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WILL THE SUPREME COURT RECOVER ITS OWN  
FUMBLE? HOW *ALSTON* CAN REPAIR THE DAMAGE  
RESULTING FROM NCAA'S SPORTS LEAGUE  
EXEMPTION

*Alan J. Meese\**

I. INTRODUCTION

Horizontal restraints are unlawful per se unless a court can identify some redeeming virtue that such restraints may create. In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* (“NCAA”),<sup>1</sup> the Supreme Court rejected this standard, refusing to condemn horizontal restraints on price and output imposed by the NCAA without specifying any possible redeeming virtues.<sup>2</sup> The Court emphasized that other restraints not before the Court were necessary to create and maintain athletic competition like that supervised by the NCAA.<sup>3</sup> This exemption for sports leagues ensures that all restraints imposed by such entities merit Rule of Reason scrutiny, regardless of how harmful they appear.

Building on a forthcoming article,<sup>4</sup> this Essay contends that NCAA's sports league exemption contravenes traditional antitrust principles, including the ancillary restraints doctrine (which NCAA ignored). This Essay also argues that the exemption increases the number of false negatives and potentially impedes the conduct of Rule of Reason analysis. Finally, this Essay explains how the exemption inspired and informed an ill-advised doctrinal innovation, the so-called “Quick Look” methodology of Rule of Reason analysis, whereby courts condemn certain restraints “in the twinkling of an eye.”<sup>5</sup> Some lower courts have recently extrapolated from this approach and exempted restraints limiting rivalry for the services of student

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1. 468 U.S. 85 (1984).
2. *Id.* Part III.
3. *Id.*
4. See Alan J. Meese, *Requiem for a Lightweight: How NCAA Continues to Distort Antitrust Doctrine*, 56 WAKE FOREST L. REV. (forthcoming Dec. 2021).
5. See Areeda, *infra* note 78, at 37–38.

athletes from Rule of Reason scrutiny, rendering such restraints lawful *per se*.<sup>6</sup>

The United States Supreme Court is currently reviewing the Ninth Circuit's holding in *National Collegiate Athletic Association v. Alston*, which condemned NCAA regulations limiting the size of athletic scholarships.<sup>7</sup> This Essay provides the *Alston Court* with a roadmap for eliminating the sports league exemption, thereby placing such restraints on equal footing with restraints imposed by other entities. The Essay also advises the Court to reject lower court decisions that built upon the Quick Look doctrine and have treated restraints governing student athlete eligibility as lawful *per se*, thus exempting them from Rule of Reason scrutiny. Finally, the Essay concludes that the restraints before the Court in *Alston* may well produce cognizable antitrust benefits by overcoming the market failure that would result from unbridled rivalry for the services of student athletes. The Essay submits that the Court should articulate a Rule of Reason methodology in *Alston* that reflects the non-technological nature of such efficiencies.

## II. THE RULE OF REASON AND THE *PER SE* RULE

The Sherman Act bans agreements “in restraint of trade.”<sup>8</sup> In *Standard Oil Co. of New Jersey v. United States*,<sup>9</sup> the Court read the Act to prohibit only agreements that restrain trade “unreasonably,”<sup>10</sup> *i.e.*, produce monopoly or its consequences: higher prices, reduced output, and/or reduced quality.<sup>11</sup> Ordinary application of this Rule of Reason is fact-intensive, requiring plaintiffs to establish that the restraint produces concrete antitrust harm.<sup>12</sup> But certain restraints are “unlawful *per se*,” and do not warrant full-blown analysis.<sup>13</sup> In *Northern Pacific Railway Co. v. United States* (“*NPR*”), the Court articulated a two-part standard for determining whether restraints in a particular category are always unreasonable and thus unlawful *per se*.<sup>14</sup> *NPR* requires courts to ask two questions about restraints in the category: do such restraints produce a “pernicious effect on competition” and, if so, do they also always lack redeeming virtues.<sup>15</sup>

Despite *NPR*'s reference to pernicious *effects*, application of this first prong does not require a judicial prediction that restraints will

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6. See *infra* nn.96–98.

7. 958 F.3d 1239 (9th Cir.), *cert. granted sub nom.*, 141 S.Ct. 1231 (2020) (mem.).

8. 15 U.S.C. § 1.

9. 221 U.S. 1 (1911).

10. *Id.* at 51.

11. *Id.* at 52 (listing three “evils which led to the public outcry against monopolies”).

12. *Cont'l T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 n.15 (1977).

13. See *generally* *N. Pac. Ry. Co. v. United States* (“*NPR*”), 356 U.S. 1 (1958).

14. *Id.* at 5.

15. *Id.*; see also *Sylvania*, 433 U.S. at 50 (quoting *NPR* with approval).

produce actual economic harm.<sup>16</sup> Instead, courts treat elimination of rivalry as itself a “pernicious effect.”<sup>17</sup> Numerous garden variety restraints, including formation of partnerships and restraints ancillary thereto, produce a “pernicious effect” under this prong.<sup>18</sup> Whether this standard condemns a restraint thus turns on the second prong, namely, whether restraints lack redeeming virtues.<sup>19</sup> For example, price fixing between two independent lawyers is unlawful *per se* because such agreements cannot create redeeming virtues.<sup>20</sup> But formation of a partnership by the same lawyers might produce redeeming virtues and thus merits Rule of Reason treatment.<sup>21</sup> Both restraints extinguish horizontal price rivalry. But formation of the partnership may also produce redeeming virtues.<sup>22</sup>

The *NPR* standard post-dates the ancillary restraints doctrine.<sup>23</sup> But both doctrines ultimately ask the same question about horizontal restraints: can eliminating rivalry also produce efficiency benefits? While the *NPR* standard takes a categorical approach, the ancillary restraints doctrine applies case-by-case.<sup>24</sup> Repeated applications of the ancillary restraints doctrine could establish that particular

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16. Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 94–95 (2003) (recognizing that the Court defines “anticompetitive” broadly).

17. *Id.* at 94 (explaining that the Court has “equated the term [‘competition’] with ‘rivalry’ for the purpose of *per se* analysis, with the result that any coordination of previously independent activity is anticompetitive”).

18. *Id.* at 95.

19. *Id.* at 96.

20. *See id.* at 96–98.

21. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L. J. 373, 383 (1966) (distinguishing between antitrust’s treatment of naked price fixing and “close-knit combinations” such as partnerships on this basis); Richard A. Givens, *Affirmative Benefits to Industrial Mergers and Section 7 of the Clayton Act*, 36 IND. L. J. 51, 52–53 (1960) (concluding that “‘lack of any redeeming virtue’ is the chief distinction between those kinds of loose-knit combinations which are held in unreasonable restraint of trade in and of themselves and the close-knit combinations”); Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 849–51 (2016) (explaining the *NPR* standard’s disparate treatment of naked price fixing and the formation of partnerships).

