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THE LEGALITY OF TICKET TIE-INS IN INTERCOLLEGIATE ATHLETICS

Arthur D. Austin*

I. INTRODUCTION

The dynamics of operating a "major" intercollegiate sports program have a tenuous nexus with academic ideals. Intercollegiate athletics is now a big business, dominated by the balance sheet of gate receipts, T.V. revenues, and talent recruiting. The best high school athletes are aggressively recruited for their physical prowess to play for teams that perform before large crowds—and frequently a national television audience—in gigantic stadiums and fieldhouses. In many instances coaches and players gain national recognition and reverence unequaled by professors, poets, or Nobel prize winners. Yet the sponsors of these sports extravaganzas are academic institutions who by charter and tradition are dedicated to the ideals of teaching, scholarship, and research. By participating in the production and sale of intercollegiate sports entertainment, academic institutions have been forced to confront the possibility of negative tradeoffs. Inevitably, administrators must decide whether the economic and social costs of intercollegiate athletics justify continued participation in "big time" sports competition.

One economic cost is from new legal liabilities derived from the existence of sports as a commercial activity.1 For example, meth-

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* Edgar A. Hahn Professor of Jurisprudence, Franklin Thomas Backus School of Law, Case Western Reserve University; B.S., University of Virginia, 1958; J.D., Tulane University, 1963.

ods used to sell season tickets may violate federal antitrust laws. A survey by the author of fifty-six National Collegiate Athletic Association (NCAA) Division I schools revealed that thirteen institutions use a system that requires buyers of season football tickets to contribute to a scholarship or support fund in exchange for certain benefits. For example, the University of Missouri gives first priority for football seating to persons who become members of the Mizzou Athletic Scholarship Associates by making a financial contribution. The plan provides for seven "membership levels . . . with a schedule of benefits and tickets available for purchase based upon the amount of contribution to the Mizzou Athletic Program." The University of Virginia, not included in the survey, uses a similar plan.

In reply to an inquiry, the author was cautioned by University of

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2. Article 9 of the NCAA bylaws defines criteria for Division I membership. Division I schools must adhere to scheduling, attendance, and stadium capacity requirements. 1980-81 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION § 9(1)(a), at 100-02 [hereinafter cited as 1980-81 MANUAL].

3. Several additional schools indicated that donations were "voluntary" or required in "some" instances. The survey randomly polled schools in the major Division I Conferences, including the Pacific 10, Southwestern, Southeastern, ACC, Big 10, plus some independents. (Survey responses, on file with the author, were obtained under a pledge of confidentiality; thus identification of schools will not be divulged.) In some instances, ticket donation plans have been publicized in the media. Time Magazine reports that "at North Carolina, demand for season tickets is so high that the university limits their sale, in the case of non-students, to people who have contributed at least $5,000 over the years to the school's athletic scholarship fund." TIME, April 7, 1980, at 79. According to The Sporting News, San Diego State "AD Gene Bourdet announced that priority seating would be made available to those donors who give at least $1,000 to the Aztec Athletic Foundation." The Sporting News, April 5, 1980, at 13.

Most schools supporting major-college athletics have similar programs. Arizona's $1,000-a-year donors receive the option to buy 10 football and basketball season tickets, parking in choice locations, a Wildcat Club golf sweater, a personalized plaque and car decal, and all publicity newsletters and press guides.

The dues for membership in the Cardinal and Gold, Southern Cal's most prestigious alumni group, are a $500 minimum. At Clemson, money is raised by the IPTAY Club. IPTAY was organized in 1934, and now stands for "I Pay Twenty a Year." (Three years ago, inflation forced a name change from "I Pay Ten a Year.")

All the money raised by the Maryland Education Foundation is used for athletic scholarships. Contrary to popular belief, a school simply cannot afford to allow a gifted athlete to attend free. The money for his scholarship—approximately $3,000 a year at Maryland, $4,000 a year at Southern Cal, and $5,000 a year at Harvard—is paid by the athletic department.

K. DENLINGER & L. SHAPIRO, ATHLETES FOR SALE 158-59 (1975).

4. 1979 Mizzou Football: Tiger Ticket Information (University of Missouri-Columbia).
Virginia officials that acquiring a season basketball ticket "is quite a difficult trick each year," 5 and that "special consideration will be given to Virginia Student Aid Foundation and faculty members." 6 A brochure described the allocation system: "All VSAF privileges are awarded by the VSAF Priority System. This system takes into consideration the amount of contribution in one year, the total monies contributed to the VSAF and loyalty to the VSAF." 7 According to the VSAF formula, a maximum of 105 "points" can be earned with the following combination: a yearly contribution of $2500 or more (50 points), cumulative contributions of $15,000 or more (35 points), and an annual contribution for ten consecutive years (20 points). Hence, to get a season ticket one is required to join the VSAF, contribute enough money to amass sufficient "points" to gain "priority" status, and then pay the "regular" price for the tickets. The literature fails to provide information on the approximate number of points needed to assure inclusion in the "priority" group.

Forcing purchasers to contribute to athletic support funds such as the Virginia Student Aid Foundation as a condition to getting a season ticket may constitute an illegal tying arrangement under the federal antitrust laws. Using the University of Virginia plan as a model, this article will describe the legal basis for antitrust liability. After first examining the "state action" defense, the article will discuss some significant jurisdictional problems, followed by an analysis of the substantive liability elements of a tying arrangement.

II. THE "STATE ACTION" EXEMPTION

Many of the major college sports powers that use a ticket priority system are state institutions. 8 The University of Virginia is administered by the "Rector and Visitors of the University of Vir-

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5. Letter from Dennis K. Womack, Ticket Manager, Dept. of Intercollegiate Athletics, University of Virginia, to the author (June 11, 1979).
6. Id.
7. VSAF Priority System (information printed on the Virginia Student Aid Foundation pledge card).
8. Of the thirteen schools which the survey revealed used the tying arrangements, eleven were state institutions. The University of Virginia, which was not surveyed, is also a state institution.
ginia,” a corporation “at all times subject to the control of the General Assembly.” The delegation of authority from the state government raises the possibility that the “state action” defense may exempt the ticket restraints from the coverage of the federal antitrust laws.

The state action exemption was judicially created in *Parker v. Brown*, where the Supreme Court held that the Sherman Act is “a prohibition of individual and not state action” and was therefore inapplicable to a rate-making program created and supervised by the California state legislature. In subsequent decisions, the Supreme Court made an analytical distinction between two different classes of immunities: (1) the activities of the sovereign state and its officials, and (2) private parties engaged in anticompetitive conduct at the direction of the state.

A. **Conduct by State Officials**

Even though acting within its broad powers, a state agency can engage in nonexempt activity. In *Goldfarb v. Virginia State Bar*, the plaintiffs alleged that a fee schedule imposed by the Virginia State Bar and adhered to by the Fairfax County Bar, a private voluntary association, constituted price-fixing. The Virginia State Bar, “a state agency by law,” is the administrative agency for im-

9. The board of visitors of the University of Virginia shall be and remain a corporation, under the style of “the Rector and Visitors of the University of Virginia,” and shall have, in addition to its other powers, all the corporate powers given to corporations by the provisions of Title 13 [Title 13.1]; except in those cases where, by the express terms of the provisions thereof, it is confined to corporations created under such title; and shall also have the power to accept, execute and administer any trust in which it may have an interest under the terms of the instrument creating the trust. The rector and visitors of the University of Virginia shall be at all times subject to the control of the General Assembly.


11. Id. at 352.


14. Id. at 791.
plementing the rules and regulations of the Virginia Supreme Court of Appeals. To practice law, attorneys must join the Virginia State Bar.

Rejecting the "status" of the Virginia State Bar as the sole determinant of state action, Chief Justice Burger identified the "threshold inquiry" in ascertaining exemption as "whether the activity is required by the State acting as sovereign." Inquiry was quickly terminated "because it cannot fairly be said that the State of Virginia through its Supreme Court rules required the anticompetitive activities of either respondent."

