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The Abuse of Offsets as Procompetitive Justification: Restoring the Proper Role of Efficiencies After *Ohio v. American Express* and *NCAA v. Alston*

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THE ABUSE OF OFFSETS AS PROCOMPETITIVE JUSTIFICATIONS: RESTORING THE PROPER ROLE OF EFFICIENCIES AFTER *OHIO V. AMERICAN EXPRESS* AND *NCAA V. ALSTON*

Ted Tatos and Hal Singer*

ABSTRACT

Under the rule-of-reason framework, litigation involving the NCAA has condoned the practice of crediting purported benefits to one group as an "offset" to antitrust injury suffered by another. Although the Ohio v. American Express *decision addressed countervailing effects on merchants versus cardholders within the same two-sided market (credit cards),* NCAA v. Alston*, consistent with the 1986* NCAA v. Board of Regents *decision, acknowledged procompetitive justifications that occur in an entirely different market (the output market for viewing sporting events) than the market in which harm occurred (the labor market for college athletes). Both cases elevated the welfare of consumers above that of injured workers (*Alston*) or other input providers (*American Express*). In* Alston*, the Supreme Court muted any intent it may have had to cabin its* American Express *decision to two-sided transactional platforms defined by indirect network effects. Further, the blind search for offsets in single-firm monopolization cases such as* American Express *and in wage-fixing cases such as* Alston *evinces a clear incongruity with the prohibition against cross-market offsets in merger evaluation. This Article discusses how a logical error in* NCAA v. Board of Regents *opened the door to justifying harms to workers through even the feeblest claims of consumer benefit. As* American Express *and* Alston *have blurred the lines between offsets that cross-market lines, we explain that the terms "intergroup" and "intragroup" offsets accurately*

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describe benefits and harms that occur to different constituencies versus those that affect the same, respectively. Although the rule-of-reason lens properly concerns itself with the latter, the former falls under the ambit of the legislative branch. As such, we argue for statutory repeal of American Express *and a prohibition on judicial balancing of claimed benefits to any group other than the group that suffered antitrust injury. The search for offsets has resulted in the justification of harms to labor even in the presence of direct evidence of antitrust injury to workers, a clear erosion of per se adjudication of cartel behavior by expanding the definition of ancillary restraints. Consistent with the broader policy of protecting labor from anticompetitive conduct, including the exercise of monopsony power, legislative intervention should prohibit such balancing. In wage-fixing cases involving multiple defendants, the no-offset rule would immediately condemn the restraint and bar courts from considering any claimed efficiencies, regardless of whom they benefit. In single-firm monopsony cases, the no-offset rule would bar courts from considering any offsetting benefits to parties other than the injured group of workers or input providers.*

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INTRODUCTION

If the Supreme Court's decision in *Ohio v. American Express* presaged the hurdles that both private plaintiffs and regulatory agencies would face when bringing antitrust claims in its wake,[1] its ruling in *NCAA v. Alston* offered new hope, or at least a glimmer of it. Antitrust scholars, left simultaneously puzzled and disheartened by the incomprehensible logic of *American Express*, warmly embraced the Court's unanimous condemnation in *Alston* of the National Collegiate Athletic Association's (NCAA) restraint on education-related athlete compensation.[2] Justice Kavanaugh's concurring opinion echoed the sentiment of Judge Milan Smith's concurrence in the Ninth Circuit's earlier decision in *Alston* and signaled that, while antitrust enforcement against entrenched market power may be handicapped, it can still wield a sword when it so chooses.[3]

Although regulatory agencies, scholars, practitioners, and journalists have dissected *American Express*, the *Alston* opinion remains in its infancy, and its precedential effects are still unclear. This decision warrants attention not only regarding what the Court said but also as to where it remained silent. Our Article focuses on the latter and the concomitant implications for interpreting *American Express*, whose repeal via statutory intervention we join other antitrust scholars in supporting. In particular, by cabining its opinion to the narrow confines of the restraint at issue, namely education-related benefits, the Court in *Alston* declined to address the broader cap on athlete labor compensation. Likewise, although Justice Barrett posed the question to Solicitor General Prelogar during oral arguments, the Court ultimately sidestepped the issue of offsetting anticompetitive harms in

1. *See* U.S. Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 52–53 (2d Cir. 2019) (discussing the impact of the Court's decision on the parties' briefing in the case). *See generally* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

2. *See, e.g.*, Michael L. Katz & Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2105–06 (2020); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST, Summer 2021, at 33, 39–41; Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 50–51.

