

CASENOTES

Did the Supreme Court Fumble?: The Supreme Court's Failure to Endorse a Market Power Threshold to the Application of the Rule of Reason for Cases under Section I of the Sherman Act in *NCAA v. Board of Regents*¹ — Section 1 of the Sherman Act provides that every business arrangement in restraint of trade is illegal.² Where a party alleges a violation of section 1 of the Sherman Act, the court will, in general, apply a rule of reason analysis, weighing all of the circumstances of the case in deciding whether the business arrangement complained of imposes an unreasonable restraint on competition.³ The court's rule of reason analysis is often both complicated and prolonged, however, because it involves a broad inquiry into both the business practices of the defendant company and the status of the surrounding industry.⁴ In order to promote efficient litigation of section 1 cases, therefore, the courts have developed the "per se doctrine" and the "market power threshold" as alternative methods of examining the legality of restraints of trade under the Sherman Act.⁵

To avoid the protracted analysis required under the rule of reason, the judiciary has responded by declaring that certain business arrangements shall be conclusively presumed to be unreasonable restraints on trade because of their pernicious effect on competition and their lack of redeeming virtue.⁶ When conduct falls within certain defined areas,⁷ therefore, that conduct can be declared illegal without the need for exhaustive judicial inquiry into its reasonableness.⁸ The Supreme Court has endorsed the per se doctrine as an effective method of avoiding the rule of reason and its complicated and prolonged analysis in certain limited circumstances.⁹

In cases where the per se doctrine is inapplicable, many lower courts have held that proof that a defendant has substantial market power is an indispensable threshold to the application of the rule of reason.¹⁰ Market power is an economic term that relates

¹ 104 S. Ct. 2948 (1984).

² 15 U.S.C. § 1 (1982). Section 1 provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.*

³ See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

⁴ In *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), the Supreme Court described the rule of reason as "an incredibly complicated and prolonged economic investigation" of the challenged business practice. *Id.* See also *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) (describing the rule of reason as an "elaborate inquiry").

⁵ See *infra* notes 6-19 and accompanying text for discussion of the "per se doctrine" and the "market power threshold."

⁶ See, e.g., *Northern*, 356 U.S. at 5.

⁷ Established per se unreasonable business arrangements are: horizontal territorial restrictions (see, e.g., *United States v. Topco Associates*, 405 U.S. 596, 608 (1972)); group boycotts (see, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)); tying arrangements (see, e.g., *Northern*, 356 U.S. at 5); horizontal price-fixing schemes (see, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)); and vertical price-fixing schemes (see, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960)).

⁸ See, e.g., *Northern*, 356 U.S. at 5.

⁹ *Id.* See also *Arizona*, 457 U.S. at 343-44.

¹⁰ See, e.g., *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir. 1984); *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 504 (6th Cir. 1983); *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983); *Products Liab. Ins. Agency,*

to the ability of a seller to alter the interaction of supply and demand within the market.¹¹ Applying this concept to the resolution of section 1 claims, courts have held that unless the party who has allegedly restrained trade has market power, its business arrangements cannot have an adverse effect on the market.¹² According to these courts, the absence of market power implies that the defendant is in competition with firms that sell products regarded by the consumer as close substitutes for the defendant's.¹³ Because of this competition, the defendant will lose most or all of its sales if it raises its price, or if it reduces its output.¹⁴ Because the defendant's business practices would result only in its losing sales, they would not adversely affect competition.¹⁵ Price and output would continue to be determined by the market.¹⁶ Hence, the defendant's practices would not constitute an illegal restraint of trade under the Sherman Act.¹⁷ Thus, according to these courts, when it can be established at the outset of a trial that a defendant does not possess substantial market power, the section 1 claim against the defendant is dismissed.¹⁸ The market power threshold, therefore, constitutes a second effective method of avoiding application of the rule of reason.¹⁹

The 1984 case of *NCAA v. Board of Regents*²⁰ presented the United States Supreme Court with an opportunity to endorse a market power threshold to the application of the rule of reason for cases under section 1 of the Sherman Act.²¹ *NCAA* involved the question of whether the plan to regulate the broadcasting of intercollegiate football games adopted by the National Collegiate Athletic Association (NCAA)²² was legal under

Inc. v. Crum & Forster Ins. Co., 682 F.2d 660, 663-65 (7th Cir. 1982); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981); *Cowley v. Braden Indus., Inc.*, 613 F.2d 751, 755 (9th Cir. 1980), *cert. denied*, 446 U.S. 965 (1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 130 n.5 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1979); *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 90-91 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 562 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

¹¹ *NCAA*, 104 S. Ct. at 2965.

¹² See *supra* note 10 and accompanying text for lower court decisions applying the market power threshold. See also Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 159 (1984); Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 16 (1981).

¹³ See *supra* note 10 and accompanying text for lower court decisions applying the market power threshold. See also Posner, *supra* note 12, at 16.

¹⁴ Posner, *supra* note 12, at 16.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *infra* note 80 and accompanying text for discussion of the purpose of section 1 of the Sherman Act.

¹⁸ See *id.*

¹⁹ See *supra* notes 11-18 and accompanying text for discussion of the market power threshold as an effective method of avoiding application of the rule of reason.

²⁰ 104 S. Ct. 2948 (1984).

²¹ *Id.* at 2965 ("Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power . . .").

²² The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private universities and more than 100 nonprofit athletic conferences and other organizations. *Id.* at 2971 (White, J., dissenting).

the Sherman Act.²³ That plan involved contracts covering the 1982-85 college football seasons, which were awarded, after competitive bidding, to two networks, CBS and ABC.²⁴ The NCAA's television plan limited the total amount of televised intercollegiate football and the number of appearances any one team could make.²⁵ Under the contracts, the NCAA granted both ABC and CBS the right to telecast fourteen live "exposures."²⁶ In turn, each of the networks agreed to pay a specified minimum aggregate compensation to the participating NCAA member institutions.²⁷

Since no college was permitted to sell television rights outside the plan,²⁸ members of the College Football Association (CFA), an organization of major college football conferences and major independent colleges,²⁹ began a move in 1979 to give colleges with major football programs a greater voice in the formulation of college football television policy.³⁰ The organization developed its own television plan and proceeded to obtain a contract offer from NBC.³¹ Considering this a violation of association rules, the NCAA announced that it would take disciplinary action against CFA schools who complied with the contract.³²

Following this announcement, two members of the CFA, the Universities of Oklahoma and Georgia, filed an action in the United States District Court for the Western District of Oklahoma.³³ According to the universities, the NCAA's regulation of televised college football violated section 1 of the Sherman Act because it resulted in price-fixing

²³ *Id.* at 2954. The NCAA began regulating the televising of college football games in 1951. *Id.* at 2955. The NCAA's initial television plan for the 1951-53 football seasons was submitted to the Antitrust Division of the Department of Justice for review. The Division raised no objections. *See* Petition for A Writ of Certiorari at 3, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

²⁴ *NCAA*, 104 S. Ct. at 2956. The plan also involved a two-year contract entered into with the Turner Broadcasting System (TBS). *Id.* at 2956 n.9.

²⁵ *Id.* at 2956-57.

²⁶ *Id.* at 2956. At least 82 different teams had to appear on each network over each two-year period. *Id.* at 2957. Also, no college was eligible to appear on television more than a total of six times during each two-year period. *Id.* This was subject to the further restriction that no more than four of those appearances could be national telecasts. *Id.*

²⁷ *Id.* at 2956. Each network was obligated to pay a minimum of \$131,750,000 over the four years. *Id.* TBS was to have paid \$17,696,000 over two years. *Id.* at 2956 n.9.

The practice that had developed over the years involved a representative of the NCAA setting a recommended fee for different types of telecasts. *Id.* at 2956. Generally, Division I national telecasts were the most valuable, Division I regional telecasts were less valuable, and Division II and Division III games commanded a still lower price. *Id.* The aggregate of all the network payments would presumably equal the total minimum aggregate compensation. *Id.*

²⁸ *Id.* The plan provided that all forms of televising football games during the plan control periods "shall be in accordance with this Plan." *Id.* "Exception" telecasts of games that were sold out were permitted, however, in the home team's market. *Id.* at 2956 n.8. They were also permitted in the visiting team's market when games were being played more than 400 miles from the visiting team's campus. *Id.* In both cases, however, the broadcast could not be shown in an area where another college football game was to be played. *Id.*

²⁹ The CFA consists of five of the major football playing conferences — the Big 8, Southeastern, Southwestern, Atlantic Coast, and Western Athletic Conferences — and major football playing independents such as Boston College, Notre Dame, Penn State, Pittsburgh, and the service academies. *Board of Regents v. NCAA*, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982).

³⁰ *NCAA*, 104 S. Ct. at 2957.

³¹ *Id.* This contract would have allowed more appearances for each university, and would have increased the revenues of each university. *Id.*

³² *Id.*

³³ *Id.*

and output limitations and it constituted an illegal group boycott.³⁴ The schools sought to enjoin the NCAA from violating the antitrust laws in the future.³⁵

The district court held that the controls exercised by the NCAA over the televising of college football were per se violations of section 1 of the Sherman Act and granted an injunction prohibiting the future implementation of television controls by the NCAA.³⁶ The court concluded that competition had been unreasonably restrained in three ways.³⁷ First, the court found that the NCAA fixed the price for telecasts.³⁸ The court also found that the plan placed an artificial limit on the number of games televised.³⁹ Finally, the court found that the exclusive network contracts were tantamount to a group boycott of all other potential broadcasters.⁴⁰ Based on the conclusion that competition had been unreasonably restrained through a price-fixing scheme, a limit on output, and a group boycott, the district court held that the NCAA's activities were illegal per se.⁴¹

Although it had concluded that the NCAA television controls constituted a per se violation of the Sherman Act, the district court also examined the case under the rule of reason.⁴² The court explained that since it had already undertaken a detailed inquiry into the industry, the interest of litigation efficiency would not be offended by its conducting a rule of reason analysis.⁴³ Applying the rule of reason, the court concluded that the NCAA television controls were unreasonable restraints on competition and, therefore, illegal.⁴⁴ In reaching this conclusion, the court considered the nature and the character of the television controls⁴⁵ and the history and the circumstances surrounding them⁴⁶ to be determinative. The court did not, however, consider the NCAA's market power in reaching its conclusion that the NCAA's television controls were unreasonable.⁴⁷

On appeal, the United States Court of Appeals for the Tenth Circuit held that the NCAA's television controls constituted illegal per se price fixing.⁴⁸ The court of appeals

³⁴ *Id.*

³⁵ *Id.* at 2954. Although the universities obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings, most CFA members were unwilling to commit themselves to the contractual agreement with NBC. *Id.* at 2957. As a result, that agreement never materialized. *Id.*

³⁶ NCAA, 546 F. Supp. at 1311, 1326-27.

³⁷ *Id.* at 1304-13.