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that position cannot claim it is beyond the reach of the Sherman Act.

Under Goldfarb, "not every act of a state agency is that of the State as sovereign." When the state agency cannot prove that it was "compelled" or directly authorized by the state, it acts ultra vires as a private party. Under these principles, the University of Virginia’s priority ticket arrangement would not be protected by state action.

The University of Virginia is a state institution governed by a corporate Board of Visitors who are subject to the control of the Virginia General Assembly. By statute, the Board of Visitors has responsibility for "the care and preservation of all property belonging to the University," along with the power to regulate the gen-

15. Id. at 790.
16. Id. Burger continued: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." Id. at 791.
17. Id. at 792.
19: Dorman, supra note 12, at 509.
The board shall be charged with the care and preservation of all property belonging to the University. They shall appoint a president, with such duties as may be pre-
eral affairs of the institution.

This general delegation of authority does not suggest that the General Assembly intended that the Board of Visitors have license to impose restraints of trade.\textsuperscript{22} While the supervision of intercollegiate athletics is clearly within the delegation, conduct violating the federal antitrust laws would presumptively be excluded. Indeed, such a presumption is made absolute by the General Assembly: in managing the affairs of the University, the Visitors may "make such regulations as they deem expedient, not being contrary to law."\textsuperscript{23}

A subsequent Supreme Court decision, \textit{Lafayette v. Louisiana Power \\& Light Co.},\textsuperscript{24} presents further obstacles for a state university seeking exemption. Plaintiff, a private utility, filed a counterclaim against a municipality alleging injuries from tie-ins and sham litigation. Refusing to dismiss the counterclaim, the Court held that an exemption is permissible only when there exists an articulated state policy to displace competition and the state subdivisions are directed or authorized to engage in anticompetitive conduct. Accordingly, "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."\textsuperscript{25}

There is nothing to suggest that the Virginia General Assembly

\begin{flushright}
\textsuperscript{22} \textit{Id.} \\
\textsuperscript{23} \textit{Id.} \\
\textsuperscript{24} 435 U.S. 389 (1978). \\
\textsuperscript{25} \textit{Id. at 416}. See California Retail Liquor Dealers Ass'n v. Midcal Alum., 100 S. Ct. 937, 943 (1980).
\end{flushright}
(or any other state legislature) has enacted or authorized a "comprehensive regulatory system" through the creation of the Board of Visitors with the purpose of regulating intercollegiate athletics. Nor is there evidence that Virginia and other state legislatures have "clearly articulated and affirmatively expressed" a policy of implementing sports restraints of trade. The pronounced absence of a policy on intercollegiate sports regulation indicates at the least a neutral attitude by state governments, a state of affairs which would not justify an exemption from antitrust.

B. Private Party Immunity

Antitrust immunity for the activities of the Virginia Student Aid Foundation would be tested under Cantor v. Detroit Edison Co., where the Court set up a four-pronged test. Immunity is achieved when (1) the defendant's actions are compelled under the authority of a regulation which the state played a dominant role in formulating, (2) the state system is incompatible with the antitrust laws, (3) immunity is necessary for the successful operation of the state regulatory system, (4) a balance between the state's interest in maintaining the regulatory system and federal antitrust policies weighs in favor of the former.

The Virginia Student Aid Foundation (VSAF) is a private, non-profit corporation chartered in 1948 under the Virginia Nonstock Corporation Act. Under 1975 Articles of Amendment, it is empowered to receive money or property in order to provide loans or

26. 435 U.S. at 410. The Court was referring to Bates v. State Bar, 433 U.S. 350 (1977), which exempted a rule prohibiting advertising by lawyers because it was the "affirmative command of the Arizona Supreme Court" and subject to active supervision and enforcement by that court.
27. 435 U.S. at 410.
28. Id. at 414-15.
29. 428 U.S. 579 (1976). The plaintiff alleged that Detroit Edison imposed a tying arrangement by furnishing lightbulbs at no extra charge to purchasers of electrical power. The defendant argued immunity on the basis of an ongoing (since 1916) approval by the Michigan Public Service Commission of tariff rates that included the lightbulb program. Under existing law, Detroit Edison could not abandon the program without approval by the Commission.
income "to needy young men and women who are seeking an education, at the University of Virginia."\textsuperscript{32} The VSAF also endeavors to help students obtain employment during vacation periods and after graduation. To accomplish its objectives, VSAF is permitted "to appropriate money, property, and other things of value to the University of Virginia for any general University of Virginia purpose."\textsuperscript{33}

As a private party who has entered into a joint venture with the University of Virginia’s athletic department to provide services to contributors and raise funds, VSAF does not satisfy the first prong under the Cantor test. Other than the general power derived from the Code of Virginia under the Articles of Incorporation, VSAF receives no special delegation of authority or direction from the General Assembly. It does not operate within a regulated system whose purpose is to control competition in intercollegiate athletics, nor does it answer to a regulatory agency.\textsuperscript{34} Under these circumstances, VSAF functions as a private party uncompelled by state action and thus is not immune to the federal antitrust laws.

III. JURISDICTION OF THE ANTITRUST LAWS OVER INTERCOLLEGIATE ATHLETICS

Before confronting the liability issues, it is necessary to evaluate the argument that intercollegiate athletics among the "big time" sports schools are not "trade or commerce" and, therefore, the antitrust laws are inapplicable. Defendants may also argue that the ticket tie-in involves "traditionally non-commercial activity" which might also exclude coverage.

Under the rubric of "amateurism," college players are popularly characterized as "student-athletes" whose participation in sports is primarily a character-building function of the education process. According to the National Collegiate Athletic Association, the

\textsuperscript{32} Articles of Amendment, Articles of Incorporation, Virginia Student Aid Foundation (Dec. 27, 1948) (filed with State Corporation Commission of Virginia).

\textsuperscript{33} Id.

\textsuperscript{34} VSAF operates under the supervision of the Athletic Director. Since the athletic department hardly constitutes a regulatory agency, this is irrelevant to the immunity issue. Interview with Field Secretary of the Virginia Student Aid Foundation, in Charlottesville, Va. (June 6, 1980).
"amateur student-athlete is one who engaged in a particular sport for the educational, physical, mental, and social benefits he derives therefrom and to whom participation in that sport is an avocation." By representing the school and performing before the students and the public, the team functions as a quasi-educational apparatus similar to a debating team or a law school moot court team. Hence, according to the accepted wisdom, college sports activities are merely a subsidiary element of the general educational process and do not come within the "trade or commerce" jurisdictional requirements of the antitrust laws or, alternatively, constitute conduct not "traditionally" within the contemplation of the statute.

The credibility of these arguments depends on a number of factors, including the degree of the athletic department's autonomy, the source of revenues, and the level of intercollegiate competition on which the school participates.

A. Trade or Commerce

1. General Principles

The Supreme Court defines "trade" as "any occupation . . . carried on for the purpose of profit, or gain, or a livelihood." This definition has been interpreted liberally to assure the preservation of competitive markets. Rejecting a plea for a "learned profession" exemption for lawyers, the Supreme Court continued its support of this principle by observing that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds

35. NCAA Const. art. 3, § 1, 1980-81 Manual, supra note 2, at 9. Sports writer Red Smith says, "Whenever a college football game is on radio or television, it is accompanied by edifying words about student athletes, about the importance of intercollegiate athletics in a rounded educational program and about the vital role played by the National Collegiate Athletic Association. The edifying words are composed by writers for the N.C.A.A." Smith, The Student Athlete, N.Y. Times, Nov. 12, 1979, § C, at 3, col. 4.


38. "If there is a dollar to make, it's trade or commerce." L. Sullivan, Handbook of the Law of Antitrust 709 (1977).
with that purpose."

