
*Sherman Act — Antitrust Law —
College Athletics — NCAA v. Alston*

In January of 2021, as the coronavirus pandemic reached its peak in the United States, Alabama Crimson Tide football coach Nick Saban won his seventh national collegiate championship.¹ For his efforts over the season, Saban was awarded a salary of \$9.3 million,² itself a fraction of the more than \$4 billion in revenue that college football generates each year.³ Saban’s players, meanwhile, were eligible to receive the cost of attendance at the University of Alabama as compensation, which included “tuition and fees, room and board, books and other expenses related to attendance”⁴ Last Term, in *NCAA v. Alston*,⁵ the Supreme Court upheld a district court ruling that the National Collegiate Athletic Association (NCAA) rules limiting education-related compensation violated section 1 of the Sherman Act.⁶ Shortly after the Court’s decision, the NCAA voted of its own accord to allow a student athlete to receive compensation in exchange for use of their name, image, and likeness (NIL).⁷ Even after this series of changes, the NCAA still restricts the compensation that schools can provide directly to their athletes unrelated to education.⁸ Although the student athletes did not challenge the remaining rules in the Supreme Court, the *Alston* decision, combined with background principles of antitrust law that the Court did not consider, lays the groundwork for a successful future challenge to the NCAA’s restrictions on compensation unrelated to education.

Although the NCAA generates roughly \$1 billion in revenues each year, NCAA rules restrict student-athlete compensation.⁹ Prior to *Alston*, the rules limited compensation to the cost of attendance,¹⁰ meaning they served to restrict not only benefits unrelated to education,

¹ Alex Scarborough, *Alabama Crimson Tide’s Nick Saban Claims Record Seventh National Championship*, ESPN (Jan. 12, 2021), https://www.espn.com/college-football/story/_/id/30696121/alabama-crimson-tide-nick-saban-claims-record-seventh-national-championship [https://perma.cc/M89F-ZX55].

² Steve Berkowitz et al., *NCAA Salaries*, USA TODAY (Nov. 17, 2020), <https://sports.usatoday.com/ncaa/salaries> [https://perma.cc/R39N-HN4M].

³ See Rey Mashayekhi, *The Financial Fallout of a Canceled College Football Season*, FORTUNE (Aug. 10, 2020, 9:49 PM), <https://fortune.com/2020/08/10/college-football-cancelled-2020-ncaa-financial-impact-revenue-schools-big-ten-sec-acc-big-12-pac-12> [https://perma.cc/N82N-M68S].

⁴ NCAA, DIVISION I MANUAL 209 (2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [https://perma.cc/X3PS-K2JQ]; see *id.* at 206–07.

⁵ 141 S. Ct. 2141 (2021).

⁶ See *id.* at 2151–52, 2166.

⁷ The *Alston* holding did not compel the NCAA’s NIL decision because the ruling left the NCAA’s rules limiting compensation unrelated to education undisturbed. See *id.* at 2165.

⁸ *Id.*

⁹ See *O’ Bannon v. NCAA*, 802 F.3d 1049, 1052 (9th Cir. 2015).

¹⁰ See *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1071 (N.D. Cal. 2019).

but also benefits tied to education, such as postgraduate scholarships, vocational school scholarships, expenses related to study abroad, and posteligibility internships.¹¹ These rules had largely escaped direct legal challenge since 1984, when the Supreme Court stated in *NCAA v. Board of Regents of the University of Oklahoma*¹²:

[T]he NCAA seeks to market a particular brand of football — college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” *athletes must not be paid*, must be required to attend class, and the like.¹³

In that case, several colleges challenged NCAA rules limiting the total number of football games that could be televised nationally, as well as the number of televised games that any single team could participate in¹⁴ — restraints that applied to the consumer-side output market rather than the labor-side input market. The Court made the statement while explaining why these horizontal restraints on trade, which would ordinarily be held per se unlawful under the Sherman Act, are instead subject to the “rule of reason” test, in which courts conduct fact-specific analyses of the relevant market to determine whether there has been an antitrust violation.¹⁵ In the decades after its decision, a circuit split emerged over whether the Court’s statement was binding precedent on the labor-side input market¹⁶ or mere dicta.¹⁷ This paved the way for *Alston*, which began in 2014 and 2015 when current and former Division I football and basketball players filed new challenges to the rules imposed by the NCAA and eleven of its conferences limiting the compensation that athletes may receive for their services.¹⁸

The United States District Court for the Northern District of California held that limitations on education-related student-athlete

¹¹ *Id.* at 1088.