³⁸ *Id.* at 1304-11.

³⁹ *Id.*

⁴⁰ *Id.* at 1311-13. The district court also held that the NCAA had violated section 2 of the Sherman Act. *Id.* at 1319-23.

⁴¹ *Id.* at 1311.

⁴² *Id.* at 1313-19.

⁴³ *Id.* at 1314. The court stated:

[i]n large part, the per se rule was developed for the purpose of avoiding detailed inquiry into an industry where such an inquiry is unlikely to reveal procompetitive justifications for the challenged restraint. In this case, the court has already undertaken a detailed inquiry into this industry, and the interest of litigation efficiency is not offended by conducting a rule of reason analysis.

Id.

⁴⁴ *Id.* at 1319.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1313-19.

⁴⁸ Board of Regents v. NCAA, 707 F.2d 1147, 1156 (10th Cir. 1983). The court of appeals

concluded, however, that the injunction, which banned the NCAA from taking any role in telecasting, swept too broadly.⁴⁹ The case was remanded to the lower court for modification of the injunction.⁵⁰

Although it agreed with the district court that the NCAA television controls constituted a per se violation of the Sherman Act, the court of appeals also considered the case under the rule of reason.⁵¹ The court indicated that it did so because, given the prospect of Supreme Court review, scrutinizing the television plan under the rule of reason promoted litigation efficiency.⁵² Under this type of analysis as well, the court concluded that the NCAA television controls were unreasonable restraints on competition in violation of the Sherman Act.⁵³

The court of appeals began its rule of reason analysis by noting that gauging the television plan's net effect on competition required an assessment of the NCAA's market power.⁵⁴ The court stated that whether market power existed depended upon the existence of competing products to which a consumer could turn when faced with relative price increases.⁵⁵ Based on the district court's finding that NCAA football constituted a unique type of Saturday afternoon programming, the court of appeals concluded that the NCAA possessed market power.⁵⁶ In light of its conclusion that the NCAA possessed market power, the court stated that the risks of anticompetitive effects were imminent.⁵⁷ Against those risks, the court held that the NCAA's proffered procompetitive justifications were insufficient.⁵⁸ Having found the risks of anticompetitive effects imminent and having rejected the procompetitive justifications, the court of appeals concluded that the television plan created an unreasonable restraint on trade.⁵⁹

The Supreme Court granted stay of judgment of the court of appeals,⁶⁰ and then certiorari.⁶¹ Upon its consideration of the case, the Court rejected the lower courts' use

found it unnecessary to consider any alleged violations of § 2 of the Sherman Act, *id.* at 1159 n.16, as did the Supreme Court. 104 S. Ct. at 2957-58 n.12. The court of appeals also rejected the district court's boycott holding. *NCAA*, 707 F.2d at 1161. The court explained that all broadcasters were free to negotiate for the contract. *Id.* at 1160-61.

⁴⁹ *NCAA*, 707 F.2d at 1162. The court stated that the NCAA could appropriately use television controls as sanctions for violating other rules. *Id.* The court noted that controls could be used to prohibit telecasting on Friday nights, when high schools play. *Id.* Also, the court was not willing to prohibit the NCAA from formulating other less restrictive plans. *Id.*

⁵⁰ *Id.* The dissenting Justice of the court of appeals would have denied the injunction altogether. *Id.* (Barret, J., dissenting). The dissenting Justice based his conclusion on the ground that the television plan's primary purpose was not anticompetitive. *Id.* at 1167 (Barret, J., dissenting). The dissenting Justice explained that the television plan was designed to further NCAA objectives of maintaining intercollegiate football as an amateur sport and as an adjunct of the academic endeavors of the member institutions. *Id.* (Barret, J., dissenting).

⁵¹ *Id.* at 1157-60.

⁵² *Id.* at 1157.

⁵³ *Id.* at 1160.

⁵⁴ *Id.* at 1158.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1158-59.

⁵⁷ *Id.* at 1159.

⁵⁸ *Id.* at 1160.

⁵⁹ *Id.*

⁶⁰ *NCAA*, 463 U.S. 1311 (1983). Anticipating that the Court would grant certiorari, Justice White stayed the judgment of the court of appeals. 104 S. Ct. at 2974 (White, J., dissenting).

⁶¹ *NCAA*, 464 U.S. 913 (1983).

of the per se doctrine, instead concluding that the proper standard of review was the rule of reason because at least some restraints among schools were essential to the existence of college football games.⁶² The Court began its rule of reason analysis by pointing out that because the NCAA's television plan restrained both price and output it had a significant potential for anticompetitive effects.⁶³ The NCAA maintained that its television plan could not have had an anticompetitive impact because the association had no market power.⁶⁴ The Court rejected this argument, holding that proof of market power was not needed to condemn the restraint because the NCAA's plan was a naked restriction on price and output.⁶⁵ The Court went on, however, to find that the NCAA did in fact possess market power.⁶⁶ The Court also rejected the NCAA's argument that its television plan actually promoted competition.⁶⁷ After analyzing the case under the rule of reason, therefore, the Supreme Court affirmed the lower courts' rulings that the NCAA's television plan violated section 1 of the Sherman Act.⁶⁸

In *NCAA v. Board of Regents*, the Supreme Court was presented with an opportunity to set forth a more structured rule of reason analysis, which would allow courts to avoid burdensome analysis in certain of those cases not involving activities which trigger the per se doctrine.⁶⁹ Specifically, the Supreme Court was called upon to require a preliminary inquiry into the defendant's market power.⁷⁰ Under that inquiry, if adopted, a failure by the plaintiff to establish the defendant's market power in a section 1 case under the rule of reason would be dispositive in the defendant's favor.⁷¹ In thus bypassing some of the rule's complicated and prolonged analysis, this threshold market power inquiry would provide structure to the rule of reason analysis. The Supreme Court, however, failed to endorse the market power threshold, holding that it had not required proof of market power in the past and that in any event the NCAA did possess market power.⁷²

This casenote deals with the Supreme Court's failure to adopt a market power threshold to the application of the rule of reason analysis. Part I will begin by tracing the history and development of the rule of reason under the antitrust laws of the United States.⁷³ The emphasis will be on the problematic structure of analysis that has evolved from the decisions of the Supreme Court in this area. Part I will then focus on the development of the two methods of avoiding application of the rule of reason, the per

⁶² *NCAA*, 104 S. Ct. at 2960.

⁶³ *Id.* at 2962.

⁶⁴ *Id.* at 2965.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2966.

⁶⁷ *Id.* at 2967-70.

⁶⁸ *Id.* at 2971.

⁶⁹ *Id.* at 2965.

⁷⁰ *Id.*

⁷¹ This proposition is based on the fact that, in some cases, the defendant's market power may be so minimal that no elaborate analysis of the challenged business practice is needed to establish that the defendant could not unreasonably restrain competition. *See, e.g., Easterbrook, supra* note 12, at 159; Landes and Posner, *supra* note 12, at 937; Posner, *supra* note 12, at 16.

⁷² *NCAA*, 104 S. Ct. at 2965-66.

⁷³ *See infra* notes 78-125 and accompanying text for discussion of the history and development of the rule of reason.

se doctrine⁷⁴ and the market power threshold.⁷⁵ The effectiveness of these methods of avoiding the protracted analysis common under the rule of reason will be the emphasis in these sections of Part I. Part II will examine the Court's opinion in *NCAA v. Board of Regents*.⁷⁶ Primary focus in Part II will be on the Supreme Court's treatment of the market power issue. Finally, Part III of this casenote will point out legal and factual errors in the Court's failure to endorse a market power threshold.⁷⁷ Part III will conclude that the Court should have endorsed a market power threshold given the benefits associated with it.

I. THE HISTORY OF THE RESOLUTION OF SECTION 1 CLAIMS

A. *The Development of the Rule of Reason*

Since enacted by Congress in 1890, the Sherman Act has been the basic antitrust legislation in this country.⁷⁸ Section 1 of the Sherman Act declares contracts, combinations or conspiracies in restraint of trade to be unlawful.⁷⁹ The purpose of section 1 is to promote competition and to inhibit restraints upon freedom of trade.⁸⁰

When it enacted the Sherman Act, Congress left to the courts determination of the scope and meaning of the language used.⁸¹ In early cases, the Supreme Court followed a literal reading of the section 1 language so as to forbid every arrangement in restraint of trade.⁸² Early analysis of the legality of challenged business practices was neither

⁷⁴ See *infra* notes 126-153 and accompanying text for discussion of the development of the per se doctrine.

⁷⁵ See *infra* notes 154-184 and accompanying text for discussion of the development of the market power threshold.

⁷⁶ See *infra* notes 185-258 and accompanying text for discussion of the *NCAA* opinion.

⁷⁷ See *infra* notes 259-344 and accompanying text for discussion of legal and factual errors in the Court's failure to endorse a market power threshold.

⁷⁸ L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 13 (1977).

⁷⁹ 15 U.S.C. § 1 (1982). Section 1 provides that, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." *Id.*

⁸⁰ L. SULLIVAN, *supra* note 78, at 14. See also *Northern*, 356 U.S. at 4. The *Northern* Court stated that:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the assumption that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id.

⁸¹ See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897).

⁸² *Id.* at 328. *Trans-Missouri* involved a cartel created by the eighteen railroads providing service west of the Mississippi River. *Id.* at 292. The government challenged the legality of the cartel's rate structure under section 1 of the Sherman Act. *Id.* at 297. The railroads argued that the statute really meant to declare illegal only those arrangements which were unreasonable restraints of trade. *Id.* at 327-28. They asserted that the object of their cartel was merely to establish reasonable rates. *Id.* at 303. In rejecting this argument and declaring the cartel illegal under section 1, the Court first noted that determining what a reasonable rate was would be an uncertain process. *Id.* at 331.

complicated nor prolonged because the Court did not consider whether a restraint on trade was reasonable or unreasonable in deeming it unlawful.⁸³ In price-fixing cases, for example, the Court considered the price yielded by open competition to be the only objective test of reasonableness.⁸⁴ Any other price was necessarily unreasonable and, therefore, violated the Sherman Act.⁸⁵ Only later, when the Court began to focus on the reasonableness of restraints on trade, did judicial consideration of claims under section 1 of the Sherman Act become burdensome.⁸⁶

As the Supreme Court slowly moved away from its literal reading of section 1,⁸⁷ antitrust defendants continued to assert that the reasonableness of the restraint on trade should be determinative in these cases.⁸⁸ In 1911, in *Standard Oil Company of New Jersey v. United States*,⁸⁹ the Supreme Court reviewed the matter again, and held that challenged business practices violated section 1 of the Sherman Act only when they created unreasonable restraints on trade.⁹⁰ Thus, the Court in *Standard Oil* adopted a rule of reason to determine when business activities which created restraints on trade also violated the Sherman Act.⁹¹

In light of that uncertainty, the Court concluded section 1 condemned every restraint of trade and recognized no exceptions. *Id.* at 328.