3. *See* NCAA v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring); *see also* Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1266–71 (9th Cir. 2020) (Smith, J., concurring), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

the relevant market with claimed procompetitive justifications that occur elsewhere.[4] Nonetheless, the question's lack of answer has cast a cloud of uncertainty over the interpretation of such offsets. And the fact that the Court would even consider an offset to a party distinct from the one that suffered antitrust injury (before ultimately rejecting it due to lack of empirical rigor) leaves open the door for future defendants to pursue these offsets in defense of anticompetitive conduct.

We do not intend to understate the importance of the *Alston* ruling in both acknowledging the anticompetitive harms wrought by the leverage of monopsony power and in correcting lower courts' misinterpretation of its prior dicta in *NCAA v. Board of Regents* as settled law.[5] Notwithstanding its significant limitations, this decision was long overdue. Even so, a somewhat wounded NCAA cartel still maintains its collusive restraint on athlete compensation and continues to seek out an antitrust exemption in an effort to preserve by statute what market realities continue to expose as indefensible under antitrust law. For the moment, however, the surviving restraint on direct compensation for athlete labor proffers a stark reminder of antitrust's failure to enjoin this conduct even in the face of clear and obvious direct evidence of worker harm, despite Justice Scalia's reference to collusion as "the supreme evil of antitrust" in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*.[6] To wit, the most significant current cracks in the NCAA's hegemony over intercollegiate athletic labor did not result from *Alston*, but rather result from statutory intervention loosening the cartel's grip over athletes'

4. Transcript of Oral Argument at 85, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512).

5. *See* Deppe v. NCAA, 893 F.3d 498, 501–02 (7th Cir. 2018). In *Deppe*, the court relied on dicta in *NCAA v. Board of Regents* to hold that where an NCAA rule or regulation fosters the tradition of amateurism in college sports, the regulation is presumed to be competitive under the Sherman Act. *Id.*; NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

6. Verizon Commc'ns. Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). The *Trinko* Court's commentary reflects the Chicago School's postwar shift from unilateral to collusive conduct concerns under the leadership of Aaron Director and John McGee. *See* Robert Van Horn, *Chicago's Shifting Attitude Toward Concentrations of Business Power (1934–1962)*, 34 SEATTLE U. L. REV. 1527, 1527 (2011). In 1948, Henry Simons, regarded by some as the progenitor of the "Old School" Chicago view, argued that "the great enemy of democracy is monopoly, in all its forms," though his definition encompassed both collusive conduct (e.g., "trade associations and other agencies for price control") and trade unions. HENRY C. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 43 (1948).

abilities to monetize their own name, image, and likeness (NIL)—a result more appropriately attributed to *Alston*'s predecessor, *O'Bannon v. NCAA*.[7]

This Article is organized as follows. Part I begins with an overview of offsets and argues that inter- and intra-market offsets signal a formulaic rather than substantive distinction in the wake of *American Express* and *Alston*.[8] It then focuses on the specious economic justifications for balancing direct harm to one group (athletes) through nebulous justifications of benefits to another group (sports fans), which are amply underscored in the latter.[9] In Part II, we revisit the Supreme Court's *Board of Regents* decision and explain how a logical error therein has permeated throughout its judicial progeny and continues to stave off attempts to correct direct harms to labor under antitrust law.[10] Part III concludes by offering policy prescriptions that would remedy the current use of offsets by courts and defense experts as an economic trump card that permits the most ill-defined and specious defenses to negate even direct and irrefutable evidence of antitrust injury to workers or other input providers.[11] Antitrust law clearly aims to protect workers and other input providers, yet the application of the consumer welfare standard has rendered their interests subservient to those of consumers. Redressing this asymmetric application of antitrust law warrants a narrowly tailored legislative intervention to restore the protections to input providers.

I. Intragroup and Intergroup Offsets and Balancing Under

7. O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
8. *See infra* Part I.
9. *See infra* Part I.
10. *See infra* Part II.
11. *See infra* Part III.

THE RULE OF REASON

This Part begins by explaining the general definition of balancing antitrust harm against procompetitive benefits within antitrust's rule of reason.[12] It then explains why the incongruence of *American Express* and *Alston* has stripped the terms "cross-market balancing" or "market-specificity rule" of substantive meaning by widening such balancing beyond the confines of any relevant antitrust market.[13]

A. The Ambit of Procompetitive Offsets

Discussion of the treatment of offsets under antitrust law and economic justifications (or lack thereof) warrants a clear definition of the concept. Under the rule-of-reason's burden-shifting framework, the crediting of offsets refers to balancing anticompetitive harm against some claimed benefit that fosters competition (the "competitive-process approach") or may address a market failure (the "market-failure approach").[14] The former approach elevates protection of the "competitive process," a commonly-used yet admittedly nebulous term, while the latter seeks to promote efficiency, presumably by increasing output, lowering prices, fostering innovation, or improving product quality.[15] Indeed, the inefficiency that the market-failure approach seeks to correct can manifest itself through steady-state disequilibrium, where the quantity supplied falls short of meeting demand. Thus, the market-failure approach shares some substantive goals with the "checklist" approach adopted by the Tenth Circuit in *Law v. NCAA*.[16]

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12. *See infra* Part I.A.

