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One aspect of the Burger Court's decisions is that one can be undisturbed by the results, but nevertheless concerned about the content of the opinions.¹

In *National Collegiate Athletic Association v. Board of Regents*,² the Supreme Court held that the NCAA's regulations restricting television broadcasts of college football games violated section one of the Sherman Antitrust Act.³ The result stemmed primarily from the Court's conclusion that the regulations did not promote their asserted purposes. However, the crucial aspect of the opinion is that, contrary to what precedent would suggest, the Court determined that the NCAA's purposes were legitimate in the first place.

This Note addresses the question of why the *NCAA* Court reasoned the way it did and examines the means by which it arrived at its result. The Note first explores the peculiar nature of the NCAA and how the antitrust treatment of it and similar organizations has developed. It then analyzes the alternatives available to the *NCAA* Court in reaching its decision. Because of the inadequacy of other alternatives, including the option adopted by the Court, the Note concludes that the Court should have overruled precedent that inappropriately restrained its decision.

I. BACKGROUND—ANTITRUST SCRUTINY AND NONMARKET GOODS

The NCAA serves two distinct functions.⁴ First, it coordinates and markets competition between athletic teams. In doing so, it is engaged in a commercial activity.⁵ Second, the NCAA promotes amateurism and

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² 104 S. Ct. 2948 (1984) [hereinafter cited as *NCAA*].
³ Id. at 2954.
education. This is its most important function,\textsuperscript{6} its historic \textit{raison d’être}.\textsuperscript{7} In promoting amateurism and education the NCAA operates noncommercially,\textsuperscript{8} providing goods unavailable in the competitive market.\textsuperscript{9} By definition, this function is performed in the public interest.

Antitrust treatment of organizations providing nonmarket goods has evolved significantly in recent years. Until 1975, Sherman Act litigation focused on organizations having commercial objectives, rarely dealing with those having other purposes.\textsuperscript{10} An organization’s general character

\begin{itemize}
  \item[6.] See Constitution and Interpretations of the National Collegiate Athletic Association, art. II, § 2(a), reprinted in National Collegiate Athletic Association 1981–1982 Manual 7–8 (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports.”); J. Weisbort & C. Lowell, supra note 5, § 5.12, at 760, 761; Note, supra note 5, at 656, 657.
  \item[7.] Fears of growing commercialism, excessive physical injury, and cheating in intercollegiate athletics led to the establishment of the NCAA, then called the Intercollegiate Athletic Association of the United States, in 1905. Note, supra note 5, at 656. The Association’s first constitution stated its object to be “[t]he regulation and supervision of college athletics throughout the United States, in order that athletic activities . . . may be maintained on an ethical plane in keeping with the dignity and high purpose of education.” Intercollegiate Athletic Association of the United States, Constitution, art. II, reprinted in J. Falla, NCAA: The Voice of College Sports 21 (1981); see Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass’n, 558 F. Supp. 487, 495 (D.D.C. 1983), \textit{aff’d}, 735 F.2d 577 (1984).
    \begin{quote}
      [T]here are some socially desirable goods and services that private firms do not find it profitable to produce. These are goods and services which provide benefits that are not marketable to individual purchasers. Sometimes these benefits are not marketable because the good or service must be provided to all members of society if it is to be offered to any of them . . . . In other cases the benefits to individuals and to society are so important in the value system of the society that markets cannot be relied upon.
    \end{quote}
\end{itemize}
determined the applicability of the Act, which prohibits only restraints "of trade or commerce." The possibility of a noncommercial organization being engaged in this type of activity was considered too small to warrant investigation. While courts might have subjected an activity with a clearly commercial purpose to further examination, they presumed that a noncommercial organization had no such purpose.

This presumption shifted dramatically in 1975 when the Supreme Court recognized that some noncommercial organizations were engaged in commercial activities. In *Goldfarb v. Virginia State Bar Association*, the Court held that a state bar association was subject to antitrust regulation. Traditionally, courts had considered the practice of law, as a "learned profession," to be outside the scope of the Sherman Act's "trade or commerce" provisions. The *Goldfarb* Court recognized, however, that Congress intended the Sherman Act to be read broadly. It then acknowledged the business aspects of the practice of law. Given those aspects, and the corresponding chance that the bar association's market restraints could have commercial ends, the exclusion of the organization from antitrust scrutiny could not be justified. Courts soon identified the business aspects

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11. 15 U.S.C. § 1 (1982) provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."


