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A Miser's Rule of Reason: Student Athlete Compensation and the *Alston* Antitrust Case

Herbert Hovenkamp*

Introduction

The Supreme Court's decision in *NCAA v. Alston* is one of the most significant antitrust rule of reason cases in history – significant both because of what it does and what it does not do. The Supreme Court unanimously agreed with the lower courts that certain restrictions imposed on member schools limiting compensation to student athletes violated §1 of the Sherman Act.¹ The plaintiffs were football and basket players subjected to these limitations.

The lower courts had struck down specific NCAA rules that limited collateral, education-related benefits that student athletes could receive, including such things as graduate or vocational school scholarships.² They declined to condemn regulations that the NCAA, an organization of 1100 member schools, applied to direct scholarships and other aid related to athletic performance. Nor did they pass judgment on any issue regarding player compensation more generally, such as whether NCAA member schools could individually pay students any salary they wished. Both the NCAA and the students appealed. The NCAA argued that the district court overreached by weakening the NCAA's restraints on education-related athlete compensation. The student athletes, by contrast, said that the court should have enjoined all of the challenged compensation limits,

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¹ Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2021 WL 2519036 (2021). Justice Gorsuch delivered the opinion, which was unanimous. Justice Kavanaugh wrote a concurring opinion.

² *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd* 958 F.3d 1239 (9th Cir. 2020).

including those not related to education, and including restriction on the size of athletic scholarship and cash awards.

The district court agreed with the plaintiffs that the restrictions imposed “significant anticompetitive effects” by permitting the NCAA to use its monopsony power to “cap artificially the compensation offered to recruits.” It found that in the absence of these restrictions, compensation would have been higher.³

Under the rule of reason, once these anticompetitive effects had been proven the burden shifted to the defendants to show a justification. If they succeeded the plaintiffs could still prevail by showing that the same justification could have been achieved through a less restrictive alternative.⁴

The district court also rejected many of the NCAA’s proffered justifications. One of them, that the restrictions increased output, was not pursued to the Supreme Court.⁵ Another was that the rules were designed to preserve amateurism in collegiate sports, and that this was a benefit that accrued to consumers rather than to the student athletes themselves.⁶ The district court had responded that the concept of amateurism was never very well defined.⁷ Further, the link between amateurism and consumer demand was never established.⁸ It did suggest, however, that a rule against unlimited compensation might have operated to distinguish collegiate from professional athletics and thus “help sustain consumer demand for college athletics.”⁹

The students also attempted to show less restrictive alternatives to those rules for which the court had found justifications, and the court

³ *Alston*, 141 S. Ct. at 2152.

⁴ See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505 (4th ed. 2017).

⁵ *Alston*, 141 S. Ct. at 2152.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2152-53.

⁹ *Id.* at 2153 (citing the district court, 375 F. Supp. 3d at 1083).

concluded that they had partially done so. The less restrictive alternative was to permit a cap provided that it be not less than the cost of attendance.¹⁰ It declined to enjoin the rules limiting compensation to the full cost of an education and that restricted benefits unrelated to their education. However, it found that the caps limiting scholarships for graduate or vocational school, payments for academic tutoring, or post eligibility internships were unlawful because these could not be confused with the compensation given to professional athletes.¹¹ As the Supreme Court subsequently observed:

Nothing in the [lower court's] order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently \$5,980 annually).¹²

The Ninth Circuit affirmed the entire decree. The NCAA, but not the students, petitioned the Supreme Court with respect to those parts of the decree that were adverse to it. As a result, the Court's decision addressed only the NCAA's disputes with the lower courts. With respect to those, the Supreme Court affirmed the district court's decree in all respects.

The Supreme Court posed the question as whether the NCAA was seeking “immunity from the normal operation of the antitrust laws”¹³ It opened with a colorful history of intercollegiate sports,

¹⁰ *Alston*, 141 S. Ct. at 2153. See discussion *infra*, text at notes __.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2159.

including the highly disorganized and questionable mechanisms that the schools used to recruit athletes and compensate them for play.¹⁴ Much of the debate prior to this decision involved the student athletes' status as "amateurs," and the various rules intended to permit schools to compensate athletes for the cost of tuition, room and board, and some other elements of school attendance, but not more. Over the years these rules had evolved, permitting some additional compensation but always significantly limited to below market levels, at least for superstar athletes. The Court also observed that intercollegiate sports, but particularly football and basketball, had evolved into multibillion dollar enterprises, paying very high salaries to principal employees such as athletic directors and head coaches.¹⁵

The Supreme Court noted that the district court had been compelled to apply the rule of reason, as the Supreme Court's own 1984 *Oklahoma Board of Regents* decision had instructed.¹⁶ On the question of market power, it then concluded that the NCAA enjoys "near complete dominance" and "monopsony power" in a relevant market defined as "athletic services in men's and women's Division I basketball and FBS (Football Bowl Subdivision) football. This was essentially "the relevant market for elite college football and basketball."¹⁷

The Supreme Court observed that neither side challenged the district court's market definition or the proposition that the NCAA enjoys monopsony power in the labor market in question. Nor did the NCAA dispute the fact of price fixing, or that the restrictions operated so as to decrease student compensation in fact.¹⁸ Nor did they dispute that these limitations tended to depress both the quantity and quality

¹⁴ *Id.* at 2148-51.

¹⁵ *Id.*

¹⁶ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of U. of Oklahoma*, 468 U.S. 85, 104 (1984).

¹⁷ *Alston*, 141 S. Ct. at 2152 (citing the district court, 375 F. Supp. 3d at 1067).

¹⁸ *Id.* at 2154-55.

of participation by student athletes.¹⁹ As a result, the soundness of the plaintiff's prima facie case was largely assumed.

Further, the court held suppression of competition on the buying side (student athlete) of the relevant market was all the competitive harm that was necessary; that is, the plaintiffs did not need additionally show harm to the selling side of the market.²⁰ The importance of this distinction is that cognizable monopsony harm to the buy side of the market is sufficient. It is not merely derivative of harm on the selling, or monopoly side of the market. This has always been clear in the economic theory of monopsony,²¹ and most have thought that it was clear in antitrust law as well.²²

The idea that harm to the buy side of the market is independently challengeable under the antitrust laws makes a difference when an entity purchases in a restrained market but resells in a competitive market. In such a case there would be competitive harm only on the buy side of the market. Because §1 of the Sherman Act²³ does not reference either buyers or sellers, it thus also seems clear that §2 applies equally²⁴ to buy side monopoly. Section 7 of the Clayton²⁵ is similar, applying equally to both sell-side and buy-side anticompetitive effects. By contrast, §3 of the Clayton Act, which covers exclusive dealing and tying, explicitly covers only sellers.²⁶

¹⁹ *Id.* at 2154 (citing 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2011b (4th ed. 2019)).

²⁰ *Id.* (citing 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 352c (2014), 12 *id.*, ¶ 2011a).

²¹ *See, e.g.*, Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991); and ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY IN LAW AND ECONOMICS* (Cambridge Univ. Press, 2d ed., 2010).

²² *See, e.g.*, 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 575 (5th ed. 2020); 4A *id.*, ¶¶ 980-982 (4th ed. 2016).

²³ 15 U.S.C. § 1.

²⁴ 15 U.S.C. § 2.

²⁵ 15 U.S.C. § 18.

²⁶ 15 U.S.C. § 14 (“It shall be unlawful . . . to lease or make a sale . . .”).

The student athletes did not dispute that it would be permissible for the NCAA to justify labor market restraints by pointing to offsetting benefits on the consumer side of the market. The Court noted that some amici had argued that such “out of market” offsets would be impermissible, but the parties themselves did not pursue it and neither did the Court.²⁷ In antitrust generally, that question is generally settled in the negative, and certainly for naked restraints.