22. Bork, *supra* note 21, at 383.

23. *See generally* *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (articulating the ancillary restraints doctrine sixty years before *NPR*).

24. *Compare* *N. Pac. Ry. Co. v. United States* (“*NPR*”), 356 U.S. 1, 5 (stating that “[the] principle of *per se* unreasonableness . . . makes the type of restraints proscribed by the Sherman Act more certain . . .”), *with Addyston Pipe*, 85 F. 271 at 282–83 (illustrating that the “very statement of the rule” implies that the court must determine whether “the contract [at issue is] one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary”).

categories of restraints never or sometimes produce redeeming virtues, thus informing application of the *NPR* standard.<sup>25</sup>

If restraints cannot produce such virtues, courts may safely conclude that parties have invested resources to create an agreement that restricts rivalry with no prospect of efficiencies. This conclusion implies that the parties believe they can exercise market power.<sup>26</sup> Even if the parties are incorrect, condemnation of such restraints does no harm and deters future price fixing.<sup>27</sup>

If restraints may produce such virtues, further inquiry is warranted regarding their ultimate impact. Moreover, a court assessing such restraints under full-blown Rule of Reason analysis must begin by assuming that the restraint before it might produce such benefits and calibrate the methodology of such inquiry accordingly.

The Court initially recognized very few redeeming virtues, limiting the category to what Nobel Laureate Oliver Williamson describes as technological efficiencies.<sup>28</sup> Beginning with *Continental T.V. v. GTE Sylvania, Inc.*,<sup>29</sup> the Court has repeatedly recognized a different category of virtues—namely, correction of market failures that would occur if parties to the restraint had instead continued unbridled rivalry.<sup>30</sup> As this Essay submits, the methodology of full-blown Rule of Reason analysis should turn upon the nature of these virtues.

25. See *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982) (explaining that restraints are condemned as unlawful *per se* “[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the Rule of Reason will condemn it”).

26. See *FTC v. Superior Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 435 n.18 (1990) (“Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices.”) (quoting R. BORK, *THE ANTITRUST PARADOX*, 269 (1978)); *Rothery Storage v. Atlas Van Lines*, 792 F.2d 210, 221 (D.C. Cir. 1986) (Bork, J., for the court).

27. Areeda, *infra* note 78, at 21–22.

28. See OLIVER E. WILLIAMSON, *ECONOMIC INSTITUTIONS OF CAPITALISM*, 7 (1985) (“The prevailing orientation toward economic organization [during this period] was that technological features of firm and market organization were determinative.”); see also Meese, *supra* note 16, at 124–32 (documenting how the Supreme Court relied upon the applied price theory tradition that Williamson discusses when expanding the scope of the *per se* rule).

29. 433 U.S. 36 (1977).

30. *Id.* at 55 (explaining how non-standard agreements could ensure production of services retailers might not provide “in a purely competitive situation”).

### III. NCAA'S MISAPPLICATION/IGNORANCE OF *NPR* AND RESULTING SPORTS LEAGUE EXEMPTION

In *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association*,<sup>31</sup> the Court evaluated an agreement setting the price and output of televised college football games.<sup>32</sup> Plaintiffs University of Georgia and University of Oklahoma, who presumably supported restrictions on player compensation, challenged the price and output restrictions.<sup>33</sup> Courts at the time defined redeeming virtues narrowly in the horizontal context, banning as unlawful *per se* restraints that seemed plainly ancillary to legitimate ventures.<sup>34</sup> Nonetheless, the Tenth Circuit rejected automatic condemnation, at least *arguendo*, and assessed whether the restraints were ancillary to the NCAA's legitimate venture.<sup>35</sup> Answering this question in the negative, the court condemned the restraints.<sup>36</sup>

The defendants reiterated their invocation of the ancillary restraints doctrine in the Supreme Court in *NCAA*.<sup>37</sup> However, the Court did not mention the *NPR* standard or the ancillary concept. Thus, the Court did not ask whether the restraints might produce redeeming virtues or enhance the efficiency of a valid venture. Instead, the Court immunized the restraints before it from *per se* condemnation because the NCAA had adopted *other* restraints not before the Court that *would* survive *per se* condemnation.<sup>38</sup> Such other restraints included horizontal agreements ensuring that players were *bona fide* students and were not semi-professional athletes that vaguely associated with the university.<sup>39</sup> These latter rules, the Court said, included bans on paying players.

Lower courts, including the Ninth Circuit in *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* ("*Alston*"),<sup>40</sup> have properly read *NCAA* to exempt restraints imposed by sports leagues from *per se* condemnation, regardless of whether the restraint may produce redeeming virtues.<sup>41</sup> As Professor Hovenkamp has explained, this exemption would "shelter an agreement between member schools fixing the price of admission

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31. 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

32. *Id.* at 1149–50.

33. *Id.*

34. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607–12 (1972).

35. *Bd. of Regents of the Univ. of Okla.*, 707 F.2d at 1153–54.

36. *Id.*

37. Brief for Respondents at 23, *Nat. Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (No. 83-271), 1984 WL 1036477, \*23.

38. *NCAA*, 468 U.S. at 101.

39. *Id.* at 102.

40. 958 F.3d 1239 (9th Cir. 2020).

41. *See, e.g., id.* at 1256; *O'Bannon v. NCAA*, 802 F.3d 1049, 1069–1070 (9th Cir. 2015); *Law v. NCAA*, 134 F.3d 1010, 1017–1020 (10th Cir. 1998).

tickets or of hot dogs purchased in the stands.”<sup>42</sup> Unlike restraints that merit Rule of Reason scrutiny because they survive the *NPR* standard or the ancillary restraints test, restraints enjoying the sports league exemption will necessarily include entire categories of restraints that would ordinarily be unlawful *per se* because they cannot produce redeeming virtues. Thus, courts cannot assume there is some probability that such restraints might produce redeeming virtues. Instead, courts must assume that application of *NPR*'s second prong would condemn some such restraints as unlawful *per se*.

By invoking restraints not before it to justify the sports league exemption, the Court assumed that such restraints would themselves avoid *per se* condemnation. This assumption was surprising, given the Court's recent condemnation of apparently beneficial horizontal restraints in decisions it expressly reaffirmed.<sup>43</sup> While the Court admitted that restrictions on player compensation prevented price competition, it opined that unbridled rivalry for the services of student athletes would transform the NCAA into a semi-professional league, tarnishing the league's brand—*college* football—associated with an academic tradition.<sup>44</sup> The Court analogized such restraints to vertical agreements that simultaneously restricted intra-brand rivalry but enhanced inter-brand competition by overcoming market failure.<sup>45</sup> Lower courts have read this language as retracting the scope of the *per se* rule *vis a vis* horizontal restraints more generally.<sup>46</sup>

#### IV. THE SPORTS LEAGUE EXEMPTION HAS NO BASIS

*NCAA*'s sports league exemption saved numerous restraints, including those before it, from a substantially overinclusive *per se* rule.<sup>47</sup> Many such restraints were likely procompetitive. Perhaps the exemption was a second-best tactic for mitigating the anti-consumer impact of an overly broad *per se* rule. The Supreme Court, however, has undermined this justification by narrowing the scope of the *per se* rule. Moreover, this exemption contradicts basic antitrust principles and has produced other negative consequences, including an additional and stronger exemption, as described below in Part V.