16. Id. at 787–88.

17. Id. at 788.
of other previously exempt organizations, including the NCAA,\(^\text{18}\) and proceeded to apply the antitrust laws.

In \textit{Goldfarb}, the Supreme Court shifted its inquiry regarding the applicability of the antitrust statutes from an organization’s general character to its particular activities.\(^\text{19}\) Yet character continued to be important. It no longer determined whether the antitrust laws applied, but was relevant in determining if the laws had been violated. Market restraints imposed by noncommercial organizations thus were to be “treated differently.”\(^\text{20}\) Restraints customarily subject to the more strict per se standards were to be reviewed under the rule of reason.\(^\text{21}\)

The premise of the rule of reason is that the Sherman Act forbids only unreasonable restraints of trade.\(^\text{22}\) Reasonability is based on the purpose of the restraint, the causal connection between the restraint and this purpose, and the severity of the restraint relative to the ends served.\(^\text{23}\) Implicit in the call for different treatment of noncommercial organizations was the understanding that (1) restraints necessary to promote noncommercial ends were reasonable,\(^\text{24}\) and (2) noncommercial organizations, despite their commercial activities, could often justify market restraints on these grounds.\(^\text{25}\) In

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  \item \textit{Goldfarb}, 421 U.S. at 788 n.17.
  \item \textit{Goldfarb}, 421 U.S. at 788 n.17.
  \item The Court left unclear what “different treatment” was to involve. J. von Kalinowski, \textit{supra} note 14, at § 49.02[1][b][ii]; Lipner, \textit{Antitrust’s Per Se Rule: Reports of Its Death are Greatly Exaggerated}, 60 DEN. L.J. 593, 596 (1983); see Note, \textit{Antitrust After Goldfarb}, \textit{supra} note 14, at 1050–51. However, subsequent cases and commentary have defined the phrase operationally as allowing application of the rule of reason to traditionally per se restraints. See Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass’n, 558 F. Supp. 487, 494–95 (D.D.C. 1983), aff’d, 735 F.2d 577 (1984); Note, \textit{supra} note 9, at 808–09; Note, \textit{supra} note 5, at 665; \textit{infra} notes 23–29 and accompanying text.
  \item Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911); see also Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
  \item \textit{See} Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); 2 P. AREEDA & D. TURNER, \textit{ANTITRUST LAW} § 314(b), at 49 (1978).
  \item \textit{See} Note, \textit{Professions and Non-commercial Purposes}, \textit{supra} note 14, at 388–94.
  \item \textit{See infra} notes 74–77 and accompanying text.
\end{itemize}
applying the rule of reason, courts could examine restraints imposed by organizations in a manner not afforded by complete exemption, while still acknowledging the organizations' noncommercial ends.26

The approach changed, again dramatically, in National Society of Professional Engineers v. United States.27 This 1978 Supreme Court decision severely limited the factors by which a market restraint could be proven reasonable. The National Society of Professional Engineers (NSPE) invoked the rule of reason to justify its ban on competitive bidding among members, asserting that such a market restraint was necessary to promote safety.28 The Court held that this argument misunderstood the scope of its inquiry under the rule of reason. Congress, through the antitrust laws, had declared competition to be in the public interest.29 The judiciary could not defer to what it might consider a higher value. Analysis under the rule of reason accordingly was to focus solely on a restraint’s impact on competition.30 Public interest justifications, absent congressional approval, were not legitimate.31 Even if safety was served by an insignificant restraint, the Court foreclosed its consideration.

Professional Engineers limited the scope of the rule of reason.32 It follows that the circumstances where that rule is useful were similarly limited.33 A legitimate intent for a restraint is a logical prerequisite for use of the rule of reason.34 The Professional Engineers Court defined

26. The NCAA was afforded this “special” treatment in Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977). The Fifth Circuit used rule of reason analysis despite evidence of a group boycott, a clear per se violation. The court justified its approach by citing “the nature and purposes of the NCAA and its member institutions,” including its intent to preserve and encourage intercollegiate amateur athletics. Id. at 1152; see also Warner Amex Cable Communications, Inc. v. American Broadcasting Co., 499 F. Supp. 537, 540–42 (S.D. Ohio 1980).