In the 1984 *Oklahoma Board of Regents* decision the Supreme Court concluded that the rule of reason should apply to restraints established by agreement among NCAA members because cooperation among teams was necessary in order to create the product in question at all.²⁸ The NCAA in the present case argued that this legal rule supported its argument that there should be truncated deferential review favoring the restrictions in this case.²⁹ The Court dismissed that argument. Neither did it conclude, however, that this was a per se unlawful or a per se lawful restraint. While some restraints could be evaluated “in the twinkling of an eye,”³⁰ that was true only for “restraints at opposite ends of the competitive spectrum,” not for those in the “great in-between.”³¹ Among the former would be restraints in which market power was clearly lacking.³² In this case, however, NCAA did not dispute the fact of its market power.³³ As a result, the Court concluded, a “quick look” was not appropriate.³⁴

²⁷ *Alston*, 141 S. Ct. at 2155 (“[W]e express no views on [these matters]”).

²⁸ *Bd. of Regents of U. of Oklahoma*, 468 U.S. at 100-01 (1984) (some “horizontal restraints on competition are essential if the product is to be available at all”).

²⁹ *Alston*, 141 S. Ct. at 2155 (citing 13 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶ 2100c).

³⁰ *Id.* (quoting Phillip Areeda, *The “Rule of Reason” in Antitrust Analysis: General Issues* 37-38 (Fed. Jud. Ctr., June 1981)).

³¹ *Alston*, 141 S. Ct. at 2155.

³² *Id.* at 2156 (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986); and 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ¶ 1507a (4th ed. 2017)).

³³ *Alston*, 141 S. Ct. at 2156-57.

³⁴ On the “quick look,” see discussion *infra*, text at notes 89-96.

The Court also observed that the 1984 decision had included a lengthy discussion of “amateurism.” Here, however, it found the concern to be relatively unimportant, except as a possible way of distinguishing the audience for collegiate athletics from that for professional athletics.³⁵

Then, getting to the rule of reason itself, the Court noted its own previous references to a “three-step, burden-shifting framework” for identifying anticompetitive restraints.³⁶ However, these three steps “do not present a rote checklist,” but must be used flexibly, proving a rule that is “meet for the case, looking to the circumstances, details, and logic of a restraint.”³⁷ Here, the district court had required “the student-athletes to show that ‘the challenged restraints produce significant anticompetitive effects in the relevant market.’”³⁸ The Court noted that this was “no slight burden,” and that “courts have disposed of nearly all rule of reason cases in the last 45 years on that ground.”³⁹ But this case was different:

. . . based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes’ labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. Perhaps even more notably, the NCAA “did not meaningfully dispute” this conclusion.⁴⁰

The second step the District Court followed was to determine whether “the NCAA could muster a procompetitive rationale for its

³⁵ Amateurism is discussed further *infra*, text at notes 100-09.

³⁶ *Alston*, 141 S. Ct. at 2160 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. at 1174, 2284 (2018)).

³⁷ *Alston*, 141 S. Ct. at 2160 (citing *California Dental Ass’n v. F.T.C.*, 526 U.S. 756, 781 (1999) and *7 Areeda & Hovenkamp*, *supra*, note 32, ¶1507a, which it described as offering a “slightly different ‘decisional model’ using sequential questions”).

³⁸ Citing the district court, 375 F. Supp. 3d at 1067.

³⁹ *Alston*, 141 S. Ct. at 2161. On the importance of this, *see* discussion *infra*, text at note 60.

⁴⁰ *Id.* (citing the district court, 375 F. Supp. 3d at 1067).

restraints.”⁴¹ Here, the NCAA claimed error in that the district court looked at the restraints collectively in order to determine competitive harm, but individually in order to assess offsetting benefits. This “mismatch,” the defendants argued, required the defendant to prove that each individual rule that was challenged was the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.”⁴²

Here, the court agreed with the NCAA’s premise “that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes.” Court should not be second guessing “degrees of reasonable necessity,” because “skilled lawyers” will “have little difficulty imagining possible less restrictive alternatives to most joint arrangements.”⁴³ It later warned that courts should give “wide berth to business judgments before finding liability.” The Court also cautioned against rules that attempt to micro-manage the details of business judgments. “To know that the Sherman Act prohibits only unreasonable restraint of trade is thus to know that attempts to “[m]ete[r] small deviations is not an appropriate antitrust function.”⁴⁴

The Court then agreed with the district court that the NCAA’s proffered defenses failed to “have any direct connection to consumer demand.”⁴⁵ The Court then qualified:

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that “some” of those rules “may” have procompetitive effects “to the extent” they prohibit compensation “unrelated to education, akin to salaries seen in professional sports leagues.” The court then proceeded to what corresponds to the third step of the *American Express*

⁴¹ *Id.* (citing 375 F. Supp. 3d at 1070).

⁴² *Id.* at 2161.

⁴³ *Id.* (citing 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1913b (2018) and, for a slightly different proposition, 7 *id.*, ¶ 1505b).

⁴⁴ *Alston*, 141 S. Ct. at 2161 (quoting Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. L. & BUS. 369, 377 (2016)).

⁴⁵ *Alston*, 141 S. Ct. at 2162 (citing the district court, 375 F. Supp. 3d at 1070).

framework, where it required the student-athletes “to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules.” And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.⁴⁶

It continued:

Of course, deficiencies in the NCAA’s proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits “To be sure, these two questions can be collapsed into one,” since a “legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative”.⁴⁷

Effectively, this meant that the district court had correctly found, not that the rules were the least restrictive means of preserving consumer demand, but rather that the restraints were “patently and inexplicably stricter than is necessary” to achieve the declared procompetitive benefits.⁴⁸

With that, the Supreme Court affirmed the lower courts.

Analysis

⁴⁶ *Alston*, 141 S. Ct. at 2162 (citing the district court, 375 F. Supp. 3d at 1082-83, 1004).

⁴⁷ *Alston*, 141 S. Ct. at 2162 (quoting 7 Areeda & Hovenkamp, *supra*, note 32, ¶1505).

⁴⁸ *Alston*, 141 S. Ct. at 2162 (quoting district court, 375 F. Supp. 3d at 1104).

The Rule of Reason: One Step or Three?

In its 1984 *Board of Regents* decision the Supreme Court held that the rule of reason should be applied to a joint venture if the product could not be produced at all without collaborative activity.⁴⁹ The *Alston* Court did not overrule that formulation. At one point it noted, however, that the fact that “some restraints are necessary to create or maintain a league sport” does not mean all “aspects of elaborate interleague cooperation are.”⁵⁰

The Court’s 1984 conclusion about the scope of the rule of reason was stated more broadly than it needed to be to address the case at hand. The result has been to make economic evaluation of practices in joint ventures excessively cumbersome and costly – a result that reaches far beyond the NCAA sports cases.⁵¹

Some practices within the NCAA need to be coordinated in order to make the product available, while others do not. For example, suppose the NCAA promulgated a rule fixing the price of hot dogs sold in stadiums hosting NCAA events. Is there any reason to subject that practice to all of the cost that accompanies rule of reason treatment, including an assessment of market power, simply because other practices that do require cooperation must be treated more

⁴⁹ *Bd. of Regents of U. of Oklahoma*, 468 U.S. at 100-01 (1984) (some “horizontal restraints on competition are essential if the product is to be available at all”).

⁵⁰ *Alston*, 141 S. Ct. at 2156 (quoting *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 199 n. 7 (2010)).

