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Tackling Intercollegiate Athletics: An Antitrust Analysis

Self-regulatory associations are private organizations that make rules and set standards regulating the conduct of their members' activities. Although they possess a measure of power to force compliance with their rules and standards, such associations differ from ordinary business cartels in that a self-regulatory association exercises its regulatory power for the benefit of a class broader than its own membership. In Goldfarb v. Virginia State Bar, the Supreme Court made clear that anticompetitive conduct occurring outside the usual business context is not immune from the antitrust laws. The Court's opinion, however, gave little guidance on the appropriate standard of legality for such conduct under the antitrust laws.

This Note analyzes the antitrust liability of one self-regulatory organization, the National Collegiate Athletic Association (NCAA). In doing so, it suggests a model of how the Sherman Act ought to be applied to similar organizations. Part I of the Note demonstrates that the NCAA engages in price fixing, market allocation, and group boycotting that would be per se illegal if practiced by ordinary business competitors. Part II shows that cases since Goldfarb have found that organizations operating in noncommercial contexts similar to the NCAA are not subject to the per se rules. While acknowledging the need for an exception to the per se rules, the Note challenges the form this exception has taken in the case law. Part III proposes a mode of analysis that better reconciles the goals of antitrust law with the need for self-regulation in certain fields and demonstrates how this standard would work by applying it to several NCAA practices.

1. Ordinary business cartels sometimes serve larger social interests, and self-regulatory associations sometimes serve the commercial interests of their members. The distinction, largely one of degree rather than kind, turns on the nature and purpose of the organization. See note 96 infra. Some examples of self-regulatory organizations are bar associations, medical associations, school-accrediting agencies, and amateur athletic associations.

Self-regulatory associations are defined to exclude two types of organizations that have frequently been scrutinized under the antitrust laws. The first type consists of associations that engage in the exchange of information among horizontal competitors without attempting to regulate the conduct in which its members engage. See, e.g., United States v. Container Corp. of America, 393 U.S. 333 (1969); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). Organizations of the second type do attempt to enforce rules for the conduct of an activity but operate primarily for the purpose of promoting the economic welfare of their memberships rather than the welfare of some broader class. See, e.g., Radovich v. National Football League, 352 U.S. 445 (1957) (professional sports); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (trade association).

I. The NCAA and Antitrust Analysis in an Ordinary Commercial Context

A. The NCAA and the Regulation of Intercollegiate Athletics

Prior to the advent of university control of intercollegiate athletics in the early twentieth century, there was little formal organization of intercollegiate athletics and control was provided either by alumni or by students. This period was marked by numerous abuses, including commercialism, excessive physical injury to student athletes, and cheating by some participating schools. Growing public agitation about collegiate sports led to the founding of the National Collegiate Athletic Association in 1905.

The NCAA consists of 843 members and is recognized as the leading self-regulatory organization in the field of college athletics. The NCAA makes policy and enforces rules that govern participation in intercollegiate athletics by its members. The fundamental purpose of

3. For a history of college athletics during this early period, see A. Flath, A History of Relations Between the National Collegiate Athletic Association and the Amateur Athletic Union of the United States, (1905-1963) 1-21 (1964); H. Savage, American College Athletics 13-29 (Carnegie Foundation for the Advancement of Teaching Bull. No. 23, 1929).

4. As athletics became increasingly formal the growing costs of athletic participation were met by charging for admission to football games and by alumni contributions. H. Savage, supra note 3, at 22-24. With this expansion came abuse. The hiring of "ringers" (athletes playing in a single game under an assumed name), the presence of "tramp" athletes ("special students" enrolled in only a single subject), and open recruiting of athletically gifted students placed intercollegiate athletics in low public esteem. A. Flath, supra note 3, at 17-18; H. Savage, supra note 3, at 28-29. Athletic participation, especially in football, was so dangerous that President Theodore Roosevelt threatened to outlaw football unless it was reformed. G. Hanford, An Inquiry Into the Need for and Feasibility of a National Study of Intercollegiate Athletics 95 (1974) [hereinafter cited as ACE Study].

5. 2 President's Commission on Olympic Sports, Final Report 1975-77, at 332. The NCAA was originally known as the Intercollegiate Athletic Association and received its present name in 1910. Id. Ratification of the NCAA's constitution by 38 institutions in 1906 marked the beginning of university control of intercollegiate athletics. A. Flath, supra note 3, at 23. But see H. Savage, supra note 3, at 24 (some instances of institutional control before founding of NCAA).


7. Cf. 2 President's Commission on Olympic Sports, supra note 5, at 331 (the 39% of nation's colleges and universities affiliated with NCAA represent institutions with largest and best endowed sports programs). The NCAA recently reported assets of $3.7 million, [1975-76] NCAA Ann. Rep. 210, and an operating budget of $3.2 million, id. at 217.

8. The membership, made up of colleges, regional athletic conferences, and other interested groups, governs the NCAA through its annual Convention. Constitution and Interpretations of the National Collegiate Athletic Association, art. IV, § 3, reprinted in [1977-78] Manual of the National Collegiate Athletic Association 22-23 [hereinafter cited without parallel citation as NCAA Const.]. The Convention may pass bylaws on a majority vote, id. art. VI, § 1(a), and may amend the constitution by a two-thirds majority vote. Id. art. VII, § 1. The Council, consisting of 18 members elected at
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the NCAA is to preserve distinctively amateur athletics as part of the academic program of the nation's institutions of higher education.9

B. The NCAA and Per Se Restraints of Trade

Although the NCAA and its member schools are nonprofit institutions,10 both the NCAA11 and its members participate in economic activities largely indistinguishable from the activities of commercial, profit-seeking competitors.12 NCAA member schools agree to add-

the Convention, is responsible for the "establishment and direction of the general policy of the Association" between Conventions. Id. art. V, § 1. The 10-member Executive Committee implements policies established by the Council. Id. art. V, § 2.

9. The NCAA seeks to maintain a "clear line of demarcation between college athletics and professional sports" by ensuring that student athletes and the athletic programs in which they participate remain "an integral part" of the overall educational program. Id. art. II, § 2(a). The NCAA's other purposes are listed at id. art. II, § 1. The presence of such programs plays an important, although unquantifiable, role in generating institutional support among students, alumni, and the broader college community. ACE STUDY, supra note 4, at 116-17. By enforcing the standards of amateurism, of eligibility, and of university control of sports, the NCAA promotes the use of athletics as a tool to further the educational and social development of students. See ACE STUDY, supra note 4, at 115. See also Gardner, The Place of Intercollegiate Athletics in Higher Education: Hold That Tiger!, 31 J. Higher Educ. 364 (1960).

There is a strong connection between the urge to make an athletic program financially successful and the urge to "win at all costs." The chances of winning, of course, are greatly increased by the presence of highly trained athletes. See, e.g., ACE STUDY, supra note 4, at 53-54, 64, 83; J. Durso, The Sports Factory 89 (1975). Fielding a winning team is also viewed as an important factor in generating broader institutional prestige that may aid in institutional fund raising. ACE STUDY, supra note 4, at 54. A "win at all costs" atmosphere, however, is conducive to a variety of competitive excesses, on the field and off. See id. at 75. Such excesses can have detrimental effects on the welfare of students. Marco, The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty, 31 J. Higher Educ. 422, 426 (1968). See p. 676 & note 106 infra.

10. The Association engages in many commercial activities. It sponsors 39 championship programs in 18 sports, yielding gross receipts of $8.6 million, [1975-76] NCAA Ann. Rep. 9-10, negotiates contracts for television exposure of some of the events in which its member schools participate, NCAA, 1976-77 Television Committee Report 9, and performs many of the functions traditionally associated with trade associations such as publishing and distributing sports books, periodicals, rule books, manuals, and films, performing lobbying functions for its members, arranging insurance packages, and sponsoring various educational, research, and scholarship programs. See ACE STUDY, supra note 4, at 85.

