"THE WHOLE SITUATION IS A SHAME, BABY!"[1]—NCAA SELF-REGULATIONS CATEGORIZED AS HORIZONTAL COMBINATIONS[2] UNDER THE SHERMAN ACT'S RULE OF REASON STANDARD: UNREASONABLE RESTRAINTS OF TRADE OR AN UNFAIR JUDICIAL TEST?

INTRODUCTION

If you ask ten different Americans what the National Collegiate Athletic Association[3] ("NCAA") represents to them, you might get ten different answers. To some gifted high school athletes, the NCAA might symbolize hope—the dream of playing collegiate sports while earning a college degree or a means to prepare for a lucrative professional athletic career. To others, the NCAA might represent corruption, greed, opportunism, and dishonesty. Scandals, including recruiting violations[4] and criminal allegations against athletes,[5] are almost weekly headlines in our nation's newspapers. To fans, the NCAA might represent the brain trust responsible for

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1 Dick Vitale, *2-in-4 Turmoil Causes Scheduling Chaos,* ESPN.COM, Sept. 8, 2003, *at* http://espn.go.com/dickvitale/v-column030908scheduling.html [hereinafter Vitale, *2-in-4 Turmoil Causes Scheduling Chaos*]. Although Dick Vitale is a noted men's college basketball expert, commentator, and opponent of the NCAA's Two in Four Rule (*See* discussion *infra* Part IV.D.), his quote, taken out of context for present purposes, represents an accurate assessment of the NCAA's antitrust battle with the courts over the last quarter century.

2 A horizontal combination is an "agreement among competitors on the way in which they will compete with one another." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99 (1984) [hereinafter *Bd. of Regents III*].

3 The NCAA is a non-profit organization headquartered in Indianapolis, Indiana. Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 273 F. Supp. 2d 933, 936 (S.D. Ohio 2003), *appeal docketed*, No. 03-4024 (6th Cir. 2004) [hereinafter *Worldwide Basketball II*]. "The NCAA essentially functions as a standard-setter, although in the area of men's college basketball, it is also the sponsor of the well-known end of the season NCAA Tournament." *Id.*

4 A recent headline involves developments stemming from the University of Alabama's five-year probation sentence imposed by the NCAA. *See Vols' Fulmer Told NCAA About Alabama Violations*, WASH. POST, Jan. 17, 2004, *available at* 2004 WL 55831988. The sentence, imposed for recruiting violations, banned Alabama from appearing in bowl games for two years and also "imposed heavy scholarship reductions." *Id.* The recent developments, however, involve University of Tennessee football coach Phillip Fulmer (Tennessee and Alabama are rivals who play in the SEC). Allegedly, Fulmer "secretly provided damaging information about Alabama to the NCAA" in exchange for the NCAA ignoring similar violations at Tennessee. *Id.*

5 For the past few months, newspapers have followed closely the saga of University of Baylor basketball player Patrick Dennehy, who was murdered in the summer of 2003. *See Ex-Baylor Athlete's Trial Faces Delays, Lawyer Says*, HOUSTON CHRON., Jan. 6, 2004, *available at* 2004 WL 57798751. One of his teammates, Carlton Dotson, was scheduled to stand trial for the murder in March 2004. *Id.*

providing countless hours of enjoyment attending athletic events or simply watching them on television.[6] Regardless of one's opinion of the NCAA, it is undoubtedly a de facto college sports monopoly[7] that generates millions of dollars in yearly revenues[8] and occupies an unparalleled position in American sports.

Despite its monopoly, the NCAA's freedom to regulate events is limited. These days, its hands are tied by the federal courts. Over the past twenty years, the Supreme Court and the lower federal courts have repeatedly held certain NCAA self-regulating bylaws and contracts negotiated with non-members to be illegal restraints of trade in violation of § 1 of the Sherman Antitrust Act.[9] In so doing, federal courts evaluate such restraints under the Rule of Reason.[10]

Stare decisis mandates that courts apply the Rule of Reason test articulated in the 1978 Supreme Court opinion, *National Society of Professional*

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6 This author started watching college football and basketball games when he was six years old. Every March, he, like many others, uses vacation days to sit at home, pay the pay-per-view fee, and watch as many NCAA Championship Tournament games as the schedule will allow. One of his earliest memories involves being a frightened seven-year-old who accidentally spilled a can of Sherwin Williams paint while he was watching Oklahoma vs. Nebraska and his parents were painting the living room. Although he was upset that Nebraska lost the game thirty-eight to seven, they finished the season, after winning nine games while losing three, by beating North Carolina in the Liberty Bowl by two touchdowns. *See 1977 Nebraska Team Page*, MCUBED.NET, *available at* http://www.mcubed.net/ncaaf/1977/ne.htm (last vistied August 10, 2004).

7 *See* Robert Barro, *Let's Play Monopoly*, WALL ST. J., Aug. 27, 1991, at A12, *reprinted in* N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS, 340-41 (2d ed. 2001). The article's author gathered a panel of Harvard economists to choose the "best operating monopoly in America." *Id.* at 340. The NCAA won the competition beating noted monopolists OPEC and the U.S. Postal Service. *Id.* One reason for its victory is that the NCAA has "convinced most observers that it would be morally wrong for . . . college[s] to pay" such athletes as "poor ghetto residents who can play basketball well." *Id.* at 341. The article observes that failure to pay such wages results in a wealth transfer "from poor ghetto residents to rich colleges." *Id.*

8 For the fiscal year ending August 31, 2004, the NCAA reported operating revenue of over $450 million. *See The National Collegiate Athletic Association Revised Budget for Fiscal Year Ended August 31, 2004*, NCAA.ORG, *available at* www.ncaa.org/financial/2003-04_budget.pdf (last visited Aug. 10, 2004).

9 *See Bd. of Regents III*, 468 U.S. 85 (The NCAA's football television broadcasting contract, which limited the amount of games broadcast nationally and the times each team could appear on national television, was declared an illegal output restriction); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (The NCAA bylaw restricting salaries of certain assistant coaches was declared to be illegal price-fixing); *Worldwide Basketball II*, 273 F. Supp. 2d 933 (The NCAA bylaw, restricting to two in a four year span, the number of exempt tournaments in which a men's college basketball team could compete, was declared adverse to competition). *See* discussion *infra* Part IV.

10 *E.g., Bd. of Regents III*, 468 U.S. at 100-03; *Law*, 134 F.3d at 1017-19; *Worldwide Basketball II*, 273 F. Supp. 2d at 947-48. The Rule of Reason is used "to form a judgment about the competitive significance of the [challenged] restraint." *Worldwide Basketball II*, 273 F. Supp. 2d at 948 (alteration in the original) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

Engineers v. United States[11]—"the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[12] The "analysis employs a burden-shifting framework"[13]—after the plaintiff makes a prima facie case showing anticompetitive effects, or a strong likelihood of such effects, the burden shifts to the defendant to demonstrate that the restraint in question[14] has procompetitive benefits which outweigh its anticompetitive effects.[15] If the defendant succeeds, the burden shifts back to the plaintiff to "show that the challenged conduct is not reasonably necessary to achieve . . . legitimate objectives or that the objectives can be achieved in a substantially less restrictive manner."[16]

Such inquiry was most recently applied in *Worldwide Basketball & Sports Tours, Inc. v. NCAA*.[17] In that case, the district court held that the NCAA's Two in Four Rule was an illegal output restriction in violation of § 1 of the Sherman Act.[18] The Two in Four Rule limits Division I men's college basketball teams to competing in a maximum of two certified (exempt) events every four years.[19] Certified, or otherwise exempt, events are multi-game, usually early-season, tournaments organized by promoters unaffiliated with the NCAA.[20] The tournaments are considered exempt be-

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11 435 U.S. 679 (1978).

12 *Id.* at 691. *See* discussion *infra* Part III.B.

13 Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003). *See also* California Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12 (1999); *Law*, 134 F.3d at 1019-24; *Worldwide Basketball II*, 273 F. Supp. 2d at 949-54.

14 In the NCAA cases explored in this Comment, the alleged restraints are ancillary restraints in connection with either NCAA bylaws or contracts negotiated by the NCAA with third parties. *See Bd. of Regents III*, 468 U.S. 85 (contract with third parties); *Law*, 134 F.3d 1010 (bylaw); Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977) (bylaw); *Worldwide Basketball II*, 273 F. Supp. 2d 933 (bylaw).

15 *See Law*, 134 F.3d at 1019; *Worldwide Basketball II*, 273 F. Supp. 2d at 948.

16 *Worldwide Basketball II*, 273 F. Supp. 2d at 948 (citing *Law*, 134 F.3d at 1019). The Supreme Court has never adopted less restrictive alternatives. Furthermore, an inquiry into less restrictive alternatives was not present in either *Law* or *Worldwide Basketball* because the courts ruled that the defendant (NCAA) did not meet its burden of proving procompetitive effects. *See Law*, 134 F.3d at 1024; *Worldwide Basketball II*, 273 F. Supp. 2d at 954.

17 273 F. Supp. 2d at 948-54. *See* discussion *infra* Part IV.D.

18 *Id.* at 954-55.

19 *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 2003-2004 DIVISION ONE MANUAL 1, Bylaw 17.5.5.4, at 253 (2003), *available at* http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf [hereinafter NCAA MANUAL]. "An institution shall be permitted to participate in no more than one certified event during a given academic year and not more than two certified events every four years." *Id.*

20 *See id.*

cause participation counts as one game on a school's schedule[21] although some tournament formats provide the possibility to play in four games.[22]

Worldwide Basketball raises controversial issues concerning the application of the antitrust laws to self-regulating entities such as the NCAA. Should the NCAA be free from judicial intervention to enact bylaws limiting the number and type of games its men's college basketball teams are permitted to schedule during a season? The Two in Four Rule seems on its face to be an attempt to do so. Should tournament promoters who simply "repackage"[23] the men's college basketball product be protected by antitrust laws or should they be forced to accept whatever constraints the NCAA puts on them? Perhaps the most ironic aspect of *Worldwide Basketball* is that the NCAA enacted the Two in Four Rule to promote the competitive balance within its sport,[24] but to achieve its objectives, it must rely on the promoters to schedule lesser-known schools in their tournaments.[25]

The history of the Rule of Reason reveals that *Professional Engineers*, by placing a heavy burden on defendants to prove procompetitive effects, marked a dramatic departure from the Rule of Reason test first articulated by Justice Brandeis in the Court's 1918 opinion, *Board of Trade of City of Chicago v. United States*.[26] The *Chicago Board of Trade* test provided that an alleged restraint can be justified even without a showing of procompetitive effects.[27] At the heart of the inquiry, the test allows courts to contemplate the difference between unreasonable restraints and justifiable self-regulation by asking "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."[28]

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21 *See id.*

22 *See id.* 17.5.3.1(d), at 251. The Preseason National Invitation Tournament (NIT) is a sixteen-team single-elimination tournament held every November at New York's Madison Square Garden. The winner, runner-up, and contestants appearing in the consolation game, will each play four games within the tournament. However, the appearance at the tournament will only count as one game on each team's schedule. Thus, a team appearing in the NIT could play thirty-one games during the season while a team that is not invited to play in an exempt tournament will only play twenty-eight games. *See id.*

23 *See* Worldwide Basketball & Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n (*Worldwide Basketball I*), No. 2:00-CV-1439, 2002 WL 32137511, at *12 (S.D. Ohio July 19, 2002) [hereinafter *Worldwide Basketball I*]. The NCAA argued that the promoters of exempt events are "non-competitive middlemen . . . who stand to make a profit" by "repackag[ing]" the NCAA's product. *Id*.

24 *See Worldwide Basketball II*, 273 F. Supp. 2d at 952. *See* discussion *infra* Part IV.D.

25 *See* discussion *infra* note 183.

26 246 U.S. 231, 238 (1918). *See* discussion *infra* Parts III.A., V.A.

27 *See id.*

28 *Id.*

The decisions against the NCAA since *Professional Engineers*[29] reveal the need for a relaxation of the Rule of Reason to a form much like that applied in *Chicago Board of Trade*. Such a change would be especially appropriate for defendants, like the NCAA and professional sports leagues, who shoulder the burden of self-regulation, and who form horizontal combinations out of necessity for their products to exist.[30] The *Professional Engineers* test results in certain harsh rulings against the NCAA and will likely lead to repeated challenges to its bylaws and negotiated contracts with third parties. Applying a modified Rule of Reason test combining desirable elements from *Chicago Board of Trade* and *Professional Engineers* would reduce the need for judicial intervention in the NCAA's self-regulatory activities and would have little or no adverse impact on competition.