The Court did not explain why antitrust treatment of restraints *not* before it determines the *per se* status of those restraints that are.

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42. See Herbert Hovenkamp, *The NCAA and the Rule of Reason*, 52 *REV. INDUS. ORG.* 323, 324–26 (2017) (reading *NCAA* in this manner); see also Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, 74 *FORDHAM L. REV.* 1775, 1791–92 (2006).

43. See, e.g., *Topco*, 405 U.S. at 608–12; see also *NCAA*, 468 U.S. at 99 & nn.18–19 (citing *Topco* with approval).

44. *NCAA*, 468 U.S. at 101–02.

45. *Id.* at 103 (“[A] restraint in a limited aspect of a market may actually enhance market-wide competition.”).

46. *Rothery Storage v. Atlas Van Lines*, 792 F.2d 210, 226 (D.C. Cir. 1986); *Polk Bros, Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985).

47. See, e.g., *O'Bannon*, 802 F.3d at 1057.

Horizontal cooperation is necessary to create and maintain numerous other ventures besides sports leagues.<sup>48</sup> However, courts do not immunize restraints imposed by such other ventures from *per se* condemnation simply because the restraints accompany a valid venture. Instead, courts employ the ancillary restraints doctrine to test whether such restraints might produce cognizable benefits that further the venture and thus warrant an additional fact-based assessment.<sup>49</sup> The content and nature of this threshold inquiry assumes that sometimes the answer to this question will be “no.” That is, some restraints that accompany an otherwise valid joint venture cannot produce any cognizable benefits but will instead simply reduce rivalry *simpliciter*.<sup>50</sup> Courts condemn such restraints while allowing the venture to proceed.<sup>51</sup>

Robert Bork, who rehabilitated the ancillary restraints doctrine, endorsed this approach in a path-breaking article.<sup>52</sup> Bork explained that horizontal restraints that accompanied lawful ventures were not ancillary if they were “incapable of adding to the efficiency of the integration which they *seemingly* accompany.”<sup>53</sup> Bork instanced a restrictive covenant that accompanied formation of a “product safety testing laboratory” by horizontal rivals.<sup>54</sup> The formation and operation of the laboratory would constitute lawful concerted action, just like formation and continued operation of the NCAA.<sup>55</sup> Still, Bork concluded that the covenant could not be ancillary and was thus unlawful *per se*.<sup>56</sup> Bork’s analysis confirms that is no reason to treat

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48. See Alan J. Meese, *Requiem for a Lightweight: How NCAA Continues to Distort Antitrust Doctrine*, 56 WAKE FOREST L. REV. (forthcoming Dec. 2021).

49. *Rothery Storage*, 792 F.2d at 224 (“To be ancillary, and hence exempt from the *per se* rule, an agreement eliminating competition must . . . serve[] to make the main transaction more effective in accomplishing its purpose. *Of course, the restraint imposed must be related to the efficiency sought to be achieved.*”) (emphasis added).

50. See, e.g., *In re Brunswick Corp.*, 94 F.T.C. 1174, 1275 (1979) (Pitofsky, Commissioner), *aff’d* 657 F. 2d 971 (8th Cir. 1981); see also *Polygram Holding v. FTC*, 416 F.3d 29 (D.C. Cir. 2004) (holding that a restraint that accompanied an otherwise legitimate venture could produce no cognizable benefits).

51. See, e.g., *Polygram Holding*, 416 F.3d at 38–39.

52. See Bork, *supra* note 21, at 380; see also *Polk Bros.*, 776 F.2d at 189 (“A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. *If it arguably did*, then the court must apply the Rule of Reason . . . .”) (emphasis added).

53. Bork, *supra* note 21, at 383 (emphasis added).

54. *Id.*

55. See *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 197–200 (2010) (treating conduct of a corporation jointly owned by thirty-two NFL teams as concerted action because agreement joined “independent centers of decision making”); *Rothery Storage*, 792 F.2d at 214–15 (analogizing challenged restraints to those challenged in *Topco* and *NCAA* and concluding that all such restraints were concerted action).

56. Bork, *supra* note 21, at 382–84; *id.* at 384 (treating non-ancillary restraints as unlawful *per se*). It should not matter that restraints that



restraints that accompany sports leagues more favorably than those that accompany other ventures when applying the *NPR* standard.

#### V. RETAINING THE SPORTS LEAGUE EXEMPTION DOES POSITIVE HARM

Perhaps the sports league exemption is a case of “no harm, no foul.” Most exempted restraints would merit Rule of Reason scrutiny under more recent applications of the *NPR* standard anyway. Moreover, both *NPR* and Rule of Reason analysis ultimately ask whether challenged restraints produce monopoly or its consequences.<sup>57</sup> *Per se* condemnation reflects a conclusion that Rule of Reason analysis will condemn the restraint.<sup>58</sup> As shown below, however, the sports league exemption still does positive harm, both by weakening the *per se* rule and also by distorting related aspects of antitrust doctrines. In particular, the exemption has contributed to a distortion of the methodology of Rule of Reason analysis that courts apply and not merely those adopted by sports leagues.

##### A. *The Sports League Exemption Deters Legitimate Challenges and Increases False Negatives.*

Full-blown Rule of Reason analysis is not free. Plaintiffs must expend resources to establish a *prima facie* case by proving either: (1) the restraint produces actual detrimental effects or (2) the parties possess the economic power necessary to impose harm.<sup>59</sup> Defendants can contest these assertions, further increasing adjudication costs. Plaintiffs fail to establish such a case 97 percent of the time.<sup>60</sup> Presumably, numerous potential plaintiffs do not attempt such a showing, leaving harmful restraints unchallenged. Knowing this, defendants will, at the margin, adopt some unambiguously harmful restraints they otherwise would not have adopted, knowing, as they will, that the sports league exemption will raise the bar for plaintiffs challenging such restraints.<sup>61</sup> In sum, the sports league exemption both increases the number of false negatives and encourages additional harmful restraints.

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accompany a joint venture “are likely to survive the Rule of Reason” in the context of sports leagues. *See Am. Needle*, 560 U.S. at 203. This is equally true with respect to restraints that accompany other joint ventures.

57. *Professional Engineers*, 435 U.S. at 692–93 (explaining that the *per se* rule and full-blown Rule of Reason scrutiny are “two complimentary categories of Rule of Reason analysis” and that “[i]n either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint”).

58. *See Maricopa Cnty. Med. Soc.*, 457 U.S. at 344.