The initial articulation by the Supreme Court of "reason" as an antitrust concept did, however, appear in the dissenting opinion of Justice White in *Trans-Missouri*. *Id.* at 343 (White, J., dissenting). White stated that "the words 'restraint of trade' embrace only contracts which unreasonably restrain trade, and, therefore . . . reasonable contracts, although they, in some measure, 'restrain trade,' are not within the meaning of the words." *Id.* at 346 (White, J., dissenting).

⁸³ *Id.* at 328.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *infra* notes 116–25 and accompanying text for discussion of the burdensome analysis under the rule of reason.

⁸⁷ This gradual evolution away from a literal reading of section 1 of the Sherman Act began with *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898). In striking down a railroad cartel similar to the one in *Trans-Missouri*, the Court distinguished between arrangements which directly and immediately reduced competition, such as the rate agreement among competing railroads before the Court, and arrangements which have only indirect or incidental effects on competition. *Id.* at 568. The latter were, the Court stated, not intended to be covered by the Sherman Act. *Id.* See, e.g., *Hopkins v. United States*, 171 U.S. 578, 592 (1898) (upholding an agreement by members of a livestock exchange to set commissions because it had no direct effect on interstate commerce).

In *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), the Court further qualified its literal reading of section 1, but reasonableness was once again rejected as a standard. 85 F. 271, 284–93 (6th Cir. 1898). *Addyston Pipe & Steel* involved the cartelization of the iron pipe trade. Specifically, six leading producers of iron pipe had divided the country into territories, had fixed the pipe prices in each territory, and then had divided the business among themselves. *Id.* at 273–74. In an opinion affirmed by the Supreme Court, the Court of Appeals for the Sixth Circuit declared that it would recognize the validity of restraints that were merely ancillary to agreements that were otherwise economically beneficial. *Id.* at 282. The court reasoned that when a restraint was truly ancillary its competitive benefits were likely to outweigh the losses. *Id.* at 282–83. The court concluded, however, that the arrangement in *Addyston Pipe & Steel* was clearly not ancillary to an economically beneficial agreement. *Id.* at 291.

⁸⁸ See *id.*

⁸⁹ 221 U.S. 1 (1911).

⁹⁰ *Id.* at 74–75.

⁹¹ *Id.* at 66. The Court claimed that this had always been the Court's position. *Id.* at 64. The Court asserted that reason was resorted to in deciding *Trans-Missouri* and *Joint Traffic*. *Id.* Nevertheless, the Court stated that those decisions were now "limited and qualified." *Id.* at 68.

In *Standard Oil*, a combination of thirty-seven oil companies had been brought under one management and control through a common holding company.⁹² The government alleged that the defendant oil companies were conspiring to restrain the trade in petroleum in violation of section 1 of the Sherman Act through the common holding company arrangement.⁹³ The Supreme Court held that the common holding company arrangement violated the Sherman Act, and ordered its dissolution.⁹⁴ In concluding that the defendant's arrangement violated section 1, the Court stated that only undue restraints of trade were illegal under the antitrust laws.⁹⁵ The Court explained that prohibiting every restraint of trade would be both impractical and contrary to congressional desire.⁹⁶ In resolving whether a particular practice restricted competition to a degree which could be called undue, the Court stated that it was necessary to resort to the standard of reason.⁹⁷ Applying the standard of reason to the common holding company arrangement in *Standard Oil*, the Court found that the arrangement was unreasonable because it had unduly interfered with competition.⁹⁸

While *Standard Oil* represented a step forward from the literalness of earlier section 1 interpretations, the rule of reason adopted in that case was of uncertain content.⁹⁹ The *Standard Oil* Court left this new standard to be expounded upon by subsequent case law.¹⁰⁰ Seven years later, in *Board of Trade of the City of Chicago v. United States*,¹⁰¹ the Court provided broad guidelines on how to apply the rule of reason which it had enunciated in *Standard Oil*.¹⁰²

In determining whether an agreement providing for a fixed price for after hours grain trading violated section 1, the *Board of Trade* Court suggested a list of factors that would be relevant in determining whether a restraint on competition was unreasonable.¹⁰³ The *Board of Trade* Court first reiterated the position taken in *Standard Oil* that

⁹² *Id.* at 41.

⁹³ *Id.* at 30.

⁹⁴ *Id.* at 74-75.

⁹⁵ *Id.* at 60.

⁹⁶ *Id.*

⁹⁷ *Id.* at 63-64.

⁹⁸ *Id.* at 74-75.

⁹⁹ P. AREEDA, ANTITRUST LAW, § 1500 (1986) ("Without further elaboration, reasonableness is too vague . . .").

¹⁰⁰ In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), the Supreme Court reaffirmed the rule of reason, but it did not expound upon the new standard of review. *Id.* at 180. That case involved the defendant's attempt to restrain trade within the tobacco industry. *Id.* at 148. In declaring the defendant's practices illegal under section 1 of the Sherman Act, the Court stated that the duty to construe the words "restraint of trade" was one that could only be discharged by a resort to reason. *Id.* at 180.

¹⁰¹ 246 U.S. 231 (1918). The Board of Trade was the center through which most of the grain trading in Chicago was done. *Id.* at 235. The exchange had adopted a rule which required members of the exchange to establish an off-hour trading price for grain that arrived when the exchange was closed. *Id.* at 237. The government questioned the legality of such a rule under the Sherman Act. *Id.*

¹⁰² *Id.* at 238-40.

¹⁰³ *Id.* at 238. The Court stated that under the rule of reason:

[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

the standard of review could not be the mere restraint of trade,¹⁰⁴ noting that every agreement concerning trade restrains trade to some extent.¹⁰⁵ The Court asserted that challenged agreements had to be analyzed in light of reason, stating that the reasonableness of a restraint was dependent upon its effect on competition.¹⁰⁶

According to the *Board of Trade* Court, among the factors relevant to the judicial determination of a restraint's reasonableness under the rule of reason would be the nature of the challenged restraint, the actual effect of the restraint on competition, and the probable effect of the restraint.¹⁰⁷ The Court stated that the history of the challenged restraint, the reason for adopting the restraint, and the end sought to be attained would also be relevant.¹⁰⁸ Finally, the *Board of Trade* Court noted that the nature of the business to which the restraint was applied, the condition of that business before the restraint was imposed, and the condition of that business after the restraint was imposed also warranted judicial consideration as part of the rule of reason analysis.¹⁰⁹

Under its newly articulated rule of reason doctrine, the Supreme Court concluded that the Board's agreement providing for a fixed price for after hours grain trading did not violate section 1 of the Sherman Act.¹¹⁰ In considering the nature of the Board's agreement, the Court found that the restriction was merely upon the period of price making.¹¹¹ In examining the scope of the Board's agreement, the Court noted that the agreement applied only during a small part of the business day, and that it applied only to a small part of the grain shipped to Chicago.¹¹² Finally, focusing on the effects of the Board's agreement, the Court found that, since the agreement did not apply to grain shipped to other markets, the agreement had no appreciable effect on general market prices.¹¹³ Having focused on the nature, the scope, and the effect of the challenged agreement, the Court concluded that the agreement was reasonable and did not, therefore, violate the Sherman Act.¹¹⁴

Board of Trade remains the leading Supreme Court case outlining the rule of reason analysis.¹¹⁵ The *Board of Trade* factors continue to be used to aid courts in determining whether a particular arrangement tends to suppress competition unreasonably.¹¹⁶ Nevertheless, lower courts have had difficulty applying the *Board of Trade* factors in cases involving section 1 claims because the Supreme Court has never assigned relative weight to each factor.¹¹⁷ Furthermore, the Court has not indicated which factors are determi-

save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The Court stated that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 239.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 240.

¹¹⁴ *Id.* at 239.

¹¹⁵ It remains common practice to include the Court's formulation of the rule of reason from *Board of Trade* in the jury instructions in section 1 cases. Posner, *supra* note 12, at 15.

¹¹⁶ See *id.*

¹¹⁷ *Id.* at 14-15 ("This passage [from *Chicago Board of Trade*] invites an unlimited, free-wheeling

native of the issue of unreasonable restraints on competition.¹¹⁸ These oversights on the Court's part have produced a common criticism of the rule of reason analysis that "[w]hen everything is relevant, nothing is dispositive."¹¹⁹

Great difficulties in the litigation of section 1 claims stem from the vague judicial declarations of the rule of reason analysis.¹²⁰ Due to the lack of an existing analytical framework for applying the rule of reason in antitrust litigation, the rule of reason analysis is often both complicated and prolonged because it involves a broad inquiry into both the business practices of the defendant company and the status of the surrounding industry.¹²¹ As a result of this protracted factual inquiry, antitrust cases under the rule of reason are extremely costly.¹²² In addition to this burden on the litigants, the rule of reason also places a burden on the judicial system. Both judges and juries are often unable to do what the current open-ended formulations require of them because they lack the expert understanding of market economies needed to determine a practice's overall effect on competition.¹²³ Moreover, given the lack of a clear analytical framework for applying the rule of reason, the decision in any given case provides little certainty about the legality of a challenged business practice in another context.¹²⁴ Thus, businesses are left with little to aid them in predicting what courts will find to be illegal business practices under the Sherman Act.¹²⁵

B. *The Development of the Per Se Doctrine*

In an effort to avoid the complicated and prolonged analysis of section 1 claims required under *Standard Oil* and *Board of Trade*, the judiciary developed another standard of review for certain antitrust cases.¹²⁶ Under this standard, the per se doctrine, certain activities, which courts have found to have a pernicious effect on competition and to lack redeeming virtue, have been conclusively presumed to create unreasonable restraints on trade.¹²⁷ Those activities subject to the per se doctrine are illegal regardless of how they effect the market in individual cases.¹²⁸

United States v. Trenton Potteries Co.,¹²⁹ decided nine years after *Board of Trade*, represents an early step in the Supreme Court's development of the per se doctrine. In that

inquiry . . . [T]he trier of fact is left in the dark as to how to decide whether a challenged practice is substantially anticompetitive." See also Easterbrook, *supra* note 12, at 155 ("[Supreme Court] formulations [of the rule of reason] are empty.").

¹¹⁸ See Posner, *supra* note 12, at 14-15.

¹¹⁹ Easterbrook, *supra* note 12, at 155.

¹²⁰ See *infra* notes 120-25 and accompanying text for discussion of the difficulties in the litigation of section 1 claims under the rule of reason.

¹²¹ In *Northern*, 356 U.S. at 5, the Supreme Court described the rule of reason as "an incredibly complicated and prolonged economic investigation" of the challenged business practice. *Id.* See also *Arizona*, 457 U.S. at 343 (describing the rule of reason as an "elaborate inquiry").

