# *NCAA v. Board of Regents* and a Truncated Rule of Reason: Retaining Flexibility Without Sacrificing Efficiency

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Judge Bork, in his book *The Antitrust Paradox*, suggests that the shifting balance between the competing forces of judicial efficiency and judicial flexibility charts the development of antitrust analysis.[1] This conflict between efficiency and flexibility underlies the relationship between two competing, yet complementary,[2] rules of antitrust law: the per se rule[3] and the rule of reason.[4] In *National Collegiate Athletic Association [NCAA] v. Board of Regents of the University of Oklahoma, [Board of Regents]*,[5] the United States Supreme Court tipped the balance in favor of judicial flexibility in horizontal price fixing situations by using rule of reason analysis. The Supreme Court's rejection of the per se rule and application of the rule of reason in *NCAA v. Board of Regents* continues a trend toward greater reliance on economic analysis and less reliance on simplistic per se rules.[6] Although it used rule of reason analysis, the Court recognized an important function of the per se rule, the promotion of judicial efficiency.[7] Consequently, the Court did not undertake the extensive analysis of the traditional

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1. *See* BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 10 (1978).

2. *See* National Society of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) (the per se rule and the rule of reason are two complementary categories of antitrust analysis).

3. Generally, courts have adopted a per se rule when the challenged practice obviously lacks redeeming value. *See* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). In *Northern Pacific*, the Court commented on the rationale behind the per se rule:

> This 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.

*Id.* at 5.

4. Rule of reason analysis requires courts to balance the potential procompetitive benefits of the challenged practice against the competitive harms that may result from the challenged practice. *See* L. SULLIVAN, ANTITRUST § 68 at 186-89 (1977).

5. 104 S. Ct. 2948 (1984).

6. *See* Sullivan, *Emerging Per Se and Rule of Reason Principles at the Supreme Court*, 1980 ANTITRUST LAW SYMPOSIUM 1, 1-2.

7. In *NCAA v. Board of Regents*, the Court notes that no elaborate industry analysis is necessary under the rule of reason. 104 S. Ct. at 2965. *See also infra* notes 141-45 and accompanying text.

rule of reason.[8]

This Note analyzes the Court's reasons for rejecting the per se rule in a case involving a horizontal agreement to fix prices and limit output. The Court's attempt to serve two masters—flexibility and efficiency—suggests the evolution of what Professor Sullivan called "analytically enhanced per se analysis."[9] This Note analyzes the development of what might be called a truncated rule of reason or an enlightened per se rule and concludes that the Court is in the process of defining a hybrid per se/rule of reason method of analysis.[10]

## *NCAA v. Board of Regents*: Context and Treatment Below

In *NCAA v. Board of Regents*, the University of Oklahoma and the University of Georgia Athletic Association brought an antitrust action challenging the NCAA's control of televised intercollegiate football games. The district court[11] and the court of appeals[12] held that the NCAA's television plan constituted price fixing and was per se illegal under section one of the Sherman Act.[13] With an eye toward appellate review, each court additionally found that the television scheme was unlawful under the rule of reason.[14]

Under the television plan, ABC and CBS shared exclusive first rights to negotiate with NCAA members for broadcast rights to football games.[15] In return for these negotiation rights, ABC and CBS each guaranteed the NCAA and its member schools a "minimum aggregate compensation."[16] Elements of the plan included a limit on the total number of games telecast, a restriction requiring NCAA members to sell television rights exclusively through the television plan, and a distribution of telecast opportunities among NCAA members.[17] Under the plan, the amount any team received from broadcasts did not depend on the size of the viewing audience, the

8. 104 S. Ct. at 2965.

9. *See* Sullivan, *supra* note 6, at 10.

10. *See infra* notes 146-48 and accompanying text.

11. Board of Regents of Univ. of Okla. v. NCAA 546 F. Supp. 1276, 1311 (1982).

12. Board of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1149-50, 1156 (10th Cir. 1983).

13. 15 U.S.C. § 1 (1976) provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or other foreign nations, is hereby declared to be illegal."

14. 707 F.2d at 1150, 1157. That both lower courts chose to apply the per se rule and the rule of reason suggests some uncertainty as to the appropriate standard of review. *NCAA v. Board of Regents* partially clarifies the proper standard of review. *See infra* notes 141-45 and accompanying text. Both the district court and the court of appeals also considered whether the television plan represented a group boycott. Although the United States Supreme Court never reached the issue, the Court did cite the Tenth Circuit's finding with approval. 104 S. Ct. at 2958 n.13. The court of appeals held that the NCAA television plan was not a boycott because broadcasters could freely negotiate with the NCAA for a contract as a carrying network. 707 F.2d at 1160-61. An analysis of group boycott per se illegality is beyond the scope of this Note.

15. 104 S. Ct. at 2956.

16. *Id.* The networks each agreed to pay a minimum of $131,750,000 over a four year period. This amount represents the total amount each network would pay the NCAA and its member schools. If at the end of a season the minimum had not been paid, the balance would be paid to the NCAA. 707 F.2d at 1150 n.1.

17. The television plan was designed to feature 115 different teams over the course of two seasons. 707 F.2d at 1150.

number of viewing markets, or the particular characteristics of the game or the teams involved.[18] The NCAA attempted to justify the contract restrictions as a means to reduce the possible adverse effects of television broadcasts upon attendance at college football games.[19]

Both lower courts found the television plan illegal per se as a naked attempt to restrict output and manipulate price.[20] The Tenth Circuit Court of Appeals affirmed the trial court's determination that the pricing practices reflected a distortion of free market forces within the context of an "arrangement so fraught with anticompetitive potential" that it appeared that the television plan "would always or almost always tend to restrict competition."[21]

One explanation for the lower courts' rigid application of the per se rule is the emphasis placed on the per se rule by the United States Supreme Court during the early 1980s. In both *Catalano, Inc. v. Target Sales, Inc.*[22] and *Arizona v. Maricopa County Medical Society*[23] the Supreme Court found the challenged practices to be price fixing and per se illegal without reference to the possible procompetitive justifications for the challenged practices. The lower courts' adherence to *Maricopa County*[24] to justify use of the per se rule in *NCAA v. Board of Regents* is therefore understandable.[25]

In *NCAA v. Board of Regents*, the Supreme Court confirms that the case law spanning the late 1970s and the early 1980s suggests a merging of the rule of reason and the per se rule into a truncated rule of reason.[26] To iden-

18. 104 S. Ct. at 2956. The television plan's unresponsiveness to market forces is best illustrated by the amount ABC paid for television rights to two football games on the same weekend during the 1981 football season. ABC chose to televise the Oklahoma-USC game over 200 stations and the Citadel-Appalachian State game over four stations. The district court noted that "incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." 546 F. Supp. at 1291.