⁵¹ *E.g.*, *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1014 (N.D. Cal. 2008) (network coordination); *Martin v. Am. Kennel Club, Inc.*, 697 F. Supp. 997 (N.D. Ill. 1988) (collaborative rules for dog shows). *See also* *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing, Co.*, 472 U.S. 284, 295 (1985) (citing this language in concluding that the activities of a cooperative buying association should be addressed under the rule of reason). *Cf.* *United States v. Apple, Inc.*, 791 F.3d 290, 326 (2d Cir. 2015) (finding that the language did not apply to a naked boycott agreement); *Dagher v. Saudi Refin., Inc.*, 369 F.3d 1108, 1122 (9th Cir. 2004), *rev’d*, 547 U.S. 1 (2006) (did not apply to a production joint venture).

deferentially? We must remember that the rule of reason is a costly tool. It is worth its price only if its use produces sufficiently greater accuracy.

The well established antitrust distinction between “naked” and “ancillary” restraints would actually work quite well for this purpose. An ancillary restraint is one that is reasonably necessary for the functioning of the venture and achievement of its purpose. Further, its profitability does not depend on the exercise of market power. To be sure, the NCAA presents some unusual complexities because of its nonprofit status and its role in the education process as well as its responsibility *in loco parentis* for student growth and discipline. But these are largely addressed “jurisdictionally,” by considering whether the challenged restraint is commercial in character and thus within the Sherman Act’s limitations to commerce.⁵²

The *Alston* Court also observed that prior courts had adopted a three-step burden-shifting framework for analyzing restraints under the rule of reason.⁵³ This decision making approach is a significant improvement over Justice Brandeis’ original statement of the rule of reason in the *Chicago Board of Trade* case. Looking at an agreement that both restrained prices and promised to make a market perform better, Justice Brandeis queried whether the restraint “merely regulated and perhaps thereby promotes competition,” or whether it might “suppress or even destroy competition.”⁵⁴ To answer that question, he concluded, the court would have to consider the history of the business and the restraint, the condition of the market before and after the restraint was imposed, and its “effect, actual or probable.”⁵⁵

⁵² See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 260 (5th ed. 2020) (commercial activities generally); *Id.*, ¶ 261 (nonprofit organizations); *Id.*, ¶ 262 (noncommercial activities); see discussion *infra*, text at notes 131-39.

⁵³ *Alston*, 141 S. Ct. at 2151 (citing *Am. Express Co.*, 138 S. Ct. at 2284).

⁵⁴ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

⁵⁵ *Id.*

In other words, the parties were invited to throw in everything relevant to the business and see what sticks. That formulation led to a rule of reason jurisprudence that required enormous records and trials.⁵⁶

Today's rule of reason takes an approach that is both more focused and more transactional, insisting on market power and the identification of practices that threatens to reduce market output and raise price.⁵⁷ The burden shifting framework is designed to guide this query, placing the burden of proof where it is calculated to produce results efficiently in the majority of cases. The prima facie case must initially be made by the plaintiff, who should be able to plead and prove a theory of competitive harm and, if necessary, injury. By contrast, because the defendant is the author of the conduct it should be in the best position to understand its motives and perceived effects. Under this framework the plaintiff has an initial burden of making a prima facie showing that the challenged restraint has a "substantial anticompetitive effect."⁵⁸ At that point the burden shifts to the defendant to prove a procompetitive rationale. If the defendant shows one, then the burden shifts back to the plaintiff for an opportunity to show that the procompetitive rationale could be achieved by less anticompetitive means.⁵⁹

In *Alston* the Supreme Court observed, however, that plaintiffs rarely get past the first step. In fact, 90% of cases litigated in the previous 45 years were dismissed because the plaintiff failed at the first stage.⁶⁰ The Court found the present case to be one of the

⁵⁶ See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 5.6 (6th ed. 2020).

⁵⁷ See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, Ch. 15 (4th ed. 2017).

⁵⁸ *Alston*, 141 S. Ct. at 2160.

⁵⁹ *Id.* (citing 7 Areeda & Hovenkamp, *supra*, note 57, ¶ 1507a).

⁶⁰ *Id.* at 2160-61 (citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9, (Nos. 20-512, 20-520), 2021 WL 943556). For the empirical work supporting this proposition, see Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265 (1999); Michael A. Carrier, *The Rule of Reason: an*

exceptions.⁶¹ And, of course, it should have been, given that the challenge was to what amounted to a naked cartel.

The Court did not seek to determine why plaintiffs' cases fail so frequently at the first, or prima facie, stage. One possibility, of course, is that plaintiffs bring a lot of weak cases. Another one, however, is that the plaintiff's burden created by the courts for the first stage is unreasonably harsh. If that is the case, then some harmful restraints escape because of judicial rather than plaintiff error.

A likely explanation for this is exaggerated confidence that markets will usually correct anticompetitive practices, and more quickly than the courts can do it. Today a wealth of observation and literature shows that this premise is both theoretically and empirically incorrect, but it has had surprising durability in antitrust policy.⁶² It shows up powerfully in federal court tendencies to articulate a three-part rule of reason, but then to load all of the important requirements into the first part – effectively, a one part rule of reason. That increases the plaintiff's burden while minimizing the defendant's need to justify its restraint.

This bias shows up mainly in the ways that the courts address the first stated step. As this Court described it, the plaintiff must show that “the challenged restraint has a substantial anticompetitive effect.”⁶³ Does that mean substantial anticompetitive effect after all efficiencies are netted out? If it does then the requirement effectively wipes out the second step of the rule of reason because it rolls harms and offsetting efficiencies all into the first step, assigning the burden for both to the plaintiff.

Empirical Update for the 21st Century, 16 GEO. MASON L. REV. 827 (2009); Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50 (Spring 2019).

⁶¹ *Alston*, 141 S. Ct. at 2161.

⁶² See Herbert Hovenkamp, *Antitrust Error Costs* (June 16, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282.

⁶³ *Alston*, 141 S. Ct. at 2160 (quoting *Am. Express Co.*, 138 S. Ct. at 2284).

The merger statute, §7 of the Clayton Act, uses roughly analogous language for assessing mergers – “where . . . the effect . . . may be substantially to lessen competition”⁶⁴ The statute does not contain an efficiency defense, and there has always been some dispute about how efficiencies should be considered.⁶⁵ But the current formulation of merger policy expressed in the Merger Guidelines is that the government makes out a *prima facie* case based largely on structural evidence, and then the burden shifts to the defendant to establish offsetting efficiencies.⁶⁶

Most rule of reason cases do not involve naked or nearly naked cartels. They are concerned with production or research joint ventures, professional association rules, standard setting, or other types of agreements whose effects are more ambiguous. *Alston* was the unique rule of reason case in which the practice that the Court was confronting was in fact very close to a naked cartel. In any other setting it would have been governed by the *per se* rule but for an idiosyncratic history that compelled the rule of reason.

Further, the Court often incorporates an anti-enforcement bias that prevents it from seeing competitive harm even when it is right in front of them. A good example is the *American Express* case, where the Court held that the plaintiff had not met its initial burden.⁶⁷ While the American Express card offered greater perquisites such as cash back, extended warranties, travel miles or other feature than competing cards, it also charged significantly higher fees to merchants. The merchants were in effect paying for benefits that accrued to the card user. The challenged anti-steering rule forbade merchants from informing customers that card fees for use of an American Express card were significantly higher than those for use of a competing card

⁶⁴ 15 U.S.C. § 18.

⁶⁵ See Areeda & Hovenkamp, *supra*, note 57, ¶¶ 970-973.

⁶⁶ See *id.*, ¶ 970f.

⁶⁷ *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018).

such as Visa or MasterCard. It also forbade them from offering customers a discount for switching to a different card.⁶⁸

Had the Court applied a more focused, transaction-specific analysis to these rules it would have had little trouble seeing competitive harm. Suppose that the merchant fee for using an American Express card on a large purchase was \$15, while the fee for accepting a Visa card was \$10. That difference created \$5 worth of bargaining room. In that case the merchant might have offered the customer a \$3 discount for using a different card. That bargain, had it occurred, would have benefitted the customer by \$3 less foregone AmEx perquisites. It would have benefitted the merchant by \$2. The customer would accept the offer only if she valued the discount by more than the foregone perquisites, so the deal would have been a Pareto improvement looking at the two bargaining parties.⁶⁹ It would permit substitution to the Visa card precisely in those circumstances where use of the Visa card was efficient.