It is the character of the activity alleged to be in restraint of trade that determines "trade or commerce." Hence, the fact that the restraint of trade is performed under the administration of a "non-profit" academic institution is not dispositive; the "trade or commerce" requirement is satisfied if the particular activity involved in the alleged restraint has a "commercial motive," such as profit-making, or is of a "business character." As a sports treatise summarizes: "[T]he Court's view of the concept of 'business' in this context seems to be quite broad and may include all undertakings which have significant economic consequences."

2. Intercollegiate Athletics as "Trade or Commerce"

The production of major college sports events involves the commitment of substantial financial resources and typically has "significant economic consequences." Operating with million-dollar annual budgets, athletic programs at the major football and basketball powers actively compete for the entertainment dollar. The ideal is participation in a post-season bowl or tournament, where the share of gate receipts can go as high as a million dollars. The following statistics provide the broad contours of the large economic commitment:

Intercollegiate athletics are big business. Five years ago, it was estimated that intercollegiate athletics consumed "about one percent of the [§30 billion] budget for higher education in the United

40. See Note, The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities, 82 YALE L.J. 313 (1972) [hereinafter cited as The Applicability of the Sherman Act].
41. J. WEISTART & C. LOWELL, supra note 1, at 765. "The general rule appears to be that every conceivable kind of commercial activity, unless it involves either professional baseball or a statutorily exempt area, is subject to the Sherman Act, if that activity has the requisite interstate involvement." 16 Business Organizations, J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 4.02 (1979). Given the intensive interstate travel of major college teams, the interstate involvement requirement would present no problem.
42. Under a new two-year contract with NBC, the NCAA will receive $18.5 million for television rights to the NCAA basketball tournaments. SPORTS ILLUSTRATED, Aug. 27, 1979, at 6.
States.” That came to $300 million or so, at a time when $3 million was a high sports budget. Today, with the budgets for athletic programs as some institutions approaching $5 million, the intercollegiate athletic enterprise could be approaching the half-billion dollar mark.  

Due to inexperience in athletic affairs, along with a general lack of interest and pressures from alumni, administrators at the “big time” powers separated the educational function from sports entertainment by creating autonomous athletic departments. Speaking on the autonomy of athletic programs, the former president of Southern Methodist University is quoted as saying: “I didn’t realize that there are a tremendous number of schools in this country where the president or chancellor does not run the athletic program. Where it is treated as none of his business by an athletic board or totally independent athletic director. . . .”

“Profit-center” athletic departments are charged with the responsibility to make enough profits from the major sports to help subsidize the “minor” sports. One study showed that 68 percent of all revenues for Division I sports programs are derived from “gate receipts, guarantees, and conference, bowl, and television income.” As a specific example, a federal court noted that the University of Alabama “has an athletic program which involves millions of dollars annually, and which has over the years, produced significant ‘profits’ for use by non-athletic activities of the institution.” Complete commercialization was assured when control was voluntarily surrendered to the NCAA, which has been characterized as a “business cartel composed of university-firms which have varying desires to restrict competition and maximize profits in the

45. See Hanford, supra note 43.
47. Hennessey v. NCAA, [1977] 2 Trade Cas. 73,176, 73,179 n.14 (5th Cir. Dec. 16, 1977).
area of intercollegiate athletics."

When functioning as autonomous profit-centers, athletic departments are compelled to attract talented players, hire successful coaches, and produce winning teams. In this context, players are employees rather than students. The function of athletics has become commercial—to make a profit so as to be self-sustaining. The athletic department "operates as, and indeed is, a commercial enterprise separate from the rest of the institution, like the food service or campus union building."

An allegation of a ticket priority tie-in would include the athletic department as the seller of sports tickets and a booster club or organization similar to the VSAF as the seller of certain services. The sale of tickets and scholarship funding are basic elements in the production of intercollegiate sports entertainment. As to those major schools producing sports entertainment, "there is a business aspect in the providing of... athletic events to an interested pub-

49. For a scathing indictment of the student-athlete myth, see Underwood, The Writing Is on the Wall, SPORTS ILLUSTRATED, May 19, 1980, at 36.
50. For the major powers, the public relations value of winning teams compels continued commercialization of the athletic program.

College presidents and administrators increasingly viewed themselves as managers of multimillion dollar businesses. Publicly favored athletics programs were valuable assets, providing political, economic, and social support. In return for entertainment, identification, and the opportunity to be a part of a "winner," the public "adopted" the institution. In this way, intercollegiate athletics became the university's most vital public relations vehicle, the visible and well-traversed bridge between the ivory tower and the state.

Institutional administrators forgot that the public, having made a financial and moral commitment to real or adopted alma maters, would evaluate its investment by commercial rather than educational standards. Winning became paramount. With commercial standards applied, it was inevitable that commercial attitudes would prevail.

The question became, Could the institution control the delicate balance between societal, institutional, and student expectations, between commercial and educational behavior in athletics programs? It could not or would not: no balance was ever achieved. In fact, commercial behavior has progressively intensified primarily because of television coverage.


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lic” and the ticket tie-in would constitute “trade or commerce.”

B. “Traditionally Non-Commercial” Activity

The corollary argument that college athletics are “traditionally non-commercial” is based on the assumption that it was the legislative intent to apply the Sherman Act only to “combinations having commercial objectives and . . . only to a very limited extent to organizations . . . which normally have other objectives.” Courts have not been receptive to this argument, accepting it only in those situations where the underlying motivation behind the conduct is social or political. Neither characterization applies when schools give first priority to the production of major athletic shows with a profit motive.

IV. The Elements of an Illegal Tying Arrangement

A tying arrangement exists whenever one product is sold on the condition that the purchaser also buy a second product. Plaintiff must first prove the existence of a tying arrangement. To prove illegality, plaintiff must satisfy the per se liability requirements that the tying product possess “sufficient economic power” and

52. Id. at 73,180.
53. A comment attributed to the school's president suggests that the “profit-center” concept is followed. Responding to student protest over a $20 increase in athletic fees, "President Hereford pointed out that the athletic department is entirely self-supporting. 'It must generate revenues not only for operating costs but for the maintenance and repair of its buildings and facilities.'" UNIVERSITY OF VIRGINIA ALUMNI NEWS, May-June 1979, at 13. Sports Illustrated reports that University of Virginia officials decided to "increase athletic expenditures from $2.7 million to $4.4 million by 1983-84." Deford, It's V-I-R-G-I-N-I-A-A-A, SPORTS ILLUSTRATED, Sept. 15, 1980, at 64, 76.
54. See The Applicability of the Sherman Act, supra note 40.
57. In response to an "educational exemption" argument, the Fifth Circuit said:
   Nor should it be taken as any attack upon the amateurism of intercollegiate athletics for one to acknowledge that there is a business aspect in the providing of coaching for the athletes or in the providing of athletic events to an interested public. The court holds that the NCAA is not entitled to a total exclusion from antitrust regulations on this ground.
   Hennessey v. NCAA, [1977] 2 Trade Cas. 73,176, 73,180 (5th Cir. Dec. 16, 1977).
that a not insubstantial amount of commerce in the tied product be involved. The existence of a tie-in is established by proof that separate and distinct tying and tied products are involved and that the tying product is sold or leased on the condition that a tied product also be purchased or leased. Since the latter issue is easily resolved, it will be discussed first.