This Comment focuses on § 1 of the Sherman Act and the Supreme Court's changing Rule of Reason standard as applied to NCAA bylaws and contracts negotiated with third parties. Part I introduces § 1 of the Sherman Act, its history and functionality. Part II traces the early development of the per se and Rule of Reason analytical approaches. Part III includes a discussion of the following landmark decisions: *Chicago Board of Trade* and *Professional Engineers*. Part IV scrutinizes how the changing Rule of Reason has been applied to four different antitrust cases involving the NCAA: *Hennessey*, *Board of Regents*, *Law*, and *Worldwide Basketball*. Part V analyzes the substantive difference between the Rule of Reason tests articulated in *Chicago Board of Trade* and *Professional Engineers*. In addition, it describes the difficulty courts face in applying the *Professional Engineers* test to cases in which the NCAA is a defendant. Furthermore, Part V proposes that the Supreme Court should consider adopting an alternative Rule of Reason test to be applied to controversies involving self-regulating entities that combined out of necessity for their products to exist. In so doing, it proposes a structured test and hypothesizes how it might have altered the outcome of *Board of Regents*, *Law*, and *Worldwide Basketball*.

I. THE SHERMAN ACT § 1: HISTORY AND FUNCTIONALITY

Section 1 of the Sherman Act provides as follows:

> 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. Every person who shall make any contract or engage in any combination or conspiracy

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29 *See Bd. of Regents III*, 468 U.S. 85; *Law*, 134 F.3d 1010; *Worldwide Basketball II*, 273 F. Supp. 2d 933.

30 *See* discussion *infra* Part V.C.

> hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[31]

A. *Origin, History and Purpose*

Since the statute is facially broad in scope,[32] courts have interpreted it a number of conflicting ways since its first application in 1897.[33] Although early English common law[34] and its American counterpart[35] helped to lay the foundation for the Sherman Act in 1890, at the time it was enacted, Congress was most concerned with the "vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, . . . combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be

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31 Sherman Act, 15 U.S.C. §§ 1-7 (2000).

32 In the early debates surrounding the bill, Senator Turpie of Indiana explained, "[t]he moment [Congress] denounces these trusts . . . the courts are bound to carry out the intention and purpose of the legislation . . . . I have no doubt that when this law goes into practical operation, it will receive a construction and definition very useful to us." 21 CONG. REC 2558 (1890), *reprinted in* HARRY AUBREY TOULMIN, ANTITRUST LAWS § 1.15 (1st ed. 1949) [hereinafter TOULMIN].

33 *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

34 An examination of the early common law origins of antitrust law is helpful to understand Congress's purpose in enacting the Sherman Act. In the *Merchant Tailor's Case*, decided in 1599, the court invalidated a bylaw passed by the London Tailor's Guild. *See* Davenant v. Hurdis, 72 Eng. Rep. 769 (K.B. 1599). The bylaw required every merchant member who sent cloth out to be finished to have at least half the work done by fellow members. *See id.* The decision stated it was unreasonable to allow the Guild to require that merchants give business only to its members without a similar requirement that such members complete the work suitably and at reasonable prices. *See id.* Three years later in the *Case of Monopolies*, a patent monopoly for the manufacture of playing cards granted by Queen Elizabeth was voided. *See* Darcy v. Allen, 77 Eng. Rep. 1260 (K.B. 1602). The Court condemned all monopolies because they result in higher prices, inferior goods, and impoverishment of individuals deprived of their livelihood. *See id.* A century later, *Mitchel v. Reynolds*, decided in 1711, involved a person's covenant to refrain from practicing his trade at a particular geographic location. *See* 24 Eng. Rep. 347 (K.B. 1711). The court upheld the covenants on a contract theory - where a person covenants under valid consideration. *See id.* However, the *Mitchel* decision is most famous for its creation of the Rule of Reason in its most rudimentary form: "All contracts where there is a bare restraint of trade and no more, must be void; where special matter appears so as to make it a reasonable and useful contract, the presumption is excluded." *Id.*

35 The American view was summarized by Chief Justice White as follows: "[T]he dread of enhancement of prices and . . . other wrongs which it was thought would flow from . . . undue limitation on competitive conditions caused by contracts or other acts . . . led . . . to the prohibition, or treating . . . illegal, all . . . acts which were unreasonably restrictive of competitive conditions." Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

exerted to oppress individuals and injure the public generally."[36] Accordingly, Congress created a statute aimed exclusively to prevent "unlawful"[37] combinations but did not aim to curb the right to form lawful partnerships or combinations where "corporations unite merely to extend their business . . . without interfering with compet[itors]."[38] Only combinations made with "a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer"[39] were prohibited.[40]

B. *Functionality: Penalties, Remedies, and the Per Se and Rule of Reason Standards*

The Act provides civil remedies[41] to injured parties and a criminal penalty to punish offenders.[42] The civil remedies include damages and injunction.[43] The injunction remedy, codified in § 16 of the Clayton Act,[44]

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36 *Id.* at 50. "[The Sherman Act] was enacted in an era of 'trusts' and of 'combinations' of big business and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." Jones v. Nat'l Collegiate Athletic Ass'n, 392 F.Supp. 295, 303 (D. Mass. 1975) (quoting Apex Hosiery v. Leader, 310 U.S. 469, 492-493 (1940). "[It] was . . . aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958).

37 *See* 21 CONG. REC. 2457 (1890), *reprinted in* TOULMIN, *supra* note 32, at § 1.8.

38 *Id.*

39 *Id.* Senator Sherman reiterated, "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." *Id.* "If their business is lawful, they can combine in any way and enjoy the advantage of their united skill and capital, provided they do not combine to prevent competition." *Id.*

40 The first bill, designated as "Senate Bill No. 1" proposed to declare "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend to prevent full and free competition . . . to be against public policy, unlawful and void." BILLS AND DEB. ON TRUSTS 3 (1903), *reprinted in* TOULMIN, *supra* note 32, at § 1.4. Although the bill was amended several times, its narrow initial purpose was reflected in Congressional debates. Specifically, Senator Sherman stated, "[the bill] declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law." 21 CONG. REC. 2456 (1890), *reprinted in* TOULMIN, *supra* note 32, at § 1.7.

41 Although the bill's proponents, such as Senator Turpie of Indiana, supported the civil remedy provision, there was greater concern over the difficulty in defining the offense—"[t]o describe it is impossible." 21 CONG. REC. 2558 (1890), *reprinted in* TOULMIN, *supra* note 32, at § 1.15.

42 *See* 15 U.S.C. § 1 (2000).

43 *See* Clayton Act, 15 U.S.C. § 26 (2000); 15 U.S.C. § 15 (2000).

44 The Clayton Act provides that "[a]ny person, firm, corporation . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." *Id.*

requires the plaintiff to demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."[45] Although the statutory injunction threshold is imprecise, it is best understood by examining the plaintiff's contemporaneous burden to prove that the defendant actually violated the antitrust laws. To be entitled to injunctive relief under § 1, the plaintiff must prove: "1) there is an agreement, conspiracy, or combination between two or more entities; 2) the agreement is an unreasonable restraint of trade under either a per se or a [R]ule of [R]eason analysis; and 3) the restraint affects interstate commerce."[46]

In § 1 controversies, courts determine initially whether to test the alleged restraint under the per se standard or Rule of Reason.[47] Such analytical tools were not formally created by the Supreme Court until nearly a quarter century after the statute's enactment.[48] Underlying the per se approach is the belief that certain agreements, such as output restrictions, price fixing, division of markets, group boycotts, and other naked restraints, are obvious violations and do not require further inquiry.[49] Such agreements are "unreasonable and therefore illegal"[50] due to "their pernicious effect on competition and lack of any virtue."[51] Absent a per se violation, potentially

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45 *E.g.*, *Worldwide Basketball II*, 273 F. Supp. 2d at 947 (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969)). The plaintiff "must [first] allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113 (1986) (quoting Brunswick Corp. v. Pueblo Bowl O Mat, Inc., 429 U.S. 477, 489 (1977)). This is because it is widely held that "antitrust laws protect competition, not particular competitors." *E.g.*, *Worldwide Basketball II*, 273 F. Supp. 2d at 950 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Clorox Co. v. Sterling Winthrop, Inc, 117 F.3d 50, 57 (2d Cir. 1997)). Therefore, a plaintiff's simple demonstration of loss of revenues, profits, or market share is not enough to earn an injunction. *See N. Pac. Ry. Co.*, 356 U.S. at 4-5.

46 *E.g.*, *Worldwide Basketball II*, 273 F. Supp. 2d at 947-48 (citing *Law*, 134 F.3d at 1016).

47 *See, e.g., Bd. of Regents III*, 468 U.S. at 104; *Hennessey*, 564 F.2d at 1147; *Worldwide Basketball II*, 273 F. Supp. 2d at 948.

48 *See* discussion *infra* Part III.A.

49 *See* Neeld v. Nat'l Hockey League, 594 F.2d 1297, 1299 (9th Cir. 1979) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); United States v. Addyston Pipe & Steel Co., 175 U.S. 211 (1899) (division of markets); Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959) (group boycotts); White Motor Co. v. United States, 372 U.S. 253 (1963) (other naked restraints)).

50 *Neeld*, 594 F.2d at 1299 (quoting *N. Pac. Ry. Co.*, 356 U.S. at 5).

51 *Id*. The *Northern Pacific* court reiterated: "The principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken." *N. Pac. Ry. Co.*, 356 U.S. at 5.

anticompetitive conduct is examined under the Rule of Reason.[52] "Under this [R]ule, the factfinder weighs all of the circumstances . . . in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[53]

II. EARLY APPLICATION OF § 1: EMBRYONIC DEVELOPMENT OF THE PER SE AND RULE OF REASON STANDARDS

Although the per se and Rule of Reason approaches began to form shortly after the statute's enactment,[54] the standards evolved in *Standard Oil Co. v. United States*.[55] The *Standard Oil* decision, written by Chief Justice White, involved a paradigmatic situation the Sherman Act was enacted to combat.[56] Dozens of oil corporations combined to form one holding company that engaged in, among other restraints of trade, industrial espionage and predatory local price cutting to force other companies to join the combination.[57]

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52 *See, e.g., Prof'l Eng'rs*, 435 U.S. at 690; Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

53 *Cont'l T.V.*, 433 U.S. at 49. The Rule of Reason was also described in *Mackey v. Nat'l Football League* as follows: "The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary." 543 F.2d at 620.

54 Prior to the turn of the century, the Supreme Court ruled in its first two antitrust cases. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). Both cases involved agreements between numerous railroad companies that formed an association (cartel) to establish and maintain rates, rules, and regulations—measures enacted to promote the health of the railroad industry. *See Trans-Missouri*, 166 U.S. 290; *Joint Traffic*, 171 U.S. 505. The beginnings of the Rule of Reason standard are apparent in Justice White's dissent in *Trans-Missouri* and the *Joint Traffic* majority's distinction between arrangements which directly and immediately reduce competition—such as a rate agreement among competing railroads—and arrangements which only had de minimus or ancillary effects. *See Trans-Missouri*, 166 U.S. at 343-74; *Joint Traffic*, 171 U.S. at 568. In *Joint Traffic*, the Court held, "[t]he effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce." *Joint Traffic*, 171 U.S. at 568.

55 *See* 221 U.S. 1 (1911).

56 Chief Justice White, over a decade prior, dissented in *Trans-Missouri*. *See Trans-Missouri*, 166 U.S. at 343-74 (White, J., dissenting).

57 *Standard Oil*, 221 U.S. at 42-43. The averments included: "[r]ebates, preferences, . . . restraint and monopolization by control of pipe lines[;] . . . contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting . . . espionage of the business of competitors, the operation of bogus independent companies, . . . the division of the United States into districts[;]. . . and finally reference was made to the 'enormous and unreasonable profits' earned by the Standard Oil Trust." *Id.*

Although *Standard Oil* did not formulate a specific or structured Rule of Reason test, it mandated that conduct challenged under § 1 had to meet a higher threshold to constitute an antitrust violation—only undue, and therefore unreasonable, restraints of trade were illegal.[58] Justice White articulated that the Act did not "intend . . . to restrain . . . combinations . . . which did not unduly restrain interstate . . . commerce."[59] Rather, the Act prohibited "methods . . . which would constitute . . . interference, that is, an undue restraint."[60] Regarding the per se category, the Court distinguished certain activities that are "clearly restraints of trade within the purview of the statute, [and] c[an] not be taken out of that category by indulging in general reasoning."[61]

III. LANDMARK DECISIONS: *CHICAGO BOARD OF TRADE* AND *PROFESSIONAL ENGINEERS*

The first formal Rule of Reason test was articulated in 1918 by Justice Brandeis in *Chicago Board of Trade*.[62] The Rule of Reason, as it has evolved to its current form, was applied by Justice Stevens nearly sixty years later in *National Society of Professional Engineers v. United States*.[63] This Comment will explore in detail both cases and legal tests.

A. *Chicago Board of Trade*

The Chicago Board of Trade, an organization of grain warehousemen, brokers, and others involved in the grain trade, operated the country's largest organized market for grain trading.[64] Just after the turn of the century, the Board created the Call Rule which prohibited members from negotiating prices when purchasing or offering to purchase "arriving grain"[65] during the period between the close of the call, usually at 2:00 p.m., and the next day's opening at 9:30 a.m.[66] In other words, the rule set specific trad-

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58 *Id.* at 60.