29. Id. at 692.

30. Id. at 690.

31. Id. at 692.

32. See supra notes 27–31 and accompanying text.

33. Prior to NCAA, this limitation apparently was not recognized. Despite Professional Engineers, commentators continued to assume that the rule of reason could be applied for reasons other than a restraint’s competitive potential. They then charged that this led to the perverse situation in which the same factors that allowed application of the rule of reason could not be considered in analysis under it. E.g., Robinson, Recent Antitrust Developments—1979, 80 COLUM. L. REv. 1, 15 (1980); Note, supra note 9, at 810. This position simply misses the full implications of Professional Engineers.

34. It is irrational to use the rule of reason because of an organization’s special purposes if such purposes cannot justify a restraint. For example, it makes no sense to use the rule of reason on restraints intended to provide nonmarket goods if providing nonmarket goods is not considered a legitimate end to
"legitimate intent" to include only the intent to maximize competition.\textsuperscript{35} Use of the rule of reason in \textit{Professional Engineers} thus made sense only if the ban on competitive bidding was purported to maximize competition. The NSPE asserted only a public interest justification. Hence, its market restraint was ruled per se illegal.\textsuperscript{36}

Since promoting safety was not the primary purpose served by the NSPE, it could remain a viable organization despite the Court's ruling. The question remaining, presented to the Court in \textit{NCAA},\textsuperscript{37} was how to treat organizations providing primarily public interest goods and needing market restraints to do so.

II. \textit{NATIONAL COLLEGIATE ATHLETIC ASSOCIATION} v. \textit{BOARD OF REGENTS}

In \textit{NCAA}, the Supreme Court ruled that the NCAA's regulations restricting the television broadcast of college football games violated section one of the Sherman Antitrust Act.\textsuperscript{38} Under its television "plan," the NCAA sold the broadcast rights to a limited number of football games to two networks as a single package.\textsuperscript{39} Networks and individual universities were

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  \item \textsuperscript{35} \textit{Professional Engineers}, 435 U.S. at 688; \textit{see supra} notes 27–31 and accompanying text.
  \item \textsuperscript{37} \textit{104} S. Ct. 2948 (1984).
  \item \textsuperscript{38} Id. at 2954.
\end{itemize}
\end{footnotesize}
Antitrust and Nonmarket Goods

not allowed to negotiate their own contracts. Although the networks were free to choose the exact games to be broadcast, their choices had to be consistent with the plan’s limit on the number of times any single university could be televised. Furthermore, the plan fixed the compensation each university received for having its game televised.

According to the Court, the television plan constituted both horizontal price-fixing and output limitation. Such trade restraints traditionally had been treated as per se antitrust violations and struck down without further investigation. The Court decided, however, that the traditional approach in this case would be inappropriate. Its decision was not based on respect for the NCAA’s historic nonmarket purpose. Rather, the Court noted that cooperation among universities was the essence of the NCAA’s product—amateur collegiate football. Without some regulations, that product could not be provided. As a result, the television plan potentially enabled a product to be marketed that would otherwise be unavailable. To determine whether the plan actually served such a procompetitive end, the Court applied the rule of reason.

Under the rule of reason, the Court’s sole objective was to determine the television plan’s competitive impact. It concluded that the restraints

40. The plan allowed for a limited number of “exceptions” to this rule, but they served only to prove, not deny, its anticompetitive impact. See Note, supra note 5, at 661 n.30.
41. 104 S. Ct. at 2959–60.
42. Id. at 2960.
43. Id.
44. Id.
45. Id. at 2961, 2969.
46. Id. at 2961.
47. In its focus on the NCAA’s potential to create market efficiencies, the Court furthered the approach ushered in by Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49–59 (1977), and Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19–24 (1979), which recognized that market restraints can have some anticompetitive effects yet remain, as a whole, procompetitive. Courts had followed this approach to a limited degree prior to 1977, e.g. in cases involving sports organizations, see infra notes 88–92 and accompanying text. However, Sylvania and Broadcast Music provided for a much broader application. The NCAA Court cited both of these cases with approval, 104 S. Ct. at 2961–62.

48. NCAA, 104 S. Ct. at 2962.
49. Id.
imposed by the plan had several anticompetitive effects. Relying on the lower court’s findings, it agreed that the television plan significantly decreased the number of games broadcast, increased the price that the networks paid for television rights, and created a structure unresponsive to consumer demand. The NCAA bore the heavy burden of justifying such restraints.

