright line separating per se from Rule of Reason analysis."[13] "Rather than presenting two radically different antitrust tests, the Burger Court's use of the per se and rule of reason tests emphasizes similar concerns."[14] Instead of resorting to a "labeling process," the Court now will assess a challenged restraint's potential impact on competition before applying either antitrust standard.[15] In other words, if the Court initially determines that a restraint is potentially procompetitive, it will judge it under the rule of reason rather than the formalistic per se rule.

The Court's "quick look" at the restraint's potential competitive impact is the functional approach to antitrust analysis.[16] Under this approach, the Court legitimizes its use of the per se rule, because it utilizes the rule of reason when antitrust defendants demonstrate that a challenged restraint is "arguably ancillary to an efficiency enhancing arrangement."[17] Although the Court has traditionally deemed price fixing illegal per se, in the present case, it analyzed the NCAA television plan under the rule of reason. Because the very nature of amateur collegiate athletics demands a "certain degree of cooperation,"[18] the Court determined that the restraint was at least potentially procompetitive.

Yet, the Court specifically limited its rule of reason analysis.

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11. *Id.*

12. *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 255 (1984) (recognizing that the Supreme Court has blurred these boundaries "in recent years").

13. *NCAA*, 104 S. Ct. at 2962 n.26.

14. Brunet, *Streamlining Antitrust Litigation By "Facial Examination" of Restraints: The Burger Court and the Per Se—Rule of Reason Distinction*, 60 WASH. L. REV. 1, 2 (1984).

15. *Id.* at 7.

16. Note, Arizona v. Maricopa County Medical Society: *Supreme Court Refuses to Immunize Doctors Against Sting of Sherman Act Section 1*, 1983 WIS. L. REV. 1203, 1212-15 (contrasting the functional approach with the formalistic approach in determining whether a restraint deserves per se treatment).

17. *Id.* at 1212.

18. *NCAA*, 104 S. Ct. at 2969.

First, the Court ignored the industry's need for cooperation once it made its threshold determination that the restraint was potentially procompetitive. Instead, it properly focused its inquiry on the challenged restraint's actual impact on competition.[19] Moreover, the Court stated that once it finds that a restraint is actually anticompetitive, it will declare it to be in violation of the Sherman Act without an elaborate market power analysis: the *sine qua non* of traditional rule of reason analysis.[20] Because functional analysis forces courts to analyze more restraints under the comparatively complicated rule of reason, the Court's adoption of the limited rule of reason appears to be an effort to allay the fear that functional analysis will further burden the judiciary.

## II. THE SHERMAN ACT: POLICY AND STANDARDS

At first glance, section 1 of the Sherman Act appears relatively straightforward; it provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[21] If the Act's language is taken literally, every contract that restrains competition would be declared illegal. Surely, the Sherman Act "cannot mean what it says."[22] Congress could not have intended the courts to declare unlawful "every" contract that restrains competition.[23] Recognizing the practical difficulty of applying the text of the Act literally, Justice Brandeis noted that "the legality of an agreement or regulation cannot be determined by so simple a test. . . . Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."[24] The intent of the Sherman Act, therefore, is to proscribe only unreasonable restraints of trade.

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19. *Id.* at 2962; *see* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363 (1978).

20. *NCAA*, 104 S. Ct. at 2965.

> Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "*per se*" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

*Id.* at 2962 n.26 (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984)).

21. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)).

22. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687 (1978).

23. *See* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 342-43 (1982) (citing United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898)).

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

Since its formulation in *Standard Oil Co. v. United States*,[25] courts have judged most restraints under the rule of reason.[26] Under the rule of reason, a court must determine "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."[27] In making this inquiry, courts traditionally have focused on whether the defendant has market power—the power to control prices and exclude competition.[28] The principal advantage of rule of reason analysis is the judicial flexibility it affords;[29] rather than summarily invalidating restraints, the presiding court can "determine the legality of a practice on the basis of the particular factual context."[30] In exchange for this flexibility, however, courts have had to engage in the complex analysis of market power.[31] "A rule of reason inquiry is . . . wide open in terms of proof. The court admits virtually any evidence concerning the purpose, history, or economic impact of a challenged restraint."[32]

On the other hand, the Supreme Court has held that certain restraints are illegal per se; therefore, application of the rule of reason analysis is inappropriate.[33] These agreements or practices conclusively are presumed to be unreasonable because of their pernicious effect on competition and lack of any redeeming virtue.[34]

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25. 221 U.S. 1 (1911). The Supreme Court in *Standard Oil* stated that "in every case where it is claimed that an act or acts are in violation of the [Sherman Act] the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied." *Id.* at 66.

26. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982). *But cf. infra* note 30 (discussing use of the per se rule for traditionally proscribed restraints).

27. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). Factors to be considered include the characteristics of the industry in question, the condition of the industry before and after the imposition of the restraint, the nature and effect of the restraint, and the reason for adopting the particular restraint. *Id.* "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." *Id.*; *see also* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 343 (1982).

28. *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 1, 260 (1984).

29. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).

30. Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 809 (1981) (footnote omitted).

31. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957). Market power analysis is "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries."

32. Brunet, *supra* note 14, at 12 (footnote omitted).

33. *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

34. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957). "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to

Restraints that historically have been held to be illegal per se include price fixing, division of markets, group boycotts, and tying arrangements.[35]

The policy behind the application of the per se rule is twofold. First, it represents an attempt to provide stability in the marketplace; the per se rule's clear delineation of the proscriptions of the Sherman Act benefits businessmen in their market decisions.[36] Second, because the only issue is the existence of the restraint, application of the per se rule frees a court from a "complicated and prolonged economic investigation into the entire history of the industry involved in an effort to determine whether a particular restraint has been unreasonable."[37] Consequently, the per se rule assumes the illegality of the restraint without regard to the market power of the defendant.[38] Antitrust litigation in per se cases is markedly different from litigation in rule of reason cases:

> A per se designation makes inadmissible reasonableness justifications supporting a restraint and, accordingly, acts as a rule of evidence. Once the plaintiff proves the existence of a restraint meriting per se treatment, a defendant may either rebut the plaintiff's prima facie case or raise those few antitrust defenses

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increase competition." United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (citing, *e.g.*, United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966); United States v. Masonite Corp., 316 U.S. 265 (1942); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)). A court, however, only will hold a restraint illegal per se if it has had considerable experience with the industry in question. *Topco*, 405 U.S. at 607; *see also* White Motor Co. v. United States, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these [horizontal territorial] arrangements emerge . . . .").

35. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (price fixing); United States v. Topco Assocs., 405 U.S. 596 (1982) (division of markets); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycott); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (tying arrangement); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) (price fixing); Kiefter-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951) (price fixing); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangement); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price fixing); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898) (price fixing); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1898) (division of markets).

36. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957). "Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." United States v. Topco Assocs., 405 U.S. 596, 609 n.10 (1972).

37. In justifying the application of the per se rule, the Supreme Court in Northern Pac. Ry. Co. v. United States, 356 U.S. 2, 5 (1957) described the rule of reason as mandating "an inquiry so often wholly fruitless when undertaken."

38. *See* Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 322.

> unrelated to the restraint's putative procompetitive considerations. The many issues accompanying a rule of reason trial are eliminated from a per se case. In per se litigation the expenditure of attorneys' fees and judicial resources is considerably less than in complicated rule of reason trials.[39]

Therefore, the possibility that the presiding court might decide an antitrust case differently under the rule of reason is irrelevant in the application of the per se rule.[40]

## III. Economic Realities and the Application of the Sherman Act

Until 1972, the Supreme Court unequivocally and formalistically applied the per se rule to its traditional proscriptions.[41] The Court's view of its institutional role in antitrust analysis was that Congress had not endowed the judiciary with the freedom to consider the reasonableness of these restraints.[42] In no uncertain terms, the Supreme Court had stated that engaging in rule of reason analysis when application of the per se rule is mandated would lead to the emasculation of the Sherman Act.[43]

In 1972, however, the Supreme Court's view of the per se rule and its perception of its institutional role in antitrust analysis began to change with its decision in *United States v. Topco Associates*.[44] Although the majority[45] held that the horizontal restraints on a regional supermarket association were illegal per se, Chief Justice Burger questioned the application of the per se rule in the

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39. Brunet, *supra* note 14, at 12 (footnote omitted).

40. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 n.16 (1982) (quoting United States v. Topco Assocs., 405 U.S. 596, 609 (1972)).

41. *See supra* note 36 and accompanying text.

42. "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . If such a shift is to be made, it must be done by Congress." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940); *accord* United States v. Topco Assocs., 495 U.S. 596, 611 (1972).

43. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). "In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." *Id.*

44. 405 U.S. 596 (1972).

45. Justice Marshall wrote the opinion of the Court, in which Justices Douglas, Brennan, Stewart, and White joined. *Id.* at 597. One reason for the present Court's relaxation of the per se rule may be simply that Justices Stevens and O'Connor have replaced Justices Douglas and Stewart. Also, Justice Blackmun's concurring opinion hardly endorsed the Court's application of the per se rule; rather, he viewed the per se rule as nothing more than a fait accompli. *Id.* at 613 (Blackmun, J., concurring). Furthermore, Justices Powell and Rehniquist took no part in the decision. *Id.* at 612.

absence of a judicial inquiry into the economic realities of the supermarket industry.[46]

Chief Justice Burger explained that the horizontal restraints were necessary for Topco to be able to compete with the national chains.[47] In conjunction with this point, the Chief Justice noted that the challenged restraints only affected intrabrand as opposed to interbrand competition. Therefore, the restraints potentially could be procompetitive and reasonably consistent with the Sherman Act's policy of promoting competition.[48]

Given the potentially procompetitive effects of the restraints, Chief Justice Burger charged that the majority had abdicated its role of "carrying out the meaning of the law" by summarily applying the per se rule.[49] Chief Justice Burger, in essence, opted for the functional—as opposed to the formalistic—approach to choosing between the per se rule and the rule of reason.[50] Rather than blindly applying the per se rule, the Chief Justice argued that before applying either the per se rule or the rule of reason, the Court should assess the potential economic impact of challenged restraints.[51] Thus, if the Court determines that a restraint is potentially procompetitive, it should apply the rule of reason rather than the per se rule.

In a series of cases subsequent to Chief Justice Burger's dissenting opinion in *Topco*, the Court began to implement the functional approach to the per se rule and the rule of reason. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[52] the Supreme Court overruled its decision in *United States v. Arnold, Schwinn & Co.*[53] that vertical restrictions on retail locations are illegal per se. Justice Powell,[54] writing for the majority, emphasized that the economic realities of industry must dominate the Court's antitrust

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46. *Id.* at 620, 622 (Burger, C.J., dissenting).

47. *Id.* at 624.

48. *Id.* at 613-14. Intrabrand competition is rivalry between sellers of the same brand; interbrand competition is rivalry with sellers of other brands.

49. *Id.* at 621-22.

50. Note, *supra* note 16. "Under [the functional] approach, unless a restraint is shown to be arguably ancillary to an efficiency enhancing arrangement, it is conclusively presumed unreasonable under section 1." *Id.* at 1212. "Under [the] formalistic approach, a defendant must show the challenged activity does not fit into one of [the absolutely] prohibited categories in order to avoid a finding of *per se* illegality." *Id.* at 1214.

51. *Topco*, 405 U.S. at 621-22, 624.

52. 433 U.S. 36 (1977).

53. 388 U.S. 365 (1967).

54. Neither Justice Powell, who wrote the majority opinion, nor Justice Rehniquist, who joined in that opinion, took part in the decision in *Topco*.

analysis, because the Sherman Act "aims at substance."[55] According to the majority, vertical restraints, which affect only intrabrand competition, should be examined under the rule of reason, because they may promote interbrand competition.[56] In contrast to its unequivocal and vigorous application of the per se rule in previous cases, the Court concluded that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[57] Given this new posture, Justice White understandably viewed the majority opinion as an erosion of the per se rule.[58]

In *Goldfarb v. Virginia State Bar*,[59] the Supreme Court further proved that it no longer would blindly apply the per se rule. Expanding *Continental T.V.'s* functional approach, the Court indicated that it would review the practical economic and noneconomic considerations facing noncommercial industries when determining which antitrust standard to apply to a challenged restraint. It stated that the "public service aspect [of an industry] may require that a particular practice, which could properly be viewed as a [per se] violation of the Sherman Act in another context, be treated differently."[60] Nevertheless, in *National Society of Professional Engineers v. United States*,[61] the Court clearly indicated that its application of either standard would focus on the competitive impact of the restraint.