19. 104 S. Ct. at 2955-56 n.6. The NCAA Television Committee briefing book outlines the NCAA's 30-year-old justification for the television plan:

> The purposes of this Plan shall be to reduce insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of inter-collegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

*Id.*

20. 546 F. Supp. at 1311; 707 F.2d at 1149-50, 1156. The courts concluded that the NCAA plan restricted output and established a fixed minimum price which in practice became the maximum price paid individual schools. 546 F. Supp. at 1305; 707 F.2d at 1152.

21. 707 F.2d at 1153.

22. 446 U.S. 643, 647 (1980) (agreement among beer retailers to fix credit terms constitutes price fixing and is illegal per se).

23. 457 U.S. 332, 351 (1982) (agreement among physicians and health insurers to adhere to established maximum fee reimbursement schedules is price fixing and is illegal per se).

24. NCAA v. Board of Regents, 546 F. Supp. 1291, 1304, *aff'd*, 707 F.2d 1147, 1152.

25. In *Maricopa County*, the Court cited United States v. Socony-Vacuum Oil, Co., 310 U.S. 150 (1940) to support the conclusion that price fixing agreements are per se invalid, even in the face of procompetitive justification. 457 U.S. at 351 n.23 ("Whatever economic justificatons particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.") (quoting *Socony-Vacuum*, 310 U.S. at 224 n.59).

26. 104 S. Ct. at 2962 n.26. In the majority opinion, Justice Stevens noted that "there is no bright line separating *per se* from Rule of Reason analysis." *Id.*

tify the scope of truncated rule of reason analysis, this Note first looks at the origins of the per se rule and the traditional rule of reason dichotomy.

## THE PER SE RULE AND THE RULE OF REASON

### A. *Origins*

From its inception, section one of the Sherman Act presented the courts with the dilemma of applying a rigid per se rule[27] to a wide range of economic activity. In *United States v. Trans-Missouri Freight Association*,[28] the United States Supreme Court interpreted the language of the Sherman Act literally, holding that both reasonable and unreasonable restraints of trade are illegal.[29] A year later, in *United States v. Joint Traffic Association*,[30] the Court recognized the hazards of rigidly applying the Sherman Act.[31] *Joint Traffic* laid the foundation for the subsequent development of both the rule of reason and the per se rule. The Court held that an agreement promoting legitimate business interests and not directly restraining trade was legal under the Sherman Act.[32] Although the Court did not use the term "per se," the implication is that if the challenged practice directly restrains trade, it is per se illegal. Alternatively, if a court can identify legitimate business interests and can determine that the challenged practice does not directly restrain trade, the practice escapes the per se rule.

*Standard Oil Co. v. United States*[33] is the landmark case which established rule of reason analysis. Rejecting a literal interpretation of the Sherman Act, the Supreme Court imported a reasonableness standard from the common law.[34] The Court noted that without a reasonableness standard, enforcement of the Sherman Act would become impossible.[35] By 1911 the Court had recognized what was implicit in *Joint Traffic*: without judicial flexibility, the enforcement of antitrust law was doomed to failure. *Standard Oil* thus stands for the proposition that only those business practices which unreasonably restrain trade are illegal.[36] In 1918 the Court added dimension to the *Standard Oil* rule of reason in *Chicago Board of Trade v. United*

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27. *See supra* note 12 and accompanying text.

28. 166 U.S. 290 (1897) (agreement to fix freight traffic rates illegal under § 1 of the Sherman Act).

29. *Id.* at 328. Rejecting the argument that the Sherman Act was meant to reach only unreasonable restraints of trade, the Court held: "The plain and ordinary meaning of [§ 1 of the Sherman Act] is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such logic . . . ." *Id.*

30. 171 U.S. 505 (1898) (agreement to fix freight traffic rates illegal under § 1 of the Sherman Act).

31. The Court retreated from the literal interpretation of the Sherman Act taken in *Trans-Missouri*:

> To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, . . . is to make a most violent assumption, and one not called for or justified by [*Trans-Missouri*]. . . .

*Id.* at 568.

32. *Id.*

33. 221 U.S. 1 (1911).

34. *Id.* at 60 (the drafters intended that the common law standard of reason should determine illegality under the Sherman Act).

35. *Id.* at 68.

36. *Id.* at 60.

*States*.[37]

The subsequent case law, including *NCAA v. Board of Regents*, has grappled with the problem of reconciling the flexibility provided by *Standard Oil* and *Chicago Board of Trade* with the need for judicial efficiency. One rule has emerged: business practices which are clearly anticompetitive are illegal per se, without reference to any reasonableness standard.[38]

## B. *The Per Se Rule and Price Fixing*

After *Trans-Missouri* and *Joint Traffic* a line of cases developed the principle that price fixing is anticompetitive and illegal per se.[39] *United States v. Socony-Vacuum Oil Co.*[40] illustrates the broad sweep of these cases. In *Socony-Vacuum* the Supreme Court found that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal *per se*."[41] Standing alone, *Socony-Vacuum* justifies the lower courts' finding in *NCAA v. Board of Regents* that the NCAA's television plan was illegal per se.

The *Socony-Vacuum* line of cases, however, does not stand alone. For example, *Joint Traffic* explicitly provides that not all restraints of trade are per se illegal.[42] Moreover, despite the broad sweep of *Socony-Vacuum* and other price fixing cases, the Supreme Court has occasionally found price fixing arrangements permissible.[43] Short of combatting Depression era economic conditions[44] or "creating a market,"[45] however, the Court had not articulated a general theory justifying departure from *Socony-Vacuum* until the late 1970s.[46]

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37. 246 U.S. 231, 238 (1918) (under the rule of reason courts must consider facts peculiar to the challenged business practice: the business's condition before and after the restraint was imposed, the nature of the restraint, the effect of the restraint, and the reason for adopting the particular restraint).