¹²² The Supreme Court has noted that "[t]he elaborate inquiry into the reasonableness of a challenged business practice entails significant costs." *Arizona*, 457 U.S. at 343.

¹²³ Easterbrook, *supra* note 12, at 153-55. See also Posner, *supra* note 12, at 15.

¹²⁴ See, e.g., *Arizona*, 457 U.S. at 343; *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n.10 (1972).

¹²⁵ Easterbrook, *supra* note 12, at 155.

¹²⁶ See *infra* notes 129-53 and accompanying text for discussion of the development of the per se doctrine.

¹²⁷ See, e.g., *Northern*, 356 U.S. at 5.

¹²⁸ *Id.*

¹²⁹ 273 U.S. 392 (1927).

case, the makers of bathroom fixtures had formed a cartel which fixed prices and limited sales to specified jobbers.¹³⁰ The Court held that the arrangement violated the Sherman Act.¹³¹ In striking down the arrangement, the Court noted that the aim and result of every price-fixing agreement was the elimination of competition.¹³² The Court concluded that that alone made price-fixing agreements unreasonable, without the necessity of further analysis.¹³³

Thirteen years later, in *United States v. Socony-Vacuum Oil Co.*,¹³⁴ the Supreme Court first articulated a formal per se doctrine.¹³⁵ *Socony-Vacuum* involved a concerted program by major oil refiners to buy independent refiners' surplus oil.¹³⁶ The Court held that the defendants' arrangement was unlawful per se.¹³⁷ Having labelled the defendants' arrangement as a price-fixing agreement,¹³⁸ the Court indicated that it would not permit inquiry into a price-fixing agreement's reasonableness.¹³⁹

In the 1958 case of *Northern Pacific Railway Co. v. United States*,¹⁴⁰ the Supreme Court extended the reach of per se doctrine to an activity other than price-fixing.¹⁴¹ In *Northern Pacific*, the Court held that the defendant railroad's preferential routing agreements were unlawful per se under section 1 of the Sherman Act.¹⁴² The Court stated that, because of their pernicious effect on competition and lack of redeeming virtue, certain restraints on trade could be conclusively presumed to be unreasonable.¹⁴³ The *Northern Pacific Railway* Court pointed out that, through conclusive presumptions of unreasonableness, the per se doctrine avoided the necessity for complicated and prolonged analysis to determine whether a restraint has been unreasonable.¹⁴⁴ Using this per se analysis, the Court concluded that tying arrangements,¹⁴⁵ such as the defendant's preferential routing agreements, would be conclusively presumed to be unreasonable.¹⁴⁶

Subsequent to the Supreme Court's extension of the per se doctrine in *Northern Pacific Railway*, in addition to horizontal¹⁴⁷ and vertical price-fixing schemes¹⁴⁸ and tying arrangements,¹⁴⁹ both horizontal territorial restrictions¹⁵⁰ and group boycotts¹⁵¹ have

¹³⁰ *Id.* at 394.

¹³¹ *Id.* at 407.

¹³² *Id.* at 397.

¹³³ *Id.* at 397-98.

¹³⁴ 310 U.S. 150 (1940).

¹³⁵ *Id.* at 223. The Court stated that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *Id.*

¹³⁶ *Id.* at 179.

¹³⁷ *Id.* at 223.

¹³⁸ *Id.* at 219-23.

¹³⁹ *Id.* at 223.

¹⁴⁰ 356 U.S. 1 (1958).

¹⁴¹ *Id.* at 8.

¹⁴² *Id.*

¹⁴³ *Id.* at 5.

¹⁴⁴ *Id.*

¹⁴⁵ The *Northern* Court defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 5-6.

¹⁴⁶ *Id.* at 8.

¹⁴⁷ See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951).

¹⁴⁸ See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960).

¹⁴⁹ See, e.g., *Northern*, 356 U.S. at 5.

¹⁵⁰ See, e.g., *Topco*, 405 U.S. at 608.

¹⁵¹ See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

been declared to be unlawful per se under section 1 of the Sherman Act.¹⁵² With respect to business conduct that falls within one of the recognized per se categories, that conduct will be conclusively presumed to restrain trade unreasonably.¹⁵³ In those cases, the per se doctrine serves as an effective method of avoiding the problems associated with litigating claims under the rule of reason.

C. *The Development of the Market Power Threshold*

The literal reading of section 1 of the Sherman Act gave way to the rule of reason analysis.¹⁵⁴ That analysis was, in turn, later joined by the per se doctrine.¹⁵⁵ If, however, the challenged restraint is not one of those conclusively presumed to be unreasonable under the per se doctrine, then it must be proven to be unreasonable under the rule of reason.¹⁵⁶ For those cases, many lower courts have opted for a more structured rule of reason analysis.¹⁵⁷ These courts, as part of a more structured rule of reason, have held that proof that the defendant has substantial market power is an indispensable threshold to the application of the rule of reason.¹⁵⁸ Under this type of analysis, when it can be established at the outset of a trial that the defendant does not possess substantial market power, a court dismisses the section 1 claims without further examination of the defendant's business or the surrounding industry.¹⁵⁹ Thus, the threshold inquiry into market power becomes a second effective method of avoiding application of the rule of reason.¹⁶⁰

While this market power threshold has not been endorsed by the Supreme Court, it has been adopted by the First Circuit,¹⁶¹ the Second Circuit,¹⁶² the Fifth Circuit,¹⁶³ the

¹⁵² New areas of per se illegality are not likely to be determined without full analysis of the market impact of the practice. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253, 261 (1963) (too little known about vertical territorial restraints to make them illegal per se). Furthermore, old areas of per se illegality may be subject to erosion, requiring further resort to the rule of reason. *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring) ("The time has . . . come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie [tying arrangement] may have.").

¹⁵³ *See, e.g., Northern*, 356 U.S. at 5.

¹⁵⁴ *See supra* notes 81-125 and accompanying text for discussion of the development of the rule of reason analysis.

¹⁵⁵ *See supra* notes 126-53 and accompanying text for discussion of the development of the per se doctrine.

¹⁵⁶ *See supra* notes 81-125 and accompanying text for discussion of the rule of reason.

¹⁵⁷ *See infra* notes 161-67 and accompanying text for lower court decisions endorsing the market power threshold.

¹⁵⁸ *See id.*

¹⁵⁹ *See supra* notes 11-18 and accompanying text for discussion of the market power threshold as an effective method of avoiding application of the rule of reason.

¹⁶⁰ *See id.*

¹⁶¹ *See George R. Whitten, Jr., Inc. v. Paddock Pool Builders Inc.*, 508 F.2d 547, 562 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) ("There still must be some consideration of the effect of a defendant's conduct on some significant part of the market.").

¹⁶² *See Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 130 n.5 (2d Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 946 (1979). *But see Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1081 (2d Cir. 1980).

¹⁶³ *See Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981) ("[P]roof of the antitrust defendant's 'substantial' market power should be a preliminary hurdle . . ."); *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 90-91 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) ("[The defendants] conspicuously lack . . . market power . . .").

Sixth Circuit,¹⁶⁴ the Seventh Circuit,¹⁶⁵ the Ninth Circuit,¹⁶⁶ and the Eleventh Circuit Courts of Appeals.¹⁶⁷ As a means of structuring the rule of reason, these circuits now insist, at the outset of the trial, that the plaintiff establish that the defendant has substantial market power.¹⁶⁸ Market power is an economic term that describes the ability of a seller to alter the interaction of supply and demand within the market.¹⁶⁹ Specifically, a party possessing market power can raise the price of its product significantly above competitive levels without losing so many sales that the increase in price is unprofitable.¹⁷⁰ Absence of market power, on the other hand, implies that the defendant is in competition with firms that sell products regarded by the consumer as close substitutes for the defendant's.¹⁷¹ Because of this competition, the defendant will lose most or all of its sales if it raises its price, or if it reduces its output.¹⁷² By losing its sales, the defendant's practices cannot affect competition, and price and output will continue to be determined by the market.¹⁷³ Thus, unless the party who has allegedly restrained trade has market power, its business arrangements cannot have an adverse effect on the market and, thus, will not constitute violations of section 1 of the Sherman Act.¹⁷⁴

In *Muenster Bulane, Inc. v. Stewart Co.*,¹⁷⁵ the Fifth Circuit Court of Appeals applied the market power threshold in resolving a dispute under section 1 of the Sherman Act.¹⁷⁶

¹⁶⁴ See *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 506 (6th Cir. 1983) ("Without proof of requisite monopoly power, AHSC is simply an integrated company, facing across the board competition in every area of hospital supplies it sells . . .").

¹⁶⁵ See *General Leaseways, Inc. v. National Truck Leasing Association*, 744 F.2d 588, 596 (7th Cir. 1984) ("With the rule of reason becoming a more popular rule of decision . . . some progress has been made toward giving it some structure by requiring that the plaintiff first prove that the defendant has sufficient market power to restrain competition substantially."); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir. 1984) ("[Evaluation under the rule of reason] means . . . that the plaintiff must show that the defendant has market power, as this is a prerequisite to being able to restrain trade unreasonably."); *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Co.*, 682 F.2d 660, 663-65 (7th Cir. 1982) ("The threshold issues would be what the relevant market was and what [the defendant's] share of that market was."); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) ("A popular [shortcut] is to say that the balance tips in the defendant's favor if the plaintiff fails to show that the defendant has significant market power."); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981) ("The requirement that plaintiffs prove adverse impact in the relevant market to establish a § 1 rule of reason violation is well established in the Seventh Circuit.");

¹⁶⁶ See *Cowley v. Braden Indus., Inc.*, 613 F.2d 751, 755 (9th Cir. 1980), *cert. denied*, 446 U.S. 965 (1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

¹⁶⁷ See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983) ("We have narrowed the broad-ranging inquiry called for by the rule of reason by insisting, at the threshold, that a plaintiff . . . establish the market power of the defendant."). *But see* *Harold Friedman Inc. v. Thorofare Mkts. Inc.*, 587 F.2d 127, 141 (3d Cir. 1978).

¹⁶⁸ See *supra* notes 161-67 and accompanying text for lower court decisions applying the market power threshold.

¹⁶⁹ *NCAA*, 104 S. Ct. at 2965.

¹⁷⁰ Landes & Posner, *supra* note 12, at 937.

¹⁷¹ Posner, *supra* note 12, at 16.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See *supra* note 12 and accompanying text for the assertion that the practices of a business without market power cannot adversely effect competition.

¹⁷⁵ 651 F.2d 292 (5th Cir. 1981).

¹⁷⁶ *Id.* at 298.