The Court continued to utilize the functional analysis in *Broadcast Music, Inc. v. CBS*.[62] Instead of formalistically applying the per se rule to blanket licenses issued for copyrighted musical composition at fixed prices, the Court chose to apply the rule of reason after reviewing the substance of the restraint. The Court asked whether the purpose of the blanket licenses "facially appear[ed] to be one that would always or almost always tend to restrict competition . . . or instead one designed to 'increase eco-

55. *Continental T.V.*, 433 U.S. at 46-47 (quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 377 (1933)). Vertical restraints are restrictive agreements between manufacturers and dealers. R. BORK, THE ANTITRUST PARADOX 18 (1978). Horizontal restraints are restrictive agreements between economic entities in the same market. *Id.* at 17.

56. *See Continental T.V.*, 433 U.S. at 51-52.

57. *Id.* at 58-59. The Court even suggested that the application of the per se rule could be detrimental. *Id.* at 57 n.26.

58. *See id.* at 70 (White, J., concurring).

59. 421 U.S. 773 (1975).

60. *Id.* at 788-89 n.17. For a full discussion of this case, see Note, *The End of Fee Schedules: The Sherman Act Applies to Lawyers Also*, 30 U. MIAMI L. REV. 464 (1976).

61. 435 U.S. 679, 692 (1978).

62. 441 U.S. 1 (1979).

nomic efficiency and render markets more, rather than less, competitive.' "[63] Despite its acknowledgment that the blanket licenses constituted price fixing,[64] the Court concluded that, because "the challenged practice may have [had] redeeming competitive virtues," the per se rule was inapplicable.[65] The Court's "clear direction was to focus on anticompetitive effect in all antitrust cases as a methodology used to decide whether to apply a per se or rule of reason approach."[66]

The Supreme Court's initial inquiry into the potential competitive qualities of a restraint before applying the per se rule or the rule of reason also is apparent in the only two cases since *Topco* in which the Court has clearly applied the per se rule.[67] In *Catalano, Inc. v. Target Sales, Inc.*,[68] competing beer distributors agreed to discontinue selling beer to retailers on credit. The Court applied the per se rule, because the distributors were unable to proffer "a procompetitive justification for [their] horizontal agreement to fix credit."[69] Consistent with the functional approach, the Court explained that the per se rule applies to restraints that entail "an obvious risk of anticompetitive impact with *no apparent potentially redeeming value*."[70]

In the second case, the controversial *Arizona v. Maricopa County Medical Society*[71] decision, the Supreme Court applied the per se rule to an agreement among competing doctors to establish a maximum fee schedule for patients that sponsoring insurance carriers insured. Although commentators have criticized the Court's opinion as "wooden" and "mechanical,"[72] the Court sufficiently utilized functional analysis to legitimize its use of the per se rule.[73] "It is apparent that the *Maricopa* Court conducted a 'facial' examination of the competitive impact of the alleged restraint and found it extremely likely to be anticompetitive."[74]

After evaluating the defendant's arguments, the *Maricopa*

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63. *Id.* at 19-20 (citations omitted).

64. *See id.* at 23.

65. *Id.* at 13-21; *see also* Gerhart, *supra* note 38, at 335-36.

66. Brunet, *supra* note 14, at 15.

67. *See* Sims, Maricopa: *Are the Professions Different*, 52 ANTITRUST L.J. 177, 182 (1983).

68. 446 U.S. 643 (1980).

69. *Id.* at 646 n.8.

70. *Id.* at 649 (emphasis added).

71. 457 U.S. 332 (1982).

72. Gerhart, *supra* note 38, at 344.

73. *See* Sims, *supra* note 67, at 183; Note, *supra* note 16, at 1223-26, 1228.

74. Brunet, *supra* note 14, at 20.

Court stated: "Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition."[75] Thus, having made the threshold determination that the maximum fee schedule was not potentially procompetitive, the Court legitimately was able to hold the restraints illegal per se.