The NCAA argued that its interest in maintaining a competitive balance among amateur teams justified its broadcast regulations. The Court acknowledged that this was a legitimate and important concern. A competitive balance among amateur athletic teams enhanced consumer interest in the NCAA’s product and consequently was procompetitive. Yet the majority was not convinced that the television plan served this end. Evidence showed that without the plan, “consumption” of collegiate football would increase. Hence, the NCAA could not contend that the plan was necessary for it to provide or promote its product. Rather, the Court held the plan to be an unreasonable market restraint.

Justices White and Rehnquist joined in dissent. They argued that the NCAA’s regulations served primarily social and not economic ends, providing a system of amateur athletics that could not be provided in the competitive market. Because of the essential noneconomic nature of the organization, any market restraint resulting from its regulations was reasonable if it promoted this public good. The Court’s rule of reason analysis, they contended, was not limited by the Professional Engineers doctrine. Since the television plan was no different than other regulations, it did not violate the Sherman Act, and should have been upheld.

50. Id. at 2963–64.
51. The NCAA argued that because it possessed no market power, its television plan could have no anticompetitive effects. Id. at 2965. The Court rejected this contention on two grounds. It stated: (1) that lack of proof of market power does not justify a naked restriction on price or output, id. at 2965, and (2) that regardless, the NCAA in fact possessed market power. Id. at 2966.
52. The NCAA also argued that the television plan was a cooperative “joint venture” that assisted in the marketing of broadcast rights and was therefore procompetitive, and that the plan was necessary to enable the NCAA to penetrate the market through an attractive package sale. Id. at 2967–68. The Court rejected both arguments on causal grounds.
53. Id. at 2969.
54. Id.
55. Id.
56. Id. at 2970–71.
57. Id. at 2971–79 (White, J., dissenting).
58. Id. at 2972.
59. Id. at 2978.
60. Id. at 2972.
61. The dissenters also argued that the television plan had no anticompetitive effects because the NCAA did not possess any market power. Id. at 2976–77.
III. ANALYSIS—THE NCAA COURT’S OPTIONS

Before the Court considered whether the television plan served the ends claimed by the NCAA, it had to determine whether those ends, if met, would justify market restraints. In making this determination, the Court had four choices. It could have held: (1) that as a public interest, promoting education and amateurism is not a legitimate goal under Professional Engineers; (2) that public interest justifications offered by the NCAA, because of the nature of the organization, are legitimate regardless of Professional Engineers; (3) that since education and amateurism are market products, promoting them is procompetitive and therefore legitimate under Professional Engineers; or (4) that public interest goals, such as those of the NCAA, are legitimate, thus overruling Professional Engineers.62

Public policy precluded the first option. The second option also was precluded because the NCAA could not rationally be distinguished from the NSPE such that Professional Engineers was not controlling. The third option, which the Court adopted, served only to demonstrate the weakness of Professional Engineers. Consequently, the fourth option was the only valid alternative, and the approach the Court should have followed.

A. Option One—Apply Professional Engineers to Nonmarket Goods

In examining the NCAA’s television plan, the Court could have applied the Professional Engineers doctrine while considering the NCAA’s output—education and amateurism—as nonmarket goods. Although this was the most obvious alternative, it was also the least desirable. It would have stripped the NCAA of its essential purposes.

Under Professional Engineers, the only legitimate purpose for a market restraint is that of promoting competition.63 Nonmarket goods, however, are not yielded by the competitive market.64 Hence, by definition, the intent to promote nonmarket goods is not procompetitive. To the extent that

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62. The NCAA Court might also have limited Professional Engineers to its facts by stating that the opinion merely reflected its belief that safety was a pretext for the NSPE’s unjustifiably broad market restraint. This reasoning, however, is inconsistent with the sweeping language of the opinion, and its interpretation in subsequent cases. See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173, 1186–87 (D.C. Cir. 1978); Redlich, supra note 1, at 54; Sullivan & Wiley, supra note 27, at 322–26.

63. See supra notes 32–35 and accompanying text.

64. See supra note 9.
the television plan’s purpose was to promote education and amateurism, it was not procompetitive.\textsuperscript{65}

Under this analysis, the Court would have struck down the television plan, a restraint with no competitive potential, as per se illegal. It would have had no reason to investigate any further. More significantly, by identifying the NCAA’s nonmarket goals as illegitimate, it would have implicitly disallowed any NCAA restraint that served only to maintain the educational and amateur aspects of college athletics.\textsuperscript{66} The objectionable nature of this approach, which would have in effect eliminated amateur collegiate sport, is evident.

