QUICK LOOK REVIEW AS A NEW PATH TO SALVATION: *NCAA V. ALSTON*, 141 S. CT. 2141 (2021)

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College sports are big business in America. The broadcast license extension for the NCAA's "March Madness" basketball tournament is worth $8.8 billion.[1] The Football Bowl Subdivision's "College Football Playoff" television rights sold for $5.64 billion.[2] Colleges compete fiercely for their share of the pie, investing fortunes in coaches[3] and sports facilities.[4] But the schools do not compete in one important respect: per NCAA rules, the main component of athlete compensation is largely limited to a full-ride scholarship.[5] In *NCAA v. Alston*,[6] the Supreme Court weighed in on this arrangement and upheld a lower court ruling that the NCAA's

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1. *See* Erik Brady, *NCAA Extends Tournament Deal with CBS, Turner Through 2032 for $8.8 Billion*, USA TODAY (Apr. 12, 2018), https://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/ [https://perma.cc/5GFU-65EF].

2. Brief for Respondents at 5, NCAA v. Alston, 141 S. Ct. 2141 (No. 20-512).

3. *See, e.g.*, *Who Are the Highest-Paid College Football Coaches? These Are the Five Top Salaries*, USA TODAY (Nov. 8, 2021), https://www.usatoday.com/story/sports/ncaaf/2021/11/08/highest-paid-college-football-coach-salaries/6319667001/ [https://perma.cc/BE88-B5D5].

4. *See, e.g.*, Thom Patterson, *America's Incredibly Expensive College Football Stadiums*, CNN (Sept. 28, 2018), https://www.cnn.com/2018/09/28/us/expensive-college-football-stadiums/index.html [https://perma.cc/9VDD-CKE8].

5. *See* Reply Brief for Petitioners at 7, NCAA v. Alston, 141 S. Ct. 2141 (No. 20-512).

6. 141 S. Ct. 2141 (2021).

limitations on education-related benefits, such as graduate or vocational school scholarships, illegally restrained trade.[7] The significance of this case for sports law can hardly be overstated. In opening the door to education-related benefits, *Alston* invites yet more ambitious challenges to remaining NCAA compensation restrictions, including those that currently prohibit cash salaries.[8] However, while *Alston* provides a historic breakthrough for Division I athletes, it is no victory for antitrust plaintiffs more generally. In its decision, the Court revisited a doctrine known as "quick look review"—an abbreviated, less fact-intensive version of the standard rule of reason—and suggested that challenged practices may be *upheld*, not just struck down, with a mere quick look.[9] The Court hands antitrust defendants a new legal argument. It also risks adding to the already-significant lower court confusion over quick look doctrine.

The NCAA imposes many restrictions on student athlete compensation in the name of preserving amateurism. According to its rules, schools cannot pay salaries to athletes, and non-cash compensation is subject to exacting limitations.[10] *Alston*, for example, was largely concerned with the NCAA's restrictions on non-cash, education-related benefits, which can include post-eligibility scholarships, tutoring services, and paid internships.[11] The NCAA has often defended its compensation restrictions by characterizing them

7. *See id.* at 2147, 2166.

8. *See generally infra* note 48 (discussing the ramifications of *Alston* on any form of compensation restriction).

9. *See Alston*, 141 S. Ct. at 2155 ("[Quick look is] only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than the restraints in the great in-between—a quick look is sufficient for approval or condemnation.").

10. *See* In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063–64 (N.D. Cal. 2019) (describing changes in NCAA compensation rules over the years).

11. *See Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

as pro-competitive rules that are necessary to foster amateurism.[12] In essence, the NCAA argues that if student athletes were paid, college sport would be indistinguishable from professional sport and, as such, not a viable commercial product. The Supreme Court, in a 1984 case concerning the NCAA's television rights plan, seemed to approve of this reasoning, noting that the preservation of amateurism "widen[ed] consumer choice" and was "procompetitive."[13]

In antitrust language, the NCAA does not—nor could it—claim that its rules do not restrain competition. Rather, the NCAA argues that its compensation rules are not *unreasonable* restraints. Section 1 of the Sherman Antitrust Act expressly prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[14] Notwithstanding the statute's sweeping language, the Supreme Court has read the Act as only prohibiting those business practices that are "unreasonable" restraints on trade.[15]

Most often, courts assess reasonability on a case-by-case basis, using a balancing test known as the rule of reason. The test involves three steps.[16] First, a plaintiff must show that challenged conduct has significant anticompetitive effects.[17] Then, the burden shifts to defendants to show that there are pro-competitive effects.[18] Finally,

12. *See, e.g.*, Deppe v. NCAA, 893 F.3d 498, 500 (7th Cir. 2018) (year-in residence rule); Agnew v. NCAA, 683 F.3d 328, 342 (7th Cir. 2012) (scholarship caps).

13. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102, 110 (1984). Although the Court's discussion of amateurism in *Board of Regents* was a gloss accompanying an analysis of restraints on television rights, some lower courts have adopted the Supreme Court's reasoning. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1343–44 (5th Cir. 1988) (accepting the Supreme Court's gloss in *Board of Regents* that solicitude should be given to the pro-competitive effects of NCAA rules).

14. 15 U.S.C. § 1.

15. *See* State Oil v. Khan, 522 U.S. 3, 10 (1997).

16. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (providing a recent statement on the rule reason).

17. *See id.*

18. *See id.*

if a court finds pro-competitive effects, the burden shifts back to the plaintiff to show that there are substantially less restrictive rules that could achieve the same pro-competitive effect.[19] In essence, the rule of reason three-step provides for a fact-intensive assessment of a challenged restraint's economic impact.[20]

The cost of evaluating restraints on a case-by-case basis is high.[21] Hence, courts have also developed other tests, which allow for particularly harmful practices to be struck down summarily. At the opposite end of the spectrum from the rule of reason, the *per se* rule allows courts to "conclusively presume[] . . . [that a practice is] unreasonable"[22] as long as it belongs to a category of practices that "always or almost always tend to restrict competition and decrease output[.]"[23] And in between the *per se* rule and the rule of reason, the Court has also fashioned a lesser-known "quick look review" that relieves plaintiffs of the burden of proving anticompetitive effect, but still gives defendants the chance to provide procompetitive justification.[24]

In *NCAA v. Alston*, the plaintiffs, a class of current and former Division I athletes, alleged that the NCAA's compensation rules violated Section 1 of the Sherman Antitrust Act.[25] The district court held that the NCAA's compensation rules were subjected to a rule of reason.[26] Applying the three-step test, Judge Wilken of the Northern District of California enjoined NCAA's rules against education-related benefits but left in place rules against cash payment. First,

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19. *See id.*

20. *See id.*

21. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 835–36 (2016).

22. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), *quoted in* United States v. Joyce, 895 F.3d 673, 676–77 (9th Cir. 2018).

23. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979), *quoted in* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

24. *See infra* text accompanying notes 51–56.

25. 15 U.S.C. § 1.

26. *In re NCAA Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d at 1066.

as the parties did not meaningfully contest that the challenged restraints suppress the price of athletes' services, the district court found that the plaintiff athletes carried their burden in showing anticompetitive effect.[27] But, at step two, the court found that the rules also had a pro-competitive effect because they "help maintain consumer demand for college sports . . . by preventing unlimited cash payments unrelated to education."[28] Finally, however, the court found that there exists a less restrictive alternative set of rules in which the NCAA prohibits cash payment but allows non-cash education-related benefits.[29] Limited academic awards, the District Court reasoned, would not compromise the amateur nature of Division I sports and would not significantly erode consumer demand.[30] Consistent with its analysis, the District Court enjoined the rules restricting non-cash education-related benefits.[31] Both sides appealed.

The Ninth Circuit affirmed the District Court. It held that the District Court's application of the rule of reason was supported by the record.[32] The District Court correctly applied the rule of reason and struck the right balance between procompetitive and anticompetitive effects in crafting its remedy.[33]

In a unanimous decision by Justice Gorsuch, the Supreme Court affirmed.[34] The NCAA focused its appeal on an argument that the lower courts were wrong to have applied the rule of reason analysis at all—rather, they should have applied a more deferential quick look review.[35] Mainly, the NCAA argued that, being a joint venture

27. *Id.* at 1067.
28. *Id.* at 1102.
29. *Id.* at 1103–07.
30. *Id.*
31. *Id.* 1109–10.
32. In re NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020).
33. *Id.*
34. NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).
35. *Id.*at 2155.

between member schools, it should be allowed to make rules facilitating cooperation between members, especially those rules that reasonably serve to distinguish the NCAA's product of amateur sports from professional sports.[36] Pointing to Supreme Court precedent, the NCAA also argued that the Court in *Board of Regents* expressly endorsed its position.[37]

Justice Gorsuch disagreed with these arguments. Restraints on competition, he wrote, are not exempted from the rule of reason simply because they happen in the context of joint ventures.[38] While courts should give latitude to business arrangements that are vital to a joint venture's functioning, the majority of restraints in a joint venture are still subject to the rule of reason.[39] *Alston* involved a complex question of balancing various pro-competitive and anti-competitive effects—the resolution of such complex questions calls for a fact-intensive analysis more than a "twinkling of the eye."[40] *Board of Regents*, explained Justice Gorsuch, might have suggested that courts should take care when reviewing the NCAA's compensation rules, but the case does not provide blanket cover to *all* NCAA restraints.[41] And in any case, antitrust law is dictated by market realties: if the market has changed since the time of *Board of Regents*, courts today must reassess previous conclusions.[42]

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36. *Id.* Joint ventures involve cooperation between multiple parties in the form of a single business entity. In this case, the NCAA functions as a joint venture between member schools, facilitating sports competitions between school teams. The Supreme Court has previously acknowledged that joint ventures can have pro-competitive effect. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) (holding that a joint venture's decision to sell separately branded oil at same price was not a *per se* illegal price fixing agreement).