11. The motivation for a school's straying from strictly educational objectives is at least partly financial; a successful intercollegiate football program can provide funds to help support the rest of a school's intercollegiate and intramural athletic program. In
minister their athletic programs in accordance with the constitution, bylaws, and other legislation of the Association. Several of these rules, as well as the mechanism for enforcing them, suppress significant economic competition among NCAA members and involve per se violations of section 1 of the Sherman Act. If a practice falls within a per se category, the practice normally is held to violate the antitrust laws "regardless of any asserted justification or alleged reasonableness."

1. Limitations on Student-Athlete Compensation

NCAA members compete for talented student athletes with each other, nonmember schools, and, to a lesser extent, professional sports

1969 large-scale football programs produced a median of 70% of total athletics revenue but only 50% of total athletics expenditures—a median profit of $250,000. R. Atwell, Financial Problems of Intercollegiate Athletics 7 (March 1974) (app. B to ACE Study, supra note 4) (on file with Yale Law Journal). In the same year, the average gross revenue from football was $960,000, with an average operating profit margin of 30.5%. Forbes, November 15, 1976, at 77. Although basketball is generally a break-even operation, it and hockey occasionally turn a profit. R. Atwell, supra at 8. As a general proposition, however, intercollegiate athletic programs appear to lose money. J. DuRso, supra note 9, at 90; Koch, A Troubled Cartel: The NCAA, 58 Law & Contemp. Probs. 135, 147-48 (1973).

13. NCAA Const., supra note 8, art. IV, § 2(a).

14. This Note's discussion of several NCAA practices, see pp. 658-63 infra, is by no means an exhaustive catalog of per se violations engaged in by the NCAA and its members. The NCAA procedures for certifying events in which NCAA athletes may participate without losing eligibility may also be a group boycott. See Samara v. National Collegiate Athletic Ass'n, 1973-1 Trade Cas. ¶ 74,536 (E.D. Va. 1973); Note, National Collegiate Athletic Association's Certification Requirement: A Section 1 Violation of the Sherman Antitrust Act, 9 Val. U.L. Rev. 193, 205-09 (1974).

NCAA members, albeit without the direct complicity of the Association, engage in a per se illegal market division when they schedule competition within regional conferences. NCAA member schools compete among themselves to achieve the best possible athletic schedule. Member schools act in the dual role of buyers and sellers. They act as sellers when they offer their team's services to other schools; they act as buyers when they accept offers of team services from other schools. See J. DuRso, supra note 9, at 68-71, 73. NCAA members have created a horizontal market division by banding into regional conferences, which generally require member schools to play a portion of their games against other members of the conference, see Koch, supra note 12, at 137-38, and thereby create geographic competitive boundaries, a per se violation of the Sherman Act. See United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); Timken Roller Bearing Co. v. United States, 341 U.S. 595 (1951).

15. Loevinger, The Rule of Reason in Antitrust Law, 50 Va. L. Rev. 23, 26 (1964); see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940) (price fixing); Flittie, The Sherman Act § 1 Per Se—There Ought To Be a Better Way, 30 Sw. L. Rev. 523, 550 (1976) (listing practices labeled per se violations). A literal reading of § 1 would eliminate the right to contract, since all contracts necessarily restrain trade, see, e.g., Standard Oil Co. (N.J.) v. United States, 221 U.S. 1, 60 (1911); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 355 (1897) (White, J., dissenting), so the Supreme Court has held that § 1 prohibits only unreasonable restraints of trade. Nevertheless, the Court has long held that certain types of contracts are irrebuttably presumed unreasonable and are thus per se in violation of § 1. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. I), 74 Yale L.J. 775, 785-805 (1965).
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Because the supply of talented athletes is limited, competition for their services is sometimes intense. NCAA rules restrain this competition by placing limits on the compensation received by student athletes who participate in Association events. Member schools are prohibited from providing more than "commonly accepted educational expenses": tuition and fees, room and board, and a few incidentals. The number and duration of athletic financial aid awards are also limited by NCAA rules.

Compensation paid to student athletes is, in economic terms, the price of their athletic services. Because the price is set by agreement.

16. NCAA members have occasionally met competition from professional teams in their efforts to recruit high school players. J. Dunso, supra note 9, at 27-30 (professional team reportedly signed seven-year, $3 million contract with athlete directly after high school graduation). Furthermore, professional teams sometimes draw seasoned players away from college teams before graduation. Id. at 81-86; see Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1055 (C.D. Cal. 1971) (striking down professional league's rule prohibiting contracts with college-age players).

17. It is estimated that only four percent of the average "big-time" athletic budget is spent on recruitment. R. Atwell, supra note 12, at 10, but this figure fails to reveal the intensity of athletic recruitment. See J. Dunso, supra note 9, at 24 (high school basketball star received recruiting letters from 200 schools). Although NCAA member schools have eliminated price competition for athletic services, almost every imaginable form of influence is used to persuade young athletes to attend a given school. Airplanes, a staff of assistant coaches who are primarily recruiters, recruiting trips, expense-paid campus visits, and visits from celebrated alumni are all part of recruiting. See generally K. Denlinger & L. Shapiro, Athletes for Sale (1975); J. Dunso, supra note 9. Although the amount of actual cheating is unknown, scandals are occasionally uncovered and rumors of widespread cheating abound. See K. Denlinger & L. Shapiro, supra at 202-16; J. Dunso, supra note 9, at 64-74.

18. NCAA Const., supra note 8, art. III, § 1(a)(3).

19. Id. § 1(g)(1). Students may receive a maximum of four complimentary tickets to a game in which they are participants, id. § 1(g)(5), travel, insurance, and tutorial expenses in connection with intercollegiate participation, id. § 1(h), and achievement awards of small value, id. § 1(o). Division III, composed of schools with weaker athletic programs, may award financial aid to student athletes only upon a showing of financial need. NCAA Bylaws, supra note 10, art. IX, § 2(b).

20. NCAA Bylaws, supra note 10, art. V, § 5 (setting maximum number of financial aid awards in each sport).

21. The duration of an athletic grant may not exceed one year if athletic ability was a basis in making the award, NCAA Const., supra note 8, art. III § 4(d), and the number of years that a student may engage in intercollegiate athletics is limited. NCAA Bylaws, supra note 8, art. IV, § 3(c). These limitations prevent student athletes from bargaining for longer awards.

22. Although colleges euphemistically label this compensation "financial aid," there can be no question that this aid is, in fact, compensation: student-athletes exchange their athletic skills, in a quid pro quo, for a package of goods and services. Although the athletic award may not be adjusted during the award's period on the basis of the student's athletic ability, a disabling injury, or any other athletic reason, the award may be graduated or cancelled if the student is declared ineligible for intercollegiate competition, engages in fraud or serious misconduct, or withdraws from a sport for personal reasons. NCAA Const., supra note 8, art. III, § 4(c). Furthermore, if an athlete is injured or fails to perform well athletically, his grant need not be renewed for the next period. NCAA,
among member schools rather than by competition, NCAA rules limiting compensation constitute price fixing among horizontal competitors in the market for athletic services. These price-fixing agreements are per se violations of section 1 of the Sherman Act.

2. Restrictions on the Number of Coaches

NCAA members also compete for the services of coaches and assistants qualified to train and manage varsity teams. NCAA rules restrict competition for coaching services by limiting the number of coaches and assistant coaches any member school may hire for its basketball and football teams. This rule is an agreement to limit supply and contains features of both horizontal market division and price fixing. It is thus a per se violation of section 1 of the Sherman Act.


23. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) (price fixing occurs "if the range within which purchases or sales will be made is agreed upon"). The costly extremes to which college coaches have gone to lure some high school athletes are an indication that member schools may be willing to offer compensation in excess of NCAA limits to at least certain athletes. See note 17 supra.