38. The Sherman Act and the early cases interpreting the Act established the concept of the per se rule. *See supra* notes 28-32 and accompanying text. *Standard Oil*, primarily cited for establishing the rule of reason, also provided for per se analysis. In *Standard Oil*, the Court noted that the reasonableness standard was not appropriate in either *Trans-Missouri* or *Joint Traffic* where the challenged practices "created a conclusive presumption that brought them within the [Sherman Act]." *Standard Oil*, 221 U.S. at 65. *NCAA v. Board of Regents* recognizes the utility of the per se rule when a practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output." 104 S. Ct. at 2960.

39. *See* Albrecht v. Herald Co., 390 U.S. 145 (1963) (vertical price fixing between newspaper publishers and carriers is per se illegal); Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons Inc., 340 U.S. 211 (1951) (horizontal price fixing among liquor producers is per se illegal); United States v. Socony-Vacuum, 310 U.S. 150 (1940) (horizontal price fixing among oil companies is per se illegal); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (horizontal price fixing among manufacturers and distributors of pottery fixtures is per se illegal).

40. 310 U.S. 150 (1940).

41. *Id.* at 223.

42. *See supra* text accompanying note 32.

43. *See, e.g.*, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (Depression era combination of coal producers to stabilize coal prices and alleviate destructive trade practices held permissible); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (rule stabilizing the price of a certain grain category held permissible because rule regulated and promoted competition by "creating a market").

44. *See Appalachian Coals*, 288 U.S. 344 (1933).

45. *See Chicago Board of Trade*, 246 U.S. 231 (1918).

46. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 803-04 (1965).

### C. *Scaling the Per Se Hurdle*

Professor Sullivan calls the period from 1977-1979 a "new phase in the Court's contribution to antitrust,"[47] a phase which reinforced the principle that courts should use economic analysis widely and per se analysis only sparingly. Specifically, three cases from the late 1970s framed this new school of antitrust thought: *Continental T.V., Inc. v. GTE Sylvania Inc.*,[48] *National Society of Professional Engineers v. United States*,[49] and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[50] Although the Court did not term the analysis "truncated rule of reason" in this series of cases, the analysis developed and applied therein suggests a departure from the rigid per se rule and the traditional rule of reason.

#### 1. Continental T.V. Inc. v. GTE Sylvania, Inc.—*Rule of Reason: The Preferred Analytical Method*

In *Continental T.V.*,[51] the Supreme Court subjected vertical resale restrictions[52] to rule of reason rather than a per se analysis. The Court noted the complexity of vertical restraints and the potential for vertical restraints to stimulate interbrand competition.[53] Because of this complexity, the Court ruled that the per se rule was not satisfactory;[54] its use must be based upon demonstrable economic evidence that the challenged practice restrains trade, rather than upon "formalistic line drawing."[55] The judicial efficiency rationale alone, does not justify the creation of per se rules. If it were otherwise, the Court noted, all of antitrust law would be reduced to per se rules, resulting in an undesirable rigidity in the law.[56] *Continental T.V.* suggests that judicial flexibility will prevail over judicial efficiency when analyzing vertical nonprice restraints.

Although *Continental T.V.* represents a departure from rigid adherence to the per se rule when analyzing vertical nonprice restraints,[57] the Court did not rule on the per se illegality of price restraints.[58] *Continental T.V.* leaves room for the argument that price restraints with a net procompetitive effect are permissible.[59]

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47. *See* Sullivan, *supra* note 6, at 2.
48. 433 U.S. 36 (1977).
49. 435 U.S. 679 (1978).
50. 441 U.S. 1 (1979).
51. 433 U.S. 36 (1977).
52. Usually a vertical resale restriction involves agreement between a competitor, a manufacturer, and the manufacturer's independent chain of intermediate distributors and retail outlets. A restrictive horizontal agreement, on the other hand, involves agreement among independent competitors. *See* L. SULLIVAN, *supra* note 4, §§ 142, 143 at 399-406.
53. 433 U.S. at 51-52. The NCAA attempted to make a similar intrabrand restraint to promote interbrand competition argument. 707 F.2d at 1155. The Court rejected this argument, noting that no intrabrand restraints are necessary to promote interbrand competiton because college football is a unique product without any interbrand competition. 104 S. Ct. at 2968 n.55.
54. 433 U.S. at 58.
55. *Id.* at 59.
56. *Id.* at 50 n.16.
57. In *Continental T.V.*, 433 U.S. at 54, the Court overruled United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (vertical resale restrictions are per se illegal).
58. 433 U.S. at 51 n.18.
59. 433 U.S. at 69-70 (White, J., dissenting). *Broadcast Music* clarified this point two years

### 2. National Society of Professional Engineers v. United States—*Primacy of Competitive Analysis*

In *Professional Engineers*, the Supreme Court considered a rule prohibiting competitive bidding between engineers. Although the Court concluded that the challenged agreement restrained trade, the Court rejected the per se rule[60] against price fixing and used an abbreviated rule of reason.[61] This abbreviated rule represents two important limitations on traditional rule of reason analysis: (1) only competitive effects will be considered under the rule of reason, and (2) analysis under the rule of reason is shortened.

The Court confronted the dilemma of choosing between the rigid per se rule and the rule of reason. To overcome the per se hurdle Justice Stevens, writing for the majority, characterized the engineers' agreement to refuse to discuss fees with a client until after the client had selected an engineer as "not price fixing as such."[62] Having thus rejected the per se rule, the Court was left with the traditional rule of reason. Rather than undertake extensive analysis of the industry and the economic effects of the engineers' practice, the Court simply concluded that no elaborate analysis was required to demonstrate the anticompetitive characteristics of the challenged agreement.[63]

In *Professional Engineers*, the Court excluded social considerations from the rule of reason analysis,[64] thereby departing from the Warren Court's practice of considering social factors.[65] If the goals of antitrust law encompass a wide variety of social objectives, [66] any analytical method short of extensive rule of reason analysis could not adequately measure the effect of the challenged practice on these objectives. Alternatively, if the goal of

later by requiring a court to determine whether price restraints are plainly anti-competitive before labeling the price restraints per se illegal. *See infra* notes 76-78 and accompanying text.

60. 435 U.S. at 693. Whether the Court applied a rule of reason or a per se rule is admittedly arguable. *See, e.g.*, Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303, 348 n.194 (1978) (*Professional Engineers* employed a per se rule); Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761, 766 (1979) (*Professional Engineers* employed a rule of reason); Sullivan, *Recent Antitrust Development: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 UCLA L. REV. 265, 323 (1979) (*Professional Engineers* employed a rule of reason).