59 *Id.*

60 *Id.*

61 *Id.* at 65.

62 246 U.S. 231, 238 (1918).

63 435 U.S. 679, 691 (1978).

64 *See Bd. of Trade*, 246 U.S. at 235.

65 *Id.* at 239. Brandeis enunciated that the Call Rule only applied to grain that was arriving in Chicago on a given day. *Id.* The rule did not apply to grain arriving to a different market. *Id.*

66 *Id.* at 237. "The change affected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session." *Id.*

ing times during which members were free to negotiate (9:30 a.m. to 2:00 p.m.) and times in which prices were fixed (2:00 p.m. to 9:30 a.m.). The regulation affected greatly traders who conducted their business during evening hours because they were no longer free to negotiate prices but were bound by the price at the call.[67]

As procedural background, Justice Brandeis observed that the district court granted the government's motion to strike from the record any testimony "concerning the [Board's] purpose of establishing the [Call Rule]."[68] Justice Brandeis stated that this caused the district court to decide the case upon the "bald proposition"[69] that a rule, created by the Board to "fix[] prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law."[70] Taken together, such statements reflect the Court's belief that the Rule of Reason considers, among other relevant factors, the motivation and intent of the defendant—a principle upon which Justice Brandeis relied in articulating the formal test.

The Court introduced the Rule of Reason test by stating "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."[71] It then articulated the Rule of Reason test 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 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.[72]

The enumerated factors, which formed the test's substantive inquiry, can be grouped into three categories: (1) those regarding the business to which the restraint applies;[73] (2) those which focus on the restraint and its

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67 *See id.* at 240.

68 *Id.* at 238. After stating the Rule of Reason test, Justice Brandeis concluded that "[t]he District Court erred . . . in striking from the answer allegations concerning the history and purpose of the [C]all [R]ule." *Id.* at 238-39.

69 *Bd. of Trade*, 246 U.S. at 238.

70 *Id.*

71 *Id.*

72 *Id.* (emphasis added). Compare the *Chicago Board of Trade* test with that articulated in *Professional Engineers*: "[T]he Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Professional Engineers*, 435 U.S. at 691. In the opinion's next sentence, Justice Stevens quotes directly the first sentence of the *Chicago Board of Trade* test as support. *Id.*

73 *See Bd. of Trade*, 246 U.S. at 238. This category includes "the facts peculiar to the business to

possible or actual influence on the business;[74] and (3) the intent, motivation and purpose of the defendant in implementing the alleged restraint.[75] The third group of factors, those concerning intent, has created the most discourse in later decisions.[76] Justice Brandeis clarified their relevance by writing: "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."[77] Ultimately, the Court held that the Board was justified in enacting the Call Rule despite the restraint of trade that it caused.[78] The opinion's final paragraph reads: "Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common."[79]

In addition to formulating a structured Rule of Reason balancing test, *Chicago Board of Trade* proposes that conduct restraining competition can avoid illegality under § 1 of the Sherman Act provided such restraint is de minimus and/or reasonably justified.[80] In applying the test, the Court held that the following factors justified the restraint of trade imposed by the Call Rule: it applied "only to a small amount of grain shipped from day to day;"[81] it applied "only during a small part of the business day;"[82] and it applied only to grain shipped to Chicago.[83] Furthermore, the Court listed a series of ways "the [R]ule helped to improve market conditions."[84] In sum,

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which the restraint is applied" and "its condition before and after the restraint was imposed." *Id.*

74 *See id.* This includes "the nature of the restraint and its effect, actual or probable[,] [t]he history of the restraint [and] the evil believed to exist." *Id.*

75 *Id.* This includes "the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." *Id.*

76 *See, e.g., Neeld*, 594 F.2d at 1300 (holding a National Hockey League rule precluding a one-eyed player from competing was not motivated by anticompetitive intent but rather its intended purpose was to promote safety); *Hennessey*, 564 F.2d at 1153 (holding that there was no evidence that NCAA Bylaw restricting the number of assistant coaches was adopted with intent to injure such affected coaches).

77 *Bd. of Trade*, 246 U.S. at 238. *See also, e.g., Cont'l T.V.*, 423 U.S. at 50; Indiana Fed'n of Dentists, 745 F.2d 1124, 1139 (7th Cir. 1984); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1259 (2nd Cir. 1982); *Hennessey*, 564 F.2d at 1152.

78 *Bd. of Trade*, 246 U.S. at 240-41.

79 *Id.* at 241. The Court further stated: "they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity." *Id.*

80 *See* discussion *infra* Part V.A.

81 *Bd. of Trade*, 246 U.S. at 239.

82 *Id.*

83 *Id.*

84 *Id.* at 240-41. "It created a public market for grain to arrive." *Id.* at 240. "It brought buyers and sellers into more direct relations." *Id.* "It increased the number of country dealers engaging in this branch of business." *Id.* "It eliminated risks necessarily incident to a private market, and thus enabled

the *Chicago Board of Trade* Rule of Reason test served as precedent for and was quoted as the standard for the next six decades.[85] However, *Professional Engineers*, in holding that restraints can only be justified with proof of procompetitive benefits, implicitly altered the standard by articulating a test that created a heavier burden on defendants.[86]

B. *Professional Engineers*

The Rule of Reason, in its current form, was explained by Justice Stevens in *Professional Engineers*.[87] The case involved the National Society of Professional Engineers Code of Ethics, which prohibited its member engineers from soliciting and submitting price bids to potential clients.[88] The Code of Ethics sought to "preserve the profession's 'traditional' method of selecting professional engineers"[89] which was based on the engineer's "background and reputation, not price."[90] The Government alleged that the Code of Ethics resulted in suppression of competition which, in turn, "deprived [customers] of the benefits of free and open competition."[91]

Turning to the Rule of Reason, the Court acknowledged that the language of § 1 of the Sherman Act "cannot mean what it says"[92] because, "as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract."[93] After stating that the courts were originally intended to

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country dealers to do business on a smaller margin." *Id.* "[I]t facilitated trading 'to arrive' by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer." *Id.* at 241.

85 *See, e.g.,* Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074, 1076 (1982); Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 343 (1982); *Cont'l T.V.*, 433 U.S. at 50 n.15; Albrecht v. Herald Co., 390 U.S. 145, 156 (1968); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 386 (1967); *White Motor Co.*, 372 U.S. at 261; United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 413 (1956) (Frankfurter, J., concurring); Standard Oil Co. v. United States, 337 U.S. 293, 314 n.17 (1949); *Hennessey*, 564 F.2d at 1152.

86 *Compare Prof'l Eng'rs*, 435 U.S. at 691 *and Bd. of Trade*, 246 U.S. at 238. *See also* discussion *infra* Part V.A.

87 *See Prof'l Eng'rs*, 435 U.S. at 691.

88 *See id.* at 684. Section 11 of the Code of Ethics provided: "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding." *Id.* at 683 n.3.

89 *Id.* at 684.

90 *Id.*

91 *Prof'l Eng'rs*, 435 U.S. at 684.

92 *Id.* at 687.

93 *Id.* at 687-88.

"give shape to the statute's broad mandate,"[94] the Court opined that "the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[95] Rather, the Rule "focuses directly on the challenged restraint's impact on competitive conditions."[96]

The Court concluded that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[97] In clarifying, it stated that the inquiry "is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."[98]

Ultimately, the Court held the restraint in question to be a § 1 violation.[99] It reasoned that while "the agreement among competitors to refuse to discuss prices with potential customers"[100] is not price fixing per se, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[101]

It is interesting that the Court used *Chicago Board of Trade* and 1977's *Continental T.V., Inc. v. GTE Sylvania Inc.*[102] as supporting precedent for its articulation of the Rule of Reason.[103] *Continental T.V.*, decided one year prior to *Professional Engineers*, is much closer to the spirit of the *Chicago Board of Trade* test—"[u]nder [the Rule of Reason] the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[104]

In one respect, *Chicago Board of Trade* and *Professional Engineers* are parallel since both advocate evaluating alleged restraints by "analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[105] However, the tests are incongruent because *Chicago Board of Trade* allows a defendant to justify a restraint[106] while *Professional Engineers* places a heavier burden on the defendant to prove

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94 *Id.* at 688.

95 *Id.*

96 *Id.* at 688.

97 *Prof'l Eng'rs*, 435 U.S. at 691.

98 *Id.* at 692.

99 *See id.* at 698-99.

100 *Id.* at 692.

101 *Id.*

102 433 U.S. 36 (1977).

103 *Prof'l Eng'rs*, 435 U.S. at 691. After stating that the inquiry is "whether the challenged agreement is one that promotes competition or one that suppresses competition," the next sentence is a direct quote of the Brandeis test. *See id.* (quoting *Bd. of Trade*, 246 U.S. at 238).

104 *Cont'l T.V.*, 433 U.S. at 49.

105 *Prof'l Eng'rs*, 435 U.S. at 692; *Bd. of Trade*, 246 U.S. at 238.

106 *See Bd. of Trade*, 246 U.S. at 238.

that the challenged conduct promotes competition to a greater extent than it suppresses it.[107]

IV. *CHICAGO BOARD OF TRADE* AND *PROFESSIONAL ENGINEERS* APPLIED TO THE NCAA

This Part explores how *Chicago Board of Trade* and *Professional Engineers* served as precedent for antitrust challenges to four NCAA antitrust cases: *Hennessey*, *Board of Regents*, *Law*, and *Worldwide Basketball*. Of the four, *Hennessey* is the only case for which *Professional Engineers* did not serve as controlling precedent, because it was decided one year prior.

A. *Hennessey*

Hennessey v. NCAA involved NCAA Bylaw 12-1 which limited the number of assistant football and basketball coaches each Division I school could employ on a full-time basis.[108] To comply with the bylaw, the University of Alabama reduced one assistant basketball and one assistant football coach to part-time status.[109] The two coaches, Hennessey and Hudson, brought an action seeking injunctive relief and treble damages under the theory that the bylaw constituted a "group boycott" under § 1 of the Sherman Act.[110]

Although the Court believed the bylaw created a situation more analogous to a "division of markets among conspirators,"[111] a per se violation, it applied the Rule of Reason because "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the profession antitrust concepts which originated in other areas."[112] Furthermore, "given the nature and purposes of the NCAA and its member institutions, this particular restraint . . . is not a per se violation of antitrust laws."[113]

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107 *See Prof'l Eng'rs*, 435 U.S. at 691. *See* discussion *supra* Part V.A-B.

108 *Hennessey*, 564 F.2d 1136, 1141 (5th Cir. 1977).

109 *Id.*

110 *Id.* at 1147, 1151.

111 *Id.* at 1151 (internal quotations omitted).

112 *Id.* at 1152 (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 n.17 (1975)).

113 *Id.* at 1152. In support of its assertion to apply the Rule of Reason to a seemingly per se violation, the Court noted that "[t]he 'Call Rule' . . . was clearly 'price fixing' and yet was, under the circumstances, not per se illegal." *Id.*

The Court, after applying the *Chicago Board of Trade* test verbatim, held that the bylaw was not an unreasonable restraint of trade under § 1.[114] First, it weighed the intent factor to note the record was "devoid of any evidence" that the bylaw was adopted by the NCAA "with intent to injure" coaches.[115] Second, it applied the motivation factor to hold the bylaw was created because "[c]olleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics."[116] It viewed the bylaw as a measure to "preserve and foster competition in intercollegiate athletics by curtailing . . . potentially monopolistic practices by the more powerful."[117] Turning to the actual or probable effects factor, the Court recognized that the bylaw might fail to help the NCAA reach its intended goals.[118] Still, the Court held the plaintiffs had the burden to prove the bylaw was unreasonable instead of the NCAA having the burden to prove it was reasonable.[119]

In recognizing the NCAA as a self-regulatory organization that needs to enact bylaws to serve the competitive and economic integrity of its competing member institutions, the Court recognized implicitly that restraints could be justified under the Rule of Reason. Such is evident in the Court's lengthy inquiry into the NCAA's purpose and intent in adopting the bylaw.

B. *Board of Regents*

The Court in *Board of Regents of the University of Oklahoma v. NCAA* applied the *Professional Engineers* Rule of Reason analysis.[120] The plaintiffs, the Universities of Oklahoma and Georgia, were members of the College Football Association ("CFA"), an association of major football-playing colleges within Division I of the NCAA.[121] The controversy involved the NCAA's television contract with broadcasters ABC and CBS, which gave each the right to broadcast a limited number of football games

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114 *Hennessey*, 564 F.2d at 1154.

115 *Id.* at 1153.

116 *Id.*

117 *Id.*

118 *Id.*

119 *See id.* at 1153-54.

120 *See* 468 U.S. 85, 103-20 (1984).