24. See United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491 (1950) (price fixing consistently condemned for services as well as goods); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948) (agreements by buyers as well as sellers to fix prices are per se illegal).

25. The employment market for collegiate coaches has been described as "multi-state, if not national." Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W, slip op. at 19 (N.D. Ala. Sept. 27, 1976).

26. This limit has only been adopted by schools in the NCAA's Division I, which consists of schools having the strongest athletic programs. NCAA Bylaws, supra note 10, art. VI, § 1. See id. art. XI, § 1(a) (NCAA divided into three divisions, each having separate legislative power).

27. A horizontal market division is an agreement among competitors to divide the market in which they purchase or sell goods or services. The division can be along geographic, customer, or product lines. The effect of such an agreement is to create protected market segments. See, e.g., United States v. Topco Assoc., 405 U.S. 596 (1972) (cooperative buying association exclusive licensing scheme); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (division of world into exclusive territories).

The limitation on hiring coaches is a horizontal market division because it divides the supply of coaching jobs equally among horizontal competitors. Moreover, the limitation is also a type of indirect price fixing that usually falls within the per se ban. Cf. National Macaroni Mfrs. v. FTC, 345 F.2d 421 (7th Cir. 1965) (uniform standards for purchasing raw materials by competing manufacturers). An agreement that, by restricting the number of purchases, accomplishes the same result as a direct agreement among competing purchasers to fix the price of purchased goods or services must also be per se illegal. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (horizontal agreements to restrict output are per se illegal). The NCAA limit on the number of coaches will depress coaches' salaries because the number of coaches employed under the rule is less than the number employed before its adoption. See Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W, slip op. at 24 & n.21 (N.D. Ala. Sept. 27, 1976) (number of displaced coaches "not insignificant").
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Furthermore, compliance with the rule may take on some of the characteristics of a concerted refusal to deal, another per se violation.  

3. The NCAA Television Plan

NCAA member schools are competitors in the marketing of broadcasting rights and compete with other forms of public entertainment. The NCAA controls all forms of simultaneous telecasting of


29. Concerted refusals to deal, or group boycotts, are agreements by traders not to do business with other traders and are per se violations of Sherman Act § 1. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (excluding competitors from marketplace); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 467-68 (1941) (coercing conduct of buyers, sellers, or competitors). See generally Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955).

The NCAA's limitation on coaches contains some of the features of a group boycott. Since there were more coaches employed than the rule permitted, a number of coaches lost their jobs as a result of the rule. See note 27 supra. Because all Division I schools are bound to follow the rule, these coaches were faced with a refusal to deal based on the concerted action of the NCAA members; thus some coaches were unable to sell their labor "in an open competitive market." See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 215 (1959). But see Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W, slip op. at 19-20 (N.D. Ala. Sept. 27, 1976) (group boycott cases require boycott of specific target group because of some characteristic of target group members; NCAA rule had no such effect). Recently, some lower courts have departed from strict per se analysis by requiring proof of exclusionary or coercive intent. See, e.g., Oreck Corp. v. Whirlpool Corp., 563 F.2d 54 (2d Cir. 1977); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970).


The NCAA plan provides for "exception" telecasts under certain specified circumstances where the telecast will not appreciably damage attendance at a concurrent college game. NCAA, 1976-77 Television Committee Report 19-25. The fact that there were 43 exception broadcasts in 1976, id. at 41, suggests that there is unsatisfied demand for telecasts, thus indicating that the NCAA plan is restricting output in the sale of television rights. Furthermore, several schools have indicated that they could receive far more for their telecast rights in an open market. See Koch, supra note 12, at 146-47. There have been indications that the stronger football schools might break away and compete with the NCAA in marketing broadcast rights. See id. at 147.

31. Intercollegiate athletics is a form of public entertainment. College football attendance in 1975 was 31.7 million. Forbes, November 15, 1976, at 77. For the 1968-69 season the NCAA estimated that football generated $145 million in revenues and that all sports generated $200 million. A strong athletic program may produce as much as $5 million in gross revenues for a school. Id. Although a precise determination of the extent to which intercollegiate sports compete with other forms of entertainment is beyond the scope of
football games between NCAA member schools and thereby restricts member schools in their direct dealings with broadcasters. The NCAA periodically sells an exclusive right to televise NCAA football to a single television network. In return for a guaranteed total fee, the NCAA receives from the network a contract specifying the total number of televised "exposures" per season, the minimum and maximum number of appearances each member school must receive, and the criteria for broadcasting additional games as exception telecasts. The NCAA football television plan is an agreement among horizontal competitors to limit output, and hence a per se violation of the Sherman Act because it restricts the amount of college football available for home viewings.

4. The NCAA Enforcement Program

The NCAA Enforcement Program imposes sanctions on violators of the Association's rules. A member school found guilty of a violation after notice and hearing can be penalized by being excluded from specified NCAA events such as NCAA championships, post-season meets, or even regular season play. Violation of NCAA rules can also lead to exclusion from the NCAA television plan. Although the

32. The network selects the football games to be telecast and must negotiate separate contracts with individual schools. The individual contracts are subject to the terms of the NCAA package contract. NCAA, supra note 30, at 9. Despite this provision for individual negotiation, the fees paid to schools appearing on television are uniform. Id. at 7 ($501,538 for national appearance, $380,000 for regional appearance, subject to six percent assessment by NCAA).

33. Before 1951 NCAA member schools negotiated television contracts individually. See Hochberg & Horowitz, supra note 30, at 112, 114. The current policy of using two-year contracts was adopted in 1960. Id. at 116.

34. See NCAA, supra note 30, at 7-13, 17. An exposure is defined as the "release of a game telecast or a combination of several game telecasts into each television market in the nation." Id. at 10.

35. An agreement by competitors to limit their output, production, or sales is equivalent to a direct agreement to fix prices. If competitors restrict output, prices will rise. See generally R. Posner, Economic Analysis of Law 195-209 (2d ed. 1977). The NCAA television plan, by restricting sales of television broadcast rights, constitutes an agreement to limit the sales of such rights. Horizontal agreements to restrict output are per se illegal as a corollary of the per se ban on price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

36. Hochberg & Horowitz, supra note 30, at 112. See note 30 supra.


38. Id.
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NCAA has no authority to discipline individual athletes for violation of NCAA eligibility rules, the Association may force a member school to discipline an individual athlete by threatening to sanction the school. The sanctions, or the threat of their imposition, ordinarily succeed in securing compliance with NCAA rules. The NCAA Enforcement Program is therefore an economic boycott or concerted refusal to deal, another per se violation.

II. The NCAA and Recent Antitrust Analysis

A. Goldfarb

Until recently, accepted judicial doctrines of immunity shielded self-regulatory organizations from antitrust scrutiny. Immunity was justified by the alternative theories that self-regulatory organizations do not engage in "trade or commerce" or that the antitrust laws do not apply to such organizations.


40. It is impossible to measure how much cheating occurs. See ACE STUDY, supra note 4, at 80-82. The Enforcement Program is designed to promote voluntary self-disclosure and self-correction of NCAA rule violations. See NCAA, OFFICIAL PROCEDURE GOVERNING THE NCAA ENFORCEMENT PROGRAMS §§ 3(b), 7(b)(12), (e), reprinted in [1977-78] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 122, 125-26. Review of the minutes of the NCAA Council and Executive Committee reveals that universities charged with violations often cooperate with the NCAA investigative staff.

41. See note 29 supra (citing cases).

42. See p. 655 & note 1 supra (self-regulatory organization controls activity for benefit of class broader than class subject to regulation).