What the Court did not see is that *every single instance* in which the no-steering rule prevented such a transaction actually caused harm on both sides of the market – i.e., to both the affected customer and the affected merchant. At that point, no sensible enforcement-neutral approach to antitrust would have dropped the inquiry. Indeed, the *Alston* Court expressly characterized the challenged harms resulting from NCAA compensation limitations in terms of price and output.⁷⁰ Rather, the *AmEx* Court should have held that the burden at that point shifted to American Express to provide a procompetitive justification for its rule.

The Court also did a version of this in the *California Dental* case, where it concluded that a dental association's restrictions on advertising that prohibited quality advertising and effectively

⁶⁸ See Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713 (2019).

⁶⁹ See Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B. U. L. Rev. 489, 514 (2021).

⁷⁰ *Alston*, 141 S. Ct. at 2158.

prohibited most forms of price advertising were not sufficiently threatening to require the defendant to provide an explanation.⁷¹ Once again, it is possible that upon further investigation we might discover that the potential for abuse is so severe that the rules were justified under the circumstances, but the Court effectively cut that inquiry short.⁷²

If the only time that plaintiffs can successfully proceed through the “three-step” rule of reason case is when the challenged restraint amounts to little more than naked collusion, then the rule of reason is not doing its job and is not really a three-step rule of reason at all. In most rule of reason challenges, including those brought by the government, the plaintiff’s prima facie case depends on market evidence that supports reasonable inferences of competitive harm. By contrast, when the burden shifts, the defense typically depends on evidence that pertains to the defendant’s own conduct and the rationales for it. In terms of decisional quality cases that raise an inference of competitive harm will be more accurately resolved at the second stage rather than the first one. This does not mean that trivial claims or claims against firms that clearly lack power should go forward. It does suggest, however, that at the first stage the plaintiff should bear a smaller burden. It should be regarded somewhat more like the probable cause requirements that judges and magistrates use in issuing a search warrant: it should raise reasonable suspicions warranting a further inquiry.

For example, in *American Express* the plaintiff had established that each instance of enforcement of the anti-steering rule caused exclusion of a rival credit card that injured both the affected merchant and the affected card holder. At that point the burden should have shifted to *AmEx* to show that the challenged steering rule (not its overall business rule) served a procompetitive purpose and was not simply a

⁷¹ California Dental Ass’n v. F.T.C., 526 U.S. 756 (1999).

⁷² See Herbert Hovenkamp, *The Rule of Reason* 70 FLA. L. REV. 81, 98-114 (2018).

way for it to get merchants and users of non-AmEx cards to subsidize its business by denying them to bargain for the opportunity to use a cheaper payment mechanism. In fact, American Express should have been an easy case, given that each instance of enforcement of the anti-steering rule resulted in harm to both sides of the affected transaction.⁷³

While harm to competition entails higher prices and reduced output, most cases do not require actual empirical evidence of such effects. In the *Alston* case itself the Court acknowledged that it was easy, mainly because the NCAA never disputed that the “restrictions in fact decrease the compensation that student athletes receive compared to what a competitive market would yield.”⁷⁴ Further, no one questioned that these decreases in compensation also “depress[ed] participation by student athletes.” As a result, both price and output were depressed.⁷⁵

In most cases the proof consists in reasonable inferences that can be drawn from the practices plus our own knowledge of rational behavior under the circumstances. For example, because an AmEx card holder and a merchant in the previous illustrations would agree to a discount for use of a different card we can infer that, as between the two of them prices are lower and output higher as a result of the deal. This is not because we have taken an actual empirical measurement of increased output or lower prices, but because parties never make voluntary agreements unless they expect to benefit. As a result, the conclusion that the no-steering rule tended to raise price and reduce output is sufficient, certainly for a prima facie case.

In a case such as *Actavis* the inference of harm is strong as well.⁷⁶ The effect of the pay-for-delay patent settlement is to enable the patentee to retain its exclusive right for the duration of the

⁷³ See discussion *supra*, text at note 68.

⁷⁴ *Alston*, 141 S. Ct. at 2154.

⁷⁵ *Id.* (citing 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2011b (4th ed. 2019).)

⁷⁶ *F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013).

settlement agreement. Prices are almost certainly higher than they would be in the absence of the settlement agreement. Otherwise the payment for delay would not be worth it. That still leaves the question whether the agreement is justified because the patent could be valid, but that question is generally determinable by looking at the size of the payment. A person who owns good title to a property interest will typically not be willing to pay hundreds of millions of dollars to exclude trespassers. So a high payment is a strong signal that the parties' expectations are that the patent is invalid.⁷⁷

The *Alston* Court did not mention causation, although both causation and harm were clearly implicit in the conclusion that compensation and output were actually suppressed by the challenged rules. A private plaintiff seeking damages would have to show causation and be able to quantify its harm,⁷⁸ while a private plaintiff seeking an injunction would have to show “threatened loss or damage.”⁷⁹

Balancing and the “Quick Look”

One goal of the changes in the rule of reason in the time since Brandeis has been to avoid or at least limit the need for “balancing” – a proposition that the *Alston* district court agreed with.⁸⁰ The term

⁷⁷ See 12 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2046c (4th ed. 2020).

⁷⁸ See Herbert Hovenkamp, *Antitrust Harm and Causation*, WASH. UNIV. L. REV. (2021) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771399.

⁷⁹ *Id.*

⁸⁰ See 375 F. Supp. 3d at 1104. See also, *id.* at 1108, quoting Areeda & Hovenkamp, ¶ 1507d:

A better way to view balancing is as a last resort when the defendant has offered a procompetitive explanation for a prima facie anticompetitive restraint, but no less restrictive alternative has been shown The court must then determine whether the anticompetitive effects . . . are sufficiently offset by the proffered defense.

balancing always sounds pleasing until someone actually has to do it. Further, it is always important to remember that in economics most of the important values are cardinal – i.e., they need to have values attached to them before they are of very much use. This is not invariably true. For example, the Pareto principle is able to identify welfare improvements without balancing because the only time it measures welfare at all is when there is nothing to balance. Unanimity, for instance, is a useful indicator of a Pareto-optimal condition.⁸¹

As soon as the prospect of both gains and losses is present, however, the issues become more complex. In the 1960s and 1970s Oliver Williamson in economics and Robert H. Bork in law developed a welfare tradeoff, or balancing, approach that netted out consumer losses from monopoly against productive efficiency gains.⁸² Bork then did antitrust an enormous disservice by naming this the “consumer welfare” principle even though one of its most potent effects is to approve of antitrust rules that harm consumers. The confusion has plagued antitrust to this day, and almost certainly accounts for much of the opposition to the consumer welfare principle. By contrast, the true consumer welfare principle asks only if output is higher, or prices lower, as a result of a certain event; it does not try to balance the effects of reduced output against claimed offsetting efficiencies.⁸³

As soon as an antitrust tribunal is required to balance in any situation that is not immediately obvious it is out of its element. Competitive losses or harms would have to be quantified. That would require a court to identify the social cost of an exercise of market

⁸¹ See Amartya Sen, *Liberty, Unanimity and Rights*, 43 *Economica* 217 (1976); Kenneth Arrow, *A Difficulty in the Concept of Social Welfare*, 58 *J. POL. ECON.* 328 (1950). See also Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 *IOWA L. REV.* 949 (1990).

⁸² Oliver E. Williamson, *Economies as an Antitrust Defense: the Welfare Tradeoffs*, 58 *AM. ECON. REV.* 18 (1968); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 106 (1978).