59. *See Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 827 (6th Cir. 2011) (describing these alternative means of establishing a *prima facie* case).

60. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–29; 837 (2009).

61. This impact will also alter the ratio of harmful to beneficial restraints in this category.

*B. The Sports League Exemption Distorts the Rule of Reason Methodology That Courts Employ.*

Rule of Reason methodology should turn upon the nature of possible redeeming virtues that save restraints from *per se* condemnation. Application of the *NPR* standard and ancillary restraints doctrine, both of which *NCAA* ignored, identifies the relevant virtues, if any, that restraints might produce. If such virtues are technological, the three-part Rule of Reason test applied in *Alston* and informed by *NCAA* is generally appropriate.<sup>62</sup> Proof of higher prices (or in *Alston*, reduced compensation) should establish a *prima facie* case, casting upon the defendants a burden to adduce evidence of such efficiencies.<sup>63</sup> If defendants satisfy this burden, plaintiffs can prove a less restrictive alternative or show that the restraint's harms exceed its benefits.<sup>64</sup> This framework assumes whatever benefits defendants prove coexist with the harms that plaintiffs purportedly demonstrated to establish a *prima facie* case.<sup>65</sup>

However, some restraints survive *per se* condemnation because they may produce *non*-technological efficiencies by overcoming

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62. *Alston*, 958 F.3d at 1256 (invoking and applying Rule of Reason's three-part framework).

63. *NCAA* opined that the defendants there bore a "heavy burden of establishing an affirmative defense[.]" *Nat. Collegiate Athletic Ass'n v. Bd. Of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984). Such an approach makes sense with respect to explicit price and/or output restraints that apparently cannot produce redeeming virtues. However, lower courts, including *Alston*, have generalized this language, applying this standard to restraints that would survive *per se* condemnation under the *NPR* standard because they may produce redeeming virtues. *See Alston*, 958 F.3d at 1257 (describing the *NCAA*'s "heavy burden" of "competitively justify[ing]" its undisputed "deviation from the operations of a free market" under the Rule of Reason) (quoting *NCAA*, 468 U.S. at 113)). There is, however, no warrant for imposing upon defendants more than the traditional burden of production when a restraint properly survives *per se* condemnation under the *NPR* standard. *See Meese, supra* note 16, at 108 n.156 (collecting authorities characterizing defendants' burden as a burden of production). Thus, exemption of the naked restraints before it from *per se* condemnation resulted in a misleading and non-generalizable pronouncement regarding this aspect of Rule of Reason analysis.

64. The exact nature of this balancing, of course, will depend on the welfare standard that the court selects. *See generally* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012).

65. *Cf.* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-offs*, 58 AMER. ECON. REV. 18 (1968). *See also Law*, 134 F.3d at 1017 (holding that, after plaintiffs make out a *prima facie* case, "[t]he inquiry then shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts" (emphasis added)).

market failure.<sup>66</sup> Here, a price-based standard makes no sense. If restraints overcome market failure, pre-restraint prices reflect a poorly functioning market that the restraint corrects. Such prices are not a useful benchmark for comparison to post-restraint prices. Instead, proof that post-restraint prices exceed the pre-restraint baseline is entirely consistent with a conclusion that the agreement overcomes a market failure and produces redeeming virtues, the prospect of which resulted in Rule of Reason treatment.<sup>67</sup> Antitrust procedure thus precludes allowing plaintiffs to prevail based solely upon such evidence.<sup>68</sup>

Moreover, once a plaintiff does make out a *prima facie* case in whatever way, proof that the restraint produces significant non-technological benefits undermines the rationale for balancing benefits against harms. Such balancing presumes that the restraint produces simultaneous harms and benefits, like a merger to monopoly that generates economies of scale that may offset the transaction's harms.<sup>69</sup> However, a defendant's showing that a restraint overcomes a market failure undermines the assumption that benefits coexist with harms.<sup>70</sup> Instead, the evidence is at least equally consistent with the conclusion that the restraint only produces benefits—benefits that manifest themselves as prices higher than those produced by the pre-restraint, poorly functioning market.<sup>71</sup> Similar logic undermines the search for “less restrictive” alternatives, because there is no reason to assume that the challenged restraint is “restrictive” in the first place.

The sports league exemption deprives courts of the information necessary to ascertain what Rule of Reason methodology makes sense. *Alston* may be such a case.

*C. The Exemption Encouraged Adoption of an Ill-Considered “Quick Look” Methodology of Rule of Reason Analysis.*

The restraint before the Court in *NCAA* expressly set price and output. Without identifying any redeeming virtues, the Court

66. Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMP. L. & ECON. 21 (2005).

67. See, e.g., *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878, 882–85, 889–90, 893, 896–98 (2007) (holding that higher retail prices resulting from additional promotion are not antitrust harm).

68. Meese, *supra* note 16, at 100–01.

69. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AMER. ECON. REV. 18 (1968).

70. See Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 278, 278 nn.216–17 (1986) (explaining that courts often treat proof of efficiencies as reason to scrutinize more carefully claims that the restraint produced harms in the first place).

71. See Meese, *supra* note 16, at 163–65.

nonetheless assessed the restraints under the Rule of Reason, because they accompanied a sports league and were thus exempt from the *NPR* standard.<sup>72</sup> The Court began by invoking the District Court's findings that the restraint had increased prices compared to a (hypothetical) non-restraint baseline.<sup>73</sup> Absent possible redeeming virtues, this price-based method of making out a *prima facie* case made perfect sense. Nonetheless, the NCAA contended that the plaintiffs' case should fail absent proof that the defendants possessed sufficient shares of a properly defined market.<sup>74</sup>

The Court could have invoked its ultimate conclusion that the defendants did, in fact, possess a large share of a properly defined market.<sup>75</sup> Instead, the Court issued a broader pronouncement, applicable well-beyond the case before it, regardless of a defendant's market position. In a passage that quoted *National Society of Professional Engineers v. United States*,<sup>76</sup> the Court announced:

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'<sup>77</sup>

The Court also quoted Professor Areeda's assertion that some restraints were so obviously harmful that courts could condemn them "in the twinkling of an eye."<sup>78</sup>

The Court's quotation of *Professional Engineers* suggests that it equated "naked" restraints with those that could not produce redeeming virtues.<sup>79</sup> Combined with the "twinkling of an eye" metaphor, this language inspired the so-called "Quick Look" methodology of Rule of Reason analysis.<sup>80</sup> Under this approach, plaintiffs may avoid establishing actual detrimental effects or market power if they convince the tribunal that, while not unlawful *per se*,

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72. See *NCAA*, 468 U.S. at 107–08.