43. The "trade or commerce" doctrine is based on the argument that Congress did not intend to exercise its full power under the commerce clause. The argument that the words "trade or commerce" mean something less than interstate commerce is founded on a misreading of the Federal Baseball case. Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). Justice Holmes wrote that a baseball exhibition "although made for money would not be called trade or commerce in the commonly accepted use of those words," id. at 209; but he was merely ruling that baseball was not interstate commerce as that term was defined in his era—a definition that required courts to ask whether an activity was "commerce" and whether it was sufficiently "interstate." See United States v. International Boxing Club, Inc., 348 U.S. 236, 243 (1955). As the definition of interstate commerce has expanded, the scope of the Sherman Act has also expanded. Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 n.2 (1976) ("decisions by [the Supreme] Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). There is language in other cases that might indicate that "trade or commerce" is narrower than the full scope of the commerce power. See, e.g., United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 490-92 (1950) (reserving question whether professional activity constitutes trade or commerce); Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436-37 (1932) ("trade" as used in Sherman Act does not include liberal arts or learned professions). But "[t]hese citations are to passing references in cases concerned with other issues." Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 n.15 (1975). The language of § 1 of the Sherman Act was intended to merge constitutional jurisdiction with the common law terminology "restraint of trade." See Note, The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities, 82 YALE L.J. 313, 321-22 (1972).
not apply to organizations whose activities are "traditionally non-commercial." According to these doctrines, the Sherman Act was simply not intended to apply to self-regulatory organizations like the NCAA.

In Goldfarb v. Virginia State Bar, however, the Supreme Court overturned accepted notions of antitrust immunity. In holding price fixing by a bar association illegal under the Sherman Act, the Court ruled that professional self-regulatory organizations are subject to antitrust scrutiny. The Court held that "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act" where anticompetitive activities or practices are alleged. Anti-competitive behavior is subject to antitrust review under Goldfarb regardless of the context in which it occurs.

44. The "traditionally noncommercial" doctrine originated in Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970), and is thus of more recent vintage than the "trade or commerce" doctrine. Judge Bazelon, in holding that a regional school accrediting association was beyond the scope of the Sherman Act, drew a distinction between ordinary commercial enterprises and combinations normally having other than commercial objectives. Id. at 654. In the latter context, an "incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." Id. The court intended to create only a partial immunity; antitrust policy was to apply to activities "that could have little other than a commercial motive." Id. The court did not cite any legislative history to support the notion that the context in which a restraint of trade arises may render the Sherman Act inapplicable, nor do the cases that the court cited as support for this proposition buttress such a view. See Note, supra note 43, at 325-27.

45. Courts have used the "traditionally noncommercial" theory to immunize the NCAA from Sherman Act review. See Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) (motion for preliminary injunction; alternative grounds); College Athletic Placement Serv. v. National Collegiate Athletic Ass'n, 1975-1 Trade Cas. ¶ 60,117, at 65,267 (D.N.J.), aff'd mem., 506 F.2d 1050 (3d Cir. 1974); cf. Amateur Softball Ass'n v. United States, 467 F.2d 312, 315 (10th Cir. 1972) (reserving question whether "trade or commerce" exemption applies to amateur athletics).


47. The Court rejected the "trade or commerce" doctrine because it could not "find support for the proposition that Congress intended any such sweeping exclusion." Id. at 787. Furthermore, in rejecting the notion that the nature of the occupation served to shield anticompetitive activities from antitrust liability, the Court implicitly rejected the "traditionally noncommercial" doctrine. Id. at 787-88. The Court did leave open, however, the possibility that the nature of the occupation could play a role in evaluating anticompetitive practices. See id. at 788 n.17.

48. 421 U.S. at 787.

49. "[T]he Sherman Act . . . 'shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.'" 421 U.S. at 788 (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944)). Two post-Goldfarb opinions suggest that the immunity argument retains some force; neither of the cases, however, cites authority for this proposition or attempts to analyze the limits of the Goldfarb holding. Donnelly v. Boston College, 558 F.2d 654, 635 (1st Cir. 1977) (dictum) ("defendants' law school activities do not have 'commercial objectives'"); In re Bates, 555 F.2d 640, 642 (Ariz. 1976), rev'd on other grounds sub nom. Bates v. State Bar, 97 S. Ct. 2891 (1977) (Goldfarb limited to restraints traditionally targets of antitrust laws; advertising "far different than price-fixing").
After *Goldfarb* the NCAA's anticompetitive practices are susceptible to antitrust attack, but the NCAA's status as a self-regulatory organization may require that its practices be tested under relaxed antitrust standards. Although the Court in *Goldfarb* rejected the argument that a restraint arising in a noncommercial context is immune from antitrust review, the *Goldfarb* opinion intimated that less stringent rules would be applied to such restraints. The Court noted that the "public service" aspects of a restraint "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."  

*Goldfarb* thus suggests that the nature of the organization engaged in a questionable practice may justify a relaxation of the per se rules. The decision to declare a given practice per se illegal rests upon two criteria. First, in all but a small percentage of cases, the anticompetitive harms of the practice outweigh any possible benefits. Second, any judicial attempt to identify cases in which the practice is not on balance harmful will waste judicial resources and add costly elements of uncertainty to the law. A per se rule therefore reflects the judgment that it is not worthwhile to make individual determinations of reasonableness. It is doubtful that the criteria for proper application of per se rules are met in the context of self-regulation since, by definition, self-regulatory organizations are substantially interested in benefiting a

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50. Since *Goldfarb* at least two courts have relied on that case to hold that the NCAA is not immune from antitrust scrutiny. Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W, slip op. at 14-16 (N.D. Ala. Sept. 27, 1976) (specifically refusing to distinguish NCAA from bar association); Board of Regents v. National Collegiate Athletic Ass'n, 551 F.2d 499 (Okla. 1977) (construing Oklahoma statute with language similar to Sherman Act §1).  
51. 421 U.S. at 788 n.17.  
52. Id.  

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class beyond the regulated group.\textsuperscript{56} Indeed, application of per se rules without regard to the context in which an alleged restraint occurs would seriously impede much legitimate and publicly desired activity.\textsuperscript{57} In the case of the NCAA, the very activities that would be prohibited now serve essential functions in regulating intercollegiate athletics.\textsuperscript{58} Application of per se rules would prohibit self-regulatory organizations from raising these issues since reasonableness is no defense to a per se violation.\textsuperscript{59}

B. \textit{After Goldfarb}

Lower courts have not ignored the caveat in the \textit{Goldfarb} opinion;\textsuperscript{60} they have been reluctant to apply per se rules to anticompetitive restraints engaged in by self-regulatory organizations.\textsuperscript{61} The courts have deviated from the per se rules in two ways. First, some courts have used the rule of reason standard to examine self-regulatory activities that would be per se illegal in an ordinary commercial setting.\textsuperscript{62} These courts look first to the nature of the organization, and, on finding that a self-regulatory organization is involved, apply rule of reason analysis to the activity or practice. Other courts, after finding themselves outside an ordinary commercial setting, have created an irrebuttable presumption of reasonableness if a threshold inquiry into the nature,
purpose, and character of the particular challenged practice reveals that specific practice to be noncommercial. Although both of these approaches recognize Goldfarb's suggestion that the context in which a restraint arises may influence the applicable antitrust standards, neither approach successfully harmonizes the goals of antitrust law with the requirements of self-regulatory organizations like the NCAA.

1. The Rule of Reason in the Self-Regulatory Context

Under the first approach, when faced with conduct that would be per se illegal in an ordinary commercial context, the court examines the conduct under the rule of reason without clearly articulating the circumstances, if any, in which it would apply per se rules to self-regulatory organizations. The courts make a determination that the context of the organization, as opposed to the particular practice, justifies the relaxed standard. Hennessey v. National Collegiate Athletic Association illustrates this approach. The plaintiffs were reduced in status from full-time to part-time coaches at the University of Alabama when the NCAA adopted its rule limiting the number of coaches. Despite finding a restraint that would normally be classified per se illegal, the court found that the nature and purposes of the NCAA justified review under the rule of reason. The NCAA rule was found to be a reasonable restraint of trade.

63. Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 632 (9th Cir.), cert. denied, 98 S. Ct. 73 (1977) ("to survive a Sherman Act challenge a particular practice, rule, or regulation . . . must serve the purpose for which the profession exists, viz. to serve the public"); Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258 (N.D. Fla. 1976). The opinions, however, are not entirely clear about whether a practice would be conclusively held reasonable if both commercial and noncommercial elements are present. See p. 671 infra.


66. Id., slip op. at 1. The NCAA rule limiting the number of coaches is discussed at pp. 660-61 supra.

67. Although the plaintiffs argued that the rule constituted a group boycott, see note 29 supra, the court thought the coach limitation "more clearly analogous to a 'division of markets'." No. CA 76-P-0799-W, slip op. at 19-20. See note 27 supra.

68. No. CA 76-P-0799-W, slip op. at 20-21. The court did not name the precise features of the NCAA that justified relaxing antitrust standards.

69. Id., slip op. at 25. This approach was taken in another case challenging the NCAA coach limitations. See Board of Regents v. National Collegiate Athletic Ass'n, 561 P.2d 499 (Okla. 1977) (construing Oklahoma statute with language similar to Sherman Act § 1). Although professional sports leagues are not self-regulatory organizations within the scope of this Note, see note 1 supra, and were not immune from the Sherman Act before Goldfarb, see Radovich v. National Football League, 352 U.S. 445 (1957), this approach has also been taken when examining the practices of the National Football League. See Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 98 S. Ct. 28 (1977). But see Smith v. Pro-Football, 420 F. Supp. 788 (D.D.C. 1976).
Use of the rule of reason to examine self-regulatory conduct is a questionable exercise of judicial power. A rule of reason inquiry is usually limited to the effect of conduct on economic competition.\(^7\) When courts undertake to balance the social benefits of self-regulatory conduct against the economic harm such conduct produces, they cannot avoid making decisions according to “some ultimate reckoning of social or economic debits and credits.”\(^7\) Such a broad balancing of social values should not be undertaken in the absence of better guidance from Congress.\(^7\) If courts attempt to avoid this problem by ignoring the broader public interest questions likely to be raised by self-regulatory organizations, they must ignore the Supreme Court’s caveat in *Goldfarb.*\(^7\) Thus the courts cannot entirely avoid making broad economic and social decisions in these circumstances.\(^7\) But the rule of reason approach offers little, if any, guidance for the exercise of broad judicial discretion.

2. Distinguishing Commercial and Noncommercial Practices in a Self-Regulatory Context

Under the second approach, when faced with a practice that would be per se illegal in an ordinary commercial context, the court makes a threshold inquiry designed to separate commercial from noncommercial practices.\(^7\) Thus the court focuses on the specific practice

70. “T]he standard of reason . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.” Standard Oil Co. (N.J.) v. United States, 221 U.S. 1, 60 (1911). The wrongs that the statute sought to prevent were the power to fix prices and limit output and deterioration in quality of monopolized goods. Id. at 52. See Loevinger, *supra* note 15, at 33-34. Courts have occasionally referred to broader social values. See Chicago Board of Trade v. United States, 246 U.S. 231, 241 (1918) (restrictions on length of working day).


73. See p. 665 *supra*.

74. Unless they adopt per se rules, courts must make these choices either explicitly, through the adoption of the rule of reason approach, or implicitly, through the adoption of a presumption of validity. See p. 669 *infra*.

75. Courts have emphasized different factors in deciding whether a self-regulatory practice is commercial or noncommercial. Two general approaches can be discerned in the case law. Some courts focus primarily on the defendant's intent and purpose. See Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976). Other courts focus on the nature and character of the practice. See Veizaga v. National Bd. for Respiratory Therapy, 1977-1 Trade Cas. ¶ 61,274, at 70,870 (N.D. Ill. 1977). One court has combined elements of both the purpose test and the nature and character test. See Boddicker v. Arizona State Dental Ass'n, 549 F.2d 625, 632 (9th Cir.), cert. denied, 98 S. Ct. 73 (1977) (examining whether "a particular practice, rule, or regulation of a profession" actually "serve[s] the purpose for which the profession exists").
rather than the self-regulatory status of the defendant organization.\(^7\)

If the restraint is found to be commercial, a per se prohibition is applied. The per se rule is not applied, however, to practices found to be noncommercial. Noncommercial practices are conclusively presumed to be reasonable and, therefore, legal.\(^7\) Feminist Women's Health Center, Inc. v. Mohammad\(^7\) illustrates this approach. The plaintiff abortion clinic alleged that the defendant physicians had conspired to withhold hospital privileges from physicians associated with the plaintiff in order to drive it out of business. Although agreeing that this was an allegation of a per se illegal group boycott,\(^7\) the court ruled that if the defendants could show a reasonable noncommercial motivation, their conduct would be deemed reasonable under the Sherman Act.\(^8\)

It is questionable that the commercial/noncommercial threshold inquiry is a workable legal standard. First, this inquiry in practice will require a complex and detailed factual investigation, whether the court relies on the motivation of the regulators or on the “nature or character” of the practice to separate commercial and noncommercial prac-

\(^7\) The court first finds that the defendant is generally engaged in self-regulatory activity and then moves on to determine whether the particular challenged practice is commercial or noncommercial. See Feminist Women's Health Center v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976).

\(^7\) One case adopts the commercial/noncommercial threshold test but uses a finding that a practice is noncommercial to trigger full rule of reason review rather than a conclusive presumption of reasonableness. Veizaga v. National Bd. for Respiratory Therapy, 1977-1 Trade Cas. ¶ 61,274, at 70,870 (N.D. Ill. 1977). Plaintiffs, in a class action, argued that the defendant agency's testing and certification procedure and the defendant hospitals' refusal to hire uncertified therapists constituted a per se illegal group boycott. The court demanded an initial inquiry into whether the challenged activity was, “by its nature and character, commercial.” Id. The court ruled that it would apply a per se rule only upon finding that the restraint was commercial and would apply the rule of reason if the restraint was noncommercial. Id. Veizaga thus represents a hybrid of the approach taken in Hennessey, see p. 667 supra, and the commercial/noncommercial threshold inquiry, because it uses the threshold inquiry to limit the occasions in which it will use rule of reason analysis.

\(^7\) 415 F. Supp. 1258 (N.D. Fla. 1976).

\(^7\) Id. at 1262.

\(^8\) Only if defendants “were motivated by [good faith concern over medical care] can their actions be deemed reasonable under the per se doctrine, if plaintiff has established a prima facie per se case.” Id. at 1263. This threshold inquiry focused primarily on intent; the test was not entirely subjective, however, since the court imported the standard of a reasonable man. Id. at 1270. See note 75 supra.

A variation of the approach taken in Feminist Women's Health Center was used in Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), cert. denied, 98 S. Ct. 73 (1977). The plaintiffs challenged a state dental association rule requiring membership in the American Dental Association as a precondition to membership in the state association. In response to the plaintiffs' claim that the rule was illegal as a tying arrangement, the court held that Goldfarb required that professional self-regulation “must serve the purpose for which the profession exists, viz. to serve the public,” to survive a Sherman Act challenge. Id. at 632.
A standard that turns on intent will require a detailed inquiry into the history of the challenged practice and subjective testimony on the purposes for which it was adopted. A standard that turns on the "nature or character" of the challenged practice will include the question of intent along with other perplexing factual issues. Either version of the threshold inquiry would require courts to determine many issues raised by full rule of reason analysis. Nor will it be the exceptional case that will require the court to make this detailed inquiry. In the context of self-regulatory organizations, the defense that a restraint serves the organization's noncommercial, rather than commercial, objectives can almost always be raised.