⁸³ See Hovenkamp, *Antitrust Harm and Causation*, *supra* note 78.

power, and also to put a cardinal value on efficiencies. No court can do these things except in the easiest cases.

Beginning with that premise, the three-stage rule of reason inquiry was designed in order to limit the circumstances when a court needs to engage in balancing. First one looks at harms alone. They do not have to be quantified in any technical sense but they must be determined to be substantial. Then one looks at claimed benefits. If there are none, then we have something close to the Pareto case – all harms and nothing else. If benefits are proven, then we would be in a more difficult situation because harms and benefits would have to be quantified. That is the paradigm that Oliver Williamson contemplated in his essay on welfare tradeoff models.

The less restrictive alternative is best viewed as a backstop – or another opportunity to make balancing unnecessary. If the defendants can achieve most of their objective through an available and effective less restrictive alternative then the harm will be either eliminated or at least mitigated.

The Court found that the NCAA was quite correct in its argument that antitrust law does not require a firm to employ “anything like the least restrictive means of achieving legitimate business purposes.”⁸⁴ Indeed, the use of least restrictive alternatives is much narrower than that. First, the query becomes relevant only when the plaintiff has shown conduct that harms competition. At that point the burden shifts to the defendant to show a justification and only when that burden is met may the plaintiff be permitted to show an available less restrictive alternative. The proffered alternative must be realistically available.⁸⁵ Importantly, however, cardinal balancing can be completely avoided in the great majority of cases.

⁸⁴ *Alston*, 141 S. Ct. at 2161.

⁸⁵ *Id.* (quoting 11 Areeda & Hovenkamp, *supra* note 43, ¶ 1913b at 398 (“‘a skilled lawyer’ will ‘have little difficulty imagining possible less restrictive alternatives to most joint arrangements.’”)).

For example, suppose that a joint venture's aggregation of patents or other intellectual property rights has been shown to be unreasonably exclusionary. The defendant is able to show that a particular acquisition or aggregation is valuable for innovation, but at that time the plaintiff might be able to show that a non-exclusive license could give the defendant everything it needs to improve its own technology, but not the right to exclude. Further, it is no answer that the non-exclusive right would be worth much less to the selling firm. The market determines that. In this case, an order compelling non-exclusivity would very likely address the competition problem fully.⁸⁶

The more problematic issue respecting less restrictive alternatives was the district court's use of that idea to regulate the size of the compensation limit. Under the order, which the Supreme Court was held, the NCAA could limit education-related benefits, but only so long as those limits are no lower than the cash awards allowed for athletic achievement."⁸⁷ This puts the court in a position uncomfortably close to that of a price regulator. For example, in a per se case in which defendant's fixed the price of widgets at \$10 each we would never say that fixing the price at \$9 is a less restrictive alternative. Of course the per rule would not permit such an approach. The price fix is unlawful no matter what its size.

If the price fix is subject to the rule of reason however – as it currently would be under the Supreme Court's holding that the rule of reason applies to all NCAA rules – then just such a possibility might arise. For example, suppose that the NCAA fixed the price of season tickets offered by individual teams – something that we would ordinarily expect to be covered by the per se rule, but in the case of the NCAA. We would not want to get into the position of says that, pricing season tickets at, say, \$500 is unlawful, but a less restrictive alternative

⁸⁶ *Cf.* Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its practice* § 12.3 (6th ed. 2020) (acquisition of nonexclusive right in order to render merger competitively harmless)

⁸⁷ *Alston*, 141 S. Ct. at 2153.

would be to price them at \$400. That would in fact turn the court into a price regulator.

In the one significant NCAA price-fixing case that has been decided, *Law v. NCAA*, the Tenth Circuit felt obligated to apply the rule of reason.⁸⁸ It applied what it characterized as a “quick look” to an NCAA rule fixing the maximum salaries for secondary basketball coaches. In effect, the rule was deeply suspicious – all the way to the anticompetitive end of Justice Gorsuch’s spectrum.⁸⁹ The court then found that there were no offsetting procompetitive benefits. As a result, it held, it was unnecessary to pursue the issue of less restrictive alternatives.⁹⁰

The Supreme Court in *Alston* also declined the NCAA’s suggestion that the Court adopt a “quick look,” which the NCAA characterized as “abbreviated deferential review” to the compensation limitations.⁹¹ The principal argument was that “collaboration among its member is necessary if they are to offer consumers the benefit of intercollegiate athletic competition.”⁹² The Court did agree that, if they apply at all, “quick look” approaches can work in both directions. In some cases, they can offer a quick path to condemnation, as the FTC requested in the *California Dental* and *Actavis* cases, but they can offer a quick path to salvation, as the NCAA was seeking in *Alston*.

The Supreme Court has never been enthusiastic about the “quick look” doctrine, which calls for an intermediate query that falls between the per se rule and the rule of reason. Prior to *Alston* it discussed the rule three times, but only to reject its use in the particular case before it.⁹³ On the other hand, it has permitted forms of truncated

⁸⁸ *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998).

⁸⁹ *Id.* at 1020.

⁹⁰ *Id.* at 1024, n. 16.

⁹¹ *See Alston*, 141 S. Ct. at 2155.

⁹² *Id.* (citing 13 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2100c (4th ed. 2020)).

⁹³ *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 159 (2013) (declining to apply “quick look”); *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (observing, and

analysis that fall somewhere short of the full rule of reason.⁹⁴ While refusing to embrace a quick look, the *Alston* Court did observe that the *Oklahoma Board of Regents* case did support “abbreviated antitrust review.”⁹⁵ That has always been the best way to think about the issue – not as three silos with per se, quick look, and full rule of reason as three discrete points along a line. Rather, methods of analysis lay along a “sliding scale” with varying amounts and kinds of evidence being necessary depending on the issues and the nature and availability of evidence.⁹⁶ In *Alston* itself, application of the rule of reason was easy, mainly because the NCAA had conceded the central points – namely that the restraint had resulted in reduced compensation and reduced output.⁹⁷

Labor Suppression – the Seen and the Unseen

Given that the issue was compensation, the players and the teams in *Alston* existed in a quasi-employer-employee relationship. As a result the decision is an example of the Supreme Court’s relatively infrequent incursions into the relationship between labor and the antitrust laws. It was made all the more infrequent by the fact that there was no labor union.⁹⁸

not questioning, that the district court had refused to apply quick look doctrine); *California Dental Ass’n v. F.T.C.*, 526 U.S. 756, 781 (1999) (declining to grant FTC’s request for “quick look” analysis).

⁹⁴ *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986) (truncated proof of anticompetitive effects); *F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 158-59 (2013) (truncated proof of both power and effects).

⁹⁵ *Alston*, 141 S. Ct. at 2157 (citing *Bd. of Regents of U. of Oklahoma*, 468 U.S. at 109, n. 39).

⁹⁶ See *Actavis*, 570 U.S. at 159 (adopting a “sliding scale” approach, quoting ¶1507). See also Hovenkamp, *Rule of Reason*, *supra* note 72 at 122-123.

⁹⁷ See discussion *supra* note 18-19.

⁹⁸ On antitrust and labor laws for unionized labor, see *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996) (unionized football times); *H.A. Artists & Assocs. v. Actors’ Equity Ass’n*, 451 U.S. 704 (1981) (line between employees and independent contractors). Other decisions are discussed in

Alston is a forceful statement of one aspect of antitrust concern for labor. The Court spoke categorically of labor's interest in a competitive marketplace. In the process it made clear that labor market competition is not in any sense derivative of competition on the other (output) side of the market. A cartel that suppresses wages is unlawful whether or not it also raises prices in product markets. This can be especially important when a firm or group of firms wield power in the labor market in which they purchase but are competitive in the output market where they sell their product.