61. 435 U.S. at 695-96. *See also* Sullivan, *supra* note 60, at 323. The Court did not treat a restraint on competitive bidding as tantamount to price fixing and therefore per se illegal. Neither did the Court undertake extensive rule of reason analysis to determine whether the restraint was anticompetitive. The Court thought the matter obvious and held accordingly.

62. 435 U.S. at 692. Justice Stevens conveniently ignored the expansive *Socony-Vacuum* holding that any agreement which fixes, pegs, or stabilizes prices is illegal per se. *See supra* note 41 and accompanying text.

63. 435 U.S. at 692.

64. 435 U.S. at 695. For authority the Court cited *Standard Oil* for the proposition that inquiry under a rule of reason is confined to analysis of competitive impact only. The Court noted the *Standard Oil* emphasis of "economic conceptions," *id.* n.16, under rule of reason analysis. Furthermore, the majority cited with approval the report of the Attorney General's National Committee to Study the Antitrust Laws 11 (1955). The Report states that the rule of reason "makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry." *Id.*

65. For example, in Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (Warren, C.J.), the Court concluded that the social importance of small, locally owned businesses outweighed the potential economic inefficiencies of fragmented industries and markets. *Id.* at 344.

66. *See supra* note 65 and accompanying text and *infra* note 67 for two cases where courts identified social objectives as policy justifications for antitrust law.

antitrust law is solely the enhancement of competition, a limited analysis becomes more viable. Competitive effects are more easily quantified than are "social or moral effects."[67] Only after narrowing the scope of the rule of reason to competitive considerations could the Court apply abbreviated analysis.

*Professional Engineers'* significance[68] lies in the Court's rejection of the per se rule in a price fixing case and in the limited focus under the rule of reason on competitive considerations.[69] The case expands general application of the rule of reason while at the same time it limits the scope of the rule of reason analysis to competitive considerations.[70] The reliance on a rule of reason, focused solely on competitive considerations, forms the basis of a truncated rule of reason.

### 3. Broadcast Music Inc. v. Columbia Broadcasting System, Inc.—*Blurring the Per Se Rule and Rule of Reason Distinction*

In *Broadcast Music*,[71] CBS challenged the licensing practices of agencies that represented the owners of copyrighted musical compositions. CBS alleged that the agencies' practice of selling only blanket-licenses for entire portfolios of compositions and refusing to sell rights for individual compositions was price fixing and illegal per se. The court of appeals found the blanket-licensing practice per se illegal but would not grant CBS an injunction. Instead, the court remanded the case, directing the district court to consider remedies requiring the agencies to provide both blanket and individual use licenses.[72]

Noting the dichotomy of the court of appeals' rigid per se analysis and its proposed flexible remedy, the United States Supreme Court commented that "the *per se* rule does not accomodate itself to such flexibility."[73] The Supreme Court termed the court of appeals' use of the per se rule a "bobtailed application of the rule of reason."[74] Recognizing the inadequacy of rigid adherence to the per se rule,[75] the Court adopted an analytical approach which blurs the distinction between the per se rule and the rule of reason.

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67. United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1941) (L. Hand, J.). In *ALCOA*, the court held that economic goals alone did not motivate Congress to enact the Sherman Act. The court noted that "[i]t is possible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of few." *Id.* at 427.

68. *Professional Engineers* is also significant for limiting the Goldfarb v. Virginia State Bar, 421 U.S. 733 (1974), professional exception. 435 U.S. at 689-90, 696.

69. Addressing the rule of reason, the Court stated: "Contrary to its name, the Rule 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. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." 435 U.S. at 688.

70. *See* Sullivan, *supra* note 60, at 323.

71. 441 U.S. 1 (1979). The facts of *Broadcast Music* are set forth 441 U.S. at 4-6.

72. Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers and Publishers, 562 F.2d 130, 140 (2nd Cir. 1977) (the court of appeals noted that a flexible remedy was appropriate because the blanket license was "not simply a 'naked restraint' ineluctably doomed to extinction").

73. *Broadcast Music*, 441 U.S. at 17.

74. *Id.* at n.27.

75. *Id.* at 8-9. "[E]asy labels do not always supply ready answers," and it will not always be a simple matter to label a practice per se price fixing. *Id.*

Justice White, writing for the majority, noted that not all arrangements between competitors that affect prices are illegal per se.[76] "Price fixing" is a term of art in antitrust law. It describes conduct so plainly anticompetitive that courts are able to condemn the conduct without an extensive analysis of the particular factual circumstances. Applying the label "*per se* illegal price fixing" to conduct which literally may be price fixing may not sufficiently determine whether the challenged practice is plainly anticompetitive.[77] The challenged conduct must first be characterized as being within the category of behavior which per se rules are designed to condemn before the fatal "*per se* illegal price fixing" label is affixed.[78] Applying this test, the Court found that the blanket-licensing arrangements could not be characterized as so plainly anticompetitive as to justify using the per se rule because of the arrangements' novelty[79] and tendency to secure market efficiencies.[80]

This characterization analysis lies somewhere in between the traditional applications of the per se rule and the rule of reason. The Court explicitly states that the per se rule is unsatisfactory and that preliminary characterization is required.[81] However, the scrutiny required under this characteriztion step must not duplicate burdensome rule of reason analysis.[82] Under the characterization standard, a court must weigh competitive harm and benefit to determine whether the challenged practice would always, or almost always, tend to restrict competition.[83] The court may determine that the challenged practice would increase economic efficiency and make markets more competitive. If the challenged practice is one with which the court is familiar, and if the court can reliably conclude that the net effect of the practice will be anticompetitive, the court can then conclude that the practice is illegal per se.[84] If, however, the court is unfamiliar with the challenged practice, or if the court cannot reliably conclude that the net effect is likely to be anticompetitive, the court must apply the rule of reason.[85]

*Broadcast Music* follows directly from *Professional Engineers*. By limiting the scope of characteriazation analysis to only competitive considerations, the Court adopts the *Professional Engineers* proposition that analysis of price fixing schemes should be confined to consideration of competitive impact. Additionally, *Broadcast Music*'s characterization analysis is generally consistent with the abbreviated rule of reason used in *Professional Engineers*.[86] Both approaches apply an analysis significantly more limited than