## IV. FUNCTIONAL ANALYSIS AND THE LIMITED RULE OF REASON: A TWO-STEP INQUIRY

The Supreme Court's decision in *NCAA v. Board of Regents*[76] is simply an extension of its analysis in preceding antitrust cases. First, true to the Court's recent emphasis on functional analysis since Chief Justice Burger's dissent in *Topco*,[77] the majority focused its inquiry on the economic realities of the industry of amateur collegiate athletics to determine which antitrust standard to apply. In deciding to apply the rule of reason rather than the per se rule, the majority conceded that the NCAA television plan constituted horizontal price fixing and output limitation.[78] The majority concluded that the rule of reason was the appropriate standard, because horizontal restraints on competition are essential to the availability of amateur collegiate athletics and are thereby potentially procompetitive.[79] It noted that the NCAA plays a vital role in both preserving the character of college football and enhancing its availability. The restraints were therefore potentially procompetitive and merited consideration under the rule of reason.[80]

Second, the *NCAA* majority stated that under either standard

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75. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982).

76. 104 S. Ct. 2948 (1984).

77. 405 U.S. 596, 613 (1972) (Burger, C.J., dissenting); *see supra* notes 52-75 and accompanying text.

78. *NCAA*, 104 S. Ct. at 2959-60. These conclusions arose from two characteristics of the television plan. First, the plan set the price so that member institutions could not compete with one another on the basis of price or kind of television rights that can be offered to broadcasters. *Id.* at 2959. Second, the plan places an artificial ceiling on the number of football games that can be televised by the broadcasters and viewed by consumers. *Id.* at 2959-60.

79. *Id.* at 2953. This is because "rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete." *Id.* at 2961. In addition, the Court pointed out that cooperation is necessary to preserve the uniqueness of the "product," college football. The requirements that the "athletes must not be paid, must be required to attend class, and the like" differentiate the product. *Id.*

80. *See id.* at 2961.

its inquiry was limited to a determination of the television plan's impact on competition.[81] Nevertheless, in language that echoed the per se rule, the majority described the television plan's restrictions on price and output as "paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[82]

This apparent inconsistency is due to the Court's adoption of the limited rule of reason.[83] In its application of this standard, the Court noted that the NCAA television plan had "a significant potential for anticompetitive effects."[84] The Court concluded that the record "indicate[d] that this potential ha[d] been realized," because the plan had "the effect of reducing the importance of consumer preference."[85]

The significance of the *NCAA* Court's approach is that the Court declined to engage in the traditional rule of reason analysis of market power.[86] In answering the NCAA's allegation that it lacked market power, the Court stated that, "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that the television plan's "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[87] In essence, the Court has shifted the burden of proof to the antitrust defendant to show the competitive effect of the restraint. Thus, the Court can avoid engaging in the complicated analysis of market power if the defendant is unable to demonstrate that the challenged restraint is actually procompetitive.

Justice White, in his dissenting opinion, accused the majority of misinterpreting the Court's decision in *National Society of Professional Engineers v. United States*,[88] thereby unduly restricting its inquiry to purely commercial considerations.[89] He claimed that the majority should have considered "the NCAA's fundamental policy of preserving amateurism and integrating athletics and edu-

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81. *Id.* at 2962.

82. *Id.* at 2964 (citation omitted).

83. *See generally* Clanton, *The FTC and the Professions*, 52 ANTITRUST L.J. 209, 217 (1983)(characterizing the limited rule of reason as "essentially a burden-shifting device").

84. *NCAA*, 104 S. Ct. at 2962 (footnote omitted).

85. *Id.* at 2963-64. One of the aspects of the plan that seemed to bother the majority most was the fact that all member institutions within the same class received the exact same compensation for the broadcast rights to their games regardless of consumer demand to see the games. *Id.*; *The Supreme Court, 1983 Term*, *supra* note 12, at 258.

86. *See The Supreme Court, 1983 Term*, *supra* note 12, at 258.

87. *NCAA*, 104 S. Ct. at 2965 (footnote omitted).

88. 435 U.S. 679 (1978); *see supra* note 61 and accompanying text.