Nevertheless, the fact remains that this is only a small part of the antitrust interest in labor market competition. There is another very important sense in which the fortunes of labor *are* dependent on competition in product markets. Monopoly in product markets reduces output. Further, nearly all of labor, and particularly at lower salary levels, is a variable cost. As a result, reduced output in product markets leads directly and often proportionately to reduced demand for labor. The negative impact on labor of product market monopoly is almost certainly many times higher than the negative impact of labor market restraints.⁹⁹

"Amateurism"

The NCAA has a long tradition of promoting amateurism in collegiate athletics. *Alston* quoted this passage from the 1984 Oklahoma Board of Regents decision:

"The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education

1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 255-257 (5th ed. 2020).

⁹⁹ See Edgar K. Browning, *A Neglected Welfare Cost of Monopoly – and Most Other Product Market Distortions*, 66 J. PUB. ECON. 127 (1997). One of the seminal studies was Leonard W. Weiss, *Concentration and Labor Earnings*, 56 AM. ECON. REV. 96 (1966)

adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”¹⁰⁰

Notwithstanding that strong statement, in fact the 1984 decision had relatively little to do with amateurism. At issue was nationwide commercial television contracts for the broadcast of NCAA football games. The NCAA had argued for a connection between the preservation of amateurism and limitations that served to equalize access to broadcasting to preserve competitive balance, but the Court disagreed.¹⁰¹ By contrast, Justice White’s dissent in the 1984 case found a strong link between the NCAA’s interest in preserving amateurism and the policy of limiting televised games. He argued that it served to spread revenue more evenly among participating school, giving amateur athletes even from less schools a fair change.¹⁰²

¹⁰⁰ *Alston*, 141 S. Ct. at 2157 (quoting *Okla. Board of Regents*, 469 U.S. at 120).

¹⁰¹ *See Bd. of Regents of U. of Oklahoma*, 469 U.S. at 119.

¹⁰² *Id.* at 124, 135-36 (White, J., dissenting):

[T]he [television restriction] plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, “[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement.” The collateral consequences of the spreading of regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice.

Subsequent lower court decisions did involve athlete compensation, however, and they made the role of amateurism more prominent.¹⁰³ The *Alston* decision stands in contrast to that. Justice Kavanaugh's concurring opinion wrote as if concerns about amateurism were no longer important at all.¹⁰⁴ The majority did not go quite that far. Rather, the Court observed that the NCAA's own conception of amateurism had evolved very considerably since 1984, and that it had "dramatically increased the amounts and kind of benefits schools may provide to student-athletes."¹⁰⁵ Most of these included things like larger scholarships or greater amounts of assistance to struggling students.¹⁰⁶ Accompanying this, the amount of revenue produced by broadcasting of collegiate sports had increased many-fold.¹⁰⁷ Further, "while the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition." Rather, its definition had "shifted markedly over time."¹⁰⁸ The Court did not rule that concerns about preserving amateurism are irrelevant to the antitrust analysis, but clearly they are now less central.

The more important question for antitrust policy is whether and how these concerns about amateurism fit into Sherman Act analysis under the rule of reason. A strong concern to protect amateurism might effectively yield to the NCAA *carte blanche* to determine the appropriate compensation for its student athletes. The Court clearly

(citations omitted).

¹⁰³ See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1059, 1063-1066 (9th Cir. 2015); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998); *In re Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n*, 40 F. Supp. 2d 1275 (D. Kan. 1999).

¹⁰⁴ *Alston*, 141 S.Ct. at 2167 (Kavanaugh, J., concurring).

¹⁰⁵ *Id.* at 2158.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*, observing that "From 1982 to 1984, CBS paid \$16 million per year to televise the March Madness Division I men's basketball tournament. In 2016, those annual television rights brought in closer to \$1.1 billion." (citations omitted)

¹⁰⁸ *Alston*, 141 S. Ct. at 2163 (citing district court, 375 F. Supp. 3d at 1070, 1071-1074).

rejected that. It also rejected the NCAA's own use of the term to defend a concept that had shifted over the time and in fact had no clear definition. At the same time, however, the Court wrote a decision that was no broader than necessary to strike down rules in a way that permitted member schools to award limited compensation that certainly seems modest in comparison with professional salaries.

Absent intervention by Congress, this suggests either that the next shoe to drop will be any agreed-upon limitations whatsoever on student athlete compensation, or else a more stable and acceptable definition of amateur athletics and what kinds of limitations on competition that entails.

The antitrust laws are not an invitation to price regulation by another name. An agreement limiting student athletes to, say, \$100,000 would be just as unlawful under the Sherman Act as an agreement to deny them compensation altogether. These problems emerged in the Court's discussion of the lower court's decree, developed below.¹⁰⁹

One approach would be for Congress to intervene, perhaps in the process defining the term "amateur" and proscribing reasonable limits on compensation and support. Another might be to permit the NCAA to produce a more defensible and stable idea of amateurism. Unfortunately, that train may already have left the station.

Compensation and Competitive Balance

The district court had rejected the NCAA's argument that limitations on athlete compensation were essential to achieving "competitive balance among teams."¹¹⁰ The NCAA did not pursue the argument on appeal.

"Balance" can mean a number of things. The Supreme Court noted one particularly large imbalance, which was between student

¹⁰⁹ See discussion *infra* text at notes 110-30.

¹¹⁰ *Alston*, 141 S. Ct. at 2152.

compensation and the multimillion dollar salaries paid to some NCAA coaches, athletic directors, and the president of the NCAA.¹¹¹

What the Court did not mention, however, was that the NCAA had attempted to cap the salaries of at least some coaches, but the Tenth Circuit had the salary rules under §1.¹¹² As a result, member schools became liable for large treble damages awards.¹¹³ So the NCAA has been operating in a legal environment in which restraints on professional salaries were presumed to be unlawful. The result has been bidding wars among the top sports schools, with salary differentials on the order of as much as eighty-to-one in various classifications of NCAA coaches.¹¹⁴

What happened to coaching salaries in the wake of *Law* may be a predictor of what will happen to student athlete salaries in a market in which all NCAA-imposed caps are removed. Only a small percentage of collegiate athletes go into professional leagues. For example, in 2020 there were 73,712 NCAA football participants of whom 16,380 were deemed to be draft eligible. Of these, 254 were actually drafted. In basketball, 3669 out of 16,509 were draft eligible

¹¹¹ *See id.* at 2151.

¹¹² *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (Justice Gorsuch was not yet on the 10th Circuit at the time).

¹¹³ After the decision, the parties settled for a damages award of \$54,500,000. *See NCAA to Pay Coaches \$54.5M*, CBS NEWS (Mar. 9, 1999, 6:32 PM), <https://www.cbsnews.com/news/ncaa-to-pay-coaches-545m/>.

¹¹⁴ *See* Emily S. Sparvero & Stacy Warner, *The Price of Winning and the Impact on the NCAA Community*, 6 *J. Intercollegiate Sport* 120, 127 (2013). For example, as of 2011 salaries of Division I coaches ranged from a low of \$23,950 to a high of \$1,832,594. Since then, a relatively small number of high paying NCAA coaches have earned salaries in the \$5m to \$9m range. Nick Saban of the University of Alabama was at the top with a reported salary of \$9.3 million. *See* Scott Prather, *10 Highest Paid College Football Coaches in 2020*, ESPN 1420 AM (Oct. 30, 2020), <https://espn1420.com/10-highest-paid-college-football-coaches-in-2020/>.

but only 36 were drafted.¹¹⁵ Of course, many other might go to minor or foreign leagues, although at significantly smaller salaries. But a very likely result will be that high offers will chase after a small number of superstar athletes, very likely going to schools with strong athletic reputations in a particular sport.