76. *Id.* at 23.
77. *Id.* at 9. Justice White states: "Literalism is overly simplistic and often overbroad." *Id.*
78. *Id.*
79. "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations." 441 U.S. at 9. The Court further stated: "We have never examined a practice like this one before." *Id.* at 10. The Court thus found that such inexperience argues against applying the per se rule. *Id.*
80. The Court concluded that the blanket-licensing arrangement accompanied the integration of sales and facilitated the monitoring and enforcement of copyright law. *Id.* at 20. Additionally, the Court found that the challenged practices lowered transaction costs. *Id.* at 21.
81. *See supra* notes 76-78 and accompanying text.
82. *Broadcast Music*, 441 U.S. at 19 n.33.
83. *Id.* at 19-20.
84. *Id.*
85. *Id.*
86. This consistency is best illustrated by an example. Assume a business practice which both

that required by the traditional rule of reason.

Justice Stevens dissented in *Broadcast Music* but agreed with the majority's conclusion that the licensing agreements were not illegal per se even though they constituted a "species of price-fixing."[87] He disagreed with the majority's remand to apply the traditional rule of reason.[88] Applying an analysis reminiscent of *Professional Engineers*, Justice Stevens simply concluded that the "blanket all-or-nothing license is patently discriminatory"[89] and therefore illegal. Justice Stevens' dissent illustrates the weakness of the *Broadcast Music* characterization step. If the challenged practice passes characterization analysis, a court has no choice but to undertake the extensive, traditional rule of reason inquiry. In *Broadcast Music*, Justice Stevens apears to be unwilling to sacrifice the efficiencies of the per se rule in order to promote judicial flexibility to the extent proposed by the majority.[90] This unwillingness may have been carried to an extreme in *Arizona v. Maricopa County Medical Society*.[91]

*Broadcast Music* left the field of antitrust law with a two-stepped analysis. A court must first characterize the challenged practice. If the challenged practice can be characterized as one likely to be anticompetitive, the court must apply the per se rule. Alternatively, if the challenged practice cannot be characterized as one likely to be anticompetitive, the court must apply the traditional rule of reason. A subsequent case, *Maricopa County* casts doubt on the vitality of the characterization step.

## PRICE FIXING AND THE RULE OF REASON IN THE 1980S

### A. *Did* Arizona v. Maricopa County Medical Society *Signal a Retreat from the 1970s Case Law?*

In *Maricopa County* a 4-3 majority[92] of the United States Supreme

restricts and promotes competition. Also assume that the net effect of the challenged business practice is anticompetitive. Under the abbreviated rule of reason, the practice would be held illegal without an elaborate inquiry into the business practice. This congruity diverges, however, when the net effect of the challenged business practice is arguably procompetitive.

Assume facts similar to those outlined immediately above, but assume that the net effect of the challenged business practice is arguably procompetitive. The challenged business practice would pass the characterization step and would be measured under the traditional rule of reason. Under the abbreviated analysis, however, the answer is less clear. For example, how does a court decide when to apply abbreviated analysis or the traditional rule of reason? This lack of clarity is due to the Court's failure to articulate reasons for the *Professional Engineer* determination that no elaborate inquiry was necessary to demonstrate anticompetitiveness. This analytical incongruity between characterization analysis and abbreviated analysis when the net competitive effect of the challenged practice is arguably procompetitive is strikingly apparent in the *Broadcast Music* majority and dissenting opinions, *see infra* notes 88-90 and accompanying text, and in the *Maricopa County* majority and dissenting opinions. *See infra* notes 100-04 and accompanying text.

87. 441 U.S. at 25 (Stevens, J., dissenting).

88. *Id.*

89. *Id.* at 30.

90. Justice Stevens has expressed this unwillingness in other contexts. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 317-20 (1977) (Stevens, J., dissenting) ("Absolute precision in the analysis of market data is too much to expect. . . . It is always possible to imagine more evidence that could have been offered, but at some point litigation must come to an end.").

91. *See infra* notes 95-97 and accompanying text.

92. The majority consisted of Justice Stevens, joined by Justices Brennan, Marshall, and White. Justice Powell dissented, joined by Chief Justice Burger and Justice Rehnquist. Justices O'Connor and Blackmun took no part in the decision of the case.

Court found that an agreement among physicians and health insurers to adhere to established maximum fee reimbursement schedules fixed prices and was illegal per se.[93] The tone of the opinion suggests a return to the rigid per se analysis in *Socony-Vacuum*[94] and a retreat from *Broadcast Music* characterization analysis.

The Supreme Court in *Maricopa County* was unpersuaded by the argument that the per se rule was inapplicable because the judiciary had had little antitrust experience in the health care industry.[95] The Court concluded that under the Sherman Act courts should apply a clear, uniform rule to all industries: price fixing is illegal per se regardless of ancillary procompetitive justifications.[96] Writing for the majority, Justice Stevens indicated reliance on the rationale underlying the per se rule: the promotion of judicial efficiency.[97]

Justice Powell's dissent takes the majority to task for failing to recognize the controlling principle of *Broadcast Music*: the need for characterization prior to resort to the per se rule.[98] Justice Powell urged a more discerning approach which considers the complexity, the novelty, and the procompetitive benefits of the challenged practice.[99]

Although the Court rigidly applied the per se rule in *Maricopa County*, the Court paradoxically left room for rule of reason analysis. *Maricopa County* reached the United States Supreme Court on an interlocutory appeal concerning the propriety of the lower courts' denial of the State's motion for partial summary judgment on the issue of the defendant's per se liability.[100] Consequently, the record had not been developed fully at trial. Without evidence in the record to the contrary, the Court presumed that the challenged practices would not enhance competition[101] and applied the per se rule. The Court implicitly recognized that in a case of literal price fixing a defendant can escape the per se rule by proving sufficient facts to warrant rule of reason analysis.[102] Consequently, *Maricopa County* and *Broadcast Music* are reconcilable. Both recognize that even in a case of literal price fixing a defendant

93. 457 U.S. at 348. The Court held that the practices violated the per se rule because the price restraints "tend to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases." *Id.*

94. *See supra* notes 39-41 and accompanying text.

95. 457 U.S. at 349.