73. See *id.* at 104–108. While the Court also claimed that the restraints had reduced output, it made no effort to adjust that reduction for the quality of the remaining games. *Id.*

74. Brief for Petitioner at 33–34, *NCAA*, 468 U.S. 85 (1984) (No. 83-271).

75. See *NCAA*, 468 U.S. at 111–113; see also *id.* at 115, 115 n.55 (resting the rejection of one of the defendants' justifications on finding that the defendants possessed market power).

76. 435 U.S. 679 (1978).

77. *NCAA*, 468 U.S. at 109 (quoting *Professional Engineers*, 435 U.S. at 692).

78. See *id.* at 109 n.39 (quoting Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37–38 (Federal Judicial Center, June 1981) (parenthetical omitted), <https://www.fjc.gov/sites/default/files/2012/Antitrust.pdf> (last visited June 9, 2021)).

79. See Meese, *supra* note 42, at 1780, 1789–91, 1800 (reading *Professional Engineers* in this manner).

80. *Id.* at 1801–02.

the restraint is nonetheless “inherently suspect.”<sup>81</sup> Initially, some proponents touted the Quick Look as a pro-defendant “safety valve” that tempered an overbroad *per se* rule.<sup>82</sup>

As a matter of decision theory, this approach makes perfect sense in a case like *NCAA*. If a particular class of restraint is usually anticompetitive and rarely, if ever, produces benefits, the chance of false positives is extremely low. Reducing plaintiffs’ burden of establishing a *prima facie* case would (properly) encourage such challenges and minimize the resources expended on litigation.

However, advocates and courts have not confined the Quick Look to restraints deemed “naked” because they lack redeeming virtues.<sup>83</sup> Indeed, the *Alston* plaintiffs began their argument before the Supreme Court by attempting to expand the definition of “naked,” contending that the challenged restraints were “naked,” despite the finding below that they produced significant benefits.<sup>84</sup> Moreover, scholars and courts have held out the possibility that a restraint may be inherently suspect and thus subject to the Quick Look, regardless of whether it is “naked” as defined by *NCAA*.<sup>85</sup> Once courts and agencies created the Quick Look methodology, plaintiffs naturally pressed courts to declare numerous restraints “inherently suspect,” hoping to eliminate the burden of establishing antitrust harm.<sup>86</sup> The result has been an increase in expensive and distracting disputes about whether various restraints are “inherently suspect”—disputes that defendants almost always win.<sup>87</sup> The cost of such disputes produces no offsetting social benefits, as failure to establish that a restraint is inherently suspect relegates plaintiffs to the standard requirement to prove anticompetitive harm anyway.

To be sure, a more expansive definition of “inherently suspect” could seemingly lighten plaintiffs’ burdens in a larger number of cases. However, proponents of the Quick Look have not offered a

81. See, e.g., *Polygram Holding v. FTC*, 416 F.3d 29, 32–33, 36–37 (D.C. Cir. 2005) (detailing and applying this approach).

82. See Meese, *supra* note 21, at 873.

83. See, e.g., *Polygram*, 416 F.3d at 35 (detailing this approach).

84. Transcript of Oral Argument at 42, *NCAA v. Alston*, No. 20-512 (Mar. 31, 2021).

85. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 777–81 (2012) (endorsing application of the Quick Look to restraints regardless of how they avoid *per se* condemnation); Meese, *supra* note 21, at 866 n.165 (collecting numerous decisions asking whether numerous restraints, including exclusive dealing contracts, are “inherently suspect”).

86. See Meese, *supra* note 21, at 864–65 (describing plaintiffs’ strong incentives to convince tribunals that challenged restraints are “inherently suspect” so as to avoid almost certain failure to establish a *prima facie* case under standard Rule of Reason analysis); *id.* at 863 (explaining that the first step in Rule of Reason analysis is to ask whether a restraint is inherently suspect).

87. *Id.* at 866 n.165 (collecting numerous decisions evaluating and (nearly) always rejecting plaintiff’s claim that restraint was “inherently suspect”).

tractable methodology for distinguishing “inherently suspect” restraints from those properly assessed under full-blown Rule of Reason analysis.<sup>88</sup> Absent such a methodology, the pro-plaintiff Quick Look is probably best reserved for those restraints that do not merit Rule of Reason scrutiny in the first place—a set that would be empty if courts properly and uniformly applied the *NPR* standard and ancillary restraints test.

In any event, the Quick Look has always rested on shaky jurisprudential ground.<sup>89</sup> *NCAA*’s suggestion that the nakedness of a restraint itself establishes a *prima facie* case was dicta, given the district court’s finding that the restraint produced actual detrimental effects.<sup>90</sup> Moreover, Professor Areeda’s “twinkling of an eye” metaphor described a hypothetical case in which courts determined at the summary judgment stage that defendants possessed a dominant market position and thus market power.<sup>91</sup> This conclusion did not support any suggestion that the mere existence of a restraint, no matter how apparently harmful, could itself establish a *prima facie* case.<sup>92</sup> Finally, while the Supreme Court has endorsed the Quick Look in concept,<sup>93</sup> it has never condemned a restraint under the Rule of Reason without first finding that the agreement produced concrete anticompetitive harm.<sup>94</sup>

Moreover, *NCAA*’s assertion that “naked” restraints should themselves establish a *prima facie* case regardless of market share or anticompetitive effects was dicta, given the Court’s holding that the plaintiffs had in fact established market power and actual detrimental effects. Finally, the actual agreement before the Court, which could not produce redeeming virtues, bore little meaningful resemblance to restraints such as those in *Alston* that *could* produce such virtues. It would thus be hazardous, to say the least, to generalize these dicta to apply to potentially beneficial restraints.<sup>95</sup> Indeed, the only restraints that would seem analogous to those before the *NCAA* Court are those that should be condemned as unlawful *per se* in the first place. *NCAA*’s unjustified exemption of the restraints

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88. See *id.* at 876–80.

89. See Alan J. Meese, *The Rule of Reason’s Prima Facie Case: Did Harvard Get it Right?*, 168 U. PENN. L. REV. ONLINE (2021) (forthcoming).

90. See Meese, *supra* note 21, at 856 & n.104 (explaining why this language was dicta).

91. See Areeda, *supra* note 78, at 37–38.

92. See *supra* note 89 and accompanying text.

93. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999).

94. See Meese, *supra* note 21, at 856 & n.104 (explaining that Supreme Court decisions endorsing or implying a Quick Look approach are dicta); see also, e.g., *Cal. Dental Ass’n*, 526 U.S. at 770–81 (rejecting application of the Quick Look to the case before it).

95. See generally Neal Devins & Alan J. Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. STATE L. REV. 323 (2005) (contending that precedents adopted in cases with idiosyncratic facts may not reflect appropriate consideration of factors that should inform the resulting rule).

before it from *per se* condemnation thus inspired a methodology of Rule of Reason analysis that was in fact only appropriate for restraints that were not properly subject to Rule of Reason analysis in the first place.