¹² 468 U.S. 85 (1984).

¹³ *Id.* at 101–02 (emphasis added).

¹⁴ *See id.* at 94–96.

¹⁵ *See id.* at 101–03.

¹⁶ *See McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that because the NCAA’s compensation rules did not violate antitrust laws, enforcement actions undertaken to uphold the rules were not an illegal group boycott). The Fifth Circuit relied on the *Board of Regents* decision to determine that the compensation rules were valid. *Id.* at 1344.

¹⁷ *See O’ Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015) (holding that the NCAA’s rules limiting compensation below the full cost of attendance were more restrictive than necessary to serve the procompetitive goal of maintaining amateurism). The Ninth Circuit concluded that the *Board of Regents* discussion of amateurism was dicta. *Id.* at 1063.

¹⁸ *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1061–62 (N.D. Cal. 2019). Cases brought by several plaintiffs were consolidated into a single case during pretrial proceedings. *Id.* at 1065 n.5.

benefits constituted unlawful restraints on trade under section 1 of the Sherman Act.¹⁹ Because the court determined that “‘a certain degree of cooperation’ is necessary to market athletics competition,”²⁰ it applied the rule of reason balancing test to determine whether the rules violated the Sherman Act.²¹ The rule of reason test contains three steps: first, the plaintiff must prove that the challenged restraint has a substantial anticompetitive effect; then, if the plaintiff succeeds, the burden shifts to the defendant to demonstrate the restraint results in procompetitive effects; finally, if the court finds procompetitive effects, the plaintiff must show the procompetitive benefit could be achieved through less restrictive means.²²

Although the court concluded that the rules limiting compensation do have the procompetitive effect of distinguishing collegiate athletics from professional athletics, it found that the NCAA could accomplish this effect through less restrictive means.²³ In particular, the district court concluded that education-related benefits, unlike benefits unrelated to education, are easily distinguishable from compensation paid to professional athletes.²⁴ Accordingly, the court left restrictions on payments unrelated to education undisturbed, while striking down limitations on education-related benefits.²⁵ At the same time, the decision left in place several limits on the newly permissible benefits, including that individual conferences can restrict education-related benefits even if the NCAA cannot.²⁶ Both parties appealed the decision.²⁷

The Ninth Circuit affirmed.²⁸ The NCAA limited its challenge to a narrow set of issues, including the district court’s application of the rule of reason’s second step.²⁹ The NCAA argued that the compensation restrictions were necessary to maintain the distinction between college and professional sports, thereby increasing consumer choice and enhancing competition.³⁰ The Ninth Circuit agreed with the district court, however, that only some of the restrictions — those on payments unrelated to education — served to enhance the distinction between college and professional athletics.³¹ The NCAA also challenged the district

¹⁹ 15 U.S.C. § 1; *In re NCAA*, 375 F. Supp. 3d at 1110.

²⁰ *In re NCAA*, 375 F. Supp. 3d at 1066 (quoting *O’Bannon*, 802 F.3d at 1069).

²¹ *Id.*

²² *O’Bannon*, 802 F.3d at 1070.

²³ *In re NCAA*, 375 F. Supp. 3d at 1082–83.

²⁴ *Id.* at 1083.

²⁵ *See id.* at 1087–88.

²⁶ *Id.* at 1090.

²⁷ *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1243 (9th Cir. 2020).

²⁸ *Id.* at 1244.

²⁹ *Id.* at 1257.