96. *Id.* at 351. The Court stated that "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justificaitons are offered for some." *Id.*

97. Justice Stevens noted that the per se rule is designed to "avoid the 'necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved.' " *Id.*

98. *Id.* at 362 (Powell, J., dissenting). Justice Powell's dissent is set forth *id.* at 357-67.

99. *Id.* at 362. Justice Powell inferred from the limited record that the maximum fee reimbursement schedules enabled insurance carriers to limit and more efficiently calculate the risks that insurance carriers underwrite.

100. *Id.* at 336-37.

101. *Id.* at 351. The majority also commented that "nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way." *Id.* at 353.

102. At one point, Justice Stevens, writing for the majority, appears to apply the *Broadcast Music* test. He states: "[T]here is no reason to believe that any savings that might accrue from [the challenged price fixing] arrangement would be sufficiently great to affect the competitiveness of these

can escape the per se rule by proving that the net effect of the challenged practice is procompetitive.[103]

*Broadcast Music* and *Maricopa County* are, however, at odds concerning a defendant's opportunity to escape the per se rule by developing a more extensive record. In *Maricopa County* the majority concluded that judicial efficiency justifies adherence to the per se rule.[104] The dissent concluded that *Broadcast Music* requires a more complete record to support characerization analysis.[105] The Court's failure in *Maricopa County* to clearly identify controlling principles for applying the per se rule and rejecting characterization analysis[106] is reminiscent of the Court's conclusory findings in *Professional Engineers.*[107] In *NCAA v. Board of Regents* this weakness is corrected. The Court allows the proponent of a horizontal agreement, which fixed prices and limited output, to develop a more complete record.[108] Writing for the majority, Justice Stevens offers a more principled explanation for the abbreviated rule of reason, an explanation that attracted six other members of the Court. Consequently, *NCAA v. Board of Regents,* rather than *Maricopa County,* more accurately represents how courts should treat horizontal price fixing schemes which have procompetitive benefits.

## B. NCAA v. Board of Regents—*The Court's Decision*

In *NCAA v. Board of Regents,* the Supreme Court drew on well developed principles of antitrust law to hold that the NCAA's television plan violated the rule of reason. In reaching this conclusion, the Court limited the apparent sweep of *Maricopa County* and returned to the flexible analytical approach of *Continental T.V.,*[109] *Professional Engineers,*[110] and *Broadcast Music.*[111]

At the outset, the Court recognized the reasonableness standard of *Standard Oil Co. v. United States.*[112] The Court noted that the Sherman Act was only intended to prohibit unreasonable restraints of trade.[113] To get to the rule of reason, however, the Court had to address *Maricopa County, Socony-Vacuum,* and the other seemingly inflexible price fixing cases.[114]

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kinds of insurance plans." *Id.* at 353-54. *See* 441 U.S. at 19-20 for the parallel language in *Broadcast Music.*

103. *NCAA v. Board of Regents* adopts the implicit recognition in *Maricopa County* and the explicit *Broadcast Music* holding that a defendant can escape the per se rule by offering sufficient competitive justification to offset the challenged practice's restraint of trade. *See infra* notes 129-31 and accompanying text.

104. 457 U.S. at 351.

105. *Id.* at 366 (Powell, J., dissenting).

106. *Id.* at 357 (Powell, J., dissenting). Justice Powell comments: "[R]ather than identifying clearly the controlling principles and remanding for a decision on a completed record, this Court makes its own per se judgment of invalidity." *Id.*

107. Justice Stevens wrote the majority opinion in *Maricopa County* and in *Professional Engineers. See supra* note 65 and accompanying text.

108. 104 S. Ct. at 2967.

109. *See supra* notes 51-59 and accompanying text.

110. *See supra* notes 60-67 and accompanying text.

111. *See supra* notes 71-91 and accompanying text.

112. *See supra* notes 33-36 and accompanying text.

113. *NCAA v. Board of Regents,* 104 S. Ct. at 2959.

114. *See supra* notes 39-41, 92-97 and accompanying text.

Although the majority agreed with the lower courts that the television plan was not responsive to consumer demand and constituted a horizontal agreement to fix prices and limit output, the Court did not resort to a simplistic application of the per se rule.[115] Instead, the Court recognized that horizontal restraints on competition are essential to the marketing of college football.[116] Consequently, the Court found the per se rule inapplicable, holding that the NCAA's competitive justifications for the television plan must be evaluated under the rule of reason.[117]

The rule of reason applied in *NCAA v. Board of Regents* follows directly from the Court's approach in *Professional Engineers.*[118] In *NCAA v. Board of Regents*, the rule of reason analysis was confined strictly to a consideration of competitive impact.[119] Applying this standard to the NCAA's television plan, the Court required the NCAA to establish competitive justifications for the plan.[120] The Court held that the NCAA failed to carry this heavy burden.

Unlike the conclusion it reached in *Broadcast Music* regarding the blanket licenses, the Court in *NCAA v. Board of Regents* found that the NCAA television plan did not produce procompetitive efficiencies that enhance the competitiveness of college football. In fact, the Court noted that the television plan actually increased prices and decreased output. Consequently, the Court held that the television plan was not necessary to marketing college football and was not within the *Broadcast Music* exception to horizontal price fixing.[121]

Additionally, the Court held that the television plan was not a permissible intrabrand restraint to promote interbrand competition.[122] Because televised football is a unique market, the Court concluded that the NCAA need not act collectively to compete against nonexistent competitors.[123]

The Court also found that the NCAA could not justify the television plan as a means to protect live attendance at NCAA football games. The plan did not protect live attendance because the plan permitted the broadcast of televised games at the same time as live events.[124] The Court observed that the NCAA could not justify its television plan on the assumption that competition is unreasonable.[125]

Finally, the Court dismissed the NCAA's argument that the television plan equalized competition among the NCAA member schools. The Court noted that the television plan was not tailored to its objective because the plan did not regulate the amount of money a college could spend on football.

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115. 104 S. Ct. at 2960.
116. *Id.* 2961.
117. *Id.*
118. *See supra* notes 60-61 and accompanying text.
119. 104 S. Ct. at 2962.
120. *Id.* at 2967.
121. *Id.* 2967-68.
122. *Id.* 2968. For a discussion of intrabrand restraints to promote interbrand competition, *see supra* note 53 and accompanying text.
123. 104 S. Ct. at 2968.
124. *Id.* at 2969 n.59. For example, the plan provided for the airing of college football games for nine hours on several Saturdays of the football season in most television markets. *Id.*
125. *Id. See also Profsessional Engineers*, 435 U.S. at 696.