In this case, the court held that the plaintiff had not met its burden of proving that the defendant possessed substantial market power.¹⁷⁷ Based on its application of the market power threshold, the court rendered judgment in favor of the defendant.¹⁷⁸

Muenster Butane involved the termination by the defendant, a Zenith distributor, of its franchise relationship with the plaintiff.¹⁷⁹ In analyzing the plaintiff's section 1 claims under the rule of reason, the court declared that proof of the defendant's substantial market power would be a preliminary hurdle.¹⁸⁰ Since the plaintiff had produced no evidence suggesting that Zenith televisions were unique, the court concluded that the defendant had no market power.¹⁸¹ Based on its conclusion that the defendant had no market power, the court held that the defendant had not violated section 1 of the Sherman Act.¹⁸²

The *Muenster Butane* court observed that a requirement that the plaintiff prove market power at the district court level in this case would have saved both the litigants and the courts much expense.¹⁸³ Through its application of the market power threshold, *Muenster Butane* exemplifies the idea that, when it can be established at the outset of a trial that the defendant does not possess substantial market power, the threshold inquiry, into market power becomes a second effective method of avoiding application of the rule of reason.¹⁸⁴

II. THE NCAA v. BOARD OF REGENTS OPINION

In *NCAA v. Board of Regents*,¹⁸⁵ the United States Supreme Court applied rule of reason analysis to hold that the NCAA's television plan violated section 1 of the Sherman Act.¹⁸⁶ The Court struck down NCAA regulation of televised college football after full inquiry into the reasonableness of the anticompetitive effects of the plan on the market in light of the procompetitive justifications offered by the NCAA.¹⁸⁷ During the course of that inquiry, the Court rejected the NCAA's assertion that its television plan could not have significant anticompetitive effects because the association had no market power.¹⁸⁸

NCAA involved the question of whether the plan to regulate the broadcasting of intercollegiate football games adopted by the NCAA violated section 1 of the Sherman Act.¹⁸⁹ The NCAA's television plan limited the total amount of televised intercollegiate

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 294-95.

¹⁸⁰ *Id.* at 298.

¹⁸¹ *Id.* at 296-98.

¹⁸² *Id.* at 298.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 104 S. Ct. 2948 (1984).

¹⁸⁶ *Id.* at 2971. The Supreme Court noted that it had to accord great weight to findings of fact made by a district court and affirmed by a court of appeals. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). The NCAA, however, did not request that the Court set aside any of the findings of the district court. *NCAA*, 104 S. Ct. at 2959 n.15. Rather, the NCAA contended that the lower courts had erred as a matter of law on the question of the legality of the television plan. *Id.*

¹⁸⁷ *Id.* at 2959-70.

¹⁸⁸ *Id.* at 2965.

¹⁸⁹ *Id.* at 2954.

football¹⁹⁰ and specified the compensation to be received by the participating NCAA member institutions.¹⁹¹ The Universities of Oklahoma and Georgia asserted that the NCAA's regulation of televised college football violated antitrust law in that it resulted in both price-fixing and output limitation.¹⁹²

In determining whether to review the case under the rule of reason, the Supreme Court noted that the NCAA television plan created a horizontal restraint,¹⁹³ the results of which were restricted output¹⁹⁴ and fixed price.¹⁹⁵ Although horizontal price-fixing and output limitation would normally be condemned under the per se doctrine because the probability that they are anticompetitive is so high, the Supreme Court stated that the proper standard of review in this case was the rule of reason.¹⁹⁶ The Court explained that its decision was not based on a lack of judicial experience with this type of arrangement,¹⁹⁷ nor on the fact that the NCAA is a nonprofit entity,¹⁹⁸ nor on respect for the NCAA's role in intercollegiate athletics.¹⁹⁹ Instead, the Court emphasized that college football was an industry in which horizontal restraints on competition are essential if the product is to be made available to the public at all.²⁰⁰ Therefore, the Court concluded

¹⁹⁰ *Id.* at 2956-57.

¹⁹¹ *Id.* at 2956.

¹⁹² *Id.* at 2957.

¹⁹³ A horizontal restraint is an agreement among competitors on the way in which they will compete with one another. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 694-95 (1978); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

¹⁹⁴ *NCAA*, 104 S. Ct. at 2959-60. The Court explained that the television agreement placed an artificial limit on the quantity of televised football available to the public. *Id.* The Court noted that cases have held limitations on output to be unreasonable restraints of trade. *Id.* at 2960. *See, e.g., Topco*, 405 U.S. at 608; *United States v. Sealy, Inc.*, 388 U.S. 350, 355 (1967); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389-90 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410-12 (1921).

¹⁹⁵ *NCAA*, 104 S. Ct. at 2960. The Court stated that since the television agreement's minimum aggregate price arrangement operated to preclude any actual price negotiation, the television agreement fixed price. *Id.* The Court stated that price-fixing was the paradigm of an unreasonable restraint of trade. *Id.* *See, e.g., Arizona*, 457 U.S. at 344-48; *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-14 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927).

¹⁹⁶ *NCAA*, 104 S. Ct. at 2960.

¹⁹⁷ *Id.* A per se rule should not be applied until the courts have gained considerable experience with the challenged restraint and have found it to have no purpose except for the stifling of competition. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9-10 (1979); *Topco*, 405 U.S. at 607-08; *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

¹⁹⁸ *NCAA*, 104 S. Ct. at 2960. There is no doubt that the broad language of section 1 applies to nonprofit entities. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-87 (1975). For a case dealing with the imposition of antitrust liability on a nonprofit entity engaged in anticompetitive conduct, see *American Soc'y of Mechanical Engr's, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982).

¹⁹⁹ *NCAA*, 104 S. Ct. at 2960. Good motives will not validate an otherwise anticompetitive practice. *See, e.g., United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Associated Press v. United States*, 326 U.S. 1, 16 n.15 (1945); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912).

²⁰⁰ *NCAA*, 104 S. Ct. at 2961. The Court explained that there were a number of rules which had to be agreed upon in order to play college football, and that those rules all restrained the manner in which the colleges competed. *Id.* The Court also stated that the integrity of college

that by widening consumer choice the NCAA's actions could be viewed as procompetitive.²⁰¹ The Court stated that this conclusion necessitated the application of the rule of reason even though horizontal price-fixing and output limitations would usually be held to be illegal per se.²⁰²

At the outset of its rule of reason analysis, however, the Supreme Court rejected the NCAA's assertion that its television plan could not have significant anticompetitive effects because it had no market power.²⁰³ First, the Court concluded that, as a matter of law, the absence of proof of market power would not justify a naked restriction on price or output.²⁰⁴ The Court added that it had never required proof of market power in similar cases.²⁰⁵

The Court likewise rejected the NCAA's market power argument because it found that the NCAA did in fact possess market power.²⁰⁶ The Court stated that the correct test for determining whether college football telecasts constituted a separate market for calculating the NCAA's market share was whether there were other products that could reasonably be substituted for televised college football.²⁰⁷ The Court agreed with the

football could not have been preserved except by mutual agreement. *Id.* The Court noted that the NCAA played a vital role in establishing the rules of play and preserving the integrity of college football. *Id.* Based on that role, the Court stated that the NCAA enabled a product to be marketed which might otherwise be unavailable. *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 2960. There are, in fact, a great number of cases applying the rule of reason to cases involving amateur and professional sports. *See, e.g.,* Brenner v. World Boxing Council, 675 F.2d 445, 455 (2d Cir. 1982); North Am. Soccer League v. National Football League, 670 F.2d 1249, 1259 (2d Cir. 1981), *cert. denied*, 459 U.S. 1074 (1982); U.S. Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781, 787-88 (7th Cir. 1981) (en banc); Neeld v. National Hockey League, 594 F.2d 1297, 1299 n.4 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1180-81 (D.C. Cir. 1978); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 652-53 (5th Cir. 1977); Hennessey v. NCAA, 564 F.2d 1136, 1151-52 (5th Cir. 1977); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Bridge Corp. of Am. v. American Contract Bridge League, Inc., 428 F.2d 1365, 1370 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); Association for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 495 (D.C. 1983); Justice v. NCAA, 577 F. Supp. 356, 380 (D. Ariz. 1983); Gunter Harz Sports v. U.S. Tennis Ass'n, 511 F. Supp. 1103, 1116 (D. Neb. 1981), *aff'd*, 665 F.2d 222, 223 (8th Cir. 1981); Cooney v. American Horse Shows Ass'n, Inc., 495 F. Supp. 424, 431 (S.D.N.Y. 1980); Warner Amex Cable Communications, Inc. v. ABC, 499 F. Supp. 537, 546 (S.D. Ohio, E.D. 1980); Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F. Supp. 154, 166 (C.D. Cal. 1979), *rev'd on other grounds*, 634 F.2d 1197, 1204 (9th Cir. 1980); Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975).

Furthermore, commentators generally deem it advisable to evaluate the regulations of sports leagues under the rule of reason. *See, e.g.,* Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. REV. 341, 345 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League*, 15 CONN. L. REV. 183, 192 n.48 (1983); Blecher and Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217, 238 (1982).

²⁰³ NCAA, 104 S. Ct. at 2965. The NCAA argued that a finding of no market power was dispositive in its favor. *See* Brief for the Petitioner at 34, NCAA v. Board of Regents, 104 S. Ct. 2948 (1984).

²⁰⁴ NCAA, 104 S. Ct. at 2965.

²⁰⁵ *Id.* As authority for this proposition the Court cited United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956), United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940), and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

²⁰⁶ NCAA, 104 S. Ct. at 2966.

²⁰⁷ *Id. See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. E.I.

district court's conclusion that no other product could be readily substituted for college football for two reasons.²⁰⁸ First, the Court stated, for many viewers there is no substitute for college football.²⁰⁹ Second, the Court noted that college football generated an audience uniquely attractive to advertisers.²¹⁰ According to the Court, these findings supported the conclusion that no other product could be readily substituted for college football.²¹¹ Therefore, the Court stated that the relevant market for calculating the NCAA's market share was televised college football.²¹² With the relevant market so defined, the Court held that the NCAA possessed market power because it exercised complete control over college football broadcasts.²¹³

The Court then continued its analysis under the rule of reason with an assessment of the anticompetitive effects of the NCAA's television plan.²¹⁴ According to the Court, the anticompetitive effects of the arrangement were readily apparent.²¹⁵ In support of this conclusion, the Court stated that, due to the NCAA's television controls, the price was higher and the output lower than they would otherwise have been.²¹⁶ The Court suggested that these were the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.²¹⁷

Having found the anticompetitive effects of the NCAA's television plan to be readily apparent, the Court then focused on the procompetitive justifications offered by the

Du Pont de Nemours and Co., 351 U.S. 377, 395 (1956); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953).

²⁰⁸ NCAA, 104 S. Ct. at 2966. Professional football, which is perhaps the most logical substitute for NCAA football, is effectively precluded by the terms of its antitrust exemption from being broadcast on Saturday afternoons during the NCAA football season. See 15 U.S.C. §§ 1291, 1293, 1294.

²⁰⁹ NCAA, 104 S. Ct. at 2966.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 2966-67. The Court stated that "[i]f college football broadcasts be defined as a separate market — and we are convinced they are — then the NCAA's complete control over those broadcasts provides a solid basis for the district court's conclusion that the NCAA possesses market power with respect to those broadcasts." *Id.*

²¹⁴ *Id.* at 2962-64.