81. See note 75 supra.

82. Indeed, any attempt to ascertain the "intent" of a complex organization may be problematic since organizational decisionmaking processes are diverse and complex. See Note, Decisionmaking Models and the Control of Corporate Crime, 85 Yale L.J. 1091, 1128 (1976). If subjective testimony is permitted, severe problems of credibility will arise, since "it is in the very nature of such evidence that in the usual case it is not worthy of credit." United States v. Falstaff Brewing Corp., 410 U.S. 526, 567-68 (1973) (Marshall, J., concurring in result) (footnote omitted); see Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1, 54-55 (1977) (limitations of testimony based on subjective intentions).

83. Courts have not clearly articulated the indicia of commerciality under the nature and character version of the inquiry test, but the inquiry would appear to require a detailed description of the setting in which the activity occurs with special emphasis on any economic advantage the defendant acquires by virtue of the activity. Undoubtedly, the defendant's purpose will also be an important criterion since evidence of intent "may help the court to interpret facts and predict consequences." Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

84. With the single, but important, exception of evidence of anticompetitive effect, the rule of reason requires substantially the same type of evidence required by the commercial/noncommercial standard:

[T]he 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. 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 predict consequences.

Id. at 238.

85. That this should be so clearly follows from the fact that such organizations, by definition, seek to promote the social benefits of a given activity. See note 1 supra. A review of the cases reveals that, in almost every one, the defendants could raise credible evidence that the challenged practice was noncommercial. See, e.g., Bates v. State Bar, 97 S. Ct. 2691, 2701-06 (1977) (restraint: ban on advertising by lawyers; asserted justifications: necessity to promote sense of professional pride, legal advertising inherently misleading, prevention of adverse effect on administration of justice, anticompetitive effects of advertising, increased consumer costs, and prevention of shoddy work); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650, 652-53, 657 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970) (restraint: refusal to accredit proprietary schools; justifications: promoting atmosphere of academic inquiry, protecting academic freedom, and institutional control of educational policy); Feminist Women's Health Center, Inc. v. Mohammad, 415 F. Supp. 1258, 1264-67 (N.D. Fla. 1976) (restraint:
Second, an attempt to distinguish commercial and noncommercial restraints breaks down when applied to practices that contain both commercial and noncommercial elements. A specific self-regulatory practice will often have a dual effect or purpose. For example, restricting entry to a profession can artificially inflate the price of professional services as well as protect the public from incompetent practitioners. The mixed practice poses a troublesome dilemma. A categorical solution, deeming the mixed restraint to be either commercial or noncommercial, would require courts to adopt either immunity, broad application of per se rules, or a rule of reason approach. On the other hand, a series of ad hoc resolutions would seriously undermine the certainty of the law. Neither alternative is satisfactory.

The costs of making this difficult threshold inquiry might be justified if the inquiry promised to further the goals of antitrust policy. But the inquiry does not promise to do so. It has long been clear in other areas of antitrust law that a "good intention" cannot justify conduct refusal to deal with physicians associating with plaintiff; justification: maintenance of adequate health care standards). If the NCAA faces an antitrust challenge, it too could raise arguments that its activities are noncommercial.

86. It will often occur that restraints arising in the context of self-regulatory organizations will be both commercial and noncommercial since, given that such organizations purport to act in the public interest, any restraint being challenged under the antitrust laws is presumably doing commercial harm. Even a cursory look at the NCAA reveals that many of its practices are both commercial and noncommercial. Although NCAA limits on student-athlete compensation, see pp. 658-60 supra, may protect the young from the corrupting influences of large sums of money and allow students to choose their schools according to educational quality rather than the size of offered athletic awards, the limitations also have a commercial effect. By limiting the amount of money student athletes may receive, NCAA member schools artificially reduce the costs of fielding a quality team. Perhaps the clearest example of mixed purposes for adopting an anticompetitive practice is the limitation on the number of coaches rule recently upheld as reasonable. Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W (N.D. Ala. Sept. 27, 1976); Board of Regents v. National Collegiate Athletic Ass'n, 561 P.2d 499 (Okla. 1977). The restriction was commercial in its admitted purpose to reduce costs and to equalize recruiting strength; however, the restriction also served to free athletic dollars for uses other than recruitment, such as attaining the noncommercial objective of providing equal opportunity for female participation in college sports, Id. at 506-07.

87. First, the courts might deem all mixed restraints to be commercial and apply the per se rules; this, however, would largely eliminate the commercial/noncommercial inquiry in favor of the per se rules. Second, the court might deem such restraints to be noncommercial and conclusively presume the restraint reasonable. This, however, would allow much damaging anticompetitive activity to continue since it would tend to immunize self-regulatory activity. Finally, the court might deem such restraints to be noncommercial but adopt the approach taken in Veizaga. See note 77 supra. This would approximate adoption of the approach taken in Hennessey, since the court would often apply the rule of reason to self-regulatory activity. See pp. 667-68 supra.

88. See note 54 supra.
that has an unreasonable anticompetitive effect. More important, the commercial/noncommercial distinction has little foundation in antitrust theory. Although the purpose of antitrust law is to promote competition, a competitive economy is itself only a means of maximizing social welfare. No reason has been advanced to show why the noncommercial nature of a practice will make the practice more likely to benefit society than a commercial practice. In Goldfarb the Supreme Court insinuated that the noncommercial aspects of self-regulatory activity might justify deviations from traditional antitrust rules, but the Court did not limit the possible justifications for relaxed antitrust scrutiny to the noncommercial aspects of self-regulatory organizations.

89. United States v. Griffith, 384 U.S. 100, 105-06 (1948). Under the rule of reason, evidence of intent may be helpful in deciding the consequences of the defendant's conduct, but it cannot justify conduct that suppresses competition. See Chicago Board of Trade v. United States, 246 U.S. 231, 258 (1918).

90. Although there is considerable dispute among observers about what the goals of antitrust ought to be, there is general agreement that the purpose of the antitrust laws is to protect competition. Compare Bork, Contrasts in Antitrust Theory: I, 65 Colum. L. Rev. 401, 401-02 (1965) with Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 492, 492-23 (1965). Disagreement centers on the meaning of the term "competition," see Dewey, The Economic Theory of Antitrust: Science or Religion?, 50 Va. L. Rev. 413, 421-22 (1964), and on the values Congress intended to protect by protecting competition. Compare Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & Econ. 7 (1966) with Letwin, Congress and the Sherman Antitrust Law: 1887-1890, 23 U. Chi. L. Rev. 221 (1956).

Observers agree that the ultimate end of a competitive economy is to maximize social welfare. See, e.g., Blake & Jones, supra at 436; Bork, supra note 15, at 831. The ways in which the Sherman Act advances social welfare are, however, in some dispute. The Act has been interpreted as stating a legislative preference for a greater number of producers of a smaller size. See Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). A corollary of this notion is the idea that the Sherman Act, by protecting a free enterprise economy, is an economic "Magna Carta" designed to guarantee personal economic freedom. See United States v. Topco Assocs., 405 U.S. 596, 610 (1972). Furthermore, anticompetitive activity can sometimes usurp governmental power. See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465-66 (1941); Dewey, The New Learning: One Man's View, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 1, 11 (H. Goldschmid, H. Mann & J. Weston eds. 1974). For a discussion of the role of equity considerations in antitrust policy, see Elzinga, The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?, 125 U. Pa. L. Rev. 1191 (1977). It is difficult to see how these policy goals mandate giving special consideration to noncommercial aspects of self-regulatory activity. Certainly, neither these goals nor the goal of maximizing material wealth will help courts adopt procedures for analyzing conduct that is both commercial and noncommercial. See p. 671 supra.