³⁰ *Id.*

³¹ *Id.*

court's injunction as impermissibly vague, arguing that the relief would "usurp[] the association's role as the 'superintend[ent]' of college sports."³² The Ninth Circuit again agreed with the district court, concluding that the district court "struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports."³³ While the NCAA again appealed, the athletes did not appeal the court's decision to leave non-education-related compensation limits intact.³⁴

The Supreme Court affirmed.³⁵ Writing for a unanimous Court,³⁶ Justice Gorsuch first concluded that the district court properly applied the rule of reason test rather than performing the quick review sometimes given to joint ventures.³⁷ Next, Justice Gorsuch agreed with the district court, and therefore the Ninth Circuit in *O'Bannon v. NCAA*,³⁸ that the Supreme Court's opinion in *Board of Regents* did not create a binding precedent "reflexively" supporting the compensation rules.³⁹ As a final step in confirming that the rule of reason test applied, Justice Gorsuch agreed with the district court that the NCAA and its member schools are commercial enterprises subject to the Sherman Act.⁴⁰ Justice Gorsuch then reviewed the district court's application of the rule of reason test.⁴¹ Despite "agree[ing] 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,"⁴² Justice Gorsuch ultimately viewed the district court's analysis as in harmony with antitrust law, finding that "the district court nowhere — expressly or effectively — required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand."⁴³ Justice Gorsuch also rejected the NCAA's arguments regarding step three of the test, holding that the district court found permissible alternative rules that

³² *Id.* at 1263 (quoting *O'Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015)).

³³ *Id.*

³⁴ See *Alston*, 141 S. Ct. at 2154.

³⁵ *Id.* at 2166.

³⁶ *Id.* at 2147.

³⁷ See *id.* at 2155. The Court assumed for the sake of its analysis that the NCAA correctly identified itself as a "joint venture." *Id.* When the Court determines that the procompetitive effects flowing from restraints imposed by joint ventures are either nonexistent or necessary, or as the Court put it, "at opposite ends of the competitive spectrum," the Court can determine the validity of the rules in the "twinkling of an eye." *Id.* at 2155 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984)); see *id.* at 2155–56.

³⁸ 802 F.3d 1049, 1063 (9th Cir. 2015).

³⁹ *Alston*, 141 S. Ct. at 2158.

⁴⁰ *Id.* at 2158–59.

⁴¹ *Id.* at 2160.

⁴² *Id.* at 2161.

⁴³ *Id.* at 2162; see *id.* at 2161–62.

could deliver the same procompetitive effects without such burdensome restraints.⁴⁴ After agreeing with the district court’s application of the rule of reason test, Justice Gorsuch held that the district court’s injunction did not invite future courts to “micromanage” the NCAA,⁴⁵ but rather constituted a permissible antitrust remedy.⁴⁶

Justice Kavanaugh concurred to note that the NCAA’s remaining rules restricting non-education-related compensation, challenged in the district court but not appealed in the Supreme Court, raised serious antitrust questions as well.⁴⁷ Justice Kavanaugh emphasized three points: that the Supreme Court’s decision did not consider the legality of the non-education-related compensation rules, that the Court’s decision established that these rules would be analyzed under the rule of reason test, and that the Court’s decision raised serious questions about the legality of the remaining restraints under the rule of reason test.⁴⁸ In challenging the NCAA’s argument that maintaining compensation restrictions is necessary to distinguish college athletics from professional athletics, Justice Kavanaugh stated: “Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.”⁴⁹ Although Justice Kavanaugh did suggest that the NCAA could protect itself from future judicial scrutiny by engaging in collective bargaining with student athletes,⁵⁰ he also flatly concluded that “[n]owhere 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. . . . The NCAA is not above the law.”⁵¹

Although the Supreme Court did not have occasion to review the NCAA’s rules regarding compensation unrelated to education, its decision laid the groundwork for the dismantling of those rules in future proceedings. Prior to *Alston*, the Supreme Court had not definitively stated whether the NCAA’s compensation rules were subject to the rule of reason test under the Sherman Act;⁵² now that the Court has clarified that they are, the remaining restrictions on compensation cannot pass scrutiny. Justice Kavanaugh’s concurrence already raised serious concerns about the legality of the remaining rules by arguing that the NCAA cannot justify restricting compensation “by calling it product

⁴⁴ See *id.* at 2164.

⁴⁵ *Id.* at 2163 (quoting Brief for Petitioner at 50, *Alston*, 141 S. Ct. 2141 (No. 20-512)).

⁴⁶ See *id.* at 2166.

⁴⁷ See *id.* at 2166–67 (Kavanaugh, J., concurring).

⁴⁸ See *id.* at 2166–68.

⁴⁹ *Id.* at 2168.