²¹⁵ *Id.* at 2963.

²¹⁶ *Id.*

²¹⁷ *Id.* at 2964. The Court also noted that the universities had lost their freedom to compete. *Id.* at 2963. See, e.g., *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 465 (1941); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 47-48 (1912); *Montague & Co. v. Lowry*, 193 U.S. 38, 44-45 (1904). In addition, the Court indicated that both price and output were unresponsive to consumer preference. NCAA, 104 S. Ct. at 2963-64. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'"). The Court also pointed out that, since all member institutions need NCAA approval in order to compete in intercollegiate athletics, members had no choice but to adhere to the NCAA's television plan. NCAA, 104 S. Ct. at 2963. See, e.g., *Silver v. New York Stock Exch.*, 373 U.S. 341, 348-49 (1963); *Associated Press v. United States*, 326 U.S. 1, 17-18 (1945). Finally, the Court stated that because only those broadcasters able to bid on the entire season could compete for television rights to college football, the NCAA's television plan eliminated competitors from the market. NCAA, 104 S. Ct. at 2964. The Court stated that the impact on competitors was analogous to the effect of block booking in the motion picture industry — a practice that the Court held to violate the Sherman Act in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 154 (1948). NCAA, 104 S. Ct. at 2964 n.36.

NCAA in support of its television plan.²¹⁸ The Court concluded that the NCAA's proffered justifications for the television plan were insufficient.²¹⁹ The NCAA's first procompetitive justification was that the television plan constituted a cooperative joint venture which assisted in the marketing of broadcast rights to college football.²²⁰ The NCAA asserted that by coordinating the televising of games, the NCAA's television plan produced procompetitive efficiencies associated with the packaging of other television series.²²¹

While in prior cases the Court had recognized that a cooperative arrangement may reap some otherwise unattainable procompetitive efficiencies,²²² the NCAA Court rejected this justification in the instant case.²²³ The Court concluded that the television plan did not produce any procompetitive efficiencies which enhanced the competitiveness of college football television rights.²²⁴ To the contrary, the Court concluded that NCAA football could be marketed just as effectively without the NCAA's television controls.²²⁵ In support of this conclusion, the Court observed that college football is a unique product, and that there is no need for collective action to enhance competition against nonexistent competitors.²²⁶

²¹⁸ NCAA, 104 S. Ct. at 2967. The Court stated that "[u]nder the rule of reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Id.*

²¹⁹ *Id.* at 2967-70.

²²⁰ *Id.* at 2967.

²²¹ See Brief for the Petitioner at 23, NCAA v. Board of Regents, 104 S. Ct. 2948 (1984). The NCAA asserted that the packaging of college football games as a series was more efficient than single sales of games because it enabled the networks to promote college football without giving away promotional benefits to other networks. This is directly analogous to the free-riding problem addressed by the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977). The NCAA explained that if games were not packaged as a series and one network advertised, another network airing college football might choose not to advertise. See Brief for the Petitioner at 23, NCAA v. Board of Regents, 104 S. Ct. 2948 (1984). That network would then, according to the NCAA, benefit unjustly from the other network's promotions. *Id.*

The NCAA also argued that the packaging of college football games as a series was efficient because it led to a reduction in the costs of production. *Id.* The association explained that their television plan increased network coverage at the expense of local broadcasts. *Id.* Network games are telecast more widely than local games would be. *Id.* The NCAA asserted that this would mean reduced production costs per viewer of college football, if the size of the production crew was held constant. *Id.* The NCAA noted that, alternatively, the cooperative activity would permit the employment of a larger and better production crew at the same cost per viewer. *Id.* at 24.

Finally, the NCAA argued that the packaging of games as a series was more efficient because games were held open under the plan. *Id.* at 23. The networks asserted that this enabled the networks to broadcast the games that appeared most likely to be exciting. *Id.* The NCAA maintained that the last-minute selection of which games to telecast could not easily be arranged in the absence of the television plan. *Id.* The NCAA asserted that all of these were procompetitive. *Id.* at 24.

²²² See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 21 (1979). See also *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 365 (1982) (Powell, J., dissenting).

²²³ NCAA, 104 S. Ct. at 2967-68.

²²⁴ *Id.* at 2967.

²²⁵ *Id.*

²²⁶ *Id.* at 2968. Thus, even though the NCAA Court refused to accept the notion of a threshold market power determination in these cases, a finding that the NCAA lacked market power would be relevant to the resolution of the case. For if the NCAA lacked market power, its activities in packaging a competitive series would be consistent with the Sherman Act. See, e.g., *Continental*

The second procompetitive justification offered by the NCAA in defense of its television plan was that the plan protected live attendance at games.²²⁷ Noting that there was no evidence to support the gate protection justification, the Court found that the television plan simply did not protect live attendance.²²⁸ In support of this conclusion, the Court indicated that games were televised during all hours that they were being played.²²⁹ The Court also noted that attempting to protect live ticket sales from competition with televised games was a justification that was inconsistent with the Sherman Act's basic policy of free competition.²³⁰

Finally, the Court also rejected the NCAA's assertion that its television plan was procompetitive because it served to maintain a competitive balance among amateur athletic teams.²³¹ The NCAA imposed a variety of other restrictions²³² which were, according to the Court, better tailored to the goal of competitive balance than was the television plan.²³³ The Court concluded that these other restrictions were clearly sufficient to preserve the desired competitive balance.²³⁴ Thus, having rejected the NCAA's

T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-56 (1977). The Supreme Court conceded that if the NCAA lacked market power then collective action would be appropriate in order to enhance college football's ability to compete. *NCAA*, 104 S. Ct. at 2968 n.55.

²²⁷ *NCAA*, 104 S. Ct. at 2968. The NCAA has in fact indicated a concern with protecting live attendance since 1952. *Id.* at 2954-55. In explaining the procompetitiveness of this justification, the NCAA asserted that colleges whose games are not televised rely on the gate and related revenues to support their football programs. *See* Brief for the Petitioner at 25, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984). The NCAA claimed that the more plentiful the television offerings of college football are, the less likely people are to attend games. *Id.* The NCAA pointed out that a diversion of fans to television viewing would have an adverse affect on some schools' football programs. *Id.* The NCAA argued that this would, in the long run, threaten the viability of those programs. *Id.* The NCAA maintained that fewer teams would mean reduced effectiveness of competition by NCAA football against other kinds of entertainment. *Id.*

²²⁸ *NCAA*, 104 S. Ct. at 2968-69.

²²⁹ *Id.* at 2968.

²³⁰ *Id.* at 2969.

²³¹ *Id.* The NCAA noted that the television plan acted to spread television appearances among more teams than would be the case in their absence. *See* Brief for the Petitioner at 20, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984). The NCAA argued that by spreading national and regional television appearances among more teams the plan increased competition because it put the teams on more equal footing in terms of recruiting student athletes and in terms of financing their athletic programs. *Id.* The NCAA claimed that the result would be teams that were more evenly matched on the playing fields. *Id.* The NCAA contended that this would lead to increased viewership because the games would be closer and more exciting. *Id.*

Without balanced rivalry on the field, the NCAA asserted that the quality of the product furnished by the NCAA would decline. *Id.* at 21. The NCAA stated that, in turn, output, measured as viewers, would decline as people turned to other sources for entertainment. *Id.*

²³² The Court noted that the NCAA has adopted playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. *NCAA*, 104 S. Ct. at 2954. The Court stated that these regulatory controls were procompetitive because they enhanced public interest in intercollegiate athletics. *Id.* at 2969.

²³³ *Id.* at 2970.

²³⁴ *Id.* The Court also indicated that the television plan was not even arguably tailored to serving the interest of fostering balanced competition. *Id.* The Court explained that the plan did not regulate the amount of money that a college could spend on its football program. *Id.* Furthermore, the Court pointed out that the plan did not regulate the way in which the colleges could use the revenues generated by their football programs. *Id.*

proffered justifications, and having found the anticompetitive effects of the television plan to be readily apparent, the Supreme Court held that the television plan violated section 1 of the Sherman Act.²³⁵

Justice White, in a dissenting opinion joined by Justice Rehnquist, asserted that the NCAA's television plan did not constitute an unreasonable restraint of trade under section 1 of the Sherman Act.²³⁶ In reaching this conclusion, Justice White first determined that the NCAA had no market power.²³⁷ He also found that the NCAA's television plan did not have substantial anticompetitive effects.²³⁸ Furthermore, even if there were anticompetitive effects, those effects, Justice White argued, would be outweighed by the NCAA's procompetitive justifications.²³⁹ As a final matter, Justice White concluded that the NCAA television plan reflected the association's fundamental policy of preserving amateurism and integrating athletics and education.²⁴⁰

In addressing the issue of market power, Justice White indicated that because of the broad possibilities for alternative forms of entertainment, the NCAA belonged in a broader entertainment market for antitrust purposes than the narrow market of football.²⁴¹ Moreover, according to the dissent, the record indicated that the NCAA could not extract from the networks an amount greater than the market value of college football television rights when competing against other types of entertainment.²⁴² Given this inability of the NCAA to raise the price of its product above competitive levels, Justice White concluded that the association had little or no market power.²⁴³

Furthermore, Justice White asserted that the NCAA's television plan did not have substantial anticompetitive effects because it expanded output and did not increase price.²⁴⁴ In reaching this conclusion, Justice White stated that total viewership was the appropriate measure of output within the television industry.²⁴⁵ By increasing network coverage, which commands more viewers, at the expense of local broadcasts, the television plan, Justice White argued, actually expanded the total television audience for college football.²⁴⁶ Thus, he concluded that the television plan expanded output.²⁴⁷

In focusing on the television plan's effect on price, Justice White was unconvinced that the NCAA's television plan resulted in an anticompetitive increase in the price of television rights.²⁴⁸ According to the dissent, the NCAA had acted to create a new product by restricting the number of college football games that could be televised.²⁴⁹ That new product, exclusive television rights, was more valuable to the networks, Justice White maintained, because exclusivity meant a larger share of the audience, hence greater

²³⁵ *Id.* at 2971.

²³⁶ *Id.* at 2971 (White, J., dissenting).

²³⁷ *Id.* at 2976 (White, J., dissenting).

²³⁸ *Id.* at 2975 (White, J., dissenting).

²³⁹ *Id.* at 2976 (White, J., dissenting).

²⁴⁰ *Id.* at 2973 (White, J., dissenting).

²⁴¹ *Id.* at 2977 (White, J., dissenting).

²⁴² *Id.* at 2976 (White, J., dissenting).

²⁴³ *Id.*

²⁴⁴ *Id.* at 2975-76 (White, J., dissenting).