A. "Sale on Condition"

Satisfactory proof that the sale of one product occurred "on condition" that a second item be purchased can be derived from an express agreement or inferred from the circumstances surrounding the relationship between the seller and buyer. Ticket priority plans like Virginia's impose express tying terms on season basketball ticket purchasers. Through VSAF literature, the terms of the "sale on condition" are described: "Availability of tickets and parking are determined by the amount of contribution in the current year [to the VSAF], the total monies contributed to the VSAF and the continuous years of VSAF membership." Although the terms of the tie-in are specific, the final consequences are not. Since there are a finite number of available seats and a variety of factors determining priority, purchasers do not know if they have successfully obtained a ticket until all subscriptions have been cal-

59. Section 1 of the Sherman Act requires proof of both per se elements, while § 3 of the Clayton Act is satisfied by proof of either element. A plaintiff who fails to satisfy the per se standards may attempt to prove liability under the "rule of reason." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 499 (1969). The difference in standards is relevant to the ticket priority tie-in under analysis because § 3 of the Clayton Act, unlike § 1 of the Sherman Act, applies only to commodities, not to services. Since the tied product, membership in VSAF, is composed of a cluster of services, the plaintiff would have to satisfy the per se standards of § 1 of the Sherman Act.

60. Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976), prohibits a lease, sale, or contract "on the condition, agreement, or understanding" that the lessee or buyer not use or deal in the commodities of a competitor of the lessor or seller. In an action under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976), the Supreme Court defined the tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different ... product." Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958).


culated according to the priority rules.63

B. Separate Products

Since adverse effects can be presumed only when market power over the tying product is used to exert power over a second or "tied" product, the plaintiff must prove that two separate products are involved in the sale. The inexhaustible and diverse range of possible product relationships renders determination of this issue more an exercise in practical judgment than in legal or economic analysis.64 Courts generally adopt a functional approach, focusing on such factors as custom, product interchangeability, and buyer perceptions.65

Viewed functionally, the Virginia type of ticket priority tie-in involves the tying of membership in the VSAF to a season basketball ticket. As the tied item, VSAF membership is composed of a cluster of services, including "dinners, socials and visits from Wahoo coaches," receipt of various sports publications, and parking priority.66 More significantly, membership provides a form of "status" that gives the subscriber an opportunity to build up a reserve of priority points.67

There are two arguments that can be raised in opposition to a separability interpretation. One is that required membership in the VSAF is merely an "ancillary service" that normally occurs in the sale and distribution of season tickets.68 It is, therefore, no more

63. Directions for ascertaining priority are established by the VSAF Board of Trustees. Interview with Field Secretary of the Virginia Student Aid Foundation, in Charlottesville, Va. (June 6, 1980).

64. L. SULLIVAN, supra note 38, at 443.


66. VSAF: There's a VSAF District Near You (brochure available from the Virginia Student Aid Foundation). The brochure notes that there are non-material benefits. "There is the personal satisfaction of belonging to a worthwhile organization, participating in a project that is succeeding, and finally of helping young people attend the University of Virginia." Id.

67. Under the VSAF system, two points are awarded for each year of continuous VSAF membership, with a maximum of twenty points allowable. VSAF Priority System (information printed on Virginia Student Aid Foundation pledge card).

the sale of two products than is the sale of an automobile and the transportation for its delivery.69

The second argument concedes that while the products may, in fact, be separate, there are “legitimate business reasons” for the package sale. Although sometimes analyzed as a separate product problem, this argument constitutes a defense, and will subsequently be discussed accordingly.

The underlying rationale of the ancillary service interpretation is that the seller is providing one of the customary and standard accessories to the distribution and sale of the tying product. “Almost all modern selling involves providing some ancillary services in connection with making the sale. . . .”70 Viewed in the broad context of its relevance to the main product, it becomes “incidental” as a customary accessory.

Analysis of the details of the ticket tying arrangement imposed under Virginia’s priority point system tends to refute this interpretation. The production of the games that constitute the tying product is made at the University’s home arena, and involves a series of events—such as scheduling dates, time, or identity of opponents—which are performed without the immediate involvement of the VSAF. Other than determining priority status and arranging for preferred parking, the VSAF does not participate in maintenance of the arena or perform other ancillary services necessary to produce games. The separateness of the tying and tied products is further emphasized by the fact that the basketball games are produced by the Department of Intercollegiate Athletics, while the


70. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 525 (1969) (Fortas, J., dissenting). Justice Fortas stated further:

Customarily—indeed almost invariably—the seller offers these ancillary services only in connection with the sale of his own products, and they are often offered without cost or at bargain rates. It is possible that in some situations, such arrangements could be used to restrain competition or might have that effect, but to condemn them out-of-hand under the “tying” rubric, is, I suggest, to use the antitrust laws themselves as an instrument in restraint of competition.

Id.
VSAF is an independent nonprofit foundation.\textsuperscript{71} The "separation" of the production of the tying product is discerned in the ability of the VSAF to convey its cluster of services throughout the year at various geographic locations, while staging home basketball games is restricted as to time and location. Finally, many other major college sports enterprises do not find it necessary to use a VSAF method to produce games successfully.\textsuperscript{72}

C. \textit{Proof of Liability}

1. Per Se Liability

Because of "their pernicious effect on competition and lack of any redeeming virtue,"\textsuperscript{75} the Supreme Court has held that tying arrangements are per se illegal. Liability is established by proof that the seller has "sufficient economic power" over the tying product to restrain competition appreciably, and that a "not insubstantial amount of commerce in the tied product is affected."\textsuperscript{76} Under the per se doctrine, satisfactory proof of these two elements conclusively establishes liability, thereby precluding the defendant from presenting evidence justifying its conduct.\textsuperscript{77}

Plaintiffs have successfully met the burden of proving sufficient economic power over the tying product by reference to certain "indicia." Proof of the existence of a "host of tying arrangements,"\textsuperscript{78} the presence of the "burdensome terms" of a tying arrangement,\textsuperscript{79} and the "uniqueness"\textsuperscript{80} of the tying product have been accepted by courts as "indicia." In \textit{United States Steel Corp. v. Fortner Enter-}

\textsuperscript{71} This may be more ostensible than real since the athletic director exercises authority over some VSAF conduct. Moreover, all scholarship grants from the VSAF "must be approved by the University's Committee on Scholarships, Loans, and Employment, the committee which administers all scholarships and grants awarded by the University of Virginia." VSAF: How It Operates (brochure available from Virginia Student Aid Foundation).

\textsuperscript{72} See note 3 \textit{supra} and accompanying text.

\textsuperscript{73} Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

\textsuperscript{74} See note 59 \textit{supra}.

\textsuperscript{75} Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). However, lower courts have ignored the per se rule to allow evidence of justifications or defenses. See notes 93-95 \textit{infra} and accompanying text.

\textsuperscript{76} 356 U.S. at 8.

\textsuperscript{77} 394 U.S. at 504.

prises, Inc. (Fortner II), the Supreme Court emphasized the importance of evidence demonstrating that the seller enjoys a cost advantage over rivals in producing the tying product.

As a predicate to proving defendant's sufficient economic power over the tying product, the plaintiff must identify the product market in which the seller competes. Since a per se violation is involved, it is unnecessary for the plaintiff "to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product." Nonetheless, since the product configuration involved in the Virginia type of ticket priority tie-in has not received prior judicial examination, a brief delineation of product and geographic markets is advisable. In the process, the type of evidence bearing on proving "sufficient economic power" will be examined.

Determination of the tying product's market power requires consideration of the competition from substitute products. It is also necessary to determine the relevant geographic market, which is defined as that area in which the seller does business and the buyers can exercise buying power consistent with their economic capacities.