91. It is obvious that even pure profit maximizers can promote competition through increased economic efficiency created by practices that may appear ostensibly anticompetitive. This was one of the rationales for ending the per se ban against vertical location restrictions. Continental T.V., Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2559-61 (1977).

92. 421 U.S. at 788 n.17 (dictum) ("The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.")

93. The Court used open-ended language ("other features of the professions") and
Intercollegiate Athletics and Antitrust

III. Reconciling Recent and Traditional Antitrust Analysis: A Proposed Approach

A. Proposal

Although the approaches taken by courts since Goldfarb are neither workable nor justified by the policy of the Sherman Act,94 some relaxing of the per se rules is justified in the context of self-regulation.95 Once it is found that the defendant is a self-regulatory association engaging in a practice that would be per se illegal in an ordinary commercial setting, courts should adopt a two-stage analysis. First, the defendant should be permitted to show that the particular restraint achieves a substantial, but not anticompetitive, objective for the benefit of a broader class than the class being regulated. If the defendant fails to do this, the practice should be held illegal with no further inquiry. If the defendant succeeds, the inquiry should proceed to the second stage. In the second stage, the plaintiff should be permitted to demonstrate that there are nearly as effective, but less competitively harmful, means of achieving substantially the same objective. If the plaintiff succeeds, the organization's conduct should be held illegal without further inquiry. If the practice survives this two-stage review, it should be held not to violate the Sherman Act.

The proposal is superior to using pure rule of reason analysis in a self-regulatory context.96 The first stage of the proposed analysis conclusively presumes that any practice that is either entirely anticompetitive or is not related to the defendant's self-regulatory role is an unreasonable restraint of trade. Thus the proposal identifies cases in

specifically withheld comment for later consideration. Id. The case for considering commercial restraints is strong where isolating commercial from noncommercial conduct is so difficult. See pp. 669-71 supra.

94. See pp. 667-72 supra.
95. See pp. 665-66 supra.
96. See pp. 667-68 supra (describing rule of reason approach taken in Hennessey). Determining whether an organization is engaged in self-regulation requires only a fairly simple inquiry. By examining an organization's constitution and bylaws, the concerns it expresses when making rules and setting standards, the historical setting that prompted formation of the organization, and the degree to which those who engage in the activity are committed to a tradition of public service, it is possible to determine whether the organization has a substantial interest in the noncommercial aspects of the conduct that it regulates and a substantial interest in protecting the welfare of a class that is broader than its membership. In fact, courts appear to determine whether a defendant should be categorized as self-regulatory without detailed analysis. See, e.g., Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 630-32 (9th Cir.), cert. denied, 98 S. Ct. 73 (1977); Feminist Women's Health Center v. Mohammad, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976). The inquiry needed to determine whether the defendant organization should be categorized as self-regulatory is far narrower than full rule of reason review.
which further individual inquiry is not justified by the Supreme Court's caveat in Goldfarb.\(^\text{97}\)

If the defendant passes the first stage of analysis, the second stage guarantees that the amount of competitive harm is minimized, since the plaintiff has the opportunity to show that less harmful means of achieving the legitimate objective are available. Moreover, if it appears that there is either no rational connection with a substantial objective for the benefit of a broader class or if there are less anticompetitive ways of achieving this objective, a court may legitimately refuse to hear further evidence relevant to determining reasonableness. The court is no longer required to engage in the unguided balancing of broad social values required by full rule of reason review.\(^\text{98}\) The defendant's self-regulatory role serves as a guideline for the exercise of judicial discretion.\(^\text{99}\)

The proposal's limited inquiry into the means-end rationality of self-regulatory practices challenged under the antitrust laws both avoids the problems of the commercial/noncommercial inquiry and better accommodates the goals of antitrust law with the requirements of private self-regulation. The proposed method eliminates the troublesome problem of deciding what courts should do if a particular practice has both commercial and noncommercial characteristics. Although the proposed analysis will probably generate much of the same evidence that the commercial/noncommercial inquiry generates,\(^\text{100}\) it focuses on whether the challenged practice produces substantial benefits rather than on the relatively unimportant question of whether the restraint is noncommercial.

The proposed analysis is also superior to applying per se rules to self-regulatory organizations.\(^\text{101}\) Application of the per se rules in the

\(97\). The "public service aspect, and other features of the professions" prompted the Court's concern for relaxed antitrust standards. 421 U.S. at 788 n.17.

\(98\). See p. 658 supra.

\(99\). Some judicial weighing of broad social values seems inevitable in light of the Supreme Court's suggestion in Goldfarb that the public service aspects of the professions might justify anticompetitive conduct. See 421 U.S. at 788 n.17. One objection might be that although the economist's tools provide courts with a means for measuring anticompetitive effect, no such tools are available for measuring broader social values. Such criticism totally ignores the role that other social sciences, especially political science and sociology, and even the humanities, can play in antitrust litigation. See Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. Pa. L. Rev. 1214 (1977).

\(100\). See p. 670 & note 84 supra. The proposal does eliminate the necessity of relying on evidence of subjective intent. Such evidence might be admissible to help a court determine the effect of the defendant's conduct, see note 83 supra, but the reliability of such evidence is no longer crucial since an objective standard of means-end rationality must be satisfied.

\(101\). There is little authority for applying per se rules to self-regulatory organizations. In a case decided on remand from the Supreme Court for reconsideration in light of
self-regulatory context would destroy much legitimate and beneficial activity. The least restrictive means test, like the commercial/noncommercial standard, reduces the certainty that an absolute per se rule produces, but a loss of certainty is inherent in relaxing per se rules in order to retain the benefits produced by self-regulatory activities. This loss of certainty is a price that many courts have been willing to pay, even in a typical commercial setting, where there may be commercial or broader social justifications for refusing rigidly to apply per se rules.

B. The Proposal and the NCAA

The NCAA would be required to show justifications for its restrictive practices because these practices would be per se illegal in an ordinary commercial context. Under this Note's analysis, the NCAA could justify some, but not all, of its practices.

Goldfarb, a district court rejected a professional association's contention that its practices should be judged under the rule of reason instead of the per se doctrine. United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457 (D.D.C. 1975), aff'd, 555 F.2d 978 (D.C. Cir.), cert. granted, 98 S. Ct. 51 (1977) (No. 76-1767). The court of appeals, while approving the use of the per se rule, used an analysis resembling the standard proposed by this Note. Although the court affirmed the application of the per se rule against price fixing, it did so only after finding that "the rationalization offered by the Society does not justify the broad ban on all competitive bidding which the Society has attempted to enforce." 555 F.2d at 982. The court specifically noted the possibility that a narrowly drawn ethical rule would rule under the rule of reason. Id. at 983. In effect, the court determined that the rule against competitive bidding was overly restrictive.

Courts are able to inject some degree of flexibility into per se analysis by taking many factors into consideration when deciding whether to include a challenged activity within a per se category. Compare United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-23 (1940) (concerted buying program held per se violation of § 1) with Appalachian Coals, Inc. v. United States, 288 U.S. 344, 373 (1933) (exclusive selling agency held reasonable despite tendency towards price stabilization).

Before the court reaches the question of substantive review, it may be faced with an argument that the NCAA can claim the protection of the Parker v. Brown state action doctrine. Parker v. Brown, 317 U.S. 341 (1943). A substantial number of NCAA members are state schools. See [1976-77] MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 148-76. In several suits between the NCAA and institutions and/or students, generally involving eligibility determinations, when questions of equal protection or due process were raised, the courts consistently found that the actions of the NCAA involved sufficient state action to trigger Fourteenth Amendment review. See, e.g., Howard Univ. v. NCAA, 510 F.2d 215, 216-20 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Note, Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association, 24 STAN. L. REV. 908, 916-21 (1972).