89. *NCAA*, 104 S. Ct. at 2977-79 (White, J., dissenting).

cation"[90] in its rule of reason analysis.[91] Justice White, citing *Continental T.V.*,[92] further argued that the television plan passed "muster under the Rule of Reason," because it promoted interbrand competition.[93]

Answering Justice White's first argument, the majority stated that the television plan did not "fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of [the NCAA] shall share the responsibilities and benefits of the total venture."[94] Furthermore, the "NCAA's argument that its television plan [was] necessary to protect live attendance [was] not based on a desire to maintain the integrity of college football . . . ."[95] Rather, it was premised on the notion—unsupported by the rule of reason—that competition itself is unreasonable.[96]

With respect to Justice White's second argument, the *NCAA* majority answered that the television plan was not procompetitive. Unlike the television retail market in *Continental T.V.*, the NCAA television plan could not promote interbrand competition, because "broadcasting rights to college football constitute a unique product."[97] Moreover, the television plan neither increased output nor reduced the price of television games.[98] Therefore, because the television plan proved to be anticompetitive, the majority held that it violated section 1 of the Sherman Act under the rule of reason.

The majority's holding, however, appears to be limited to the specific restrictions in the television plan before the Court. The majority took great care to distinguish the television plan's horizontal restrictions from those that were held valid under the rule of reason in *Broadway Music, Inc. v. CBS*.[99] The majority emphasized that, unlike the NCAA television plan, the blanket licensing agreement in *Broadway Music* placed no limit "on the volume that might be sold in the entire market and each individual remained

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90. *Id.* at 2973.

91. *Id.* at 2971-73, 2977-79.

92. 433 U.S. at 54-57.

93. *NCAA*, 104 S. Ct. at 2976 (White, J., dissenting).

94. *NCAA*, 104 S. Ct. at 2969. *See generally* Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977) (applying the rule of reason to the NCAA's restriction on the number of football coaches each team may employ).

95. *NCAA*, 104 S. Ct. at 2969.

96. *Id.*

97. *Id.* at 2968 ("[T]here is no need for collective action in order to enable the product to compete against its nonexistent competitors.").

98. *Id.* at 2967-71.

99. 441 U.S. 1 (1979).

free to sell his own [product] without restraint."[100] This distinction implies that a NCAA television plan that did not limit the number of games televised and that allowed member institutions to negotiate individually would be valid under the rule of reason.

## V. *United States v. Topco Associates* REVISITED

In an attempt to facilitate competition with the larger national and regional chains, Topco Associates, a cooperative association of twenty-five small- and medium-sized regional supermarket chains formulated the horizontal restraints that the majority held illegal per se in *Topco*.[101] The association used private-label products to achieve cost economies in the purchasing, transportation, warehousing, promotion, and advertising of its products.[102]

Private-label products are distinguished from other brandname products "in that they are sold at a limited number of easily ascertainable stores."[103] To foster this distinction, Topco issued to its members the territorial licenses at issue before the Supreme Court.[104] These licenses promoted the exclusivity of the association's product in much the same way that the NCAA television plan ensured the exclusivity of college football broadcasts; by limiting a market area or broadcast schedule to one seller of a given product, demand for that product is increased for that individual seller.

In judging the territorial license under the two-pronged test of *NCAA*, one first must determine which antitrust standard to apply. This inquiry focuses on whether the challenged restraint is potentially procompetitive. Although the horizontal division of markets once would have been deemed illegal per se, the specific factual context of the restraint in the supermarket industry now merits consideration under the rule of reason. As with the NCAA television plan, the challenged restraint was necessary for the availability of the product: "There was no such thing as a Topco line of products until [the] cooperative was formed."[105] The purpose of forming the association and setting the private-label products was to compete with the larger national and regional chains. As Topco's answer stated: "Private label merchandising is a way of

100. *NCAA*, 104 S. Ct. at 2968.
101. *Topco*, 405 U.S. at 598.
102. *See id.* at 599 n.3.
103. *Id.*
104. *Id.* at 601-02.
105. *Id.* at 613 (Burger, C.J., dissenting).

economic life in the food retailing industry, and exclusivity is the essence of a private label program; without exclusivity, a private label would not be private."[106] Therefore, by allowing regional supermarkets to compete with the private label merchandising of the national chains, Topco's territorial licenses were potentially procompetitive.