In sum, it does not necessarily follow that the fixing of maximum student compensation in *Alston* presents exactly the same problem as the fixing of stadium hot dog prices. A stronger case can be made that student athlete compensation must be controlled in order to maintain competitive balance – a defense that is virtually universally rejected in the general run of cartel cases. But athletic conferences are owned by universities that have a broader educational mission. As a result, they may have an interest in maintaining broad participation in intercollegiate activities.¹¹⁶ For example, they regularly enforce such things as equalizing the number and size of scholarships that individual teams may offer.¹¹⁷ They select schools for particular “divisions” based on size and largely limit intercollegiate games to schools within a division, so that very large schools do not often play against very small ones.¹¹⁸ More generally, there is a well supported belief that intercollegiate sports is best served by a situation in which teams of roughly equal ability and resources play one another.¹¹⁹ In the *Name*

¹¹⁵ See NCAA, *Estimated Probability of Competing in Professional Athletics*, <https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (Apr. 8, 2020).

¹¹⁶ A wide literature has discussed the issue. See E. Woodrow Eckard, *The NCAA Cartel and Competitive Balance in College Football*, 13 *Rev. Indus. Org.* 347 (1998) (finding that competitive balance has not improved notwithstanding NCAA efforts); Steven Salaga & Rodney Fort, *Structural Change in Competitive Balance in Big-Time College Football*, 50 *Rev. Indus. Org.* 27 (2017).

¹¹⁷ See Daniel Sutter & Stephen Winkler, *NCAA Scholarship Limits and Competitive Balance in College Football*, 4 *J. Sports Econ.* 3 (2003).

¹¹⁸ See Brian M. Mills & Steven Salaga, *Historical Time Series Perspectives on Competitive Balance in NCAA Division I Basketball*, 16 *J. Sports Econ.* 614 (2015)

¹¹⁹ See Allen R. Sanderson & John J. Siegfried, *Thinking about Competitive Balance*, 4 *J. Sports Econ.* 255 (2003).

and *Likeness* licensing antitrust litigation the district court denied summary judgment on the issue, although after expressing some doubts.¹²⁰

In its 1984 decision the Supreme Court agreed that the NCAA had a legitimate role in maintaining competitive balance within NCAA football, but it also held that this did not serve to justify the challenged restraint on nationally televised games.¹²¹ In *Alston* the Supreme Court paid very little attention to the issue after noting that the district court had rejected it and observing that the NCAA did not appeal on that issue.¹²² The district court in the closely related *O'Bannon* case had also rejected it after concluding that the NCAA presented insufficient evidence on the issue.¹²³ In particular, that court cited the lack of adequate evidence that concerns about competitive balance affected desirability or audience size.¹²⁴ Justice Kavanaugh also raised the issue briefly in his concurring opinion in *Alston* when discussing how the NCAA would operate in a regime in which all agreements governing athlete compensation were declared unlawful.¹²⁵

Counterintuitively, professional sports appear to differ. In the *American Needle* case the Supreme Court recognized concerns for maintaining competitive balance as “legitimate and important” in the development of professional (NFL) football.¹²⁶ And in *Major League Baseball* the Second Circuit found it to be an important interest to the

¹²⁰ *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1149-1150 (N.D. Cal. 2014).

¹²¹ *Bd. of Regents of U. of Oklahoma*, 468 U.S. at 117, 119-120

¹²² *Alston*, 141 S. Ct. at 2153-54.

¹²³ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 955, 1001-02 (N.D. Cal. 2014).

¹²⁴ *Id.* The Ninth Circuit affirmed the District Court's ruling in part, reaching the same conclusion about competitive balance. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1059 (9th Cir. 2015).

¹²⁵ *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

¹²⁶ *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010) (“the interest in maintaining a competitive balance’ among ‘athletic teams is legitimate and important.’”).

preservation of professional baseball.¹²⁷ In fact, the court in that case approved of a system in which revenues from the licensing of the intellectual property rights of the individual teams were pooled and distributed among them equally.¹²⁸

One wonders why the concern about competitive balance should be regarded as legitimate for professional sports but not for collegiate sports. Intuitively, the opposite conclusion might seem more sensible. For the future, more extensive fact finding on this issue would be helpful, including more elaborate articulation by the NCAA.

The *Alston* Court did not disturb lower court findings that gave some credence to the argument that “professional-level cash payments . . . could . . . blur the distinction between college sports and professional sports and thereby negatively affect consumer demand.”¹²⁹ The lower court had observed:

[W]hen compared with having no limits on compensation, some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues [H]owever, not all of the challenged rules in their current form are necessary to achieve this procompetitive effect, and there is a less restrictive alternative to the set of current challenged compensation restrictions.¹³⁰

“*Commercial Enterprise*”

¹²⁷ *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 328-329 (2d Cir. 2008).

¹²⁸ *Id.* at 334.

¹²⁹ *Alston*, 141 S. Ct. at 2153 (quoting the district court, 375 F. Supp. 3d at 1104).

¹³⁰ *Alston*, 375 F.3d at 1101.

The NCAA is a nonprofit organization comprised mainly, although not entirely,¹³¹ of nonprofit educational institutions. Its principal job is not athletics but rather the education of students at an important transitional time in their lives. In fact, the great majority of students who participate in NCAA athletics are not only amateurs at the time, but they will never become professional athletes.¹³²

For its part, the Sherman Act pays no attention to the distinction between profit and non-profit institutions, although it pays a great deal of attention to the distinction between commercial and noncommercial *acts*. That is, whether the Sherman Act applies depends on the nature of the restraint, not of the entities who are engaged in it. This is not a consequence of any deep thought about the nature of nonprofit education but rather that the source of jurisdictional power for the Sherman Act is the Commerce Clause of the Constitution, which applies only to “commerce.”

The distinction has actually served the educational community fairly well, because the division between “commercial” and “noncommercial” permits universities to do a great many things that are an important part of educational policy, although probably not of antitrust policy, such as guaranteeing that students athletes obtain a good education.

In *Alston*, the Court dismissed any claim that the NCAA and its members schools were not involved in a “commercial enterprise,” but rather “oversee[s] intercollegiate athletics ‘an an integral part of the undergraduate experience.’”¹³³ Commercial status seems unquestionable in this case, as it was in the *Board of Regents* case, which involved lucrative television contracts.

¹³¹ See Stephen L. Carter, *What is a For-Profit College, Anyway? And Who Decides?*, BLOOMBERG (Mar. 18, 2021, 10:30 AM), <https://www.bloomberg.com/opinion/articles/2021-03-18/what-is-a-for-profit-college-anyway-and-who-decides>.

¹³² See discussion *supra*, text at note 115.

¹³³ *Alston*, 141 S. Ct. at 2158.

The statement should not be read to mean, however, that the Court regarded every conceivable regulation that the NCAA might impose as a commercial one. Ordinarily the nature of the restraint, rather than of the organization, determines its commercial character.¹³⁴ As a result, nonprofit entities can be subjected to the antitrust laws, but their laws reach only “commercial” activities.¹³⁵ To illustrate, suppose a student with low grades challenged the NCAA requirement that students must maintain a “C” average in order to participate in intercollegiate sports.¹³⁶ Such a rule is literally output restricting, in the sense that some students otherwise able to play and perhaps even desirable for that purpose would be excluded. To that extent it can even be said to “restrain trade.” But the minimum GPA requirement is not a regulation of commerce, but rather of the school’s academic enterprise.

On a related issue, the Court had no occasion to overrule baseball’s long-standing judicially created immunity from the antitrust laws.¹³⁷ That immunity was also based on Justice Holmes’s conclusion in the early 1920s that baseball was not “commerce.” In *Alston*, the Court appeared not to think very much of the baseball exemption but it noted that the route to overruling it was through Congress, and the same thing should apply to the present decisions concerning athlete compensation. It noted that Congress had created antitrust immunities in the past,¹³⁸ “[b]ut until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on

¹³⁴ See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 260-262 (5th ed. 2020).