⁵⁰ *Id.*

⁵¹ *Id.* at 2169.

⁵² See *id.* at 2167.

definition.”⁵³ But neither Justice Kavanaugh’s concurrence nor the majority opinion analyzed a separate doctrinal hurdle for the NCAA: multimarket balancing. The NCAA’s justification for its remaining rules — that they enhance collegiate athletics by distinguishing them from professional sports — impermissibly balances harm in the labor-side market against benefits in the consumer-side market, benefits that do not accrue to the parties harmed by the challenged restraints (the student athletes). The NCAA’s sole justification for its remaining rules is therefore not a valid procompetitive justification and accordingly does not satisfy the second prong of the rule of reason test. *Alston*’s subjecting the NCAA’s compensation rules to the rule of reason test, combined with the established impermissibility of multimarket balancing, therefore opens the door to further changes in the future of United States amateur athletics.

The second step of the rule of reason test requires the defendant to show that a procompetitive rationale exists that justifies the challenged restraint.⁵⁴ Only one procompetitive justification offered by the NCAA for its compensation rules survived the district court’s scrutiny⁵⁵ and was considered by the Supreme Court: that the rules preserve amateurism, which provides consumers a unique product distinct from paid professional sports.⁵⁶ The district court relied on this justification to leave in place the NCAA’s limitations on non-education-related benefits, stating that “[r]ules that prevent unlimited payments such as those observed in professional sports leagues, therefore, are procompetitive when compared to having no such restrictions.”⁵⁷ The district court erred, however, in allowing the NCAA to balance the potential procompetitive impact of the rules on the consumer-side output market against the anticompetitive restraints on trade in the labor-side market.⁵⁸

First, existing case law prohibits the district court’s decision to balance harms in the labor market against benefits in the consumer market. Although not in the Sherman Act context, the Supreme Court held while reviewing a merger in *United States v. Philadelphia National Bank*⁵⁹ that weighing procompetitive effects in one market with anticompetitive effects in another violates antitrust law.⁶⁰ Justice Brennan reasoned that “[i]f anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every

⁵³ *Id.* at 2168.

⁵⁴ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

⁵⁵ *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019).

⁵⁶ *Alston*, 141 S. Ct. at 2152.

⁵⁷ *In re NCAA*, 375 F. Supp. 3d at 1083.

⁵⁸ See *Alston*, 141 S. Ct. at 2152.

⁵⁹ 374 U.S. 321 (1963).

⁶⁰ See *id.* at 370.

firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.”⁶¹ Not long after, the Court confirmed in *United States v. Topco Associates, Inc.*⁶² that this principle also applies to antitrust challenges brought under the Sherman Act.⁶³ In that case, Justice Marshall rejected the defendant’s attempt to justify its anticompetitive rules, stating that competition “cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.”⁶⁴ The Court has therefore made clear that its typical antitrust review does not allow for multimarket balancing.

Some scholars suggest, however, that the atypical nature of sports requires atypical antitrust review, and that multimarket balancing is a component of the necessary horizontal cooperation that the Supreme Court has held valid in the context of sports.⁶⁵ To be sure, in *Board of Regents* and other cases, the Court has stated that sports leagues have “a perfectly sensible justification for making a host of collective decisions,” including that otherwise competing teams have a collective “interest in making the entire league successful and profitable.”⁶⁶ In particular, the Court held in *Brown v. Pro Football, Inc.*⁶⁷ that professional leagues may exert monopsonistic buying power in the labor context.⁶⁸

Supreme Court cases analyzing the legality of professional sports league rules governing the player market have, however, held that antitrust law does not even apply.⁶⁹ In one of the first Court cases to approach this issue, *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,⁷⁰ the Court determined that professional baseball was exempt from antitrust scrutiny because “in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States.”⁷¹ Together, these decisions might have implied that, because horizontal restraints on trade are necessary to operate sports

⁶¹ *Id.*

⁶² 405 U.S. 596 (1972).

⁶³ *See id.* at 610. The defendant attempted to justify anticompetitive rules it had imposed in the buying market by pointing to its need to cooperate to compete in the consumer market. *Id.* at 598, 605.

⁶⁴ *Id.* at 610.

⁶⁵ *See, e.g.,* Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 132 (2017).