The University of Virginia basketball team competes in the NCAA Division I intercollegiate market. As a submarket of the entire college sports entertainment market, this product market is characterized by unique rules, strategy, and fan support. Division I basketball is therefore distinguishable from professional basketball or any other form of sports entertainment where seasons may overlap. Within this general product market Virginia competes in the Atlantic Coast Conference (A.C.C.), which is nationally known

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80. Id. at 620-22. It is possible to read Justice Stevens' opinion as imposing a more stringent "sufficient economic power" standard. See Jones, The Two Faces of Fortner: Comment on a Recent Antitrust Opinion, 78 Colum. L. Rev. 39 (1978).
83. See note 2 supra.
84. The "submarket" principle is derived from Brown Shoe Co. v. United States, 370 U.S. 294 (1962), where the Supreme Court indicated that submarkets are to be defined by "practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id. at 325.
for outstanding teams, vociferous fans, and talented performers, along with innovative floor tactics such as the "four corners offense." The caliber of play and the intense rivalries that have blossomed make each game a significant event.\textsuperscript{95} Since the University of Virginia is the only A.C.C. member from Virginia, its home games provide a unique product to fans within traveling distance. The product and geographical uniqueness of the University of Virginia's home games is further enhanced by the location of the University in a region without serious competition from professional teams or other college teams that play on the A.C.C. level. Virginia Tech, the nearest team with a national reputation, is located in southwest Virginia, approximately 150 miles from Charlottesville. In addition, no other team in the area can showcase the talents of Ralph Sampson, "acclaimed as the next great center, a second coming of Russell, Chamberlain, or Abdul-Jabbar."\textsuperscript{96} Winning the 1980 National Invitational Tournament and the attendant publicity added another layer of "uniqueness" to the production of home games.

Within this clearly defined product and geographic area, University of Virginia home basketball games assume the characteristics of a monopoly product, easily supplying the seller with "sufficient economic power" over the tying product. Indeed, the uniqueness of the home games justifies comparison to copyrighted films\textsuperscript{97} or trademarks,\textsuperscript{98} which have been recognized as conclusive indicia of "sufficient market power." As a producer of intercollegiate basketball games, the University of Virginia has the power to control prices.\textsuperscript{99}

The second liability requirement—a "not insubstantial" amount of commerce affected in the tied product—is determined according to dollar amount and, according to \textit{Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I)}, can be as low as $190,000.\textsuperscript{90}

\textsuperscript{85} The ACC basketball phenomenon has been recognized by the national media. \textit{See}, e.g., "In The South, There's No Doubt A.C.C. Tourney Is The Greatest," N.Y. Times, Mar. 2, 1980, § 5, at 11, col. 4.
\textsuperscript{86} The Sporting News, Dec. 22, 1979, at 34.
\textsuperscript{88} Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971).
\textsuperscript{90} 394 U.S. 495, 501-02 (1969).
According to tax returns, VSAF received “gross contributions, gifts, grants and similar amounts” of $1,021,650 and $1,222,930 for the years 1977-78 and 1978-79.91 The bulk of “contributions” are payments for priority points and access to other benefits and services, and are substantial enough to satisfy easily the Fortner I standard.

The Supreme Court’s experience with tie-ins has crystallized into an unyielding per se condemnation.92 Under Supreme Court decisions, proof that the University of Virginia season basketball tickets are sufficiently “unique” to deposit the seller with monopoly power and that a non-insubstantial amount of commerce in VSAF membership is affected would render the tying restraint per se illegal, cutting off defenses or justifications.

2. Justifications and Defenses

Confronted with an inexhaustible variety of tie-in configurations, lower federal courts have occasionally refused to apply the per se rule. As one court rationalized, “while the per se rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the per se rule.”93 Enough courts have followed this rationalization to produce a substantial number of decisions allowing defendants an opportunity to offer evidence justifying the use of tie-ins.94 Moreover, in manifesting tolerance for certain types of ties, lower courts sometimes expand inquiry to include an examination of possible effects on competition.95

a. Legitimate Business Reasons

Rationalizing that there are “legitimate reasons for selling nor-

91. Tax returns filed on form 990 under I.R.C. § 501(e) (returns available at Internal Revenue Service, Mid-Atlantic Regional Office).
92. *Fortner II* may have increased the burden of proof necessary to satisfy the “sufficient economic power” requirement. See note 80 supra.
95. See the professional football ticket cases, notes 120-36 infra and accompanying text.
mally separate items in a combined form," courts have allowed ties to protect goodwill, to assure the tying products’ quality, and to enable a newcomer to enter a market when malfunctions would deter investment. In these special situations courts weigh the likelihood of creating a more efficient firm against the possibility of harmful effects on competition. The “crucial question” is whether the defendant “could have accomplished the ends it sought without requiring the [tying] contracts.”

Since the University of Virginia is a long-standing member of the NCAA and A.C.C., a conference known for success in the production of basketball entertainment, the newcomer defense obviously does not apply. The two other “legitimate reason” defenses—protection of quality and goodwill—require that the defendant meet the burden of proving that the tying arrangement is the least harmful alternative and that without the use of the tie-in the integrity of the product would suffer irreparable harm.

In all probability, major sports schools like the University of Vir-

96. 187 F. Supp. at 559. In Jerrold, the government alleged two ties: (1) Jerrold required purchasers of antennae to accept service contracts for supervision on installation and maintenance and (2) Jerrold refused to “sell its various items of equipment designed for community antenna systems separately, but [agreed] only to sell them as components of a complete system.” Id. at 558. Judge Van Dusen exonerated the first tie under the “newcomer” rationale and held that there was a “sound business reason” for the second tie. “Thus, the court concludes that Jerrold’s policy of full system sales was a necessary adjunct to its policy of compulsory service and was reasonably regarded as a product as long as the conditions which dictated the use of the service contract continued to exist.” Id. at 560.


100. 187 F. Supp. at 557.


102. In Jerrold, the court made it clear that the tie-in contracts were not protected once Jerrold became an established enterprise. “[W]hile Jerrold has satisfied this court that its policy was reasonable at its inception, it has failed to satisfy us that it remained reasonable throughout the period of its use, even allowing it a reasonable time to recognize and adjust its policies to changing conditions.” 187 F. Supp. at 558.

ginia would have difficulty in satisfying this burden. Many schools conduct highly successful athletic programs without resorting to ticket priority tie-ins,\textsuperscript{104} a fact that persuasively suggests the availability of less harmful alternatives. Most importantly, there is nothing to indicate that a ticket priority tie-in is an essential factor in the successful production of basketball or football entertainment. While forced membership in the VSAF may provide the scholarship funds for paying the wages of the athlete-employees,\textsuperscript{105} these funds are fungible and could just as easily be appropriated from some other source in the budget. Moreover, since the NCAA defines the terms of employment between its members and the athlete-employees,\textsuperscript{106} the success of recruiting depends on other factors, such as the school’s athletic record, climate, and the opportunity to play immediately and before a national television audience.\textsuperscript{107} The tenacity of the recruiters, along with the reputation and personality of the head coach, are also important intangibles in successful recruiting.\textsuperscript{108}

b. The Split-Ownership Defense

Where, like the University of Virginia and VSAF, the sellers of the tying and tied products are separate and distinct corporations, the “split-ownership” defense may be applicable. Section 3 of the Clayton Act prohibits a seller from using a tying arrangement to prevent buyers from dealing with “a competitor or competitors of

\textsuperscript{104} See note 3 supra and accompanying text.

\textsuperscript{105} For the year 1978-79, VSAF contributed $680,995 to the University of Virginia for “grants in aid to student athletes.” VSAF also supplied $332,855 for “stadium expansion.” Tax returns, supra note 91.

\textsuperscript{106} For a discussion of the NCAA as a cartel, see Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 YALE L. J. 655 (1978); Koch, supra note 48.

\textsuperscript{107} “Lots of kids being recruited don’t ask for much extra if you can promise them six to eight appearances in three years before a U.S. television audience. The publicity, what it means to their ambitions to turn pro, is enough to sell them.” J. Michner, Sports in America 399 (1976).

\textsuperscript{108} The intangibles of the recruiting battle are endless, including coed escorts. The University of North Carolina relies on “The Sweet Carolines,” described as “40 of the prettiest coeds at UNC. Their job (for which they volunteer and are selected and receive no money) is to greet the prospects, show them around campus, make them feel at home and, in general, try to sell them on attending Carolina.” Cleveland Press, Thurs., Nov. 15, 1979, § C, at 1, col. 3. For an expose of the darker side of college recruiting, see K. Denlinger & L. Shapiro, Athletes for Sale (1975); J. Rooney, The Recruiting Game (1980).
the . . . seller." Moreover, "the conventional case law definition of the tying arrangement assumes a single seller using the market power of one product as a means of inducing the purchaser to buy a second product." Hence the argument that there is no violation when the alleged tyer—for example, the University of Virginia—does not compete in the market for the tied product—here furnishing a cluster of services to season ticket holders.