37. *Alston*, 141 S. Ct. at 2158.

38. *Id.* at 2155.

39. *Id.*

40. *Id.* (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984)).

41. *Id.* at 2158.

42. *Id.*

Though Justice Gorsuch held that the NCAA could not resort to quick look review under the facts in *Alston*, he did not rule out that some antitrust defendants could avoid the rule of reason analysis and prevail via quick look review. According to the Court's opinion, quick look can resolve cases that obviously favor either the plaintiff or defendant. First, quick look review is enough to approve a challenged practice when it is "so obviously incapable of harming competition that [it] require[s] little scrutiny." And second, on the opposite end of the spectrum, courts may also strike down a practice that "so obviously threaten[s] to reduce output and raise prices" with only a quick look.[43] As an example, Justice Gorsuch commented that joint ventures might avail themselves of a defensive quick look when their market share is so insignificant that they cannot credibly wield market power.[44]

Justice Kavanaugh joined the Court's opinion *in toto*, but concurred separately to raise doubts about the legality of the NCAA's remaining compensation rules, which restrict non-education-related benefits. The NCAA's argument that its compensation restrictions are pro-competitive turns crucially on the theory that amateurism is essential to college sports and that many consumers prefer amateur sports.[45] But in Justice Kavanaugh's opinion, just as "restaurants . . . cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks," the NCAA cannot escape judicial scrutiny simply by defining its product market as amateur—that is, unpaid—sports.[46] Making no attempt to hide the natural implication of his reasoning, Justice Kavanaugh fired a warning shot at the NCAA, concluding that the NCAA and member colleges' practice of "not paying student athletes a fair share of the revenues" is "highly questionable."[47]

43. *Id.* at 2155–56.
44. *Id.* at 2156.
45. *See id.* at 2152.
46. *Id.* at 2167 (Kavanaugh, J., concurring).
47. *Id.* at 2168 (Kavanaugh, J., concurring).

Alston is a pivotal victory for student athletes and their supporters. Not only did the Supreme Court unanimously endorse education-related benefits for student athletes, Justice Kavanaugh's concurrence also sends a clear signal that some members of the court would look favorably on a more ambitious challenge of the NCAA's compensation rules. Division I athletes can, perhaps, begin to hope for much better days ahead.[48] But *Alston*'s broader implications for antitrust plaintiffs are not nearly as sunny. The Court's majority opinion signals a potential shift in long established doctrine on quick look review. Prior to *Alston*, quick look review was solely a device that allowed plaintiffs to *challenge* clearly anticompetitive practices without having to go through the full rule of reason analysis.[49] In other words, quick look review was a sword for plaintiffs, not a shield for defendants. But the Supreme Court in *Alston* noted that defendants can also benefit from quick look review when a court deems the challenged practice to be "obviously incapable of harming competition."[50] In so holding, the Court hands antitrust defendants a new argument to use against plaintiffs and enforcing agencies. But the Court's opinion only briefly discussed its innovation, raising—largely without answering—questions as to how quick look review will henceforth be applied.

Prior to *Alston*, quick look review served as a way for courts to strike down practices that, though not *per se* illegal, were very clearly anticompetitive. In *California Dental Association v. FTC*,[51] the Supreme Court introduced quick look review as a truncated version of the rule of reason.[52] According to the Court, quick look applied where a challenged restraint, though not a *per se* condemnable

48. *See, e.g.*, Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh's Concurrence*, TIME (June 21, 2021, 6:24 PM), https://time.com/6074583/ncaa-supreme-court-ruling/ [https://perma.cc/53M9-BN8F].

49. *See infra* text accompanying notes 51-56 (explaining previous doctrine).

50. *Alston*, 141 S. Ct. at 2155 (majority opinion).

51. 526 U.S. 756 (1999).