121 *See id.* at 89. At the time *Board of Regents* was decided, the CFA was comprised of five major conferences and "major football-playing independent institutions." *Id.* "The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure." *Id. See* discussion *infra* note 223 and accompanying text.

per season.[122] The plan also incorporated two-year appearance requirements and limitations on each network.[123] Specifically, during two-year periods, each network was required to televise games featuring eighty-two different schools with the added requirement that no school could appear on television more than six times.[124] Furthermore, member schools were not permitted to sell television rights "except in accordance with the plan."[125] Thus, in effect, the NCAA's television contract with ABC and CBS constituted a limit on price and output.[126]

In 1981, the CFA ignored the restriction and negotiated a contract with NBC,[127] which allowed a greater number of televised games and substantial revenues for each CFA member.[128] The NCAA responded by announcing that it would initiate disciplinary hearings against "any CFA member that complied with the [new] CFA-NBC contract."[129] The Supreme Court granted *certiorari* after the Court of Appeals affirmed the grant of a preliminary injunction preventing the NCAA from initiating such disciplinary proceedings.[130]

At the outset of its opinion, the Court acknowledged certain points regarding application of the Sherman Act to the NCAA. First, in deciding to apply the Rule of Reason to a facially per se violation,[131] the Court observed, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available

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122 *See Bd. of Regents III*, 468 U.S. at 91-94.

123 *See id.* at 94.

124 *See id.* Within the six appearances, there was additional limit on the number of nationally televised games to four. *Id.*

125 *Id.* at 94. "In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games." *Id.* at 93. Furthermore, the agreement "involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable." *Id.* at 93.

126 *See id.* at 99-100.

127 *See id.* at 94-95.

128 *See Bd. of Regents III*, 468 U.S. at 94-95.

129 *Id.* at 95.

130 *See id.* at 88. The appellate court held that the plan's "anticompetitive limitation on price and output was not offset by any procompetitive justification." *Id.* at 97-98. However, Judge Barrett dissented, arguing the plan was "designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions." *Id.* at 98 n.16 (quoting Bd. of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 707 F.2d 1147, 1163 (10th Cir. 1983) [hereinafter *Bd. of Regents II*]). Judge Barrett reasoned further, "[t]he restraints upon Oklahoma and Georgia and other colleges . . . with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement." *Id.* at 98 n.16 (quoting *Bd. of Regents II*, 707 F.2d at 1167).

131 *Id.* at 100. Justice Stevens stated: "Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *Id.* at 107-08.

at all."[132] Second, it recognized that the NCAA "would be completely ineffective if there were no rules on which the competitors agreed to create and define."[133] Notwithstanding these factors, the Court concluded that "[w]hile as the guardian of an important American tradition the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice."[134]

Turning to the Rule of Reason, the Court held that the NCAA's television contracts with CBS and ABC limited price and output in violation of § 1 of the Sherman Act.[135] In so doing, the Court rejected the NCAA's proffered procompetitive benefits which included the following: (1) the plan was a "cooperative 'joint venture' which assist[ed] in the marketing of broadcast rights;"[136] (2) the plan was designed in part to protect gate attendance;[137] and (3) the plan helps to maintain a competitive balance among Division I football teams.[138]

The Court evaluated the NCAA's procompetitive justifications in the order listed above. Regarding the first—the plan "assist[ed] in the marketing of broadcast rights"[139]—the Court validated the district court's finding that NCAA football games "could be marketed just as effectively without the . . . plan."[140] Furthermore, the plan failed to produce competitive efficiencies because it did not increase output and reduce prices.[141] The Court

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132 *Id.* at 101. Justice Stevens then quoted Judge Bork, "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." *Id.* (quoting ROBERT BORK, THE ANTITRUST PARADOX 278 (1978)).

133 *Id.* at 101.

134 *Bd. of Regents III*, 648 U.S. at 102 n.23. Although the Court cited numerous cases as authority for this assertion, for purposes of this Comment, the idea that "good motives will not validate an otherwise anticompetitive practice" can be traced directly back to *Chicago Board of Trade*. *See Bd. of Trade*, 246 U.S. at 238. In his dissenting opinion, Justice White was critical of the majority's treatment of the NCAA: "in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed." *Bd. of. Regents III*, 468 U.S. at 126 (White, J., dissenting).

135 *See Bd. of Regents III*, 468 U.S. at 120.

136 *Id.* at 113.

137 *See* discussion *infra* Part V.B.2.

138 *Bd. of Regents III*, 468 U.S. at 117.

139 *Id.* at 113.

140 *Id.* at 114 (citing Bd. of Regents of the Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276, 1306-08 (W.D. Okla. 1982) [hereinafter *Bd. of Regents I*]). Justice Stevens went on to state: "Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale." *Id.* at 115. "Since broadcasting rights to college football [games] constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors." *Id.*

141 *See Bd. of Regents III*, 468 U.S. at 114.

was most critical of the NCAA's reasoning for its second proffered pro-competitive justification—the plan helped to protect attendance at college football games.[142] Again, it agreed with the district court's finding that "there was no evidence to support that theory in today's market."[143] Furthermore, it held that the plan is "inconsistent with its original design to protect gate attendance,"[144] because it allows games to be broadcast "during all hours that college football games are played."[145]

Finally, although the Court conceded that the NCAA has a legitimate interest in "maintaining a competitive balance among . . . athletic teams,"[146] it did not agree that such interest justified the challenged regulations.[147] The argument was refuted by holding that the plan was insufficient to maintain competitive balance because it only restricts one source of revenue.[148] Furthermore, the Court opined that "[t]here is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue producing-activity."[149]

The Supreme Court's *Board of Regents* decision is perhaps the most relevant NCAA antitrust case today because it is the last NCAA antitrust case the Court decided. Furthermore, it was the first Supreme Court decision to apply the *Professional Engineers* Rule of Reason interpretation to the NCAA's role as self-regulator. As a result, future decisions invalidated NCAA self-regulatory activity that resulted in ancillary price and/or output restrictions.[150]

C. *Law*

Law v. NCAA is significant because the challenged NCAA Bylaw, 11.02.3, which limited annual compensation of Division I entry-level

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142 *See id.* at 115-117. *See* discussion *infra* Part V.B.

143 *Bd. of Regents III*, 468 U.S. at 116 (citing *Bd. of Regents I*, 546 F. Supp. at 1295-96, 1315).

144 *Bd. of Regents III*, 468 U.S. at 116.

145 *Id.* In a footnote, Justice Stevens quoted the district court's opinion which stated that ultimately the "plan . . . does not limit televised football." *Id.* at 116 n.59 (quoting *Bd. of Regents I*, 546 F.Supp. at 1296). "[U]nder the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season." *Id.* "[A] full nine hours . . . will . . . be shown . . . during a nine-to-twelve hour period on almost every Saturday." *Id.* "It can hardly be said that such a plan is devised . . . to protect gate attendance." *Id.*

146 *Bd. of Regents III*, 468 U.S. at 117.

147 *Id.*

148 *See id.* at 119.

149 *Id.*

150 *See, e.g.*, *Law*, 134 F.3d 1010 (10th Cir. 1998); *Worldwide Basketball II*, 273 F. Supp. 2d 933.

coaches to $16,000,[151] is analogous to Bylaw 12-1 challenged in *Hennessey*.[152] However, because *Board of Regents* was controlling precedent, the result was opposite of that in *Hennessey*.[153] The Court stated: "*Hennessey* predates . . . *Board of Regents*. The [Court] very well may have reached a different result . . . if it had the benefit of that precedent, because *Board of Regents* suggests a less deferential approach to the NCAA than the approach taken in *Hennessey*."[154]

Once again, the court tested a seemingly per se violation under the Rule of Reason by finding "certain products require horizontal restraints, including horizontal price-fixing, to exist at all."[155] Under the "shifting burdens of proof" test,[156] the NCAA proffered three procompetitive justifications for salary limits.[157] First, it reasoned that limiting one of the coaching positions to an entry-level position "will create more balanced competition by barring some teams from hiring" another experienced coach.[158] The Court rejected the defense because the NCAA failed to show evidence of the position being held by entry-level applicants or "that the rules will be effective over time in accomplishing this goal."[159] The NCAA's second assertion—the plan will help member schools cut costs, a necessity to maintain the competitive balance among athletic teams[160]—was similarly

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151 *See Law*, 134 F.3d at 1014.

152 *See Hennessey*, 564 F.2d at 1141 (involving an NCAA Bylaw that limited the number of full-time football and basketball coaches a member college could employ).

153 *See* discussion *infra* Part IV.A.

154 *Law*, 134 F.3d at 1021. The *Law* Court stated additional reasons why *Hennessey* was "not controlling": 1) "*Hennessey* . . . did not involve a naked restriction on price;" 2) the *Hennessey* Court placed the burden on plaintiffs to show the restraint was unreasonable while the plaintiffs in *Law* "only ha[d] burden of establishing anticompetitive effect" thus shifting the burden to the defendant to show procompetitive justification; and 3) "*Hennessey* is not Tenth Circuit precedent." *Id.*

155 *Law*, 134 F.3d at 1017; *see, e.g., Bd. of Regents III*, 468 U.S. at 101; Broad. Music, Inc. v. Columbia Broad., 441 U.S. 1, 23 (1979); *Hennessey*, 564 F.2d at 1152.

156 *See Law*, 134 F.3d at 1019. Under the test, "the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition." *Id.* If the plaintiff succeeds, "the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct." *Id.*

157 *Id.* at 1021.

158 *Id.* at 1022.

159 *Id.*

160 *Id.*at 1022-23. The NCAA was concerned with the fact that many less successful collegiate athletic programs felt pressure to "keep up with the Joneses" by increasing expenditures on "recruiting talented players and coaches." *Id.* at 1012. A report commissioned by the NCAA in 1985 found that forty-two percent of Division I schools reported deficits in their athletic program budgets averaging $824,000 per school. *Id.* Furthermore, athletic expenses from 1978 to 1985 rose more than one-hundred percent and fifty-one percent of Division I schools experienced a net loss in their basketball programs—an average of $142,000 per school. *Id.* at 1013.

rejected since no evidence was presented to prove such measures would be successful in reducing deficits reported by many colleges.[161]

Finally, the NCAA reasoned that the bylaw helped to maintain competitive equity among competing schools by "preventing wealthier schools from placing a more experienced [and] higher-priced coach in the position."[162] Such assertion was also rejected by the Court—the NCAA offered no proof "that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities."[163]

In sum, the Court's dismissal of all procompetitive justifications extends *Professional Engineers* and *Board of Regents* which placed heavy burdens on defendants to prove conclusively procompetitive effects to escape condemnation. Still, the most compelling aspect of *Law* is that after reevaluating the NCAA's justifications, the Tenth Circuit affirmed the district court's grant of summary judgment to the plaintiff coaches.[164]

D. *Worldwide Basketball*

Most recently, just as in *Hennessey*, *Board of Regents*, and *Law*, the Rule of Reason was applied to a seemingly per se violation—an output restriction—in *Worldwide Basketball*.[165] The facts surrounding *Worldwide Basketball* are unique because it involved non-member third parties,[166] as opposed to NCAA members, who sought to enjoin the NCAA from enforcing its Two in Four Rule.[167] The Two in Four Rule, NCAA Bylaw 17.5.5.4, which applies to men's college basketball teams, states as follows:

> An institution shall be permitted to participate in no more than one certified event during a given academic year and not more than two certified events every four years. Participation in a certified event shall count as a single contest in the institution's maximum contest limitations.[168]

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161 *See id.* at 1023.

162 *Id.* at 1024.

163 *Law*, 134 F.3d at 1024.

164 *Id.*

165 *See Worldwide Basketball II*, 273 F. Supp. 2d 933, 948 (S.D. Ohio 2003), *appeal docketed*, No. 03-4024 (6th Cir. 2004). The Court noted that in its prior opinion it addressed sufficiently the issue of whether to apply the per se or Rule of Reason analysis to the facts. *Id.* (citing *Worldwide Basketball I*, 2002 WL 32137511, at *7).

166 *See Worldwide Basketball II*, 273 F. Supp. 2d 933. The plaintiffs were several promoters of exempt college basketball tournaments, not members of the NCAA.

167 *See id.* at 936.

168 NCAA MANUAL, *supra* note 19, Bylaw 17.5.5.4, at 253.

The bylaw, which took effect prior to the 2000/2001 basketball season, limits at two the number of exempt tournaments[169] in which a team can appear over a four-year period.[170] Exempt tournaments, such as the Great Alaska Shootout, Coaches vs. Cancer Classic, Maui Invitational and Las Vegas Invitational,[171] are organized by the plaintiff promoters and typically take place before and during the regular college basketball season.[172] The term "exempt" means participation qualifies as one game on a school's schedule, although many tournament formats allow teams to compete in as many as four games.[173] Thus, despite the twenty-eight-game season limit, it

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169 Such exempt tournaments typically occur during November and December. The exempt tournaments are not to be confused with the season-ending NCA Tournament, known by fans as "March Madness," which consists of sixty-four teams and commences in March.