This interpretation has been criticized for "exalting form over substance" and for ignoring the adverse effects of the tie-in on the buyers. Moreover, while section 3 of the Clayton Act was specifically enacted to reach tie-ins and exclusive dealing, section 1 of the Sherman Act, which is the applicable statute where services are involved, is a general purpose statute reaching agreements to restrain trade. The "contract, conspiracy, or combination" between the school and the VSAF form of organization to tie season tickets to membership satisfies the broad statutory range of the Sherman Act. According to one court:

In such cases, if the tying agreement itself is found to be unlawful, then both the seller of the tying product (who is a party to the tying agreement) and the seller of the tied product (who is not a party to the tying agreement itself) may be held liable as members of a conspiracy to restrain trade by means of the tying agreement. . . . And in such cases, it is plain that the defendant, who sells the tied product, but who is not a party to the tying contract itself, commits overt acts in furtherance of the conspiracy whenever he collects payment for the tied product from plaintiff.

Most significantly, the recent trend of the decisions avoids statutory nitpicking when the tier receives a pecuniary benefit from the sale of the tied product. In Osborn v. Sinclair Refining Co.,

112. 68 F.R.D. at 95-96.
114. See note 59 supra.
115. Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1043 (5th Cir. 1977).
the Fourth Circuit held a split-ownership tie-in illegal, noting,

The perniciousness of the imposed tie-in is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue.\(^{118}\)

The University of Virginia derives substantial pecuniary benefits from its relationship with the VSAF. At the least, VSAF assumes the responsibility for allocating season tickets. By arranging social functions involving coaches and ticket holders and circulating sports publications, VSAF assumes a publicity agent role. However, the most significant economic benefit comes from access to VSAF scholarship funds, which relieves Virginia of a costly financial burden.\(^{119}\)

V. THE FOOTBALL TICKET TIE-IN CASES

Lower courts have eschewed application of the per se rule in cases involving allegations of illegal ticket tying arrangements by National Football League professional football teams.\(^{120}\) These cases are particularly relevant because of the liability rationale adopted by several decisions and the acceptance of defenses in fact situations somewhat similar to the ticket priority tie-ins analyzed in this article.

Plaintiffs' common allegation was that an NFL team imposed a tie-in by forcing purchasers of season tickets to buy one or more


\(^{118}\) 286 F.2d 832 (4th Cir. 1960).

\(^{119}\) See note 91 supra.

tickets to pre-season games. Pre-season games were allegedly of inferior quality, highly undesirable, and would not have been purchased absent the tie-in. In rejecting plaintiffs' allegations and granting defendants' motions for summary judgment, the courts relied upon one or more of the following rationales: (1) season and pre-season games are fungible and thus constitute a "single product," (2) plaintiffs failed to prove "sufficient economic power" over the tying product to "coerce" acceptance of the tied item, and (3) failure of plaintiffs to demonstrate the existence of harmful effects on competition in the market for the tied product. Each of these arguments will be evaluated for its relevance to the University of Virginia type of ticket priority tie-in.

A. Description and Analysis of the Cases

1. Single Product

One court resolved the issue favorably for the defendant by construing the transaction as involving only one product. To Judge Garrity, professional football is professional football and any distinction between season and pre-season games "would rest on such gossamer and subjective considerations as to be untenable." This is the weakest of the three exculpatory rationales employed in the pro football tie-in cases. Its most obvious flaw is that it ignores the critical difference in relevance to league standings of season and pre-season games. As a consequence, the holding is in direct conflict with those decisions which recognize separability on the basis of product quality differences. Even if one conceded credibility to the single product argument in pro football tie-ins, it is not relevant to the University of Virginia tie-in model. There is no quality continuum connecting the VSAF cluster of services with the pro-

121. Pfeiffer v. New England Patriots Football Club, Inc., [1973] 1 Trade Cas. 93,265 (1st Cir. Nov. 1, 1972). The court added: "For example, how could a court determine objectively whether a regular season game with the Philadelphia Eagles is a more interesting and desirable product than a pre-season game against the Dallas Cowboys? We consider such determinations to be out of our league." Id.


duction of home basketball games that justifies a finding that the items are "fungible." As discussed earlier, the tying and tied services are produced by different entities charged with different responsibilities and operating from separate sources of corporate authority.

2. Sufficient Economic Power to Coerce

All of the pro football ticket tie-in cases either expressly or implicitly indicate that plaintiffs have the burden of demonstrating "sufficient economic power in the tying market to coerce purchase of the tied product." In two decisions, defendants' motions for summary judgment were granted when the record showed the availability of a sufficient number of single game tickets. As one court explained, "[w]hile individual game tickets remain available, it cannot be said that defendant has structured the marketing of its tickets in such a way that consumers are compelled to buy something they don't want in order to obtain something they do want."

This interpretation of the requisites for per se liability exaggerates the plaintiff's burden of proof in showing "sufficient economic power" over the tying product. It is, of course, true that if the seller has no market power over the tying product, the presence of tie-ins would be of little or no competitive consequence. This is hardly the case in pro football, where each franchise is a monopoly.

Within its franchise geographic market, each NFL team exercises monopoly price power over season, single, and pre-season tickets. As soon as a professional team imposes the season-pre-sea-


125. See notes 71-72 supra and accompanying text.


129. See notes 76-80 supra and accompanying text.
son ticket tie-in, some buyers (those who desire assured season-long access to regular games and preferred seating) lose the opportunity to obtain an unencumbered season ticket. The presence of sufficient economic power is therefore manifest: "Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market."\(^{130}\)

The pro football "sufficient economic power" holdings are inapplicable to the University of Virginia-VSAF type of tie-in. As previously discussed, the absence of substitute sports entertainment, the unique style of A.C.C. competition, and the presence of outstanding talent on the University of Virginia’s team creates monopoly power over season tickets.\(^{131}\) The utilization of this market power is manifested in the presence of the tie-ins and the allocation of student season ticket space. Of the available 9,000 home game tickets, 4,500 are allocated to students, while the remaining 4,500 are sold to season ticket holders,\(^{132}\) presumably under VSAF tie-in terms.

3. Lack of Adverse Effects in the Market for the Tied Product

In *Coniglio v. Highwood Services, Inc.*,\(^{133}\) defendants argued that since they held an NFL franchise monopoly in both season and pre-season football games, the tying arrangements could not produce anti-competitive effects in the market for the tied product. The Second Circuit agreed, concluding that “Highwood is not using its economic power in the tying (season ticket) market to restrain free competition in the market for the tied product.”\(^{134}\) The court also rejected plaintiff’s effort to create a “general entertainment market” of alternative activities into which pre-season games could be included. Plaintiff relied on this argument to show that the tie-in would adversely affect rival producers of “general entertainment.”\(^{135}\)

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131. See notes 83-89 *supra* and accompanying text.
132. Information obtained from Sports Information Office, University Hall, University of Virginia.
133. 495 F.2d 1286 (2d Cir. 1974).
135. In rejecting this contention, the court said: “[W]e consider the purportedly relevant
The plaintiff's second argument that the tie-in forced the abdication of his "freedom" to evaluate and select the tied product on its merits was rejected. To the court, the coerced restraint on the buyer's freedom of choice "represents no more than the causal determinant of the proscribed restraint on competition in the tied market which ordinarily results from such interference." 136

It could be argued that Coniglio exonerates the University of Virginia ticket priority tie-in. Similar to the pro football context, the University of Virginia exercises a monopoly over home basketball games while VSAF is the sole supplier of the tied services. With no competition in the market for VSAF services, the ticket tie cannot produce adverse effects in that market. However, the credibility of Coniglio weakens, perhaps fatally, when the court's rationale is examined.

a. Criticisms

A threshold criticism of the Second Circuit's perception of the tie-in is that it ignores the firmly established Supreme Court precedent which assumes that the restraint invariably produces harmful effects and is therefore per se illegal. 137 Recognizing the drastic consequences of a conclusive liability doctrine, 138 the Supreme Court has been cautious in characterizing restraints of trade as per se illegal. Once the issue is settled, however, the Court is not inclined to accept qualifications. "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." 139 Given this well established policy, lower courts should ignore the per se rule product market so broadly defined as to render that concept all but meaningless as an analytic tool for assessing the anti-competitive effect requisite to a Sherman Act violation." Id. at 1292.