Additionally, noted the Court, the NCAA could use a variety of other methods to promote competition among schools without having to resort to price fixing and output restrictions.[126]

Based on the NCAA's failure to provide competitive justifications for its television plan, the Court concluded that the plan curtailed output and blunted the ability of NCAA member schools to respond to consumer preference. Accordingly, the Court held the plan illegal under the rule of reason.[127]

### C. NCAA v. Board of Regents—*Contribution to Antitrust Analysis*

In *NCAA v. Board of Regents*, the Supreme Court affirmed the importance of both judicial flexibility and efficiency in dealing with horizontal price fixing agreements. On the one hand, the Court acknowledged the flexibility the late 1970s case law brought to the Sherman Act. On the other hand, the Court recognized the imperatives of judicial efficiency by adopting a truncated rule of reason. With *NCAA v. Board of Regents*, the pendulum has apparently come to rest between the extreme positions espoused in *Broadcast Music* and *Maricopa County*.[128] The remand of *Broadcast Music* for application of the traditional rule of reason is an example of the Court's willingness to treat price fixing flexibly. At the other extreme, the Court's resort to the per se rule in *Maricopa County* is an example of the Court's desire to deal with price fixing cases efficiently.

#### 1. *Rejecting Per Se*

Although the NCAA television plan presented the Court with anticompetitive consequences strikingly similar to the anticompetitive consequences of the physician's and health insurer's agreement in *Maricopa County*,[129] the Court rejected the per se rule. After *NCAA v. Board of Regents*, the proponent of horizontal price fixing has the opportunity to offer a procompetitive justification for the price fixing scheme in the characterization step in the analysis.[130] If the defendant can convince a court that the challenged practice is not likely to restrict competition, the challenged practice escapes the per se rule.[131] If, however, the court concludes that the challenged practice

126. 104 S. Ct. at 2970.

127. *Id.* at 2971.

128. *See supra* notes 104-05 and accompanying text for a comparison of the cases' differing conclusions regarding a defendant's opportunity to develop a more complete record.

129. Both the NCAA Television plan and the physicians and health insurers agreement included horizontal price fixing. *See NCAA v. Board of Regents*, 104 S. Ct. at 2956; *Maricopa County*, 458 U.S. at 348.

130. This unlimited opportunity for a proponent of horizontal price fixing to offer procompetitive justifications for the price fixing scheme results from the Court's reaffirmation of *Broadcast Music*. *See* 104 S. Ct. at 2960. *Broadcast Music* requires characterization prior to resort to the per se rule. *See supra* notes 78-81, 84-89 and accompanying text. In *NCAA v. Board of Regents*, the NCAA escaped the per se rule because even the University of Oklahoma and the University of Georgia Athletic Association apparently recognized the potential procompetitive justifications for horizontal agreements among NCAA member schools to restrain competition. 104 S. Ct. at 2962. Consequently, the Court held: "[D]espite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints." *Id.*

131. *See supra* note 89 and accompanying text.

is likely to restrict competition and decrease output, the court will find the challenged practice per se illegal.[132]

*NCAA v. Board of Regents* redefines the *Broadcast Music* characterization step. *Broadcast Music* requires a court to be familiar with the challenged practice to find the practice per se illegal.[133] *NCAA v. Board of Regents* allows a court to reject the rule of reason and to apply the per se rule even when the court is unfamiliar with the industry involved.[134]

*NCAA v. Board of Regents* represents both a return to the flexibiilty of *Broadcast Music* and a retention of the *Maricopa County* holding that courts need not be familiar with an industry to apply the per se rule. The Court's reaffirmation and redefinition of *Broadcast Music* characterization allows a defendant at least the opportunity to develop a record to meet the characterization test. The record *NCAA v. Board of Regents* allows, however, is not the one required by the traditional rule of reason.

### 2. *The Truncated Rule of Reason*

Justice Stevens' *NCAA v. Board of Regents* majority opinion follows directly from his *Professional Engineers* majority opinion and his *Broadcast Music* dissent. The *NCAA v. Board of Regents* opinion addresses questions left unresolved in *Professional Engineers* and *Maricopa County*.

In *Professional Engineers*, Justice Stevens stated that under the rule of reason no elaborate analysis was necessary to demonstrate the anticompetitive nature of the engineers' prohibition against competitive bidding.[135] In *Broadcast Music*, Justice Stevens dissented over the need for remand to apply the traditional rule of reason.[136] He felt that the record was sufficient to conclude that the competitive restraints imposed by the blanket-licensing agreements were not offset by procompetitive justifications.[137] He considered the blanket-licensing agreements illegal without resorting to the extensive analysis of the traditional rule of reason. Thus, in *Professional Engineers* and *Broadcast Music* Stevens abbreviated the traditional rule of reason. In *NCAA v. Board of Regents*, he applied this abbreviated analysis.

Justice Stevens' *Professional Engineers* and *Maricopa County* opinions left at least three questions unresolved: (1) How does a court determine when to apply the per se rule to price fixing?[138] (2) How does a court deter-

132. 104 S. Ct. at 2960.

133. *Compare NCAA v. Board of Regents*, 104 S. Ct. at 2960 n.21 with *Broadcast Music*, 441 U.S. at 19-20. *See also supra* note 79 and accompanying text. In *NCAA v. Board of Regents*, the Court states that horizontal price and output restrictions are normally sufficient to justify application of the per se rule without inquiry into the special characteristics of a particular industry. 104 S. Ct. at 2960 n.21.

134. Admittedly, the Court notes only in dictum that its decision is not based on a lack of judicial experience with the industry involved. 104 S. Ct. at 2960. In *Maricopa County*, however, the Court held that the per se rule is applicable even when a court is unfamiliar with an industry. 457 U.S. at 349.

135. 435 U.S. at 692.

136. *See supra* note 88 and accompanying text.

137. 441 U.S. at 34 (Stevens, J., dissenting).