*D. NCAA Inspired a New and More Powerful Exemption.*

NCAA spawned another, more powerful exemption, one squarely before the Court in *Alston*. The Quick Look’s logic cuts both ways. If some restraints that survive *per se* condemnation are almost always harmful on balance, presumably some are nearly always beneficial. An antitrust regime could reflect this fact, making it especially difficult for plaintiffs to establish a *prima facie* case and/or easier for defendants to rebut such a case. Over a decade ago, the Seventh Circuit embraced such logic, holding that a NCAA Bylaw is “presumed procompetitive” when it is “clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education.’”<sup>96</sup> The court built upon dicta in *American Needle, Inc v. National Football League*,<sup>97</sup> which itself invoked NCAA’s mistranslation of Professor Areeda’s “twinkling of an eye” metaphor.<sup>98</sup>

Defendants have invoked this line of precedent, albeit without the term “Quick Look,” preferring instead the phrase “twinkling of an eye.”<sup>99</sup> Indeed, this pro-defendant approach is really a rule of *per se* legality and thus an outright exemption from antitrust scrutiny for covered restraints because the “presumption” in favor of such restraints is irrebuttable.<sup>100</sup> It is likely no coincidence that this pro-defendant irrebuttable presumption arose in the context of sports leagues in general and the question of student athlete eligibility in particular. After all, the very existence of NCAA’s sports league exemption broadcasts that “sports are different” and are therefore susceptible to more relaxed antitrust scrutiny than more mundane commercial endeavors. Thus, a pro-plaintiff methodology born from

96. See *Deppe v. NCAA*, 893 F.3d 498, 501, 503 (7th Cir. 2018); *Agnew v. NCAA*, 683 F.3d 328, 342–43 (7th Cir. 2012). But see *O’Bannon v. NCAA*, 802 F.3d 1049, 1063–64 (9th Cir. 2015) (rejecting this approach and assessing restrictions under the Rule of Reason).

97. 560 U.S. 183 (2010).

98. *Id.* at 203; see also *Agnew*, 683 F.3d at 341 (quoting *Am. Needle*, 560 U.S. at 203).

99. Petition for Writ of Certiorari, at 19–20, 24–25, *Nat. Collegiate Athletic Ass’n v. Alston*, No. 20-512 (Oct. 2020) (invoking *Agnew* and *Deppe*); see also Transcript, *supra* note 84, at 7 (NCAA disclaiming reliance on the term Quick Look). Of course, the NCAA is seeking more than what the Quick Look provides plaintiffs.

100. See *Deppe*, 893 F.3d at 501–502 (holding that courts should dismiss challenges to such restraints on the pleadings without opportunity for rebuttal); *Agnew*, 683 F. 3d at 343, n.6 (same); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion) (explaining that an irrebuttable presumption is really a substantive rule).

an unjustified sports league exemption has morphed into a second and more ironclad exemption. This Essay contends that the Court should reject this exemption as contrary to antitrust doctrine and policy.<sup>101</sup>

#### VI. WHAT THE COURT CAN DO ABOUT IT IN *ALSTON*

What, then, can the Supreme Court do to correct for this untethered and harmful sports league exemption and the subsequent doctrinal consequences described above? Most aggressively, the Court could order re-argument and add three questions for consideration: (1) are all restraints imposed by sports leagues exempt from *per se* condemnation under the *NPR* standard?; (2) do restraints such as those reviewed in *Alston* possibly produce redeeming virtues?; and (3) if so, what are those virtues? After such re-argument, the Court could overrule that portion of *NCAA* creating the sports league exemption, while reiterating the condemnation of express limitations on price and output of televised games.<sup>102</sup> The Court would then have to face the question that has eluded a fully considered decision since 1984, namely, whether horizontal restrictions on player compensation can produce redeeming virtues and thus survive *per se* condemnation under the *NPR* standard.

The Court could also take a different approach altogether, confining itself to the present record and arguments. The Court could still begin by noting that it is only applying the exemption *arguendo* because neither party challenged it. It could also note that it generated the exemption when courts misapplied the *NPR* standard and banned *bona fide* ancillary restraints, such that the exemption saved many procompetitive restraints from wrongful condemnation.<sup>103</sup> The Court could then note that, given today's more accurate application of the *NPR* standard, the exemption no longer performs this function.<sup>104</sup> Such a statement could encourage lower courts to abandon the exemption, teeing up Supreme Court review.

Application of the exemption would ordinarily preclude consideration of whether the challenged restraints might produce redeeming virtues until *after* the plaintiff establishes a *prima facie* case. But the *Alston* Court could answer this question before a full-blown analysis. The defendants' bid to exempt their restraints from even Rule of Reason scrutiny necessarily assumes that such restraints usually, or even always, produce redeeming virtues by protecting and enhancing the amateur nature of NCAA sports from

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101. See *infra* notes 122–28 and accompanying text.

102. Transcript, *supra* note 84, at 33.

103. Cf. Meese, *supra* note 21, at 873 (describing assertions by proponents of the “Quick Look” Rule of Reason analysis that this approach could soften an over-inclusive *per se* rule).

104. See *id.* at 873–74 (explaining how more selective application of the *per se* rule eliminated any putative need for “safety valve” function of the Quick Look).



unbridled rivalry for players.<sup>105</sup> While not a sufficient condition for such an exemption, this assumption is certainly necessary.<sup>106</sup>

Recent commentary and some questions at oral argument, however, seem to take issue with this threshold assumption by, for instance, analogizing limits on player compensation to putative limits on coaches' salaries.<sup>107</sup> The latter, of course, would be unlawful *per se* absent the sports league exemption.<sup>108</sup> Indeed, the plaintiff began its oral argument by characterizing the restraints before the Court as “naked horizontal monopsony restraints that would be *per se* unlawful in any context.”<sup>109</sup>

This Essay submits that the *NCAA* dicta correctly signaled that agreements restricting player compensation could create redeeming virtues, notwithstanding Nick Saban's unregulated salary.<sup>110</sup> To be sure, the restraints restrict atomistic rivalry for players. But as *Standard Oil* itself recognized, some agreements that restrict atomistic rivalry have the “legitimate purpose of reasonably forwarding personal interest and developing trade” and are thus not unreasonable.<sup>111</sup> The Court in *Sylvania* concurred, explaining that some restrictions on “a purely competitive situation” can overcome free riding, correct a market failure, and *enhance* inter-brand competition.<sup>112</sup> There is no reason to suspend this logic because the restraints govern buying rather than selling.<sup>113</sup> *NCAA's* dicta, which addressed the validity of compensation limits, expressly invoked *Sylvania*, suggesting that such restraints could “enhance market-wide competition.”<sup>114</sup>

*Sylvania* and *NCAA* assumed that product differentiation is beneficial. Moreover, the “more accurate economic conceptions” that courts must apply when assessing restraints in “the light of reason” bolster *NCAA's* assertion that unbridled rivalry will produce insufficient differentiation.<sup>115</sup> Imagine that schools could include non-students on teams, perhaps providing compensation equal to the

105. See Brief for Petitioner at 9–11, 18–21, Nat. Collegiate Athletic Ass'n v. Alston, No. 20-512 (Mar. 31, 2021).

106. Of course, under a straightforward application of the *NPR* standard or ancillary restraints doctrine, courts would have asked and answered this question earlier in the process of assessing these restraints.