B. Option Two—Distinguish NCAA from Professional Engineers

1. As a Noncommercial Organization

Another possible approach would have distinguished NCAA from Professional Engineers based on the general character of the organizations involved. The premise of such an approach is that the Professional Engineers doctrine applies only to commercial organizations.\textsuperscript{67} Thus the NCAA, pursuing primarily noneconomic ends, is exempt from the holding and free to impose market restraints justified by its public interest goals.\textsuperscript{68} This reasoning, however, finds little support in Professional Engineers and does not accord with recent antitrust decisions.

\textsuperscript{65} To the extent that the NCAA intended the television plan to serve procompetitive purposes independent of its relationship to education and amateurism, see 104 S. Ct. at 2967–69, the Court still might have examined the plan under the rule of reason. This, however, would not have denied the illegitimacy of the NCAA’s educational and amateur goals.

\textsuperscript{66} As a result, the NCAA would be allowed to do nothing more than what was essential to its commercial function—marketing athletic competition. This would have converted the organization into merely another sports league. See infra note 92 and accompanying text.

\textsuperscript{67} See NCAA, 104 S. Ct. at 2978 (White, J., dissenting); Gulland, Byrne & Steinbach, Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges, 52 Fordham L. Rev. 717, 727–30 (1984). This premise is based on the questionable assumption that the NSPE is a commercial organization. See NCAA, 104 S. Ct. at 2978 (White, J., dissenting); Gulland, Byrne & Steinbach, supra, at 727–28. Although the practice of engineering obviously generates income, the exact nature of the NSPE is unclear. As a self-regulating association of “learned professionals,” the NSPE would seem to engage in a sufficient number of nonmarket activities to be labeled, for antitrust purposes, “noncommercial.”

\textsuperscript{68} Because of the questionable causal relationship between the television plan and the NCAA’s public interest goals, see supra notes 55–56 and accompanying text, this approach may still have led the Court to invalidate the plan. However, the NCAA’s intent to promote amateurism and education, unaffected by Professional Engineers, would have remained legitimate.
In determining the applicability of the antitrust statutes, courts no longer distinguish between "commercial" and "noncommercial" organizations;\(^{69}\) both engage in commercial activities.\(^{70}\) To distinguish between those organizations for the purpose of using different rules of reason would be inconsistent. It would be incompatible with the principle that antitrust scrutiny is to focus on an organization's individual activities and not its general character.\(^{71}\) It cannot be assumed that the Court in *Professional Engineers* allows for this result.

The Court's decisions prior to *Professional Engineers* also fail to provide for this inconsistency. In *Goldfarb*, the Court refused to exempt noncommercial organizations from antitrust regulations.\(^{72}\) Yet once the regulations were applied, such organizations were to be "treated differently."\(^{73}\) On this basis, one could argue that there are two rule of reason standards—one for commercial organizations bound by the economic justifications of *Professional Engineers*, and one for noncommercial organizations not limited by that decision.\(^{74}\) This argument fails on two grounds.

First, the argument misinterprets *Goldfarb*. That case did not distinguish between organizations based on their intrinsic character.\(^{75}\) It simply recognized that despite their commercial activities, noncommercial organizations continued to engage in a far greater number of noncommercial activities than did commercial organizations. "Different treatment" was merely to take account of this distinction.\(^{76}\) Hence, courts applied the rule of reason to noncommercial organizations because of the significant potential that their market restraints could be justified by their noncommercial activities.\(^{77}\) Such potential did not exist with commercial organizations.\(^{78}\) "Different treatment" of noncommercial organizations—in the form of application of the rule of reason to traditionally per se violations—was grounded in a rationale consistent with antitrust law's focus on individual activities.

No comparable rationale, however, supports use of a different rule of reason. Just as noncommercial organizations participate in commercial

\(^{69}\) See supra notes 13–18 and accompanying text.

\(^{70}\) Id.

\(^{71}\) Supra note 19 and accompanying text.

\(^{72}\) *Goldfarb*, 421 U.S. at 786–88.

\(^{73}\) Id. at 788 n.17.

\(^{74}\) See NCA, 104 S. Ct. at 2978 (White, J., dissenting); Gulland, Byrne & Steinbach, supra note 67, at 728 n.77; Note, supra note 9, at 813.