Under the rule of reason, as it is applied in *NCAA*, a court only may consider the challenged restraint's impact on competition. Moreover, if the antitrust defendant is unable to demonstrate that the restraint is actually anticompetitive a court now may make this inquiry without engaging in an elaborate analysis of market power. By allowing courts to declare restraints illegal under the rule of reason without regard to market power once they determine that those restraints are anticompetitive, the Supreme Court has answered the *Topco* majority's primary fear of entering into rule of reason analysis. The *Topco* Court concluded that, because judges are not trained in economics, the judiciary lacks the institutional capacity to "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[107]

Because Topco's territorial licenses appear to be actually procompetitive, they likely would pass antitrust muster. As a result of the territorial licenses and the private-label products, "Topco members [were] frequently in as strong a competitive position in their respective areas as any other chain."[108] As a practical matter, Topco's territorial licenses had substantially the same effect on competition as the tactics that the national chains used in marketing their private-label products.[109] In his dissent, Chief Justice Burger explained the similarities between Topco's private-label program and those of the national chains:

> The national chains market their own private-label products, and these products are available nowhere else than in stores of those chains. The stores of any one chain, of course, do not engage in price competition with each other with respect to their chain's private-label brands, and no serious suggestion could be made that the Sherman Act requires otherwise. *I fail to see any difference* whatsoever in the economic effect of the Topco arrangement for the marketing of Topco-brand products

106. *Id.* at 604.
107. *Id.* at 611-12.
108. *Id.* at 600.
109. *Id.* at 623 n.11 (Burger, C.J., dissenting).

> and the methods used by the national chains in marketing their private-label brands.[110]

Moreover, as the district court noted, the territorial licenses positively promoted competition in the supermarket and produced lower costs for the consumer.[111] Therefore, as the trial judge concluded, blindly applying the per se rule "would substantially diminish competition in the supermarket field."[112]

In the words of Senator Sherman, the Sherman Act sought " 'only to prevent and control combinations made with a view to prevent competition . . . [or to] increase the profits of the producer at the cost of the consumer.' "[113] Thus, given the Supreme Court's recent emphasis on these policies through its adoption of the functional approach to antitrust analysis, the challenged restraints in *Topco* would appear to survive the two-pronged test of *NCAA*. As the Chief Justice pointed out in discussing the validity of Topco's tactics as compared with the tactics of the national chains: "The controlling consideration . . . should be that in neither case is the policy of the Sherman Act offended, for the practices in both cases work to the benefit . . . of the consuming public."[114]

## VI. College Football Television: A Return to the Sherman Act

The Supreme Court's recent emphasis on functional analysis in determining which antitrust standard to apply to a challenged restraint has blurred the dichotomy between the per se rule and the rule of reason. Yet, the emphasis is justified given the Sherman Act's policy of promoting competition.[115] Although the Court conclusively presumed that restraints such as price fixing, division of markets, group boycotts, and tying arrangements violated the Sherman Act,[116] the present Court first will assess the potential competitive qualities of a restraint before applying either antitrust

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110. *Id.* (emphasis added).

111. United States v. Topco Assocs., 319 F. Supp. 1031, 1038 (N.D. Ill. 1970).

112. *Id.* at 1043.

113. United States v. Topco Assocs., 405 U.S. 596, 620-21 (1972) (citing 21 Cong. Rec. 2457, 2460 (1890)).

114. *Id.* at 623 n.11 (Burger, C.J. dissenting).

115. *See supra* notes 52-75 and accompanying text.

116. United States v. Topco Assocs., 405 U.S. 596 (1972) (division of markets); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycotts); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (tying arrangements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing).

standard.[117]

Judge Bork,[118] the FTC,[119] and the Reagan Justice Department[120] all have advocated this approach, because it legitimizes the process and makes "antitrust a rational, proconsumer policy once more."[121] Rather than blindly applying the per se rule, as the majority did in *Topco*, the Court now may make a more realistic determination of a restraint's competitive effect under the rule of reason if the restraint appears to be at least potentially procompetitive. Although cases like *Catalano* and *Maricopa* indicate that the Court has not abrogated the per se rule, the cases do manifest a significant narrowing of the rule because of their threshold inquiry into the competitiveness of the challenged restraints. Because functional analysis "requires identification of procompetitive and anticompetitive efficiencies, it is very unlikely that its employment would result in an undesirable knee-jerk application of a per se rule."[122]