170 NCAA MANUAL, *supra* note 19, Bylaw 17.5.5.4, at 253.

171 Dick Vitale, *Glad 2-in-4 Tourney Rule Has Been Overturned,* ESPN.COM , Jul. 31, 2003, *at* http://msn.espn.go.com/dickvitale/vcolumnfexempttourneys.html [hereinafter Vitale, *Tourney Rule Has Been Overturned*]. Mr. Vitale also comments on the "David vs. Goliath matchups" that "don't normally take place during the season." *Id.* Such matchups, according to Vitale, give the mid-major teams, such as Ball State, the chance to "play the big boys on a neutral court." Dick Vitale, *Keep the Early Season Tournaments Alive,* ESPN.COM, Aug. 21, 2003, *at* http://espn.go.com/dickvitale/v-column030821exempt_tourneys.html [hereinafter Vitale, *Keep the Early Season Tournaments Alive*]. Vitale believes such tournaments, played at neutral sights, afford the only opportunity for smaller schools to play larger schools because "the big schools won't go for home-and-home series." *Id.* Note: a home-in-home series is one in which two teams play each other a total of two times in two years; once at each home court. Vitale, also mentioned specifically (in three different ESPN.com columns) the Cinderella story of Ball State beating UCLA and Kansas (both Big Six Conference schools) in the 2001 Maui Invitational. *See id.*; Vitale, *Tourney Rule Has Been Overturned*, *supra*; Vitale, *2-in-4 Turmoil Causes Scheduling Chaos, supra* note 1. Other articles mention the 1982 Cindarella story of Chaminade (a small school in Hawaii) which upset number one ranked Virginia. *See, e.g.*, Pat Forde, *Maui Invitational Notebook; Events Wary of Losing Teams Due to Exempt Rule*, THE COURIER-JOURNAL, Nov. 2, 2002, *available at* 2002 WL 103355787. Although such events are comparatively big news in the world of sports, it is difficult to imagine that Senator Sherman's antitrust crusade would result in shared headlines with stories about a college basketball coach's preference for mixed drinks. *See id.* Utah basketball coach Rick Majerus, who "spends 24 weeks in Maui every year," likes a drink called a "Lava Flow, which is piña colada with crushed strawberries" partly because "it's got an umbrella and a toy in it." *Id.* Similarly, Senator Sherman might be surprised to see an antitrust headline on the same newspaper page as a story about a Roman Catholic priest who was charged with involuntary manslaughter in the "death of a drunken Pitt football player who fell through a church ceiling after a cookout at which the priest was accused of serving alcohol to underage drinkers." *Priest Charged in Fall*, THE COMMERCIAL APPEAL, Aug. 28, 2003, *available at* 2003 WL 59708269.

172 *See Worldwide Basketball II*, 273 F. Supp. 2d at 937-38. The number of exempt events from the last seven college basketball seasons is as follows: sixteen in 1996/1997; nineteen in 1997/1998; twenty-two in 1998/1999; twenty-six events in 1999/2000; twenty-two events in 2000/2001; twenty-five events in 2001/2002; seventeen events in 2002/2003. *Id.* at 937. The numbers are a dramatic increase from the ten such tournaments scheduled during the 1994/1995 season. *See Worldwide Basketball I*, 2002 WL 32137511, at *2. The Two in Four Rule took effect prior to the 2000/2001 season. *Worldwide Basketball II*, 273 F. Supp. 2d at 935-38.

173 *See Worldwide Basketball I*, 2002 WL 32137511, at *1-2. The Preseason National Invitational

is possible for a school to play in thirty-one games if it appears in an exempt tournament featuring sixteen teams.

Many coaches, most of whom are opponents of the Two in Four Rule,[174] seek actively to secure a spot in an exempt tournament for the following reasons: (1) players enjoy the tournament atmosphere and traveling to locations such as New York, Las Vegas, Alaska, and San Juan;[175] (2) participation in a tournament helps a team build its RPI ranking;[176] (3) it gives teams a chance to compete in highly competitive situations early in the season;[177] (4) regular appearances in such tournaments help coaches recruit highly sought after high-school athletes. Likewise, the plaintiff promoters find it lucrative to organize them since ticket demand is usually high and there is a possibility for national television coverage.[178] In short, the circumstances surrounding the exempt tournaments and the implementation of the Two in Four Rule provided fertile ground for another antitrust suit against the NCAA.

Tournament (NIT), played over the Thanksgiving holiday at Madison Square Garden in New York City, is a sixteen-team single elimination tournament with one consolation game. *See* NCAA MANUAL, *supra* note 19, Bylaw 17.5.3.1(d), at 251. Thus, four of the sixteen teams that appear in the Preseason NIT will play four games although such participation only counts as one game on a team's twenty-eight-game regular-season schedule.

174 Jim Boeheim, head coach of 2003 National Champion Syracuse University, believes that the exempt tournaments are "the best thing that's happened to college basketball." Michael Dobie, *Exempt Tourneys Play by New Rules*, NEWSDAY, Nov. 13, 2002, *available at* 2002 WL 102169307. Boeheim went on to state, "I don't know why anybody ever initiated a movement to get rid of them." *Id.* "I know why, because they're idiots, but other than that there is no logical reason." *Id.* Noted basketball commentator and former coach Dick Vitale states that there's "[n]othing like some mega-games to kick off the start of the season." Vitale, *Tourney Rule Has Been Overturned, supra* note 171.

175 According to Vitale, the exempt tournament schedule "gives the opportunity for major programs to travel and perform in Hawaii, Alaska, and/or New York on a regular basis." Vitale, *Tourney Rule Has Been Overturned, supra* note 171. "Kids get an opportunity to have a cultural experience." *Id.* Kelvin Sampson, head coach at Oklahoma, states: "[e]very coach in this country, the one venue they would love to take their team to play it's Madison Square Garden." Andrew Gross, *A No-Win Situation: NCAA Regulations Force Tournament to Stop Awarding Title*, JOURNAL NEWS, Nov. 14, 2002, *available at* 2002 WL 101879806 [hereinafter Gross, *A No-Win Situation*]. "It's one of those hallowed places in college basketball." *Id.*

176 The Rating Percentage Index (RPI) is an index that helps the NCAA to select teams to appear in the NCAA Tournament. *See Ratings Percentage Index*, ESPN.COM, Jan. 5, 2004, *available at* http://espn.go.com/ncb/rankings/rpi.html. Dick Vitale states, "[y]es, that magical RPI is influenced because of such an opportunity." Vitale, *Tourney Rule Has Been Overturned, supra* note 171.

177 Boeheim states, "It's a tremendous loss to lose these events. We would have had another game in the regular season and two games in New York." Gross, *A No-Win Situation*, *supra* note 175. According to Vitale, "[s]o many exempt tournaments have provided interesting showdowns in the past." Vitale, *2-in-4 Turmoil Causes Scheduling Chaos, supra* note 1.

178 *Worldwide Basketball I*, 2002 WL 32137511, at *8.

The Court followed *Professional Engineers* in applying the Rule of Reason test: "Plaintiffs bare the initial burden of showing that the . . . Rule has a substantially adverse effect on competition. If this burden is met, the Defendant must then show the procompetitive virtues of the agreement."[179] After defining the relevant market as "school-scheduled games,"[180] the Court prefaced its discussion of the bylaw's effect on competition by stating, "[p]laintiffs must show . . . a concerted attempt . . . to reduce output and drive up prices or otherwise reduce customer welfare."[181] The Court held that the Plaintiffs proved that the output restriction reduced welfare of college basketball fans[182] because (1) the number of exempt tournaments decreased from year two to year three of the bylaw,[183] and (2) the total number of school-scheduled games also decreased in the last year by eighty-five games.[184] Despite the NCAA's argument that fans are not af-

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179 *Worldwide Basketball II*, 273 F. Supp. 2d at 948.

180 *Id.* at 944. NCAA bylaws allowed Division I schools to schedule as many as eleven of the twenty-eight slots within their schedule. *Id.* at 945. Instead of defining the relevant market as "exempt tournament games" or "regular-season games," the Court reasoned that since the exempt games count as school scheduled games, "events that are scheduled by the schools themselves are close substitutes for each other." *Id.* at 949.

181 *Worldwide Basketball II*, 273 F. Supp. 2d at 950 (citing Consol Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 292-93 (5th Cir. 1988)).

182 *Worldwide Basketball II*, 273 F. Supp. 2d at 951. The Court noted, "[i]t is undisputed that school-scheduled games, and certified events in particular, are very popular among fans." *Id.*

183 *Id.* at 950. There were twenty-five events in 2001/2002 and seventeen in 2002/2003. *Id.* The Court also noted that eleven events were cancelled in 2002/2003 and "five events went forward with a reduced field." *Id.* Furthermore, "[t]he evidence shows that even fewer certified events will go forward in the upcoming year." *Id.* Thirteen exempt tournaments were originally scheduled for the 2003/2004 season although one was cancelled. *See Winter-Spring 2003-04 Bylaw 30.10 Certified Events*, NCAA.ORG, *available at* http://www1.ncaa.org/membership/membership_svcs/certified_events-leagues-contests/bylaw30_lists/WinterSpring_03-04. It is important to note the district court originally held in abeyance the promoters' request for permanent injunction. *See Worldwide Basketball I*, 2002 WL 32137511, at *18. The Court held, "it is premature to assess whether Plaintiffs have satisfied their initial burden . . . to determine whether the Two in Four Rule will have a substantially adverse effect on the output of certified event games in years three and four." *Id.* at *14. In a footnote following the preceding comment, the Court asserted how the Plaintiffs might prevail in the future by stating, "[i]f the Plaintiffs are unable to schedule teams *and* there is a reduction in output of certified events, then the Court will revisit the issue." *Id.* at *14 n.9 (emphasis in original). In light of the litigation battle, and more specifically the Court's statement, it is impossible to assess how many tournaments might have been scheduled had the court dismissed flatly the Plaintiff's claim. It stands to reason that Plaintiffs' efforts to schedule competitive tournaments may have been diminished since an overall reduction would mean another chance in court to enjoin the NCAA from enforcing the rule. Herein lies the NCAA's predicament. To avoid liability under § 1 of the Sherman Act and to accomplish its goal of fostering competitive equity in men's college basketball, the NCAA needs the promoters to schedule more non-power conference teams so that the total number of tournaments does not decline. However, the promoters have the incentive to reduce the number of tournaments in the short-term so that they might prevail in enjoining the NCAA from enforcing the Two in Four Rule.

184 *Worldwide Basketball II*, 273 F. Supp. 2d at 950. After debate over the accuracy of the figures,

fected adversely when the approximately 5,000 Division I games played is reduced by eighty-five, the Court reasoned that the reduction is "not insubstantial."[185]

The NCAA asserted three procompetitive justifications. First, it argued that the bylaw "furthers the goals of competitive equity between large and smaller schools."[186] The Court answered that fewer exempt events means fewer "non-power conference teams"[187] will participate, but such teams actually played in "fewer exempt games in 2002-03 than in previous years."[188] The Court also rejected the NCAA's second justification: the bylaw "furthers the goal of students avoiding missed class time."[189] The Court reasoned that the bylaw has "little, if any," effect on missed class time, because most certified events are played during the Thanksgiving and Christmas holidays.[190] Furthermore, the bylaw affects only five percent of the total Division I games played and "[i]f student welfare were the justification, to be effective, the [R]ule would certainly have to regulate the other [ninety-five percent] of the games played."[191]

Finally, the NCAA suggested the bylaw effectively "makes a more uniform season by stabilizing schedules and preventing an excessive number of games from being played."[192] In rejecting the NCAA's argument, the Court stated as follows: "It is disingenuous for the NCAA to claim that the Two in Four Rule, which has reduced the number of exempt games, was intended to promote student welfare by limiting the number of games, while simultaneously increasing the overall number of games each team may play [and schedule]."[193]

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the Court determined there was a reduction of eighty-five school-scheduled games from the 2001/2002 season to the 2002/2003 season. *Id.* There were 2,047 games in 2001/2002 and 1,962 in 2002/2003. *Id.*

185 *Id.* at 951.

186 *Id.* at 952.

187 *Id.* at 953. According to Plaintiffs' expert witness, Dr. Tollison, the six power conferences, which include sixty-eight teams, are as follows: ACC, Big East, Big Ten, Big 12, SEC, and the Pac-10. *Id.* at 942 n.9. The Big Six include noted basketball powerhouses such as Duke, Michigan, UCLA, North Carolina, Indiana, and Kansas.

188 *Id.* at 953. *See* discussion *infra* Part V.B.2.

189 *Worldwide Basketball II*, 273 F. Supp. 2d at 952.

190 *Id.* at 953.

191 *Id.* at 954.