52. *Id.* at 770–71.

practice, is so suspect that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[53] If a plaintiff demonstrates that a restraint is inherently suspect, courts relax the plaintiff's burden.[54] The plaintiff no longer needs to show economic harm through a detailed economic analysis.[55] The burden shifts to the defendants: defendants may overcome the court's presumption of illegality if they show that there are pro-competitive effects sufficient to redeem the restraint.[56] Quick look review filled a gap between the *per se* rule and the rule of reason: unlike the *per se* rule, quick look review would still be open to the pro-competitive possibility of challenged restraints, but it placed the burden more on the defendant when compared to the rule of reason.

The Supreme Court in *Alston*, however, put a completely new spin on quick look review. Justice Gorsuch—in one brief paragraph and without making mention of *California Dental Association*—created a new variety of quick look review. Whereas in *California Dental Association*, quick look was solely a device that facilitated condemnation of inherently suspect restraints, Justice Gorsuch commented in *Alston* that practices "obviously incapable of harming competition" can also be reviewed under a quick look.[57] In other words, quick look can now function as a vehicle for the facilitated *approval* of challenged practices: if defendants can convince a court that a restraint is "obviously incapable of harming competition," the court would give them a fast track through judicial review.[58]

53. *Id.* at 770.

54. WILLIAM C. HOLMES AND MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2.10 (2020).

55. *Id*.

56. *Id.*

57. NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021).

58. *Id.*

Interestingly, the NCAA's argument was precisely that its compensation rules should have been deferentially reviewed because they served the clearly procompetitive function of preserving amateur sports.[59] The Supreme Court disagreed on a factual level with the NCAA on the harmfulness of its compensation rules, but the NCAA seems to have won the legal argument that defendants can use quick look review to their advantage.

Justice Gorsuch's expansion of the quick look doctrine, though, was largely an unneeded innovation. Recall that under the rule of reason, the plaintiffs bear the initial burden of showing anti-competitive effect.[60] Empirical studies show that this is not an easy burden to bear—in up to 97% of claims to which the rule of reason is applied, courts dispose of cases at this first stage.[61] In effect, the rule of reason is already a defendant-friendly test, one that can be counted on to weed out meritless claims. The new quick look review, if taken up by lower courts, would tilt the playing field further towards defendants, providing nearly presumptive legality to certain classes of business practices. Where judges deem a challenged practice to be "obviously harmless," they might even dispose of the case at the motion to dismiss stage,[62] melding Justice Gorsuch's new quick look with *Bell Atlantic Corporation v. Twombly*'s[63] higher pleading standards.[64] But tilting the field in such a way, to the extent that it reduces opportunity for case-by-case economic analysis, would come at the cost of accuracy. Indeed, the trend of the past decades has been one of retreating from bright-

59. *See* Reply Brief for Petitioner at 7, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512).

60. *See supra* text accompanying note 27.

61. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828, 837 (2009).

62. Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 65–66 (2017).

63. 550 U.S. 544 (2007)

64. *See id.* at 555–56 (requiring plaintiff to raise factual allegations—as opposed to conclusory legal claims—that "raise a right to relief above the speculative level").

line rules, which declared broad categories of conduct *per se* unreasonable, towards a more flexible rule of reason that accommodated for possible case-specific pro-competitive effects. The same principle would suggest caution when shielding categories of conduct under a cover of *per se* reasonableness.

In addition, *Alston* has provided only the vague contours of the new defensive quick look, giving lower courts the work of filling in the blanks. Chief among the uncertainties are the types of business practices that count as being "obviously incapable of harming competition." The Court's opinion provides only a vague explanation, suggesting that defendants with very small market share would be able to benefit from quick look review, as small size implies commensurably small market power.[65] Additionally, quick look may be applied to agreements in joint ventures, such as rules "necessary to produce a game" in the case of the NCAA and other sports leagues.[66] This guidance, however, is not necessarily easy to apply. Whether a joint venture's internal restraint is "necessary," for instance, is likely to be a contested issue, as it was in *Alston*.[67]

It is easy to think of *Alston* as a Supreme Court case that signals a tougher approach to antitrust. But read more closely, *Alston* is a box of assorted chocolates with both bitters and sweets. For sports law, the case portends a more aggressive judicial review. The NCAA should be particularly worried about its remaining compensation restrictions, including notably its rule against cash payments. And the general counsels of professional sports leagues, which have also been the beneficiary of judge-made antitrust carveouts, may be well advised to flag this case. But the broader implications for antitrust law are mixed. While the Court did not accept the NCAA's argument that the Association's compensation restrictions should be exempt from the rule of reason, it indicated—

65. *See* NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021).

66. *Id*. at 2157 (quoting Chicago Pro. Sport Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996)).

67. *Id.* at 2155–56.

against the grain of precedent—that challenged practices can sometimes be upheld with a mere quick look. In effect, the Court seems to have ruled against the NCAA on the facts of the case all while giving a subtle nod to its legal theory.