²⁴⁵ *Id.* at 2975 (White, J., dissenting).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 2976 (White, J., dissenting).

advertising revenues and larger payments to the member universities.²⁵⁰ Since the increase in price related to a new product, Justice White concluded that the price of nonexclusive television rights was not increased.²⁵¹ In summary, because the NCAA's television plan expanded output and did not increase price, the dissenting Justice concluded that the plan did not have substantial anticompetitive effects.²⁵²

In addressing the issue of the NCAA's proffered justifications for its television plan, Justice White stated that the NCAA had suggested a number of plausible ways in which its television plan might enhance the ability of college football telecasts to compete against other forms of entertainment.²⁵³ Based on the NCAA's justifications, Justice White maintained that even if the television plan had anticompetitive effects on competition, he would still uphold the validity of the television plan.²⁵⁴

Justice White concluded by addressing the issue of the noneconomic nature of the NCAA's program of self-regulation.²⁵⁵ He pointed out that the restraints in question operated on nonprofit educational institutions.²⁵⁶ When noneconomic values like the association's fundamental policy of preserving amateurism and integrating athletics and education were factored into the balance, Justice White argued, the NCAA's television plan was eminently reasonable and did not violate antitrust law.²⁵⁷ Thus, based on his conclusions that the NCAA did not possess market power, that the NCAA's television plan did not have substantial anticompetitive effects, that the NCAA's proffered justifications were sufficient to outweigh anticompetitive effects, and that there were important noneconomic values to be considered, Justice White would have upheld the validity of the television plan.²⁵⁸

III. ANALYSIS AND CRITIQUE

Since the Supreme Court's decision in *Standard Oil*, only unreasonable restraints of trade are prohibited by section 1 of the Sherman Act.²⁵⁹ *Standard Oil* established that the rule of reason should be the method of reviewing the reasonableness of restraints.²⁶⁰ The rule of reason analysis, however, continues to be a complicated and, as a result, time-consuming method of testing the legality of restraints of trade under the Sherman Act.²⁶¹ These difficulties stem from vague judicial declarations of the rule of reason analysis, which have led both commentators²⁶² and judges²⁶³ to complain about the lack of an analytical framework for applying the rule of reason in antitrust litigation. Where

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 2975 (White, J., dissenting).

²⁵³ *Id.* at 2977 (White, J., dissenting).

²⁵⁴ *Id.* at 2976 (White, J., dissenting).

²⁵⁵ *Id.* at 2977 (White, J., dissenting).

²⁵⁶ *Id.* at 2978 (White, J., dissenting).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2979 (White, J., dissenting).

²⁵⁹ See *supra* notes 89-98 and accompanying text for discussion of the Supreme Court's decision in *Standard Oil*.

²⁶⁰ See *id.*

²⁶¹ See *supra* notes 116-25 and accompanying text for discussion of the burdensome analysis under the rule of reason.

²⁶² See, e.g., Easterbrook, *supra* note 12, at 155; Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 34 (1978); Posner, *supra* note 12, at 16.

²⁶³ See, e.g., *Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983).

applicable, the per se doctrine allows courts to avoid this burdensome analysis.²⁶⁴ A market power threshold to the application of the rule of reason would allow courts to avoid the difficult analysis in still more cases.²⁶⁵

Several circuit courts have endorsed the market power threshold.²⁶⁶ Those courts now insist, at the outset of the trial, that the plaintiff establish that the defendant has substantial market power.²⁶⁷ When the plaintiff fails to do so, the defendant's restraints will be found reasonable without further analysis.²⁶⁸ In those instances, the threshold inquiry into market power becomes an effective method of avoiding the protracted analysis required under the rule of reason.²⁶⁹ *NCAA v. Board of Regents* presented the Supreme Court with an opportunity to endorse a market power threshold to the application of the rule of reason for cases under section 1 of the Sherman Act.²⁷⁰

In recognition of the trend in the circuit courts to structure the rule of reason analysis by establishing a market power threshold, the NCAA argued that the record indicated that the organization had no market power.²⁷¹ The NCAA argued that a finding of no market power was dispositive in its favor.²⁷² Refusing to follow the trend in the circuit courts, the Supreme Court rejected the NCAA's argument for a market power threshold.²⁷³

The Court rejected the NCAA's argument for a market power threshold as a legal matter and as a factual matter.²⁷⁴ The Court stated that, as a matter of law, the absence of proof of market power does not justify a naked restriction on price or output.²⁷⁵ The Court's legal rationale for rejecting the market power argument is suspect because the Court confused the rule of reason and the per se doctrine.²⁷⁶ If this case involved a naked restriction, which is one that is inherently likely to enhance price or restrict output while offering no competitive benefits,²⁷⁷ it would have been proper to condemn the NCAA's practices under the per se doctrine.²⁷⁸ If the NCAA's practices were governed by the per se doctrine, the Court would have been correct in its assertion that proof of market power was not necessary because the NCAA's practices would be conclusively

²⁶⁴ See *supra* notes 129-53 and accompanying text for discussion of the development of the per se doctrine.

²⁶⁵ See *supra* notes 11-18 and accompanying text for discussion of the market power threshold as an effective method of avoiding application of the rule of reason.

²⁶⁶ See *supra* notes 161-67 and accompanying text for lower court decisions endorsing the market power threshold.

²⁶⁷ See *id.*

²⁶⁸ See *id.*

²⁶⁹ See *supra* notes 11-18 and accompanying text for discussion of the market power threshold as an effective method of avoiding application of the rule of reason.

²⁷⁰ *NCAA*, 104 S. Ct. at 2965.

²⁷¹ *Id.*

²⁷² See Brief for the Petitioner at 34, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

²⁷³ *NCAA*, 104 S. Ct. at 2965-66.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 2965.

²⁷⁶ See *infra* notes 277-80 and accompanying text for the assertion that the NCAA Court confused the rule of reason and the per se doctrine.

²⁷⁷ The most common formulation offered by the Court has been that naked restrictions have "no purpose except stifling competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

²⁷⁸ See *supra* notes 129-53 and accompanying text for discussion of the application of the per se doctrine.

presumed unreasonable.²⁷⁹ In its decision to apply the rule of reason to review the legality of the NCAA's practices, the Court implied that the NCAA's practices were not a naked restriction on price or output, but were mere restraints on trade subject to the rule of reason analysis.²⁸⁰ Thus, in addressing the market power threshold, the Court should have resolved the question of whether absence of proof of market power precluded a finding that the NCAA's restraints on trade were unreasonable under the rule of reason.

In addition, the Court stated that it had never required proof of market power in an antitrust case in order to find a practice illegal under the rule of reason.²⁸¹ Clearly, in the cases that the Court cited as authority for this proposition, it had not required proof of market power.²⁸² None of those cases, however, involved application of the rule of reason.²⁸³ Rather, they involved application of the per se doctrine. Therefore, no support for the Court's proposition that market power had never been required under the rule of reason is to be found in those cases.²⁸⁴

After holding that the NCAA's market power was not relevant to its analysis of the section 1 claims as a matter of law, the Court nevertheless went on to analyze whether the NCAA possessed market power.²⁸⁵ The Court found that the NCAA, as a factual matter, possessed market power.²⁸⁶ In practice, to establish market power the plaintiff must prove that the defendant has a large market share within the relevant market.²⁸⁷ Defining the relevant market properly, therefore, is crucial to an accurate assessment of market power.²⁸⁸ Given an accurate treatment of the economics of the television industry, the relevant market was not properly defined in *NCAA*.²⁸⁹

The relevant market was not properly defined in *NCAA* because the Court incorrectly assumed that it made no difference whether the television market was defined from the standpoint of the networks, the advertisers, or the viewers.²⁹⁰ The dissenting

²⁷⁹ See *id.*

²⁸⁰ *NCAA*, 104 S. Ct. at 2960.

²⁸¹ *Id.* at 2965.

²⁸² See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

²⁸³ *Klor's*, involved group boycotting, a per se illegal activity. *Klor's* 359 U.S. at 213. *McKesson & Robbins* involved a per se illegal price-fixing agreement. *McKesson & Robbins*, 351 U.S. at 311. *Socony-Vacuum* also involved an unlawful per se price-fixing agreement. *Socony-Vacuum*, 310 U.S. at 223.

²⁸⁴ These cases merely state that lack of proof of market power has no effect on the per se analysis. See, e.g., *Klor's*, 359 U.S. at 213; *McKesson & Robbins*, 351 U.S. at 310; *Socony-Vacuum*, 310 U.S. at 221.

²⁸⁵ *NCAA*, 104 S. Ct. at 2966.

²⁸⁶ *Id.*

²⁸⁷ Market share is used in litigation as a surrogate for market power because market power is conceptually difficult to define, and because measuring market power requires sophisticated economic analysis. *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983). See also *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

²⁸⁸ The relevant market for this purpose is composed of products that have reasonable interchangeability. See, e.g., *United States v. E.I. DuPont de Nemours and Co.*, 351 U.S. 377, 404 (1955).

²⁸⁹ See *infra* notes 290-309 and accompanying text for the assertion that, given an accurate treatment of the economics of the television industry, the relevant market was not properly defined in *NCAA*.

²⁹⁰ *NCAA*, 104 S. Ct. 2966-67 n.49.

Justices, however, realized that it would not be proper to define the television market from the standpoint of the viewers.²⁹¹ In addition, the Department of Justice has concluded that power over advertisers, and not over viewers, is the key to any market power a program supplier, such as the NCAA, may possess.²⁹²

In accurately assessing the economics of the television industry, the most important fact about the industry is that the viewers are not the consumers; rather, they are a measure of output.²⁹³ A television program will generate viewers, and that, in turn, is what causes the networks and the advertisers, the actual consumers within this industry, to make their purchases.²⁹⁴ The networks purchase the programs that will be telecast, and the advertisers then purchase from the networks time during those programs within which to convey their messages to the viewing audience.²⁹⁵ It is within this realm that the relevant market should have been defined, and the NCAA's market power should have been assessed.²⁹⁶

Given a market in which the networks and the advertisers are the consumers, the Supreme Court has indicated that if the networks and the advertisers have sufficient substitutes for televised college football available to them, then televised college football cannot be the relevant market.²⁹⁷ The evidence refutes the notion that college football is unique in its attractiveness to the networks and the advertisers.²⁹⁸ First, the advertisers substitute freely between different modes of advertising.²⁹⁹ Network television advertising accounted for only 9.1% of all advertising expenditures in 1981.³⁰⁰ Second, there is a correlation between the movement of the prices of all television programs and the movement of the price of NCAA college football telecasts.³⁰¹ The joint movement of prices is a standard signal that two products are in the same product market.³⁰² In fact, joint price movement may be the single most useful guide to market definition.³⁰³ Furthermore, the advertisers who purchase NCAA network spots are not specialized to NCAA college football.³⁰⁴ Even the heaviest advertisers on NCAA football purchase 95% of their advertising time on other programs.³⁰⁵

²⁹¹ *Id.* at 2975 (White, J., dissenting).