138. Presumably *Broadcast Music* had already answered the question. *See supra* notes 76-80 and accompanying text. The vitality of *Broadcast Music*, however, was left in doubt following *Maricopa County*. *See supra* notes 95-98 and accompanying text.

mine when to apply the truncated rule of reason or the more extensive analysis of the traditional rule of reason?[139] and (3) Given a court's decision to apply the truncated rule of reason, what is the scope of inquiry under this abbreviated analysis?[140]

*NCAA v. Board of Regents* clearly answers the first question by reaffirming the *Broadcast Music* characterization and redefining it as the initial step in the analysis. A court can only resort to the per se rule after determining that the challenged practice is likely to restrict competition and decrease output. To escape the per se rule, the price fixing defendant must offer sufficient procompetitive justifications to convince a court that the challenged practice is not likely to restrict competiton and decrease output.[141]

*NCAA v. Board of Regents* also answers question three by defining the scope of this truncated rule of reason. The Court adopts a test that requires a horizontal price fixing defendant to first pass the characterization test. If the challenged practice is determined not to be per se illegal, the defendant faces the heavy burden of justifying the restraints imposed by the horizontal price fixing scheme.[142] The defendant must go farther than showing that the challenged practice is not likely to restrict competition, the standard under the characterization step. To satisfy the truncated rule of reason, the defendant must show that the challenged practice is likely to promote competition.[143]

Under *NCAA v. Board of Regents*, price fixers may not seek refuge in a rule of reason that requires the party complaining of the price fixing agreement to undertake extensive analysis to prove the defendant's market power. The Court acknowledges that the traditional rule of reason normally includes analysis of market power. The Court observes, however, that the rule of reason can be applied in the "twinkling of an eye."[144]

*NCAA v. Board of Regents* does not answer question two. Instead, the Court notes simply that there are no bright lines between the traditional rule of reason and the per se rule. Perhaps the distinction between the truncated rule of reason and the traditional rule of reason is evidentiary. Assuming the defendant has passed the characterization step by showing that the challenged practice is not likely to restrict competition, the defendant must then show that the challenged practice is likely to promote competition to satisfy the truncated rule of reason. If the defendant can satisfy this standard, the

139. After *Professional Engineers*, courts were left with only the conclusory finding that no elaborate industry analysis was required to demonstrate the anticompetitive nature of the engineers' prohibition against competitive bidding. 435 U.S. at 692. *Professional Engineers* offers no criteria for choosing between the traditional rule of reason and the truncated rule of reason. Nor does *NCAA v. Board of Regents* adequately clarify the distinction. *See infra* note 145 and accompanying text.

140. To determine the scope of a truncated rule of reason prior to *NCAA v. Board of Regents*, courts could look to the conclusion in *Broadcast Music* that the record was sufficient to find the blanket-licenses illegal under the rule of reason. 441 U.S. at 34 (Stevens, J., dissenting from an eight justice majority). Alternatively, courts were left with the conclusion in *Professional Engineers* that no elaborate analysis was necessary. *See supra* note 145.

141. *See supra* text accompanying notes 89 and 137.

142. 104 S. Ct. at 2962, 2967.

143. *Id.*

144. *Id.* at 2965 n.39.

burden then shifts to the plaintiff to prove the challenged practice unreasonable under the traditional rule of reason.[145] If the defendant cannot show that the challenged practice is likely to promote competition, the plaintiff need not meet the traditional rule of reason burden of proof.

*NCAA v. Board of Regents* leaves courts with the characterization step followed by three options for analyzing horizontal price fixing schemes. A court must first characterize a challenged practice by weighing the competitive costs and benefits of the horizontal price fixing scheme. Depending on the outcome of the characterization step, the court must choose between one of three alternatives. At one extreme, if the court concludes that the challenged practice is likely to restrict competition and decrease output, the challenged practice is per se illegal.[146] At the other extreme, if the court cannot easily determine the anticompetitive effects of the challenged practice, and if the court can identify procompetitive justifications for the challenged practice, it should apply the traditional rule of reason.[147] Between these extremes, the court is left with a truncated rule of reason, for which the defendant carries the heavy burden of showing that the price fixing scheme is likely to promote competition.[148]

*NCAA v. Board of Regents* blurs the distinction between the per se rule and the traditional rule of reason by combining elements of both in a truncated rule of reason. The Court specifically notes that there is no bright line separating per se from rule of reason analysis.[149] *Broadcast Music* began the process of lessening the distinction by introducing characterization as the initial step in the analysis.[150] *NCAA v. Board of Regents* now adds truncated rule of reason as a possible next step following *Broadcast Music* characterization. Taken together, *Broadcast Music* and *NCAA v. Board of Regents* enable a court to deal flexibly with horizontal price fixing schemes without having to undertake the extensive analysis of the traditional rule of reason.

## CONCLUSION

In *NCAA v. Board of Regents*, the Supreme Court has recognized a hybrid rule of reason/per se analytical method for horizontal price fixing cases. By rejecting the per se rule and by adopting what this Note calls a truncated rule of reason, the Court reaffirmed the flexibility *Broadcast Music* introduced into the Sherman Act analysis. No longer should courts rely on the per se rule in knee-jerk fashion. Instead, a court should first characterize a challenged practice. If the practice is within the category of behavior which per se rules are designed to condemn, the court should apply the per se rule. If the practice is not within the category of behavior which per se rules are

145. *Id.* at 2967.
146. *Id.* at 2960.
147. *Id.* at 2965 n.42.
148. *Id.* at 2962, 2967. To be sure, there is no bright line between each of these levels of analysis. This absence of a bright line further supports the conclusion that the Court has adopted a hybrid per se/rule of reason method of analysis that blurs the distinction between the traditional rule of reason and the per se rule.
149. *Id.* at 2962 n.26.
150. *See supra* notes 93-94 and accompanying text.

designed to conemn, the court should apply either the truncated rule of reason, or the traditional rule of reason accordingly.

*NCAA v. Board of Regents* also recognizes that courts must deal with antitrust litigation efficiently. A court need not be familiar with the industry involved to find a challenged practice per se illegal. Equally important, *NCAA v. Board of Regents* and the truncated rule of reason limit the scope of analysis once the challenged practice passes the *Broadcast Music* characterization test. No longer must courts undertake the rigorous analysis of the traditional rule of reason. Instead, courts may apply a truncated rule of reason, perhaps in "a twinkling of an eye." By adopting this abbreviated rule of reason the Court has blurred the distinction between the per se rule and the traditional rule of reason and provided greater flexibility to the lower courts to evaluate the competitive benefits of a challenged practice.