\(^{75}\) See generally, supra notes 22–25 and accompanying text.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) This does not deny that commercial organizations engage in noncommercial activities. See infra note 79 and accompanying text. It simply recognizes that the number of such activities is too small to warrant rule of reason analysis.
activities, so commercial organizations participate in noncommercial activities.\textsuperscript{79} To limit the application of the \textit{Professional Engineers} doctrine to commercial organizations would create a distinction based on an irrelevant factor. The message of \textit{Professional Engineers} is that activities otherwise in the public interest are unlawful if they impose anticompetitive market restraints.\textsuperscript{80} Neither that case, nor others in the antitrust field, suggest that this depends on the organization performing these activities.

This argument also fails to recognize other, more significant, implications of \textit{Professional Engineers}. Prior to that case, courts treated noncommercial activities differently because their market restraints served the public interest.\textsuperscript{81} \textit{Professional Engineers}, however, precluded public interest considerations.\textsuperscript{82} In doing so, it implicitly overruled \textit{Goldfarb} on this point.\textsuperscript{83} It is irrational to argue that the special treatment granted noncommercial organizations in \textit{Goldfarb} limits application of \textit{Professional Engineers} when, in fact, \textit{Professional Engineers} nullified the grounds on which that special treatment was based.

2. \textit{As a Sports Organization}

Alternatively, the Court might have distinguished the NCAA by ruling that as a sports organization, it was not subject to the \textit{Professional Engineers} doctrine.\textsuperscript{84} The basis of this approach is that preserving the integrity of the sport and fair competition is a legitimate purpose for market restraints imposed by such organizations.\textsuperscript{85} Thus, regardless of \textit{Professional Engineers}, the NCAA is free to impose its restraints, subject only to the rule of reason requirement that they be sufficiently related to these intended ends.\textsuperscript{86} This approach, however, fails to recognize the dual nature of the NCAA\textsuperscript{87} and the complexity of recent antitrust decisions. Although prior

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\item \textsuperscript{79} See Note, supra note 5, at 655 n.1.
\item \textsuperscript{80} See \textit{Professional Engineers}, 435 U.S. at 691–92.
\item \textsuperscript{81} See J. Von Kalinowski, supra note 14, at §§ 49.02[1][b][ii].
\item \textsuperscript{82} 435 U.S. at 1365.
\item \textsuperscript{83} See J. Von Kalinowski, supra note 14, at §§ 49.02[1][a], 49.02[1][b][ii]; Note, \textit{Antitrust Per Se Rule or Rule of Reason}, supra note 14, at 1152–53, 1159.
\item \textsuperscript{84} See \textit{Justice v. National Collegiate Athletic Ass’n}, 577 F. Supp. 356, 382 n.17 (D. Ariz. 1983). In \textit{Justice}, the court held that sanctions imposed by the NCAA excluding a football team from post season play and television appearances for two seasons did not violate antitrust laws. Applying the rule of reason, the court stated that the sanctions were reasonably related to the NCAA’s legitimate goals of preserving amateurism and promoting fair competition. Therefore, despite \textit{Professional Engineers}, they were valid.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Because of the “sufficiently related” requirement, the NCAA Court might still have struck down the television plan. See supra note 68. Yet, using this approach, it would have been able to ignore \textit{Professional Engineers} and the limits that case places on rule of reason analysis.
\item \textsuperscript{87} Supra notes 4–9 and accompanying text.
\end{itemize}
cases support the conclusion that sports leagues are entitled to special antitrust considerations, that conclusion does not adequately address the antitrust issues presented by the NCAA.

There is little doubt that organizations promoting athletic competition may impose regulations essential to protect the existence and integrity of their sport. To that end, game rules, equipment standards, and safety regulations are valid despite their anticompetitive effects. Indeed, they have the net procompetitive impact of providing a product otherwise unavailable, and thus are permissible even under Professional Engineers.

What this approach does not acknowledge is that the NCAA’s regulations also promote amateurism and academic values. Such regulations are not essential to athletic competition, as the existence of professional sports leagues demonstrates. They therefore warrant no special deference on grounds that they are procompetitive. Yet, neither can they be defended on public interest grounds. Under Professional Engineers, anticompetitive regulations imposed by any organization, including sports leagues, violate antitrust laws regardless of their otherwise desirable effects. An approach in NCAA that would have treated the ends allegedly served by the NCAA’s regulations as valid simply because the regulations were promulgated by a sports organization was not a viable option.