²⁹² Comments of the Dept. of Justice, Jan. 26, 1983 at 37-39.

²⁹³ See Brief for the Petitioner at 38, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

²⁹⁴ See *NCAA v. Board of Regents*, 104 S. Ct. 2948, app. at 159 (1984). (An economic analysis of the broadcast market appears in the report of Dr. William M. Landes, who appeared as an economic expert for the NCAA).

²⁹⁵ *Id.*

²⁹⁶ Since the relevant market is composed of products that have reasonable interchangeability, see, e.g., *E.I. DuPont*, 351 U.S. at 404, proper definition of the relevant market and assessment of market power is contingent upon finding the actual consumer.

²⁹⁷ *Id.*

²⁹⁸ See *infra* notes 299-305 and accompanying text for discussion of evidence which refutes the notion that college football is unique in its attractiveness to the networks and the advertisers.

²⁹⁹ See *NCAA v. Board of Regents*, 104 S. Ct. 2948, app. at 159 n.13 (1984).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 164.

³⁰² *Id.*

³⁰³ See, e.g., Areeda, *Market Definition and Horizontal Restraints*, 52 ANTITRUST L.J. 553, 566 (1983).

³⁰⁴ See Brief for the Petitioner at 41, *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

³⁰⁵ *Id.*

Thus, the evidence indicates that the networks and the advertisers have substitutes to NCAA football available to them.³⁰⁶ The availability of substitutes to the consumers leads to the conclusion that NCAA football is part of a broader market.³⁰⁷ Thus, the proper relevant market in *NCAA* was not televised college football.³⁰⁸ Rather, the proper relevant market should have been a broader entertainment market.³⁰⁹ If the relevant market had been properly defined, it would have been evident that the NCAA lacked market power.

Although the Supreme Court failed to endorse a market power threshold in *NCAA*, that failure was based on suspect legal analysis³¹⁰ and a "confused treatment"³¹¹ of the economics of the television industry.³¹² An endorsement of a market power threshold by the Court would have helped to solve some of the problems presented by the current rule of reason analysis.³¹³ A market power threshold would be consistent with the objectives of the Sherman Act, it would contribute to judicial efficiency by reducing the burden on both litigants and the judicial system, and it would provide more guidance to the business community.³¹⁴

With a market power threshold, courts would be able to avoid elaborate analysis in those cases where the plaintiff cannot establish that the defendant has substantial market power.³¹⁵ Limiting section 1 claims to those anticompetitive actions which are taken by entities with substantial market power is consistent with the objectives of the Sherman Act.³¹⁶ Lacking market power, the defendant does not have the capacity to harm competition within the market because its arrangements cannot have an adverse effect on prices or output.³¹⁷ If the defendant's acts are procompetitive, then they will be beneficial to both the defendant and consumers alike.³¹⁸ Alternatively, if the defendant's acts do not affect competition, then the defendant injures only itself.³¹⁹ Neither case, however, is violative of the Sherman Act.³²⁰

³⁰⁶ See *supra* notes 299–305 and accompanying text for discussion of evidence which refutes the notion that college football is unique in its attractiveness to the networks and the advertisers.

³⁰⁷ See, e.g., *E.I. DuPont*, 351 U.S. at 404.

³⁰⁸ See *id.*

³⁰⁹ Commentators have suggested that NCAA football is part of a broader entertainment market. See, e.g., Grauer, *Recognition of the NFL as a Single Entity Under Section One of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 34 n.156 (1983); Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 661–62 n.31 (1978).

³¹⁰ See *supra* notes 275–84 and accompanying text for discussion of the Court's legal analysis in *NCAA*.

³¹¹ Note, *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 256 (1984).

³¹² See *supra* notes 290–309 and accompanying text for discussion of the Court's treatment of the economics of the television industry in *NCAA*.

³¹³ See *infra* notes 315–34 and accompanying text for discussion of how the market power threshold would help solve some of the problems presented by the current rule of reason analysis.

³¹⁴ See *id.*

³¹⁵ See *supra* notes 11–18 and accompanying text for discussion of the market power threshold as an effective method of avoiding application of the rule of reason.

³¹⁶ See *supra* note 80 and accompanying text for discussion of the objectives of the Sherman Act.

³¹⁷ See *supra* note 12 and accompanying text for the assertion that the practices of a business without market power cannot adversely effect competition.

³¹⁸ See *id.*

³¹⁹ See *id.*

³²⁰ See *supra* note 80 and accompanying text for discussion of the objectives of the Sherman Act.

In light of the fact that it is not inconsistent with the objectives of the antitrust laws, a threshold finding that the defendant lacks market power should be adopted to reduce the burden on both litigants and the judicial system of the complicated and prolonged rule of reason analysis.³²¹ Currently, antitrust cases are extremely costly because of the protracted factual inquiry necessary under the rule of reason.³²² A structured analysis serves to reduce the burden on litigants by reducing the costs of litigation.³²³ Also, judges and juries are unable to do what the current open-ended formulations require of them.³²⁴ The Court has stated that judges often lack the expert understanding of market economies needed to determine a practice's effect on competition.³²⁵ Therefore, a structured analysis also serves to reduce the burden on the judicial system by sharpening the judicial focus.

A more structured formulation of the rule of reason analysis would likewise be beneficial in providing guidance to the business community.³²⁶ As the Supreme Court has recognized, at present the decision in any given case provides little certainty about the legality of a business practice in another context.³²⁷ Businesses are left with little to aid them in predicting in any particular case what business practices courts will find to be illegal under the Sherman Act.³²⁸ A more defined analysis would increase the predictability of the outcome of section 1 cases.³²⁹ Such predictability creates several advantages.³³⁰ First, by knowing with more certainty whether their practices were lawful, businesses could plan their practices to avoid being sued.³³¹ Second, illegal practices will be more obvious, and suits will more surely be brought when necessary.³³² Finally, with regard to those suits that are brought, predictability promotes settlement.³³³ Cases are more likely to be settled when the parties can agree on the likely outcome of the trial.³³⁴ Thus, a market power threshold would be consistent with the objectives of the Sherman Act, it would contribute to judicial efficiency, and it would provide more certainty to the business world.

The notion of a market power threshold, however, is not without drawbacks. Some practices in restraint of trade may escape examination under this determination.³³⁵ This is not, however, a sufficient ground for invalidating the test. Along with the benefits of

³²¹ See *infra* notes 322-25 and accompanying text for discussion of how the market power threshold would reduce the burden on both litigants and the judicial system.

³²² The Supreme Court has noted that "[t]he elaborate inquiry into the reasonableness of a challenged business practice entails significant costs." *Arizona*, 457 U.S. at 343.

³²³ See, e.g., *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981) ("A requirement that plaintiff prove market power in this case would have saved the litigants and the courts much expense.").

³²⁴ Easterbrook, *supra* note 12, at 153-55. See also Posner, *supra* note 12, at 15.

³²⁵ See, e.g., *Arizona*, 457 U.S. at 343; *Topco*, 405 U.S. at 609-10.

³²⁶ Easterbrook, *supra* note 12, at 157.

³²⁷ See, e.g., *Arizona*, 457 U.S. at 343; *Topco*, 405 U.S. at 609 n.10.

³²⁸ Easterbrook, *supra* note 12, at 155.

³²⁹ *Id.* at 157.

³³⁰ See *infra* notes 331-34 and accompanying text for discussion of the advantages of increased predictability of the outcome of section 1 cases.

³³¹ Easterbrook, *supra* note 12, at 157.

³³² Posner, *supra* note 12, at 15.

³³³ Easterbrook, *supra* note 12, at 157.

³³⁴ *Id.* at 155 n.38.

³³⁵ *Id.* at 157.

more structure comes the burden of imprecision.³³⁶ That is, however, a burden that the Court has already shown that it is willing to accept in antitrust litigation, as demonstrated by its use of the per se doctrine.³³⁷ The per se doctrine condemns whole categories of practices even though courts acknowledge that some practices in these categories are most likely beneficial.³³⁸ Courts have shown themselves willing to accept such overbreadth under the rationale that all rules are imprecise.³³⁹

Definitional problems, in addition, may be presented by the market power threshold.³⁴⁰ The inquiry necessary to establish the relevant market can be burdensome, and this is not made easier by the fact that the plaintiff will try to persuade the court to define the market as one in which the defendant has a substantial share.³⁴¹ Furthermore, there is as yet no agreement as to how great the defendant's market share must be to satisfy the threshold condition of substantial market power.³⁴²

The definitional problems, along with the possible overbreadth associated with them, are the market power threshold's drawbacks.³⁴³ These drawbacks, however, are outweighed by the benefits of implementing the market power threshold.³⁴⁴ Based on those benefits, the Supreme Court should have endorsed the market power threshold in *NCAA*.

IV. CONCLUSION

In *NCAA v. Board of Regents*, the United States Supreme Court applied rule of reason analysis to hold that the NCAA's television plan violated section 1 of the Sherman Act. The Court struck down NCAA regulation of televised college football after full inquiry into the reasonableness of the anticompetitive effects of the plan on the market in light of the procompetitive justifications offered by the NCAA. During the course of that inquiry, the Court rejected the NCAA's assertion that its television plan could not have significant anticompetitive effects because the association had no market power.

In *NCAA*, therefore, the Supreme Court failed to endorse a market power threshold to the application of the rule of reason. That failure, however, was based on suspect legal analysis and a confused treatment of the economics of the television industry. The application of a market power threshold to section 1 cases would be consistent with the

³³⁶ *Id.*

³³⁷ See, e.g., *Arizona*, 457 U.S. at 344.

³³⁸ "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.*

³³⁹ Easterbrook, *supra* note 12, at 157.

Admittedly, in comparing the per se doctrine and the market power threshold, there is a difference which must be recognized. The per se doctrine errs on the side of striking down lawful practices and the market power threshold would err on the side of protecting unlawful practices. This difference would entail some social cost. That would, however, be a "bearable" cost. *Id.*

³⁴⁰ See *infra* notes 341-42 and accompanying text for discussion of the definitional problems that might be presented by the market power threshold.

³⁴¹ Posner, *supra* note 12, at 17.

³⁴² *Id.* At present, the court must decide whether a market share is large enough to support an inference of the required degree of market power. Landes and Posner, *supra* note 12, at 938.

³⁴³ See *supra* notes 335-42 and accompanying text for discussion of the drawbacks of the market power threshold.

³⁴⁴ See *supra* notes 313-34 and accompanying text for discussion of the benefits of implementing the market power threshold.

objectives of the Sherman Act, would contribute to judicial efficiency by reducing the burden on both litigants and the judicial system, and would provide more guidance to the business community. Therefore, the Court should have endorsed a market power threshold as an effective method of avoiding the rule of reason and its complicated and prolonged analysis in certain limited circumstances.

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