107. See Transcript, *supra* note 84, at 10 (Thomas, J., asking question).

108. See *generally* Law v. Nat'l Collegiate Athletics Ass'n, 134 F. 3d 1010 (10th Cir. 1998).

109. Transcript, *supra* note 84, at 42.

110. See *generally* Nat'l Collegiate Athletics Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

111. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911).

112. *Cont'l T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977).

113. *Id.* at 54.

114. *NCAA*, 468 U.S. at 103.

115. *Standard Oil*, 221 U.S. at 55, 63.

cost of attendance.<sup>116</sup> Each team would fully internalize the private benefits of including non-students. These benefits could include, for example, improved winning percentages. But no school would internalize the full impact of such participation upon the nature of the product. If a few schools chose this route, others would predictably follow suit, producing an equilibrium where few, if any, schools fielded teams exclusively populated by students. Only a horizontal agreement preventing rostering non-students would reliably prevent a race to the bottom that would transform college football into a football team owned by a college but full of non-students.

The agreement just described is as “pernicious” under *NPR* as one restricting player compensation.<sup>117</sup> Both restrict rivalry for inputs. But plaintiffs have properly declined to challenge such restrictions.<sup>118</sup> This concession reflects recognition that unbridled rivalry over the composition of rosters would produce a market failure manifesting itself in negative differentiation of the NCAA’s product, reduced inter-brand competition, and decreased consumer welfare.<sup>119</sup> Translated into the *NPR* standard and ancillary restraints test, such restrictions can produce redeeming virtues and enhance the efficiency of an otherwise valid venture.

Defendants’ bid for a stronger exemption regarding compensation restrictions rests upon a similar claim. Unbridled compensation rivalry, they say, will result in an additional market failure, also undermining the quality of the NCAA’s product and reducing demand.<sup>120</sup> Indeed, *plaintiffs* have asserted that the challenged restraints reduce student-athlete compensation compared to what unfettered rivalry will produce.<sup>121</sup> Such limits on compensation rivalry reinforce the requirement that participants be students. If schools could pay whatever the market would bear, the supply of non-student labor would increase significantly, in both

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116. The analysis propounded by this paragraph does not depend upon the provision of such compensation.

117. See *supra* notes 13–18 and accompanying text.

118. Transcript, *supra* note 84, at 50–51 (“[O]f course, we’re not challenging any restrictions or rules regarding that they be students.”).

119. *Id.* at 50 (articulating the plaintiffs’ contention that the main distinction between professional and collegiate athletics is that the latter is exclusively comprised of students).

120. See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.* (“*Alston*”), 958 F.3d 1239, 1248–50, 1257–58, 1260, 1268 (9th Cir. 2020).

121. See *id.* at 1256–57 (describing the district court’s finding that elite student-athletes are “forced to accept . . . whatever compensation is offered to them”). If this is truly the case, then one might ask why the NCAA does not replicate the approach taken by the Ivy League, that is, ban members from providing any athletic financial aid. See *Prospective Athlete Information*, THE IVY LEAGUE, <https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx> (last visited June 9, 2021).

numbers and quality, thus increasing schools' temptation to include non-student participants and undermining the "student-only" policy.

The defendants, district court, and Ninth Circuit agree that the propensity of a restraint to *prevent* unbridled compensation rivalry helps differentiate collegiate from professional sports, improving consumer welfare.<sup>122</sup> They only disagree as to the magnitude of benefits and as to whether the restrictions are broader than necessary.<sup>123</sup> Thus, both lower courts agreed that restrictions on compensation unrelated to education—that is, restrictions that prevent the payment of an outright salary—are procompetitive, even though such restrictions extinguish the very rivalry that would produce the largest increase in student-athlete compensation.<sup>124</sup> Indeed, one implication of *Alston's* result is that a less restrictive means of achieving the objective would entail voluntary integration, independent of any exercise of market power.<sup>125</sup> No one has articulated a similar account of how limiting coaching staffs to students, for instance, or limiting coaches' salaries to the cost of attendance, would distinguish the quality of the product that schools offer to paying fans in a manner that would appeal to consumers.<sup>126</sup>

However, a conclusion that compensation restraints may produce redeeming virtues is simply a necessary condition for application of the player eligibility exemption. Proponents must also explain why this stronger exemption is superior to Rule of Reason scrutiny. Hopefully, the Court will reject this proposed new exemption, at least for now. As explained in Subpart V.C of this Essay, the basis for the

122. *See, e.g., Alston*, 958 F.3d at 1246–47, 1256–57, 1260.

123. *See id.* at 1254, 1257 (“The NCAA does, however, quarrel with the district court’s analysis at the Rule of Reason’s second step[.]”).

124. *See id.* at 1254–55, 1258 (“Not paying student-athletes ‘unlimited payments unrelated to education, akin to salaries seen in professional sports leagues’ is what makes them ‘amateurs.’” (quoting *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig. (“Alston”)*, 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019))).

125. The Ivy League, which provides no athletic scholarships, provides an example of such horizontal voluntary integration that would be difficult to attribute to market power. Indeed, the Ninth Circuit in *Alston* apparently assumed that individual conferences could, without market power, impose restraints identical to those the court invalidated. *See Alston*, 958 F.3d at 1256–57; *see also* *Rothery Storage v. Atlas Van Lines*, 792 F.2d 210, 221 (D.C. Cir. 1986) (stating that absence of market power established that defendants adopted challenged practice to “make the conduct of their business more effective”); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 22 & n.39 (1979) (highlighting the fact that firms without market power had adopted a practice similar to challenged restraint, thereby suggesting that the practice might be reasonable).

126. *Cf. Law v. Nat’l Collegiate Athletic Ass’n*, 134 F. 3d 1010, 1021–24 (10th Cir. 1998) (describing and rejecting different purported redeeming virtues that supposedly justified limits on the salaries of so-called “restricted earnings coaches”).

original Quick Look, on which *American Needle's* dicta tried to build, was questionable at best.<sup>127</sup>

Therefore, the pro-plaintiff Quick Look has very little to recommend it and is surely no model for further doctrinal evolution that completely shields some concerted action from Sherman Act scrutiny. NCAA's apparent endorsement of "a great majority of such restrictions" was dicta and rested in part upon a concession by plaintiffs—the University of Georgia and the University of Oklahoma—with strong economic interests to preserve such restrictions.<sup>128</sup> Even on their own terms, these dicta conceded that *some* such restrictions did not enhance competition, thereby implying that courts should assess such restraints under the Rule of Reason to separate the wheat from the chaff.