¹³⁵ See, e.g., *Missouri v. Nat’l Org. for Women (NOW)*, 620 F.2d 1301 (8th Cir. 1980) (political boycott against states that did not ratify the Equal Rights Amendment not reachable under Sherman Act).

¹³⁶ See *Agnew v. Nat’l Collegiate Athletic Ass’n*, No. 1:11-CV-0293, 2011 WL 3878200 (S.D. Ind. Sep. 1, 2011) (noting NCAA’s minimum GPA requirement).

¹³⁷ See *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922); and 1B AREEDA & HOVENKAMP, *supra*, note 134, ¶ 251h2.

¹³⁸ *Alston*, 141 S. Ct. at 2159 (giving examples).

one assumption alone—“competition is the best method of allocating resources” in the Nation’s economy.”¹³⁹

Scope of the Decree

The Court was also concerned about administrability of the lower court’s decree, and the NCAA proffered some objections. The Court acknowledged that “static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition.”¹⁴⁰ As a result “Judges must be open to reconsideration and modification of decrees in light of changing market realities,” because conditions may vary over time.¹⁴¹ Further,

“An antitrust court is unlikely to be an effective day-to-day enforcer” of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court “impose a duty . . . that it cannot explain or adequately and reasonably supervise.” In short, judges make for poor “central planners” and should never aspire to the role.¹⁴²

The Court more-or-less dismissed concerns raising the possibility that the NCAA would act in bad faith. For example, the district court’s injunction permitting some post-eligibility internships could be circumvented by the use of different terminology. It might permit a school to grant “a sneaker company or auto dealership” with “extravagant salaries” as a post-eligibility “internship.” In any event the NCAA subsequent to the district court’s opinion had adopted new regulations that only a “conference or institution” may fund post-eligibility internships. Further, the NCAA retained the ability to define appropriate educational benefits, thus “leaving . . . room to police phony internships.”¹⁴³ It concluded that “. . . the NCAA may seek whatever limits on paid internships it thinks appropriate.”¹⁴⁴

¹³⁹ *Id.* at 2160 (citing *Nat. Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978)).

¹⁴⁰ *Alston* 141 S. Ct. at 2161 (citing *Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004)).

¹⁴¹ *Alston*, 141 S. Ct. at 2163 (citing *California Dental Ass’n*, 526 U.S. at 781).

¹⁴² *Alston*, 141 S. Ct. at 2163 (citing *Trinko*, 540 U. S. at 415, 408).

¹⁴³ *Alston*, 141 S. Ct. at 2164.

¹⁴⁴ *Id.* at 2165.

The NCAA also attacked a part of the decree permitting schools to limit academic or graduation achievement awards, provided that those limits were “no lower than its aggregate limit on parallel athletic awards,” which were at the time \$5980 per year.”¹⁴⁵ The Court also noted that under the decree “the NCAA is free to forbid in-kind benefits unrelated to a student’s actual education; nothing stops it from enforcing a ‘no Lamborghini’ rule.”¹⁴⁶ The Court then observed:

To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.¹⁴⁷

The Court also noted that the district court gave the NCAA “considerable leeway” even with respect to education-related benefits:

[T]he court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court’s injunction to reflect that definition. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those “limits are never lower than the limit” on awards for athletic performance. And the court emphasized that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.¹⁴⁸

¹⁴⁵ *Alston*, 141 S. Ct. at 2165.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2165-66.

¹⁴⁸ *Id.* at 2164 (citations to record omitted)

The very last sentence of the quoted statement is peculiar, because the individual conferences within the NCAA also operate as agreements among the participating teams. It is unclear why if a restraint covering the entire NCAA is unlawful, a restraint covering only the Big Ten or Pac-12 conference would be permissible, but the Court did not elaborate.

The Court rejected a variety of objections to the decree. Nevertheless, it bears observing that all of the challenges were from the NCAA, arguing that the decree limited the NCAA's control excessively. The Court clarified that its focus was "only on the objections the NCAA" raised." It "express[ed] no views" on other issues.¹⁴⁹ The Court did not categorically approve the restrictions on other compensation that might sometime be challenged by the players as too expansive. It then closed with:

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law." That review persuades us the district court acted within the law's bounds.¹⁵⁰

Justice Kavanaugh alone concurred. The principal point of his concurring opinion was to suggest that the NCAA's remaining compensation rules might be unlawful under the Sherman Act as well, effectively leaving the compensation issue to the market. Given the length that the Court's opinion went to emphasize what the district

¹⁴⁹ *Alston*, 141 S. Ct. at 2155.

¹⁵⁰ *Id.* at 2166 (quoting the Ninth Circuit, 958 F.3d at 1265).

court did not do, this decision reads a little more like a partial dissent rather than a concurrence. He did emphasize that under the Court's characterization comments about amateurism should be regarded as "stray" and not to be accorded much weight. Indeed, he described them as "dicta" that "have no bearing on whether the NCAA's current compensation rules are lawful."¹⁵¹ Further, he believed that all the compensation limitations imposed by the NCAA should be subject to ordinary rule of reason analysis, and the Court had made clear that the NCAA is not entitled to an antitrust exemption.¹⁵²

From that point, Justice Kavanaugh found "serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny."¹⁵³ As he observed, "The NCAA's business model would be flatly illegal in almost any other industry in America."¹⁵⁴

Justice Kavanaugh also acknowledged the possibility of legislation as an alternative to antitrust litigation.¹⁵⁵ Another possibility was collective bargaining which would presumably subject the issue to the labor immunity, which limits the application of the antitrust laws to much of professional sports.¹⁵⁶ Somewhat mysteriously, he also suggested "some other negotiated agreement." In general, however, an agreement that violated the Sherman Act would not be enforceable. He did end, however, with this supplication in behalf of the athletes.

Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.¹⁵⁷

¹⁵¹ *Alston*, 141 S. Ct. at 2167.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2167.

¹⁵⁵ *Id.* at 2168 (Kavanaugh, J., concurring).

¹⁵⁶ See 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 255-257 (5th ed. 2020).

¹⁵⁷ *Id.* at 2169 (Kavanaugh, J., concurring).

Conclusion

The Court did not address every question about student athlete compensation. It also made clear that it was not affirming every element of the district court's decree. One can anticipate future challenges from students claiming, as Justice Kavanaugh suggested, that all agreed-upon restrictions on student athlete compensation are unlawful. But they will do so in the face of a unanimous decision that was sympathetic to the district court's decree overall. Even the Supreme Court's dicta will be taken seriously.

That does not necessarily mean that Congressional intervention is unlikely or ill-advised. There is also good precedent for Congressional action. For many years medical schools have run a "resident matching" program for recent graduates that assigns them by lottery to a particular employer for a residency. That practice would almost certainly constitute market division, per se unlawful under the Sherman Act. After a district court held just that, Congress passed legislation that immunized the practice from the antitrust laws.¹⁵⁸ If Congressional action occurs in the NCAA situation, however, very likely more than student compensation will be on the table. For example, Congress has already entertained proposals to limit the salaries of highly paid coaches.¹⁵⁹

¹⁵⁸ Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs, 15 U.S.C. § 37b(b)(2). See *Jung v. Ass'n of Am. Med. Colls.*, 339 F. Supp. 2d 26, 34 (D.D.C. 2004), *aff'd*, 184 Fed. Appx. 9 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1156 (2007),

¹⁵⁹ See Dennis Dodd, *Proposed Federal Law Seeks to Limit Skyrocketing Salaries of College Coaches*, CBS SPORTS (Jan. 28, 2020), <https://www.cbssports.com/college-football/news/proposed-federal-law-seeks-to-limit-skyrocketing-salaries-of-college-coaches/>.