Moreover, the *NCAA* approach makes this preliminary inquiry and the subsequent rule of reason analysis easier for courts like the *Topco* majority to accept, because the *Topco* majority feared that entering into functional analysis—thus limiting the Court's use of the per se rule—would "leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach."[123] As one commentator noted, the Court's approach seems to indicate "that it will accept slightly abbreviated versions of rule of reason analysis when deleterious effects on the market can be discerned through a quick look at the restraints."[124] Thus, the Court responded to the *Topco* majority's fear of the complexity of market power analysis[125] by adopting the Justice Department's

117. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551 (1984) (tying arrangements); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) (price fixing); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978) (group boycotts); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (division of markets). "*Hyde* centered on the tying of anesthesiology to hospital services. The Court, though reaffirming its per se condemnation of tying, nevertheless engaged in a detailed market-power inquiry, . . . and thereby continued its trend away from condemning tying with little or no inquiry into market power." *The Supreme Court, 1983 Term*, *supra* note 12, at 256 n.6.

118. R. BORK, *supra* note 55, at 287.

119. Clanton, *supra* note 83.

120. Brief for United States as Amicus Curiae at 6-7, NCAA v. Board of Regents, 104 S. Ct. 2948 (1984).

121. R. BORK, *supra* note 55, at 287.

122. Brunet, *supra* note 14, at 27-28.

123. *Topco*, 405 U.S. at 609-10 n.10.

124. *The Supreme Court, 1983 Term*, *supra* note 12, at 256.

125. "The fact is that courts are of limited utility in examining difficult economic

proffered approach to rule of reason analysis: "[U]nless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power."[126] In other words, if the antitrust defendant is unable to demonstrate that the challenged restraint is actually procompetitive, the Court will invalidate the restraint without entering into market power analysis. The Court, however, left open the question of whether it will continue to examine market power if the defendant is able to prove that the restraint is procompetitive.

In *NCAA*, the Court found that, under the television plan: (1) the fees paid to individual schools for broadcast rights were unresponsive to consumer preference; (2) the networks were paying excessive fees for these rights; and (3) the number of college football games was artificially restricted.[127] Yet, in the few months since the Court's decision enabled football-playing universities to negotiate individually with the networks, the free market has changed drastically the college football horizon. ABC and CBS paid $42.5 million less in broadcast fees in 1984 than they paid in 1983.[128] Consequently, both networks were able to make a "profit on their college [football] packages this year—something they [had not] been doing under their respective NCAA pacts."[129] In turn, each

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problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules." *Topco*, 405 U.S. at 609-10 (footnote omitted); *The Supreme Court, 1983 Term*, *supra* note 12, at 262-64.

126. *NCAA*, 104 S. Ct. at 2965-66 n.42 (quoting Brief for United States as Amicus Curiae at 19-20, NCAA v. Board of Regents, 104 S. Ct. 2948 (1984)).

> There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only the NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. . . . And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.

*Id.*

127. *NCAA*, 104 S. Ct. at 2963-64.

128. Serrill, *Taking Away the N.C.A.A.'s Ball*, TIME MAGAZINE, July 9, 1984, at 77, col. 2.

129. *Football Ratings: Lower Ratings Haven't Hurt Profit-ability*, BROADCASTING, Nov. 12, 1984, at 55, col. 1.

network charged "about half the $60,000-plus for 30-second spots that their NCAA packages commanded in 1983."[130] Finally, last year's college football television menu was a "smorgasbord" for the viewing public.[131]

Although these results would have been the same had the Supreme Court applied the per se rule rather than the limited rule of reason, the Court's emphasis on functional analysis legitimized the Court's decision while remaining faithful to the Sherman Act's policy of promoting competition. At least in this college football television contest, the Supreme Court has won one for the consumer rather than for the Gipper.

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130. *Id.* at col. 3.

131. Taafe, *A Supremely Unsettling Smorgasbord*, SPORTS ILLUSTRATED, Sept. 5, 1984, at 151; *Football Ratings*, *supra* note 129, at 155, col. 1 ("The most common term used to describe the phenomenon is 'saturation.' ").

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