⁶⁶ *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 202 (2010).

⁶⁷ 518 U.S. 231 (1996).

⁶⁸ *See id.* at 231.

⁶⁹ *See, e.g., Fed. Baseball Club of Balt., Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200, 200 (1922) (holding that professional baseball is exempt from antitrust scrutiny).

⁷⁰ 259 U.S. 200.

⁷¹ *Id.* at 208.

leagues, and because professional sports leagues may impose restraints on trade in the labor market exempt from antitrust scrutiny, the NCAA may impose horizontal restraints in the market for college-athlete labor.

The Court's opinion in *NCAA v. Alston* opens the door to a different approach in the collegiate sports context.⁷² First, the Court's opinion establishes that, unlike in professional sports contexts, antitrust rules do apply to labor market rules in collegiate athletics.⁷³ The principal contribution of the Court's decision was to make clear that the NCAA's compensation rules are subject to Sherman Act scrutiny.⁷⁴ Once the Court holds that the rule of reason test applies, the burden shifts to the NCAA to offer a valid procompetitive justification for its rules.⁷⁵ As a result, the Court's willingness to uphold horizontal restraints in professional sports contexts when it did not apply antitrust law does not require the Court to allow multimarket balancing once it has determined that antitrust law applies in the collegiate sports context.

Additionally, the compensation rules at issue in the *Alston* case are distinct from the horizontal cooperation upheld by the Court in other sports contexts. In *Brown v. Pro Football, Inc.*, professional football players challenged National Football League (NFL) rules establishing a "developmental squad" of substitute players with a fixed compensation of \$1,000 per week.⁷⁶ Although the players alleged that this compensation cap violated the Sherman Act, the Supreme Court instead held that because the NFL imposed the plan after a failed effort to bargain with the players' union, federal labor law shielded the NFL from antitrust scrutiny.⁷⁷ The NCAA, meanwhile, does not collectively bargain with its players, and therefore cannot claim that any dispute should instead be governed by labor law.⁷⁸ The lack of collective bargaining in the collegiate context is particularly important because it means that those harmed by the anticompetitive rules cannot negotiate to receive a portion of the benefit purportedly secured in the consumer market.

To be sure, if the NCAA were to engage in collective bargaining with its players, it might be able to receive more lenient treatment under

⁷² The Supreme Court has held that it will review different sports leagues in distinct manners. See *Radovich v. NFL*, 352 U.S. 445, 451 (1957) ("The Court was careful to restrict [*Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953)] to baseball '*Toolson* is not authority for exempting other businesses merely because of the circumstance that they are also based on the performance of local exhibitions." (quoting *United States v. Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236, 242 (1955))).

⁷³ Prior to the Court's decision, "legal analysis of the NCAA's monopsony power remain[ed] underdeveloped due, in part, to [the] unfortunate dicta in *Board of Regents*." Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights*, 54 ANTITRUST BULL. 923, 923-24 (2009).

⁷⁴ See *Alston*, 141 S. Ct. at 2145.

⁷⁵ *Id.* at 2160 (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)).

⁷⁶ *Brown v. Pro Football, Inc.*, 518 U.S. 231, 231 (1996).

⁷⁷ *Id.*

⁷⁸ See *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring); *Brown*, 518 U.S. at 237.

antitrust law because student athletes, like professional athletes, would be able to negotiate for their fair share of the benefits coming from those labor market restraints.⁷⁹ For example, in some professional leagues, star athletes clearly earn less than their market value because the players have collectively agreed with the team owners that there should be a salary cap to ensure competitive balance.⁸⁰ But collective bargaining creates an avenue through which players can share in the benefits associated with that competitive balance, such as enhanced ticket sales and larger TV deals. If the NCAA similarly allowed student athletes to negotiate for their share of any procompetitive benefits, then the NCAA would be able to point to a procompetitive benefit in the labor market. However, absent such a change — one that might necessarily include waiving some of the compensation restrictions unrelated to education (since players would likely try to negotiate for such compensation as part of their collective bargaining) — the NCAA’s proffered procompetitive justification poses serious multimarket balancing problems.