Proponents of narrowing the scope of *per se* rules in favor of full-blown Rule of Reason analysis in other contexts have persuasively explained that such fact-intensive scrutiny can generate information about the actual impact of restraints previously condemned, thereby informing future assessment regarding whether something other than full-blown analysis is appropriate.<sup>129</sup> Such scrutiny can also help parties, courts, and scholars hone their theoretical conceptions regarding how to think about the impact of such restraints and what questions a tribunal should ask when examining them. By analogy, the exemption sought by the defendants would prevent the generation of information about the impact of exempted agreements that decisions such as *O'Bannon* and *Alston* have themselves produced, information that scholars and practitioners alike can employ to assess their true economic effect. Perhaps such assessments would confirm defendants' assumption regarding the uniformly procompetitive nature of such agreements, but perhaps not.

Of course, at least in the short run, a full-blown Rule of Reason assessment will consume more resources than the defendants' new exemption. But this would be true of any exemption from ordinary full-blown analysis. Moreover, this putative benefit is partly illusory. Once parties understand that inclusion in a particular category will obviate Rule of Reason scrutiny, defendants will predictably invest resources attempting to convince courts that restraints in fact fall into this category, while plaintiffs will invest resources to prove the opposite.<sup>130</sup> These additional litigation-related investments will

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127. See *supra* Subpart V.D.

128. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103 (1984) ("Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions.").

129. See, e.g., Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L. J. 461, 488–89 & nn.113–14 (2000); see also Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) (suggesting that courts can ultimately dispense with full-blown Rule of Reason assessment "if rule-of-reason analyses in case after case reach identical conclusions").

130. See Meese, *supra* note 21, at 863–66.

partly offset the savings from eliminating full-blown scrutiny. Finally, as noted earlier, the prospect of complete exemption from any antitrust scrutiny will encourage potential defendants to adopt some eligibility related restraints that are anticompetitive on balance, knowing as they will that such restraints will be immune from antitrust scrutiny.<sup>131</sup>

Assuming the Court does reject the defendant's bid for a new exemption, it will finally have to wrestle with the problem that consumed the Ninth Circuit—namely, application of the full-blown Rule of Reason to the challenged restraints. Here, *NCAA* itself strongly bolsters the Ninth Circuit's approach, which found that plaintiffs had established a *prima facie* case by showing that, but for the restraints, NCAA members would have provided greater compensation to student-athletes—at least those playing football and basketball.<sup>132</sup> However, as explained in Part V.B of this Essay, this approach seems to contradict the apparent rationale for rejecting *per se* condemnation of such restraints in the first place.<sup>133</sup> After all, if such restraints do in fact avoid *per se* condemnation, they do so because they may produce non-technological efficiencies by eliminating or attenuating a market failure.<sup>134</sup> Thus, proof that such restraints reduce player compensation below the level that unbridled rivalry would produce is unremarkable given that such restraints would properly survive *per se* condemnation in the first place.<sup>135</sup> That is, a conclusion that such proof establishes a *prima facie* case rests upon an arbitrary choice between two entirely different accounts of the impact of such restraints; one reflecting a harmful exercise of market power and the other reflecting an entirely beneficial example of horizontal voluntary integration, closely analogous to the numerous almost mundane restraints agreed upon by franchisees upon entry into a particular franchise system.<sup>136</sup>

To be sure, the plaintiffs have also convinced the Ninth Circuit that the defendants possess market power—indeed, a monopsony—in a properly defined relevant market, although defendants apparently stipulated this market.<sup>137</sup> Still, even dominant firms enter

131. *See supra* Subpart V.D.

132. *See NCAA*, 468 U.S. at 104–07 (invoking the finding that challenged restraints resulted in higher prices and reduced output compared to a non-restraint baseline to establish *prima facie* case).

133. *See supra* text accompanying notes 62–71.

134. *See supra* notes 66–68 and accompanying text.

135. *See Meese, supra* note 16, at 149–52.

136. *Id.*; *see also* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5, 69 & nn.312–14 (2004) (collecting authorities demonstrating that franchising contracts are horizontal).

137. *See In re. Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. ("Alston")*, 958 F.3d 1239, 1248, 1270 (9th Cir. 2020) (reporting that district court adopted this market definition at "the parties' request"), *cert granted sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 1231 (2020) (mem.).

agreements that overcome market failures and produce benefits.<sup>138</sup> Proof that such a firm has entered a contract does not, without more, logically give rise to a presumption that the agreement produces antitrust harm. This is so even if the restraint produces prices that are higher than those that a non-restraint world would create. Only proof that the challenged restraint reduces output, properly defined, would, as a logical matter, suffice to establish a *prima facie* case.<sup>139</sup> However, plaintiffs apparently made no attempt to define the proper measure of output in this context or link the imposition of the restraints to any reduction in that measure.

The Court could therefore reverse and remand for additional assessment of whether the plaintiffs have established a *prima facie* case. The plaintiffs would thus have an opportunity to define the proper measure of output and prove that the restraint reduced output measured in this manner.

In any event, regardless of how the plaintiffs have established a *prima facie* case, the defendants have in fact satisfied their burden of producing evidence that the challenged restraints produce significant benefits. If the defendants had not discharged this burden, there would have been no need for the plaintiffs to adduce evidence of a less restrictive alternative that supposedly produces identical benefits. Moreover, as explained earlier, proof of such benefits further undermines any presumption that a restraint produces anticompetitive harm, in this case, by establishing that the agreement overcomes a market failure.<sup>140</sup> As a result, there is no rationale for calculating the magnitude of these benefits or comparing such benefits to presumed harms—because there is no longer any reason to presume that such harms exist. Indeed, proof that the restraint in fact overcomes a market failure both negates any presumption of harm and establishes that the restraint produces benefits, thus requiring a conclusion that the practice unambiguously improves welfare.

Proponents of the lower court's decision may respond that courts should nonetheless assess whether there is a less restrictive means of achieving the same benefits as the challenged restraints. Proof that such an alternative exists, they might say, suggests that the defendants have adopted the restraint mainly or just partly to exercise market power. But any such argument begins with the assumption that the restraints are restrictive to begin with. Absent

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138. See Alan J. Meese, *Monopolization, Exclusion, and the Theory of the Firm*, 89 MINN. L. REV. 743, 845 (2005) (explaining that some "exclusionary agreements can overcome market failures" and result in "significant cognizable benefits").

139. See Hovenkamp, *supra* note 42, at 324 ("The plaintiff generally makes out a *prima facie* case by finding an anticompetitive effect, which means either a restraint that tends to reduce output or that excludes a significant firm or firms.").

140. See *supra* Subpart V.B.

evidence that the restraints have reduced output, proof that they in fact overcome a market failure that would have manifested as lower pre-restraint prices undermines any presumption that such restraints are restrictive in the first place.