1. Limitations on Student-Athlete Compensation

Some limitation on student-athlete compensation is inherent in attaining the NCAA's fundamental goal of maintaining distinctively amateur intercollegiate athletics.105 Furthermore, some definition of amateurism, it could be argued, is necessary to prevent the excessive commercialism that can produce a "win at all costs" attitude that may be detrimental to the educational development of student athletes.106 The NCAA thus could pass the first stage of the analysis; its limitation on student-athlete compensation achieves a substantial, but not anti-competitive, objective that benefits students and the general public.

A requirement that regional athletic conferences adopt independent standards might be a less restrictive means of accomplishing the NCAA's goals.107 Such a requirement would provide for some interconference competition but would preserve the right of educational institutions to set appropriate limits on student-athlete compensation. In order for the NCAA compensation limits to satisfy the least restrictive means test, the NCAA would have to justify a nationwide definition of "amateur." The NCAA could persuasively argue that regional compensation limits would break down through interconference competition and that this would result in the type of excesses that a nationwide standard is designed to prevent. Having satisfied the second stage of the analysis, the NCAA compensation limits would be conclusively presumed reasonable and thus legal under the Sherman Act.

2. Restrictions on the Number of Coaches

The NCAA limitations on the number of coaches have twice been challenged under the Sherman Act and have been found to satisfy the rule of reason on both occasions.108 The NCAA offered two justifications for the rule. First, it argued that athletically superior schools

105. See notes 9 & 58 supra.
106. Not only may such an attitude draw the student too far from his studies, but it may expose the student to dishonest and unethical conduct. See Marco, The Place of Intercollegiate Athletics in Higher Education, 31 J. HIGHER EDUC. 422, 426 (1960). Even with the present limitations, it is questionable whether college athletes are being adequately educated. In 1974 only about 62% of professional basketball players had received their undergraduate degrees. J. Durso, supra note 9, at 82. Limits on compensation, moreover, encourage student-athletes to choose their college, at least in part, on the basis of educational quality by reducing the economic element of the choice.
107. Some regional conferences do this to a degree, with the NCAA limitations serving as a ceiling. For example, the Ivy League limits athletic-related financial aid to student need. R. Atwell, supra note 12, at 15.
were using their success to entrench themselves as "super powers." Because a successful football or basketball team generates prestige and revenue required to recruit talented athletes,\textsuperscript{109} short-term imbalances in athletic strength were used to perpetuate athletic superiority to the detriment of athletically weaker schools. Second, this detrimental effect was especially severe in a time of inflationary costs. The competition to keep up with these "super powers" was causing schools to increase expenditures on profitable sports and thus to reduce athletic funds available for minor sports.\textsuperscript{110}

These limitations would be declared illegal under this Note's proposal. Assuming that the NCAA's arguments satisfied the first stage of the proposal, both of these goals could have been substantially achieved by either limiting total expenditures on certain sports or by limiting the amount of recruiting that any coaching staff might engage in, perhaps gauged according to previous athletic success.\textsuperscript{111}

3. The NCAA Television Plan

The NCAA might offer two justifications in defense of its method of selling television rights. First, NCAA control over broadcasting allows the Association to retain control over the identity of sponsors in order to protect the NCAA's name, the image of college sports, and the reputation of the NCAA member schools. Second, the restraint on open sale of television rights by member schools and the limits on television exposure are intended to increase ticket sales and attendance at live events.\textsuperscript{112} The restraint is thus viewed as achieving the objective of promoting competition in the ticket market.\textsuperscript{113} Increasing attendance might also be viewed as promoting school spirit and wider institutional support.\textsuperscript{114}

\textsuperscript{109} See note 12 supra.

\textsuperscript{110} Hennessey v. National Collegiate Athletic Ass'n, No. CA 76-P-0799-W, slip op. at 23 (N.D. Ala. Sept. 27, 1976).

\textsuperscript{111} But cf. id. at 25 (not clear that there were less restrictive ways of accomplishing NCAA objectives; however, the court appears only to have considered limit on coaches' salary rather than number of coaches).

\textsuperscript{112} NCAA, supra note 30, at 8. Adoption of the NCAA television plan was prompted by the belief that unrestricted televising of football games was harming attendance figures. Hochberg & Horowitz, supra note 30, at 113-15. This harmful effect was eliminated by preventing schools with a strong regional following from televising its games regionally every weekend. The theory was that although a strong school could fill its stadium every week despite the fact that the game might be televised in a home region, a weaker school might not be able to pull fans away from their television sets, which were displaying superior quality football with no admission charge. Id.

\textsuperscript{113} Cf. Continental T.V., Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2559-61 (1977) (increased interbrand competition may justify restraint on intrabrand competition).

\textsuperscript{114} See ACE STUDY, supra note 4, at 117.
The first justification would not satisfy the initial stage of the proposal because, assuming the objective to be a substantial and not anticompetitive objective, it does not work to the benefit of anyone other than members of the NCAA.\textsuperscript{115} The second justification satisfies the proposal's first stage if the television plan is viewed as benefiting the nation's sports consumers by working to achieve an optimal mix of live and televised football games.\textsuperscript{116} Moreover, there are no less restrictive means of accomplishing this end. Dividing the nation into several regional television markets administered by regional athletic associations would either fail to create competition in the sale of television rights to the television industry or would impair the member schools' ability to use concerted action to achieve an optimal mix of live and televised games within any given region.\textsuperscript{117} The NCAA television plan would not be held to violate the Sherman Act since it satisfies both stages of the proposal.

4. The NCAA Enforcement Program

Once it is admitted that some nationwide rules for the conduct of intercollegiate sports are desirable,\textsuperscript{118} the organization that makes these rules must be permitted to secure compliance.\textsuperscript{119} If a concerted refusal to deal is being used to secure compliance with an NCAA rule that itself satisfies the first stage of the analysis, the first part of the proposed method of review will be satisfied—that is, the restrictive practice is being used to accomplish some legitimate end. It is also clear that, on some occasions, this sanction will be the least expensive and most effective means of securing compliance with these legitimate

\textsuperscript{115} Even if this justification could satisfy the first stage, less restrictive means of accomplishing this objective are readily available to the NCAA—for example, the use of tightly drafted NCAA rules. An example of such a regulation is the NCAA ban on advertising "alcoholic beverages (except malt beverages and wine), political organizations, feminine hygiene products, and professional sports organizations or personnel" during the televising of NCAA championships. \textit{Executive Regulations of the National Collegiate Athletic Association}, Regulation 2, § 16(a), \textit{reprinted in} \textit{[1977-78] Manual of the National Collegiate Athletic Association} 99.

\textsuperscript{116} Thus by maximizing the revenue produced by college sports through both the sale of television rights and tickets for live football, the NCAA plan might be viewed as optimally allocating football between advertisers and sports fans. Competition between live and telecast football would be imperfect at best, since the ultimate consumers of televised football, the viewers, do not pay for the privilege of viewing.

\textsuperscript{117} Creating a number of exclusive regional plans would not create competition among regions since the market would be geographically segmented. Competing plans within a region would tend toward eliminating the allocative control of the plans.

\textsuperscript{118} This has been demonstrated with respect to limits on student-athlete compensation. \textit{See} p. 676 supra.

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rules. Thus, the use of boycotting tactics is permitted under this Note's proposal if such tactics are used to enforce an NCAA practice that does not itself violate the proposal.

Conclusion

Nowhere in *Goldfarb* did the Supreme Court explicitly label the defendants' fee-setting activity a per se violation. Whether this omission was intentional is unclear; however, once it is decided that criteria other than effect on competition are of importance to the antitrust liability of self-regulatory activities—a suggestion made in *Goldfarb*—the need for a method of meshing antitrust's per se rules with private self-regulation arises. By forcing members of self-regulatory organizations to achieve the objectives of their activities while causing only such competitive harm as is necessary to achieve these objectives, the proposal of this Note harmonizes the goals of antitrust with the beneficial features of private self-regulation.