192 *Id.* at 952.

193 *Id.* at 954. The Court is referring to another NCAA bylaw that raised the number of games on a school's schedule from 27 to 28. *See* NCAA MANUAL, *supra* note 19, Bylaw 17.5.5.1, at 251. The bylaw was enacted simultaneously with the Two in Four Rule. Thus the Court pointed to the total number of Division I games played over the last four seasons: 4,911 in 1999/2000 (prior to the rule taking effect); 4,930 in 2000/2001; 5,043 in 2001/2002; and 4,974 in 2002/2003. *Worldwide Basketball II*, 273 F. Supp. 2d at 954. Again, the Court's reasoning is misleading because it simply measures the total

In rejecting all of the NCAA's procompetitive justifications, the Court's opinion serves as another challenge to the NCAA's "authority as standard-setter for collegiate athletic sports."[194] In conclusion, *Hennessey*, *Board of Regents*, *Law*, and *Worldwide Basketball* establish the following: (1) facially per se violations under § 1 of the Sherman Act will be tested under the Rule of Reason partly because the NCAA is an "industry in which horizontal restraints on competition are essential if the product is to be available at all;"[195] (2) "the NCAA's motives must be accorded a respectful presumption of validity . . . [although] good motives will not validate an otherwise anticompetitive practice;"[196] and (3) application of the Rule of Reason, in its current form, resulted in different outcomes against the NCAA than did application of the *Chicago Board of Trade* test.

V. ANALYSIS

The Sherman Act's § 1 aims to protect competition by punishing those who conspire illegally or combine to restrict the natural working of competitive markets.[197] The Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[198] With this goal in mind, the Rule of Reason was designed to "give shape to the statute's broad mandate"[199] by evaluating certain restraints on competition within the context of a given market. Specifically, the Rule gives the Act "flexibility and definition"[200] by declaring illegal only unreasonable restraints on competition, thereby precluding "every" restraint from being condemned.[201] The Rule in its current form, applied in cases concerning certain NCAA bylaws and contracts negotiated with third parties, has led to unnecessarily harsh results against the NCAA.

This Part argues that the *Chicago Board of Trade* test explicitly provides for justification of ancillary anticompetitive tendencies if, after inquiry into certain factors, a court sees fit to categorize such activity under a

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number of games as its basis. *See* discussion *infra* Part V.C.3.c.

194 *Worldwide Basketball II*, 273 F. Supp. 2d at 953.

195 *E.g., Bd. of Regents III*, 468 U.S. at 101; *Plymouth Whalers*, 325 F.3d at 719; *Law*, 134 F.3d at 1017; *Worldwide Basketball II*, 273 F. Supp 2d at 953.

196 *Bd. of Regents III*, 468 U.S. at 101 n.23. *See also Bd. of Trade*, 246 U.S. at 238; *Worldwide Basketball II*, 273 F. Supp. 2d at 953.

197 *See supra* note 36 and accompanying text.

198 *Prof'l Eng'rs*, 435 U.S. at 695 (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951)).

199 *Prof'l Eng'rs*, 435 U.S. at 688.

200 *Id.*

201 *See* discussion *supra* Part I.A.

regulatory category. Furthermore, it asserts that the *Chicago Board of Trade* test was implicitly altered by *Professional Engineers* which requires defendants to prove that alleged restraints affirmatively promote competition enough to outbalance anticompetitive tendencies. Accordingly, this Part criticizes the current form of the Rule as applied to the NCAA by examining specific aspects of the *Board of Regents* and *Worldwide Basketball* opinions. Finally, this Part proposes that the Supreme Court should consider adopting an alternative Rule of Reason inquiry for controversies involving self-regulatory organizations that combine horizontally out of necessity for their products to exist. In so doing, this Part articulates an alternative Rule of Reason test and applies it to *Board of Regents*, *Law*, and *Worldwide Basketball*.

A. *Justifying an Alleged Restraint Under Chicago Board of Trade and Professional Engineers: The Tests Distinguished*

The *Professional Engineers* and *Chicago Board of Trade* Rule of Reason tests are significantly different.[202] The irreconcilable decisions in *Law* and *Hennessey* are evidence of this fact.[203] Despite both cases involving strikingly similar facts, the results were opposite since each applied a different form of the Rule of Reason test. Although the court in *Law* believed that the *Hennessey* court tried to "free the NCAA . . . from its burden of showing that the procompetitive justifications . . . outweigh its anticompetitive effects,"[204] it stated that "*Hennessey* predates . . . *Board of Regents* [and] the Fifth Circuit very well may have reached a different result . . . if it had the benefit of that precedent, because *Board of Regents* suggests a less deferential approach to the NCAA than the approach taken in *Hennessey*."[205]

Unlike *Professional Engineers*, decided in 1978, *Hennessey*, decided in 1977, applied correctly the *Chicago Board of Trade* test. The Court in the *Chicago Board of Trade* articulated a Rule of Reason test that created two categories into which courts ultimately compartmentalized challenged restraints of trade: those that "merely regulate[]," [206] (reasonable and legal) and those that "suppress or even destroy competition"[207] (undue, unreasonable, and illegal). The Court, unlike in *Professional Engineers*, chose not to place a heavy burden on the defendant to prove affirmatively that procom-

202 *See* discussion *supra* Part III.A-B.
203 *See* discussion *supra* Part IV.A.,C.
204 *Law*, 134 F.3d at 1021.
205 *Id.*
206 *Bd. of Trade*, 246 U.S. at 238.
207 *Id.*

petitive benefits resulted from the alleged restraint. It realized that to do so would be contrary to the Sherman Act's purpose. Instead, by articulating the two categories of restraints, the Court provided that ancillary restraints could be justified if, on balance, such restraints fit more closely into the regulatory, rather than the suppressive, category.

The *Chicago Board of Trade* test is of particular significance when applied to NCAA bylaws. Although the Court obviously never considered the NCAA when it articulated the Rule of Reason test, it is significant that the test was established in a case involving another self-regulating entity, the *Chicago Board of Trade*. The Court believed that such entities, when establishing rules and regulations for their members, should be afforded a certain amount of flexibility under the Sherman Act. Although most alleged damaging activity caused by self-regulating groups overlaps both categories, Justice Brandeis intended that Courts apply certain relevant factors to place the challenged activity into one of the two categories. The three factor groups—(1) those regarding the business to which the restraint applies,[208] (2) those which focus on the restraint and its possible or actual influence on the business,[209] and (3) those concerning the intent, motivation and purpose of the defendant in implementing the alleged restraint[210]—are tools to assist the Court in placing the conduct in either of the two categories.

Arguably the most important factors concerned the defendant's intent.[211] Because Sherman Act § 1 violations must satisfy three elements—(1) there is a conspiracy or combination (2) in restraint of trade (3) involving interstate commerce[212]—the defendant's intent was central to the Court's test because it allowed for an otherwise illegal restraint to be reasonable, and thus justified, under the second prong. The Court recognized the significance of the defendant's intent because all self-regulating organizations satisfy automatically the combination prong of the test. Thus, they are disadvantaged by the test regardless of the presence of a conspiracy. In affording such organizations a fair chance at surviving a Rule of Reason inquiry, the Court believed that "knowledge of intent may help the court to interpret facts and to predict consequences."[213] Therefore, Brandeis implied

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208 *See Id.* This category includes "the facts peculiar to the business to which the restraint is applied; [and] its condition before and after the restraint was imposed." *Id.*

209 *See Id.* This includes "the nature of the restraint and its effect, actual or probable[,] [t]he history of the restraint [and] the evil believed to exist." *Id.*

210 *See Bd. of Trade*, 246 U.S. at 238. This includes "the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." *Id.*

211 *See id.* at 237-38. In the opinion, inquiry into the defendant's intent formed the basis for reversing the district court's decision to strike from the record "allegations concerning the [Board of Trade's] purpose of establishing the regulation." *Id.*

212 *See, e.g.*, *Worldwide Basketball II*, 273 F. Supp. 2d at 947-48 (citing *Law*, 134 F.3d at 1016).

213 *Bd. of Trade*, 246 U.S. at 238.

that for much of self-regulation, a defendant's pure motives would usually produce or predict de minimus or justifiable restraints on competition while bad intent would tend to produce or predict a significant unjustifiable adverse effect, thus placing it in the destructive to competition and illegal category.

The *Professional Engineers* Rule of Reason test emerged due to a slight misinterpretation of the *Chicago Board of Trade* decision. Although *Professional Engineers* agreed that "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,"[214] the Court nonetheless articulated an interpretation of the Rule of Reason that is nearly as inflexible as the statute's language. The Court believed that the holding of *Chicago Board of Trade* validated the alleged restraint (the "Call Rule") because it had a "positive effect on competition."[215]

Although the *Chicago Board of Trade* opinion mentioned explicitly some of the Call Rule's positive effects on "market conditions,"[216] it is imperative to distinguish two crucial aspects of the decision. First, the test allows a restraint that has anticompetitive effects to be declared legal even if it fails to produce procompetitive effects. The Court had the opportunity to validate the Call Rule while creating a standard similar to *Professional Engineers* but it chose not to do so. Instead, it created a much more realistic test that reflects the idea that antitrust laws should not condemn "every" anticompetitive restraint. Rather, justifiable restraints, mainly rules and regulations created by self-regulating entities, should be afforded flexibility under the Act.

The second noteworthy aspect is the opinion's final paragraph. It reiterated the nature of self-regulating entities by stating, "nearly every trade organization imposes some restraint upon the conduct of business by its members."[217] The Court explained further that "[t]hose relating to the hours in which business may be done are common."[218] Not once in the opinion's conclusion does it mention that the Call Rule had procompetitive effects that outbalanced the restraint. Rather, it speaks of justifications for restrictive rules promulgated by self-regulating entities. In this respect, the decision's conclusion is consistent with the Rule of Reason test it articulated.

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214 *Prof'l Eng'rs*, 435 U.S. at 688.

215 *Id.* at 694 n.19.

216 *Bd. of Trade*, 246 U.S. at 240-41. *See supra* note 84.

217 *Bd. of Trade*, 246 U.S. at 241.

218 *Id.*

B. *The Difficulty In Applying the Professional Engineers Test to NCAA Cases*

This Part analyzes the inevitable obstacles the courts faced in applying the *Professional Engineers* test to *Board of Regents*, *Law*, and *Worldwide Basketball*. First, it criticizes the Court's strained attempt in *Board of Regents* to incorporate an implied exception to the procompetitive benefits inquiry. Such exception was similarly recognized in *Law* and *Worldwide Basketball*. Second, this Part examines the courts' misapplication of the exception in *Board of Regents* and *Worldwide Basketball*.

1. The Implied Exception

In *Board of Regents*, the Court realized the *Professional Engineers* test's flaw as applied to the NCAA, so it incorporated an implied exception. Since the "great majority of the NCAA's regulations enhance competition among its members," the Court gave the NCAA an opportunity to prove procompetitive effects, not directly in the market, but indirectly by proving enhanced competition among members.[219] "The hypothesis that legitimates the maintenance of competitive balance [among member schools] as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product."[220] The implied exception reveals the Court's acknowledgment that the NCAA, as the regulator of amateur collegiate athletic competition, is a unique entity in antitrust law and should be afforded "ample latitude to play that role."[221]

Although reasonable on its face, the implied exception creates two problems. First, in allowing the court to decide what promotes competition among member schools, the court becomes the de facto NCAA Rules Chairman. Instead of taking a deferential approach to the NCAA in its role as self-regulator, the court occupies unnecessarily and unfairly a position that allows it to evaluate the success of NCAA bylaws. Second, a characteristic of many combinations is that enhanced competition among firms benefits the market and consumers. However, that standard does not necessarily apply to the NCAA and the market for its products—what is beneficial for a majority of schools might not be desired by a majority of consumers. Many of the NCAA's consumers, fans of schools with disproportionately

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219 *Bd. of Regents III*, 468 U.S. at 103. The Court stated, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id.* at 117.

220 *Id.* at 119-20.

221 *Id.* at 120.

successful athletic programs, do not want parity—enhanced competition among competing schools. Rather, they want to see their schools have a competitive advantage over others. They want to see their schools appear on television every Saturday. They want their schools to win more games, compete for national championships, recruit better athletes, and keep the cycle going. Likewise, the Court believes the casual fan wants to see games featuring the better teams in the nation.[222] But, the less dominant schools can only hope to compete if the NCAA sets restrictions on its product. For example, since the advent of the Bowl Championship Series ("BCS"), no team outside the BCS coalition has been permitted to play in a BCS Bowl.[223] Undoubtedly, since an invitation to a BCS bowl game helps ensure the success of a school's football program, fans of BCS conference schools would prefer to keep the status quo.