C. Option Three—The NCAA Approach

The Supreme Court could not rationally distinguish NCAA from Professional Engineers so as to disregard the latter case. Instead, required to invoke the Professional Engineers doctrine, it adopted an approach that distinguished the type of activity to which it was being applied. Whereas

89. See NCAA, 104 S. Ct. at 2961.
91. See Neeld v. National Hockey League, 594 F.2d 1297, 1298–1300 (9th Cir. 1979).
93. See supra notes 6–7 and accompanying text.
the Court treated safety in *Professional Engineers* as a public interest,\(^\text{95}\) it characterized amateurism and education in *NCAA* as market products.\(^\text{96}\) The Court recognized the NCAA’s intent to promote these products as legitimate. Such an intent justified its use of the rule of reason. Following this approach, it needed only to review the causal connection between the television plan and the NCAA’s “procompetitive” ends.

The *NCAA* Court’s approach demonstrates the faults of the *Professional Engineers* doctrine. By limiting inquiry under the rule of reason to a restraint’s competitive impact, the Court emasculated the rule of reason, converting what had been two distinct types of antitrust scrutiny into two different forms of the same test.\(^\text{97}\)

Per se antitrust rules declare a practice illegal when the probability of that practice being economically anticompetitive is so significant that further examination is unjustified.\(^\text{98}\) Following *Professional Engineers*, courts apply the rule of reason only when the probability of that practice being anticompetitive is not significant and further examination is justified to verify its actual impact.\(^\text{99}\) In focusing on nothing other than a restraint’s competitive impact, the rule of reason analysis reflected in *NCAA* is little more than an extended determination of whether that restraint is per se illegal. The Court’s opinion implicitly recognized this fact, yet dismissed it as seemingly unimportant.\(^\text{100}\) If past antitrust developments are any indication, it is possible that eventually only a single antitrust standard will remain.\(^\text{101}\) Regardless of its desirability, a decision with this potential effect

\(^{95}\) *See supra* notes 28–31 and accompanying text.

\(^{96}\) *NCAA*, 104 S. Ct. at 2961. It is actually unclear whether the Court characterized education and amateurism themselves as market products or as “aspects” of a market product. In either case the effect is the same: the Court arbitrarily declared that promoting amateurism and education was “procompetitive,” despite traditional treatment of the two items as nonmarket goods. *See supra* note 9.

\(^{97}\) *See Harrison, Price Fixing, The Professions, and Ancillary Restraints: Coping With Maricopa County, 1982 ILL. L. REV. 925, 931; Lipner, supra note 21, at 599–600; Little & Rush, supra note 36, at 353; Sullivan & Wiley, supra note 27, at 323. See generally Brunet, supra note 36, at 14–27.*

\(^{98}\) *Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).*

\(^{99}\) *See supra* notes 32–36 and accompanying text.

\(^{100}\) *NCAA*, 104 S. Ct. at 2962 n.26 (“Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.”). The *Professional Engineers* opinion pretended to keep the distinction between the two standards alive, 435 U.S. at 692 (“[i]n either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . . .” *Id.* (emphasis added)).

\(^{101}\) *In Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982), the Court reiterated the well-worn principle that “[]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.” *Id.* at 344. Taking this to its logical conclusion, a focus under the rule of reason solely on the competitive impact of market restraints will lead eventually to a categorization of those restraints as either anticompetitive or procompetitive; per se illegal or per se legal. With sufficient
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deserves more discussion and explanation than that provided in *NCAA*.

Of greater significance is the proof offered by *NCAA* that the Supreme Court's sacrifice of the rule of reason served no purpose. Those favoring a limited rule of reason argue that to allow judges to consider public interest justifications for restraints of trade puts them in the position of determining what, if anything, is to be valued more than competition. It is, they contend, within the exclusive power of Congress to establish the values national legislation is to promote. Furthermore, Congress' sole purpose in passing the antitrust laws was to promote competition. For the courts to meddle with this policy would represent judicial usurpation of congressional power, placing national policy decisions at the whim of the unpredictable and inconsistent judiciary. The Court's reasoning in *NCAA*, however, reflects just such judicial decisionmaking.

Clearly, *Professional Engineers* did not strip the Court of all discretion as to antitrust matters. It established that only market restraints with a procompetitive effect are justifiable. To be permitted, a particular regulation must provide or promote a market product. The Court, however, never defined "procompetitive" nor set forth standards by which legitimate market products could be identified. This is the loophole through which the *NCAA* Court stepped by simply choosing to consider the *NCAA*’s output a market product. The Court gave no explanation of how this decision was reached, nor on what standards it was based. Amateurism and education are nonmarket public goods, not market products, and had previously been treated as such by the courts. The *NCAA* Court changed this characterization without comment. It applied the label that achieved the desired result.