Further supporting this objection’s seriousness, the Court *did* allude to multimarket balancing as a potential concern but tabled that argument only because the plaintiffs waived it.⁸¹ Justice Gorsuch stated:

[T]he student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that . . . review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. But the parties before us do not pursue this line.⁸²

Elsewhere in the opinion, Justice Gorsuch commented on multimarket balancing with language suggesting that the objection is serious. Justice Gorsuch remarked that the asserted benefits of the rules “[a]dmittedly” accrue only to “consumers in the NCAA’s seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market,” but that “the NCAA argued [that] the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market — and the district court agreed to do so.”⁸³ Finally, Justice Kavanaugh also

⁷⁹ *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

⁸⁰ See, e.g., Brian Windhorst & Darren Rovell, *How Much Would LeBron Make in an Open Market? Look to Ronaldo*, ESPN (July 11, 2018), https://www.espn.com/nba/story/_/id/24062252/how-much-lebron-james-make-open-market-look-cristiano-ronaldo-nba [<https://perma.cc/YU8X-XJVE>].

⁸¹ See *Alston*, 141 S. Ct. at 2155.

⁸² *Id.* (citation omitted). The Court cited an amicus brief that argued courts should not engage in the policy-based exercise of “trad[ing]-off” competition in one market for competition in another. Brief for American Antitrust Institute as Amicus Curiae in Support of Respondents at 3, 11–12, *Alston*, 141 S. Ct. 2141 (Nos. 20–512, 20–520). This argument is made even stronger by the Court’s holding that the NCAA’s compensation rules are not exempt from antitrust scrutiny. *Alston*, 141 S. Ct. at 2145.

⁸³ *Alston*, 141 S. Ct. at 2152.

alluded to the fact that the purported competitive benefits of the rules do not accrue to the student athletes, lamenting that the “enormous sums of money” that collegiate athletics generate “flow to seemingly everyone except the student athletes.”⁸⁴ The Court’s references to the fact that the NCAA’s multimarket balancing went unchallenged could suggest that it has reservations about such balancing; at the very least, the references suggest that the Court would invite a line of argument regarding the permissibility of multimarket balancing.

If student athletes do accept Justice Kavanaugh’s invitation to challenge the remaining rules, future courts need not worry that they must either allow for multimarket balancing or risk destroying college athletics. There are Sherman Act-compliant NCAA rules that distinguish collegiate athletes from their professional counterparts that do not rest on the fact that collegiate athletes are unpaid — most notably the requirement that collegiate athletes remain enrolled while they compete.⁸⁵ This rule better serves to distinguish collegiate athletes from professional athletes; while the casual observer may not be aware how much collegiate or professional athletes are compensated for their efforts on the field, college fans can, unlike professional fans, take pride in sitting next to the star player in English 101. In fact, the district court found that the NCAA did not “establish that the challenged compensation rules . . . have any direct connection to consumer demand.”⁸⁶

Justice Kavanaugh’s concurrence foreshadows that significant changes may still come to the NCAA’s compensation rules. Even the NCAA may agree; days after the *Alston* decision, the NCAA adopted its policy allowing student athletes to benefit from NIL opportunities, such as endorsement deals.⁸⁷ In just the first month after the policy was adopted, Coach Saban estimated that incoming star Alabama quarterback Bryce Young earned almost \$1 million in endorsements.⁸⁸ Still, the NCAA seems intent on restricting non-education-related compensation, with Division II Presidents Council chair Sandra Jordan declaring: “The new policy preserves the fact college sports are not pay-for-play”⁸⁹ The Court’s decision in *Alston*, however, means that pay-for-play is likely on the NCAA’s one-yard line.

⁸⁴ *Id.* at 2168 (Kavanaugh, J., concurring).

⁸⁵ NCAA, *supra* note 4, at 165.

⁸⁶ *Alston*, 141 S. Ct. at 2152.

⁸⁷ Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy> [https://perma.cc/EMT3-3283].

⁸⁸ Alex Scarborough, *Alabama QB Bryce Young Approaching \$1M in Endorsement Deals, Says Coach Nick Saban*, ESPN (July 21, 2021, 11:45 AM), https://www.espn.com/college-football/story/_/id/31849917/alabama-qb-bryce-young-approaching-1m-endorsement-deals-says-head-coach-nick-saban [https://perma.cc/4688-R5QH].

⁸⁹ Hosick, *supra* note 87.