2. How Does the Exception Work With the Procompetitive Benefits Burden?

In *Board of Regents*, the Court rejected the NCAA's procompetitive justification that the television plan was designed in part to protect live gate attendance.[224] In so doing, the Court reasoned that there is "no evidence to support that theory in today's market."[225]

Although the NCAA's assertion is difficult to prove affirmatively under the test, its concern is valid nonetheless. The Court recounted that in the 1950s, the NCAA created a Television Committee to investigate the effect that college football television broadcasts had on live attendance.[226] The Committee concluded that "television . . . [had] an adverse effect on college football attendance, and unless brought under some control, threatens to

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222 *Cf. id.* at 106 n.29 (quoting *Bd. of Regents I*, 546 F. Supp. at 1294).

223 *On the Issue of Fundamental Fairness and the Bowl Championship Series (BCS) Before the House Judiciary Comm.* (2003) (statement of Steve Young, former NFL football player), *available at* http://www.house.gov/judiciary/young090403.htm (last visited July 29, 2004) [hereinafter Steve Young]. Steve Young stated, it is "clear to even the casual observer that the BCS represents a powerful combination of a small number of schools which have created a powerful barrier to entry whose purpose is to exclude all non-members . . . from any meaningful participation in post-season play." *Id.* The BCS coalition, featuring sixty-three teams, is comprised of Notre Dame and teams from the following power conferences: *ACC*, Big East, Big 10, Big 12, Pac-10, and SEC. *See* Dennis Dodd, *BCS Kicks Off a Fifth Bowl, Title Game for Consideration*, Apr. 30, 2003, CBS.SPORTSLINE.COM, Apr. 30, 2003, *at* http://www.cbs.sportsline.com/collegefootball/story/6345606 (last visited July 29, 2004). Currently, the BCS features four bowl games, the Rose, Sugar, Fiesta, and Orange. *Id.* Each season, the winners of the six conference championships are guaranteed a slot in a BCS bowl. *See id.* at *passim*.

224 *Bd. of Regents III*, 468 U.S. at 115-16. *See* discussion *supra* Part IV.B.

225 *Id.* at 116.

226 *Id.* at 89-90.

seriously harm the nation's overall athletic and physical system."[227] Furthermore, "[d]uring each of the succeeding five seasons, studies made by the NCAA tended to indicate" the same results."[228] Originally, the NCAA was concerned partially that gate attendance at a given football game could suffer if fans were able to stay at home to watch it on television.[229]

At the time *Board of Regents* was decided, the NCAA's concern was primarily that "fan interest in . . . televised game[s] may adversely affect ticket sales for games that will not appear on television."[230] Because *Board of Regents* declared that the NCAA's television contract violated antitrust laws,[231] there are no longer similar restrictions. The result validates the NCAA's fears—an overabundance of quality televised games featuring the country's most powerful teams could result in fans staying home rather than going to a local stadium to see a non-televised game that does not feature powerful teams.

For example, the Washington, D.C. area college football television schedule for Saturday, November 1, 2003 featured a total of sixteen games (thirteen games without paying for ABC/ESPN's Pay-Per-View) of which included thirteen of the Associated Press' Top 25 ranked teams.[232] The televised games included:[233] (14) Oklahoma State at (1) Oklahoma; (5) Florida State at Notre Dame; (6) Washington State at (3) USC; (2) Miami at (10) Virginia Tech; (4) Georgia at (23) Florida; and (9) Michigan State at (11) Michigan.[234] Logically speaking, gate attendance at such games is not the NCAA's primary concern as the games were certain to be sellouts or near sellouts. Rather, the concern is that the plethora of high-quality televised games will deter fans from attending comparatively less interesting

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227 *Id.*

228 *Id.* at 90.

229 *Cf. Bd. of Regents III*, 468 U.S. at 89. In 1938, the University of Pennsylvania televised one of its home games and all six televisions sets in Philadelphia were tuned to the game. *See id.*

230 *Id.*

231 *Id.* at 120.

232 *See Weekend on the Air*, WASH. POST, Oct. 31, 2003, at D9 [hereinafter WASH. POST]; *On TV This Weekend*, USA TODAY, Oct. 31, 2003, at C3 [hereinafter USA TODAY]; *NCAA Division I-A: AP Top 25*, ESPN.COM, Oct. 31, 2003, *available at* http://sports.espn.go.com/ncf/rankings?poll=1&week=1 [hereinafter *AP Top 25*] (last visited March 31, 2004).

233 The parenthetical numbers represent the schools AP ranking at the time the games were played. *See AP Top 25*, *supra* note 232.

234 *See* WASH. POST, *supra* note 232; *AP Top 25*, *supra* note 232. The schedule reminds the author of his time spent as an apprentice broker at a Wall St. investment banking firm. Every Friday morning, he and his friend Chris (nicknamed "Baywatch" because he was a Santa Monica, California native) bought copies of The New York Post and The Daily News from a street vendor and brought them back to their office to see which college football games would appear on television the following day. Countless times, "Baywatch" would look at the schedule and utter, "Hey man, once again there's no need to leave the house."

matchups they might otherwise attend but for the compelling television schedule. For example, the sixteen televised games likely lead to diminished attendance at the following games: Hofstra (1-7) at William & Mary (2-7); Fresno State (4-4) at SMU (0-8); and Middle Tennessee (2-6) at Utah State (2-6).[235] However, proving loss of attendance is cost prohibitive and logistically impossible.

At the time *Board of Regents* was decided, there were 187 Division I football teams,[236] most of which rarely appeared on national television. The decision to limit the number of national television appearances is sensible and would likely be justified under the *Chicago Board of Trade*. Likewise, because the Court applied the exception, the NCAA's television contract should also have been justified under the Rule of Reason in its current form.

In *Worldwide Basketball*, as it did in *Board of Regents*, the NCAA asserted that its Two in Four Rule "furthers the goals of competitive equity between large and smaller schools."[237] In rejecting the justification, the court reasoned that the bylaw had the opposite effect since there are fewer exempt tournaments and non-power conference teams (non-Big Six conference teams)[238] actually "played in substantially fewer [school-scheduled games] in 2002-03 than in the previous years."[239] Aside from failing to state that number, the court's measurement is flawed for two reasons. First, since it declared the relevant market to be "school-scheduled games," the number of exempt tournament games played has little relevance since exempt tournament games only represents a submarket of the relevant market. Second, even if the court was justified in measuring numbers pertaining to exempt tournaments, it is senseless to measure the total number of available tournament slots and/or games played by non-power conference teams when inquiring whether the bylaw furthers competitive equity. Doing so measures the success of non-power conference teams within the tournaments since certain formats allow teams to play as little as one or as many as four games depending how far they advance. The more relevant number is the percentage of exempt tournament appearance slots available to power conference teams compared with slots available to non-power conference teams.

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235 *See* WASH. POST, *supra* note 232 (listing games played, not supporting that there was diminished attendance); USA TODAY, *supra* note 232 (listing games played, not supporting that there was diminished attendance).

236 *Bd. of Regents III*, 468 U.S. at 89.

237 *Worldwide Basketball* II, 273 F. Supp. 2d at 952.

238 *See supra* note 187.

239 *Worldwide Basketball II*, 273 F. Supp. 2d at 953.

The numbers suggest that the bylaw accomplished its purpose. Since the bylaw allows each team to play in two tournaments every four years, there were 136 exempt tournament slots available to the 68 Big Six teams during the bylaw's first four seasons.[240] They used 92 of their 136 slots within the first two years, during which 47 exempt tournaments were played.[241] To make matters simple, suppose an average of 8.33 teams played in each of the 47 tournaments.[242] Thus the total slots available to all teams would be 391. The first two seasons resulted in the Big Six taking 24% of the available slots (92 of 391 slots) while non-power conferences used 76% (299 of the 391 total slots). Since the Big Six teams used 92 of their four-year allotment of 136 in the first two years, they had only 44 open slots remaining during years three and four of the bylaw. Because there were 29 scheduled events during years three and four, there were 241 total available slots for all teams (based on an average of 8.33 teams per tournament). The result is that Big Six teams used at most 18% (44 of 241 slots) of the total available slots while non-power conferences used 82% (197 of 241 slots).

Therefore, the statistics indicate that in years three and four of the bylaw, non-power conferences team appearances at exempt tournaments increased by eight percent while Big Six appearances decreased by twenty-five percent. Consequently, the bylaw helped to foster competitive equity between Big Six and non-power conference teams. Most importantly, the bylaw prevents a scenario where nearly all of the Big Six teams appear yearly in exempt tournaments. Given the popularity of the Big Six conferences, such a scenario is foreseeable.

C. *An Alternative Rule of Reason Test*

1. Why Is a Modified Test Appropriate?

The NCAA is a horizontal combination. That is fact. However, it was not formed with evil intent to restrain competition. Rather, like many others, most notably professional sports leagues, it is a self-regulating entity in

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240 *See Worldwide Basketball I*, 2002 WL 32137511, at *8.

241 *Worldwide Basketball II*, 273 F. Supp. 2d at 938.

242 In the 2003-04 season, there were twelve exempt tournaments averaging 8.33 slots per tournament. *See 2003 Preseason Tournaments*, ESPN.COM, Nov. 17, 2003, *at* http://sports.espn.go.com/ncb/news/story?id=1642612 (last visited July 29, 2004) [hereinafter *2003 Preseason Tournaments*]. To make matters simple this Comment supposes each tournament over the last four years averaged the same number of slots.

an "industry in which horizontal restraints on competition are essential if the product is to be available at all."[243] Although the Rule of Reason in its current form considers the unique characteristics of such combinations,[244] the Rule's application can result in unnecessarily harsh rulings against such organizations, specifically, the NCAA. Mainly, since such combinations were not created with an evil eye toward the competitive market, the Supreme Court should consider relaxing the current Rule of Reason test to compensate accordingly. This Part focuses on why one such organization, the NCAA, is unique.

The NCAA itself does not operate in a free market. The essence of amateur athletic competition requires the NCAA to operate in a clearly defined limited environment. A traditional free market would allow schools to compensate athletes according to their true financial worth. Likewise, schools would be permitted to shower deserving athletes with luxuries such as gifts, apartments, and fancy cars. Consequently, the unique environment in which the NCAA regulates reveals the difficulty courts face in reconciling it with the current Rule of Reason test, which applies uncompromisingly free market concepts.

The NCAA is not a ruthless corporate predator. Rather, it exists to "enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity."[245] There is little doubt that intercollegiate sporting events are enormously popular nationwide. There is also little doubt that the NCAA could ensure higher profits for the nation's more popular athletic programs if it wished to do so.

Absent prohibitive regulation, basketball programs from schools such as Duke, Michigan, and Kansas, would be invited to, and appear in, more than one exempt basketball tournament per season. Absent regulation, a competitive market could conceivably support a powerful team competing in greater than forty games per season. Likewise, if the NCAA formats a college football playoff system to determine a national champion, the revenues could be staggering. However, it is easy to see how such a competitive market, one without a player draft or a salary cap, could leave lesser-known programs defenseless. Worse still, absent regulation, colleges would be tempted to dissolve unprofitable athletic programs in favor of allocating

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243 *Bd. of Regents III*, 468 U.S. at 101. The Court also concluded: "the NCAA plays a vital role in enabling college football to preserve its character, and as a result, enables a product to be marketed which might otherwise be unavailable." *Id.* at 102.

244 *See id.* at 101-02; *see also Law*, 134 F.3d at 1017-18; *Worldwide Basketball II*, 273 F. Supp. 2d at 953.

245 *Bd. of Regents III*, 468 U.S. at 122 (White, J., dissenting) (quoting Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 558 F. Supp. 487, 494 (D.D.C. 1983)).

nearly all of their resources to programs that provide the greatest chance of turning profits. However, such motives are not part of the NCAA mentality. Rather, "[b]y mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere."[246]

2. The Proposed New Test

The proposed inquiry begins with the usual burden on the plaintiff to establish that the conduct under review has a substantial adverse effect on competition.[247] Under the proposed test, like all § 1 inquiries, the plaintiff must show: "(1) there is an agreement, conspiracy, or combination between two or more entities; (2) the agreement is an unreasonable restraint of trade; and (3) the restraint affects interstate commerce."[248] In cases in which the NCAA is the defendant, the first prong is typically not contested,[249] because "the NCAA Bylaw [or negotiated contract] can be seen as the agreement and concert of action of the various members of the association, as well as that of the association itself."[250] Similarly, the interstate commerce prong is satisfied because "the NCAA and its member institutions are, when presenting amateur athletics to [the] ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises."[251]

Under the proposed test, the conspiracy or combination prong requires courts to determine whether a horizontal combination is necessary for the product to exist. If there is an affirmative finding, the court proceeds to determine whether the restraint is naked or ancillary. If the court finds the restraint is ancillary, the court applies the proposed test. Otherwise, the Rule of Reason test in its current form is used. Under the proposed test, the

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246 *Bd. of Regents III*, 468 U.S. at 122 (White, J., dissenting).

247 *See, e.g.*, *Law*, 134 F.3d at 1016; *Worldwide Basketball II*, 273 F. Supp. 2d at 947-48.