The way in which the Court exercised this discretion is the most significant aspect of *NCAA*. As a producer of nonmarket goods, the *NCAA* would have had no justification for its market restraints other than that they served

experience, courts will no longer have any use for the rule of reason in its current form. This assumes a finite number of market arrangements for the courts to examine. Regardless, even without further decay, the current "rule of reason" is that in name only.


the public interest. Under the limited rule of reason, such regulations, and in effect the entire NCAA, would have been immediately condemned. By characterizing education and amateurism as market products, the Court sidestepped such a result. It could consider the NCAA’s purposes “pro-competitive” and needed only to determine whether the television plan served such legitimate ends.

This approach is available to the courts in cases involving organizations other than the NCAA. Indeed, it could apply when any organization providing nonmarket goods through market restraints was subject to antitrust charges. If the Court believed that the organization provided something of value, it could simply label the good a market product. Anticompetitive market restraints serving the public interest would consequently be saved from the immediate condemnation that they now receive under the limited rule of reason. This labeling allows a court to examine market restraints said to promote such “products,” and uphold those that it determines to truly meet these ends. In effect, it would permit organizations whose primary purpose was to provide public goods to remain operative.

A limited rule of reason places the power to provide nonmarket goods in the hands of Congress.105 Yet, as NCAA demonstrates, the power to decide what is a nonmarket good remains with the courts. If production of that good requires market restraints, this decision will determine whether that good may be produced. It may also determine the fate of the producing organization. Courts can therefore be expected to characterize items they consider important as market products. Inherent in this determination is the same balancing of values, inconsistency, and lack of standards that a limited rule of reason ostensibly eliminates. Courts will continue to make the subjective judgments that previous antitrust law recognized as an existing, if not favored, judicial function. Limiting the rule of reason only masked this function while causing a fundamental change in antitrust scrutiny.

D. Option Four—Recognize Public Interests as Legitimate

The approach taken by the NCAA Court perpetuates the demise of the rule of reason initiated in Professional Engineers. It also circumvents the barriers established in that case to the exercise of judicial discretion. Unable to distinguish between NCAA and Professional Engineers, the Court recharacterized education and amateurism to accommodate public policy. In so doing, it exposed the inherent fallacies of the Professional Engineers doctrine.

The only remaining approach would have been to openly acknowledge that public interests could justify some market restraints. Under this approach, the Court could have reached the identical result, yet avoided the deception that characterizes its *NCAA* opinion. To the extent that this approach was inconsistent with *Professional Engineers*, the Supreme Court should have overruled that opinion.\(^a\)

Having identified education and amateurism as legitimate justifications for market restraints, the Court could still have tested the television plan under the rule of reason. By examining whether the particular restraint was essential to the social values promoted by the NCAA, the Court would have avoided validating a regulation that served only to restrain competition. In a similar fashion, the use of public interest as a pretext for market restraints in future litigation would have been prevented. This approach would have restored vitality to the rule of reason, once again distinguishing it from the per se rule. The Supreme Court also would have explicitly recognized the "legislative" role played by the judiciary under the Sherman Act. If that role is truly a significant and avoidable problem,\(^b\) Congress and the courts should deal with it in a more direct and effective manner.

IV. CONCLUSION

In *NCAA*, the Supreme Court had the opportunity to resolve much of the confusion and controversy regarding antitrust law and the production of nonmarket goods. Given the nature of the NCAA and the virtues it promotes, and the checks against abuse intrinsic in rule of reason analysis, the Court should have recognized public interests other than competition as legitimate justification for market restraints. Although this would have required overruling precedent, it was the only logical approach to the antitrust issues presented in *NCAA*. By failing to reason in the appropriate manner, the Court further muddled an already confusing area of law, and offered little guidance for lower courts in future antitrust cases.

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*a* This would not mean that the NSPE would automatically be free to impose a ban on competitive bidding. Rather, courts would examine market restraints said to promote safety under the rule of reason. Given the broad reach of a total ban on competitive bidding relative to the ends served, it would still be unlikely that such a restraint would survive judicial scrutiny.

*b* Commentators are far from unanimous in the belief that the courts' legislative role in antitrust matters is to be discouraged. See Redlich, *supra* note 1, at 54–56; Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 9–11 (1980); Sullivan, *supra* note 103, at 773; Note, *supra* note 9, at 813.