136. Id. at 1292.
137. See note 73 supra.
138. The drastic effects of the per se rule have been sharply criticized as "repugnant to . . . constitutional safeguards." Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1157 (1952). It "forecloses a respondent from introducing evidence on the panoply of possible legal and economic justifications in harmony with an overriding public interest of which the antitrust laws may properly take cognizance." Id. at 1157-58.
only in those rare instances where “the facts indicate that an injustice would be done by blindly accepting the per se rule.”

It is difficult to perceive an “injustice” in applying the per se rule to pro football tie-ins. The decisions offer no facts that would support recognition of any of the accepted justifications such as newcomer, quality control, and goodwill. Moreover, subsequent analysis reveals the likelihood that the purpose behind the restraint is to exploit market leverage so as to maximize monopoly profits, an objective hardly justifying nonadherence to entrenched policy.

Even assuming the appropriateness of discarding per se characterization, the “rule of reason” analysis adopted by the court misinterprets or fails to recognize the reasons that prompted the Supreme Court to include tie-ins under the per se characterization. Specifically, the pro football ticket opinions fail to perceive the various ways that tie-ins can produce harmful effects.

In its initial encounters with tying arrangements, the Supreme Court identified the “leverage” effect as the principal vice. By transferring monopoly power from the tying product, the seller can use the tying arrangement to increase its market power in the tied product. In a 1917 case, for example, the Court concluded that tying films to patented exhibiting machines could “create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law.”

Subsequently, in *IBM Corp. v. United States* and *International Salt Co. v. United States*, the Supreme Court expressed disapproval of a different manifestation of “leverage”—the use of

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141. See notes 96-100 supra.

142. Under the “rule of reason,” courts balance the effects on competition against justifications. See Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).


144. 298 U.S. 131 (1936).

the tie-in to maximize monopoly revenues. By resorting to a tie-in, a seller can utilize existing market power in a more efficient manner—"in a way that increases the net return from the exercise of that power."\textsuperscript{146} The Court's assumptions on this form of "leverage" are implicit and do not specifically identify the various ways in which revenue maximizing can occur. A more thorough description of this form of leverage has been presented by economists, who note that tie-ins can maximize revenues by: (1) producing economies in production or distribution of goods, (2) protecting goodwill, (3) sharing risks with buyers, (4) evading price ceilings on the tying product, and (5) price discrimination.\textsuperscript{147}

The mainspring of "leverage" exploitation by the seller is the existence of monopoly power over the tying product. Absent monopolistic control, enough buyers would be able to go to other sources so as to render the tie-in ineffective.\textsuperscript{148} As a result, the basis for liability under early Supreme Court decisions was proof of enough monopoly power to produce either of the two possible leverage effects.\textsuperscript{149} The liability test was subsequently reduced to its present per se formulation when the Court recognized two addi-

\textsuperscript{146} Ferguson, Tying Arrangements and Reciprocity: An Economic Analysis, 30 Law & Contemp. Prob. 522 (1965). Sullivan describes International Salt Co. v. United States, 332 U.S. 392 (1947) and the revenue-maximizing effects:

On our assumption, the tie of salt to the salt dispensing machine has no distorting effect on the salt market—the dispensing machine monopolist gains no new power there—but given the fact that buyers must fill all salt needs from the seller (though no salt quantities are specified), it does enable the machine monopolist to increase its monopoly return: through the tie the monopolist can, in effect, extract a higher price for its monopoly.


\textsuperscript{147} See articles cited note 146 supra. The consensus among economists is that revenue-maximizing ties should not be per se illegal and may be reasonable under a rule of reason analysis. If a firm has monopoly power over the tying product it can exact a monopoly price in that market, and thus does not need the tie. Antitrust should be concerned with the legitimacy of monopoly power over the tying product and with ties that expand market power in the market for the tied item, not with the seller's use of a tie to maximize existing monopoly profits.

\textsuperscript{148} "A competitive supplier, selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not." Bowman, supra note 143, at 20.

\textsuperscript{149} Austin, supra note 94, at 103-06.
tional vices: foreclosure and coercion.

In *Northern Pacific Railway*, Justice Black condemned tying arrangements because they foreclose rival sellers of the tied product from "access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." The Court also registered a concern that buyers "are forced to forego their free choice between competing products" and over the coerced abdication of the buyer's discretion to make an "independent judgment as to the 'tied' product's merits." Since both foreclosure and coercion can occur when the seller has less than monopoly power over the tying product, the Court was compelled to reduce the liability standard to "sufficient economic power."

At the minimum, a rule of reason analysis requires a court to determine whether the tie-in produces leverage effects (either maximizing revenues or enhancing market power in the tied product), foreclosure, or coercion. These effects are the underpinnings of the per se rule and the possible existence of any one of them is relevant to the rule of reason process of comparing adverse effects and possible justifications. As the following discussion indicates, the pro football tie-ins produced both forms of leverage, plus a coercion effect.

b. Failure to Recognize Leverage Effects

By creating a new market in pre-season games and coercing sales through a tie-in, the seller "jumps" market power from one monopoly market into a second market. It is not, however, the typical form of monopoly extension where the tie-in is used to deflect competition away from rival producers of tied products in the second market. Instead, the seller is responsible for the creation of a

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151. *Id.* at 6.
152. *Id.*
new market which cannot be duplicated by rivals. There is another important difference: the production of pre-season games results in a "static" market, the success of which depends upon the seller's previous regular season record and which has an inelastic demand curve which limits production to two or three games.

These built-in limitations on the market power of the suppliers of the pre-season games suggest that the monopoly-extending leverage effects are modest and that the primary motive for the use of pre-season tie-ins is to achieve the second leverage objective—maximization of monopoly revenues. Concerned with adverse public opinion and the possibility of a drop in sales, sellers are inhibited from charging customers the full monopoly price for the season ticket. By producing pre-season games and imposing the tie-in, pro football teams can maximize revenues without directly raising the price of season tickets, and thereby avoid widespread disenchantment of the fans.

c. The Coercion Effect

As noted, the unique characteristic of the pro football tie is that the seller exercises an absolute monopoly over both the tying and tied products. Thus, as the decisions correctly hold, there can be no foreclosure of nonexistent rivals. There is, however, the possibility that a form of "coercion" has nevertheless been produced.

Supreme Court decisions refer to two undesirable consequences from seller coercion. One is that the buyer loses the discretion to examine competing tied products and to reach a non-coerced decision on the perceived merits of the products. Here, as with foreclosure, the absence of competing products renders concern over this form of coercion superfluous.

The second form of coercion, less distinctly articulated in the decisions, is the interference with the buyer's autonomy. In varying

156. Coniglio has been criticized for ignoring the competition from other sports teams in the area. Bauer, A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis, 33 Vand. L. Rev. 283, 302 n.60 (1980).


158. Id. at 10, citing Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953).
degrees of subtlety, the Supreme Court has espoused a "free trader" principle which seeks, when possible, to skew the inquiry in a way that protects the purchaser's discretion over product selection and the use of products once purchased. This objective was most noticeable in the decisions of the Warren Court, which was committed to "equality of opportunity, free access to markets by competing sellers, and complete freedom of choice by buyers." The Sixth Circuit has described the second form of buyer coercion in these words: "One of the evils inherent in any tying arrangement is that it forces the buyer to give up his independent judgment as to whether, or where, to purchase the tied product." Thus, any vertical arrangement—such as a pro football ticket tie-in—that inhibits buyer autonomy is suspect.