248 *Worldwide Basketball II*, 273 F. Supp. 2d at 947-48 (citing *Law*, 134 F.3d at 1016).

249 *See, e.g., Law*, 134 F.3d at 1016; *Worldwide Basketball II*, 273 F. Supp. 2d at 948. For example, in *Law,* the Court stated, "[t]he NCAA does not dispute that the [Two in Four] Rule resulted from an agreement among its members." *Law*, 134 F.3d at 1016.

250 *Hennessey*, 564 F.2d at 1147.

251 *Id.* at 1149 n.14. In *Hennessey*, decided in 1977, the NCAA asserted that it was exempt from federal antitrust laws because it is a "voluntary, non-profit organization whose activities and objectives are educational and are carried out with respect to amateur athletics." *Id.* at 1148. The Court struck down the NCAA's defense stating that Congress "intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exception as that urged on us would be at odds with that purpose." *Id.* at 1149 (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975)).

defendant then bears the burden of justifying the restraint with evidence that it can better be compartmentalized in the regulatory category (neutral or positive in promoting competition) rather than the suppressive to competition category. The modified test does not include *Professional Engineers*' mandate that the defendant prove procompetitive benefits to survive the inquiry. Rather, more like *Chicago Board of Trade*, the defendant simply bears the burden of proving that the restraint results from justifiable self-regulation. However, if the defendant can prove procompetitive effects, his burden is satisfied. This difference will provide courts more flexibility for inquiries into the self-regulatory activities of entities such as the NCAA.

In applying the modified inquiry, the court's role in placing an alleged restraint in either the regulatory or destructive to competition category would require examination of the following factors: "the facts peculiar to the business,"[252] whether the activity has procompetitive benefits,[253] and the intent, motivation and purpose of the defendant in implementing the alleged restraint.[254] The fourth and final factor originated from the words of former SEC Chairman William L. Cary. His words are quoted by the Court in *Silver v. NYSE*, a 1963 antitrust case challenging NYSE regulations.[255] Regarding the NYSE, Chairman Cary observed, "some . . . oversight is warranted, indeed necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious."[256] Thus, the proposed test's fourth factor requires courts to determine whether the alleged ancillary restraint resulted from discriminatory or capricious self-regulation.

The proposed test would force courts to take a deferential approach to organizations shouldered with rulemaking duties upon which their industries rely. It also would provide courts with flexibility since its application should ensure condemnation of significant restraints. It punishes evil intent, but requires balancing the enumerated factors without the stringent requirement that restraints affirmatively promote competition. The proposed test is simply a tool to filter the justifiable actions of self-regulatory organizations that combine horizontally out of necessity from those that combine with evil intent to destroy competition.

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252 *Prof'l Eng'rs*, 435 U.S. at 692; *Bd. of Trade*, 246 U.S. at 238.

253 *See Prof'l Eng'rs*, 435 U.S. at 691; *Bd. of Trade*, 246 U.S. at 238.

254 *See Bd. of Trade*, 246 U.S. at 238. This grouping includes two factors noted in *Chicago Board of Trade*: "the reason for adopting the particular remedy, [and] the purpose or end sought to be attained." *Id.*

255 373 U.S. 341, 359 (1963).

256 *Id.* (quoting William L. Cary, *Self-Regulation in the Securities Industry*, 49 A.B.A. J. 244, 246 (1963)).

3. Applying the Proposed Test to the NCAA

This Part briefly examines how *Board of Regents*, *Law*, and *World-wide Basketball* would be decided under the proposed test. In so doing, this Part, based on the outcome in the actual cases, will assume the following: (1) the plaintiff established that the restraint produced significant anticompetitive effects; (2) the court determined that a horizontal combination is necessary for the product to exist; (3) the restraint under review is ancillary to a legitimate business purpose; (4) the restraint will be examined under the Rule of Reason; (5) the defendant failed to prove procompetitive effects. Furthermore, the hypothetical tests will not apply the first factor—"the facts peculiar to the business"—because all cases involve the NCAA, which was already discussed at length in this Comment.

a. *Board of Regents*

In *Board of Regents*,[257] the NCAA asserted that it established its television broadcast policy to protect gate attendance and to preserve the competitive balance among the NCAA's Division I football programs.[258] In its opinion, the Court agreed that the NCAA's motive to preserve the cpmpetitive balance was "legitimate and important"[259] but that such motives did not justify the restraint since there were no procompetitive benefits to offset the affect it had on the market for televised college football games.[260] Under the proposed test, recognition of the legitimacy of such motives would validate the restraint, on balance, unless the Court also recognized evidence to support bad intent. However, in the Court's opinion, there is no such alternative evidence.

As such, the restraint fits into the regulatory and legal category because the evidence supports that the NCAA's policy was neither discriminatory nor capricious. The *Board of Regents* opinion is devoid of evidence that the television contract discriminated against particular teams or conferences. Rather, the policy applied equally to all schools within each conference.[261] As for capricious, the evidence suggests that the NCAA's policy was the product of years of research which established a realistic concern for live attendance at games throughout the country. Furthermore, the Court's opinion validates the NCAA's concern that an unregulated free

257 *See* discussion *supra* Part IV.B.

258 *See Bd. of Regents III*, 468 U.S. at 96.

259 *Id.* at 117.

260 *See id.*

261 *See id.* at 93 n.10.

market for televised games would result in greater national exposure for the nation's more powerful teams.[262]

b. *Law*

In *Law*,[263] the NCAA asserted that Bylaw 11.02.3—which limited compensation paid from athletic departments to "Restricted-Earnings Coaches" to $16,000 annually[264]—was enacted to help "create more balanced competition"[265] by "preventing wealthier schools from placing a more experienced, higher-priced coach in the position."[266] Since the NCAA's asserted intent was legitimate, and the record is void of bad intent, the focus shifts to the test's discriminatory or capricious inquiry.

The NCAA maintained that the bylaw allows schools to retain an "entry-level coaching position . . . [that] will allow younger, less experienced coaches entry into Division I coaching positions."[267] Although this might appear on its face to be an attempt to discriminate, the bylaw did not necessarily preclude hiring experienced coaches nor did it provide guidelines for schools to follow in hiring younger coaches.[268] Furthermore, the schools were free to pay the restricted-earnings coaches "more than [the] $16,000 per year [maximum] by hiring them for physical education or other teaching positions."[269] Although such factors rescue the bylaw from being categorized as discriminatory, the compensation factor, in the end, demonstrates its capricious nature. Ultimately, the evidence shows that the bylaw was created during a panicked response to huge deficits reported by many Division I athletic programs.[270] Furthermore, the bylaw itself, in allowing additional compensation, provided a loophole for schools to avoid compliance. Thus, under the proposed test, Bylaw 11.02.3 would likely be deemed an antitrust violation.

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262 *See* discussion *supra* Part IV.B.

263 *See* discussion *supra* Part IV.C.

264 *See Law*, 134 F.3d at 1014 n.4.

265 *Id.* at 1022.

266 *Id.* at 1024. In 1985, fifty-one percent of Division I schools reported deficits in their basketball programs that averaged $145,000 per school. *Id.* at 1013.

267 *Id.* at 1021.

268 *See Law*, 134 F.3d at 1014 n.4.

269 *Id.* at 1022.

270 *See supra* note 160.

c. *Worldwide Basketball*

In *Worldwide Basketball*,[271] just as in *Board of Regents* and *Law*, the court rejected, as proof of procompetitive benefits stemming from the Two in Four Rule, the NCAA's assertion that it "furthers the goals of competitive equity between large and smaller schools."[272] The second and third justifications were similarly rejected—the bylaw helps students avoid missing class time[273] and it stabilizes schedules by preventing "an excessive number of games [from] being played."[274] Although the court accepted the legitimacy of such concerns, it ultimately concluded that the bylaw failed to aid the NCAA in accomplishing its goals.

The Court's reasoning serves as an example of the difference in the *Professional Engineers* test and this Comment's proposed test. The *Professional Engineers* procompetitive effects mandate requires courts to evaluate the success or failure of the NCAA's self-regulatory activity. Such inquiry can kill the baby in its crib since inherent in every bylaw is the need for time to evaluate its effect. The proposed test, in balancing a deferential approach with flexibility to condemn significant restraints of trade, allows the NCAA, in many instances that the *Professional Engineers* test would not, the opportunity to see its bylaws reach fruition.

Under the proposed test, the NCAA's asserted purpose in enacting the Two in Four Rule was legitimate. However, regarding the bad intent factor, there is evidence that could invalidate the bylaw. First, the NCAA's decision to increase simultaneously the regular season schedule from twenty-seven to twenty-eight games could be construed as an alternative motive. However, the statistics reveal that the bylaw helps the NCAA accomplish its goals. For example, without the Two in Four Rule, a school such as Duke, a noted basketball powerhouse, would undoubtedly appear in an exempt tournament each season. Thus they would have the opportunity to play four games during each tournament, resulting in a possible thirty-one-game regular-season schedule. Thirty-one games, compared with a twenty-eight-game schedule played by lesser-known teams not invited to appear in an exempt tournament, results in an eleven percent differential. Eleven percent is a significant advantage since the extra games can improve a team's RPI[275] and help them reach the important twenty-win plateau. As for the goal of providing athletes a more stable schedule by preventing an excessive number of games from being played, the bylaw helps protect the yearly

271 *See* discussion *supra* Part IV.D.

272 *Worldwide Basketball II*, 273 F. Supp. 2d at 952-53.

273 *Id.*

274 *Id.*

275 *See supra* note 176.

wear and tear on a Duke student-athlete by ensuring that he does not play eleven percent more games each season.

Further evidence of bad intent is that the plaintiff promoters alleged that the Two in Four Rule intended to "eliminate certified events and shift revenues to the NCAA and its member institutions."[276] In October 1998, the NCAA Division I Championships/Competition Cabinet stated its findings as follows: "The cabinet continues to be concerned about the proliferation of exempted basketball events, . . . particularly those that involve outside sponsors that appear to benefit . . . financially . . . more than the . . . institutions participating in such events."[277]

Although bad intent could be inferred, other evidence is equally relevant. First, the Cabinet also reasoned that as many schools as possible "should be given . . . [the] opportunity to compete in exempted events, particularly those offshore, so that the inherent recruiting and competitive advantages are distributed equitably."[278] Furthermore, the Cabinet stated that "[a]llowing too many exempted basketball contests off the mainland . . . may lead to pressure from coaches in other sports to receive the same opportunities."[279] Although the facts are close to supporting bad intent, the evidence is, on balance, insufficient to invalidate the bylaw.

Finally, in applying the discriminatory or capricious factor, the bylaw appears to discriminate against the exempt tournament promoters. However, it does not forbid such tournaments or even limit their number. Rather, it still allows promoters to lure powerhouse schools to tournaments each year but in a slightly altered format. For example, the 2003-2004 season included eight non-exempt tournaments, many of which featured teams who had already used their two exempt tournament slots.[280] Furthermore, the Two in Four Rule is not capricious since it was enacted to promote the competitive balance among member schools and to promote schedule stability, goals which it contributes to meeting. Therefore, application of the factors enumerated in the proposed test would likely result in categorizing the Two in Four Rule as justified self-regulation.

The proposed Rule of Reason test would provide courts with a tool flexible enough to condemn significant restraints while validating justified self-regulatory activity of organizations that combine out of necessity. The test, applied to *Board of Regents, Law, and Worldwide Basketball*, did not

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276 *Worldwide Basketball I*, 2002 WL 32137511, at *15.

277 *Id.* at *16 n.10.

278 *Id.* at *15.

279 *Id.*

280 *See 2003 Preseason Tournaments*, *supra* note 242. The eight tournaments featured thirty-six teams including noted basketball powerhouses Kentucky, Stanford, Florida, UCLA, Kansas, and Pittsburgh. *See id.*

validate all of the NCAA's attempts to regulate itself. Instead, it reached desirable outcomes because it inquired into the NCAA's motives, realized the unique situation of the industry in which the NCAA operates, considered possible procompetitive effects of alleged restraints, and tested whether discriminatory or capricious acts were disguised as self-regulation.

CONCLUSION

In light of the recent decisions declaring illegal certain NCAA bylaws and contracts negotiated with third parties, the Supreme Court should consider adopting and applying a modified Rule of Reason test for § 1 challenges to self-regulating entities that combine horizontally out of necessity for their products to exist. The modified inquiry proposed in this Comment would reduce the need for judicial intervention into the activities of certain self-regulatory entities, such as the NCAA, and would result in little or no adverse effect on competition. The recent cases, most notably *Board of Regents*, *Law*, and *Worldwide Basketball*, reveal that the *Professional Engineers* test is incompatible with the Court's acknowledgment that the NCAA must be provided a certain flexibility to perform its self-regulatory functions. If the trend against the NCAA continues, the future will bring more unnecessary challenges to its rulemaking capacity.

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