B. The Virginia Ticket Tie-In Compared

Given the factual similarities, the pro football tie-in decisions provide an argument for exonerating the Virginia type of ticket priority tying arrangement. However, the rationale of these decisions falls apart under the rule of reason analysis mandated by Supreme Court decisions that established the per se rule. According to the above analysis, both pro football and college sports ticket ties may produce effects—such as "leverage" and coercive effects of tying:

We must therefore begin with the supposition that the hostility to tying embodied in the act and espoused in the cases may have more to do with notions of appropriate competitive behavior (conceptions about fair opportunity or access) and with the polar concepts of coercion and free choice, than it has to do with the efficiency or allocation consequences of competitive structure and process.


The persistent reduction in the amount of commerce that plaintiff must show is affected by the tie indicates a growing concern with buyer autonomy. In most markets, for example, $190,000 of commerce affected (the amount accepted by the Court in Fortner I, see note 90 supra) would be an insignificant foreclosure whether from a tie or a direct sale. To the coerced buyer, however, any amount represents an infringement on autonomy.


We must therefore begin with the supposition that the hostility to tying embodied in the act and espoused in the cases may have more to do with notions of appropriate competitive behavior (conceptions about fair opportunity or access) and with the polar concepts of coercion and free choice, than it has to do with the efficiency or allocation consequences of competitive structure and process.


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162. The professional football cases have been sharply criticized for failing to recognize the coercion effect of tying. Bauer, supra note 156, at 302.
cion—subsumed under the per se rule.\(^{163}\) There is one important difference between the pro football ties and the college ticket restraint in that the latter constitutes a price discrimination mechanism—an effect expressly condemned by the Supreme Court in *Fortner II*.\(^{164}\)

1. Leverage: Maximizing Revenues

In participating in a joint venture with the VSAF to provide season ticket buyers with a cluster of services and priority ticket status, the University of Virginia creates a new market. Similar to the pre-season pro football games, the market for VSAF services is largely dependent on the success of the school's athletic department in producing attractive sports entertainment. While the new market is a pure monopoly, it does not involve monopoly extension effects. To a greater extent than pre-season pro games, VSAF services comprise a static market without growth potential. It is the use of the VSAF tie-in to maximize revenues of the home game monopoly that best explains the arrangement. The necessity to engage in revenue-maximizing ties is derived from the special pressures involved in participating in "big time" intercollegiate athletics.

Even more than pro football franchises, college teams like the University of Virginia's are inhibited by strong external pressures from directly extracting the full monopoly price from ticket purchasers. It would, for example, create an immediate and strong adverse public reaction if monopoly-power football teams like Oklahoma or Nebraska were to charge $500 or $1,000 per ticket for "significant" home games. Likewise, if the University of Virginia were to set its season basketball ticket price at something like $2,000, the negative reaction would resound from the Appalachian Mountains to the Dismal Swamp, and on to the corridors of power in the General Assembly.

Alternatives to an "up front" or direct method of maximizing monopoly revenues are limited. Selling tickets on the black mar-

\(^{163}\) One decision, Driskill v. Dallas Cowboy Football Club, Inc., 498 F.2d 321 (5th Cir. 1974) has been criticized as a perversion of the "reasonable business practice rationale." Ross, *supra* note 64, at 993.

ket, i.e., “ticket scalping,” is apparently used by some athletic departments as a means of paying athlete-employees. Scalping is both illegal and extremely inefficient and cannot be deemed a feasible means of raising capital or subsidizing employees. A more practicable option is the tying arrangement, which is extremely efficient—although it may also be illegal under the antitrust laws.

Hence, the joint venture between the University of Virginia and the VSAF service organization constitutes a successful, revenue-maximizing technique. Possible public approbation for the revenue-maximizing effects are further softened and rationalized under scholarship funding objectives. For example, the literature advertises that “over 2,000 student-athletes have received direct scholarship assistance from the VSAF. . . . Helping student-athletes . . . is the VSAF’s primary function and the VSAF members’ biggest dividend.” Revenue-maximizing burdens are also rendered palatable by the opportunity to use the payment as a tax deduction.

In one critical respect, a college priority-point tying arrangement has an advantage over the pro football ticket tie-ins. By exploiting the VSAF priority point system, Virginia is able to further maximize revenues by engaging in price discrimination. Under the point system, which allows purchasers to amass points and thereby gain priority according to the amount of contribution and length of participation, buyers willing to pay the most to satisfy their desire to see home games are preferred over those unwilling or unable to

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165. “Issuing free game tickets to athletes for the purpose of resale is a common means of providing extra cash. The practice is especially lucrative at schools where games are regularly sold out and has been known to generate seasonal income in excess of $2,000 per athlete.” J. Rooney, supra note 108, at 86. O. J. Simpson, winner of the Heisman Trophy at the University of Southern California in 1968, reportedly said: “I think every player has scalped tickets in college. Whenever we’d play UCLA, I had friends from UCLA who’d come over and bring me their tickets because they felt S.C. guys would do better with tickets than they would.” Plain Dealer (Cleveland, Ohio), Nov. 3, 1979, § B, at 3, col. 4.

Indeed, every top player at Ohio State—and probably most other major colleges around the country—received batches of season tickets. In a sense, they become “legal scalpers.” It was simple. “If you were a pretty good player, you could get an alumnum to take a ticket off your hands for $300. . . .” J. Durso, The Sports Factory 49 (1975). See Regents of Univ. of Minn. v. NCAA, 560 F.2d 352, 369 (8th Cir. 1977).

166. VSAF: There’s a VSAF District Near You (brochure available from the Virginia Student Aid Foundation).
match payments.

The price discrimination objective puts the ticket tying arrangement squarely within a category of harmful effects recently condemned by the Supreme Court. In *Fortner II*, Justice Stevens said: "If, as some economists have suggested, the purpose of a tie-in is often to facilitate price discrimination, such evidence would imply the existence of power that a free market would not tolerate." 167

2. Coercion

The ticket priority tie-in can be condemned because of its coercive effects on purchasers. Buyers of season tickets are forced to forego the opportunity to make an independent judgment on VSAF membership, thereby losing the protection of the "buyer autonomy" principle espoused by some members of the Supreme Court. The restraint "distorts the spending decisions from those that would have prevailed absent the tie." 168 In this situation, more than the buyer's decisional autonomy is involved; but for the forced membership in the VSAF and participation in its priority system, buyers could obtain season tickets unencumbered by the additional costs of price discrimination.

VI. Conclusion

The production of "big time" intercollegiate sports entertainment is one of the nation's most competitive industries. Operating as "profit-center" athletic departments, the major entrepreneurs aggressively compete for talent, customers, and dollars. As participants in the free market system, these sports enterprises are vulnerable to various public laws—including the antitrust laws.

The ticket priority system is a form of conduct that may constitute an antitrust violation. Since it is an extremely complex type of tying arrangement which, if tested, would be a case of first impression, predictions on its legality are necessarily tentative. Nevertheless, the above discussion analyzes the relevant issues as encompassed in Virginia's ticket plan and suggests that a credible a priori argument can be made for illegality. Of course, each case

167. 429 U.S. at 617.
must be judged according to its particular facts. College sports entreprenuers should be on notice, however, that the words of the antitrust statutes possess a "generality and adaptability comparable to that found to be desirable in constitutional provisions"\textsuperscript{169} which, since 1890, have nourished the flexibility to accommodate new, complex, and seemingly innocuous forms of restraint of trade.

\textsuperscript{169} Sugar Institute, Inc. v. United States, 297 U.S. 553, 600 (1936).