13. *See infra* Part I.B.

14. Scholars have observed that the rule of reason has permitted defendants to begin "increasingly numerous and creative explanations for their behavior. . . . Examination of the relevant case law reveals multiple competing approaches and seemingly irreconcilable opinions." *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 501 (2019).

15. For an extensive and detailed treatment of efficiencies in antitrust law, see generally Mark Glick & Gabriel A. Lozada, *The Erroneous Foundations of Law and Economics* (INET, Working Paper No. 149, 2021), https://www.ineteconomics.org/uploads/papers/WP_149-Glick-and-Lozada.pdf [https://perma.cc/4S5S-H6RR].

16. *See* Law v. NCAA, 134 F.3d 1010, 1021–24 (10th Cir. 1998).

Balancing offsets that accrue to constituencies in a different market against harm to those in another market altogether have been labeled cross-market balancing or the application of the market-specificity rule.[17] We proffer the terms "intergroup" and "intragroup" offsets as more accurate descriptions of countervailing harms between and within parties, respectively. We refer to procompetitive benefits and anticompetitive restraint affecting the same group as intragroup offsets to distinguish them from intergroup offsets—that is, those where harms and benefits accrue to different constituencies, even though, as in *American Express*, they may be considered part of the same "multi-sided" market.[18]

Certainly, balancing the anticompetitive effects of restraints on trade with those deemed to enhance competition has a long history and reflects the acknowledgment that antitrust laws only condemn "unreasonable" restraints. Conceptual support for balancing claimed procompetitive effects against a restraint's harms to competition as the "true test of legality" harkens back to the Supreme Court's opinion in

17. Daniel A. Crane, *Balancing Effects Across Markets*, 80 ANTITRUST L.J. 397, 397 (2015); Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?*, 43 J. CORP. L. 119, 119 (2017).

18. Other scholars have prescribed a focus on harm to competition that "lowers the welfare of the merging parties' trading partners." C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078, 2100 (2018). That focus is on the trading partners rather than solely on the downstream purchasers and sellers:

> The symmetric treatment of monopoly and monopsony in antitrust law protects the competitive process and the welfare of the merging firms' trading partners, whether purchasers or sellers. Reduced competition between buyers may well harm downstream purchasers, even where that harm is infeasible to prove, but that reduced competition is unlawful even where *in fact* there is no such harm.
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> . . . .
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> . . . Whatever the label applied, an approach focused solely on the welfare of downstream purchasers or final consumers is inconsistent with the case law.

Id. at 2080 (footnotes omitted); *see also* Marius Schwartz, Professor, Georgetown Univ., Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?, Comments at the DOJ/FTC Workshop on Merger Enforcement 1 (Feb. 17, 2004) (transcript available with the Georgia State Law Review) ("[T]he term 'consumers' is, in my view, a metaphor for 'trading partners'—be they buyers of the merging firms' products or sellers of inputs to them. A merger that increases market power and enables the merged firm to impose worse terms on its trading partners is equally objectionable if the trading partners in question are suppliers to, or buyers from, that firm.").

Board of Trade of City of Chicago v. United States.[19] Delivering the Court's opinion, Justice Brandeis explained:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.[20]

The Court described nine ways in which the restraint at issue "helped to improve market conditions"; each of these reflected the Court's limitation of procompetitive effects to the same market in which the restraint occurred.[21]

Leaning on this precedent, *United States v. Topco Associates* illuminated the rule-of-reason analysis and discarded the logic of attempting to balance cross-market economic harms.[22] Indeed, Justice Marshall's opinion exhibited exemplary foresight in preemptively foreclosing precisely the type of "consumer demand" argument that the NCAA has offered in defense of its anticompetitive restraint in the labor market for college athletes:

> Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

19. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).
20. *Id.*
21. *Id.* at 240–41.
22. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). The per se rule condemns anticompetitive conduct by virtue of its existence, without further inquiry into the existence of market power. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

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> . . . [T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it 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.[23]

Notably, the *Topco* Court cited precedent in *United States v. Philadelphia National Bank*, and in doing so, the Court underscored the nexus between antitrust aims in merger and conduct cases.[24] The current divergent treatment of offsets in antitrust law in merger and monopolization cases exaggerates the distinction between these two sources of injury to competition. With some recent exceptions, such as the T-Mobile–Sprint merger,[25] treatment in merger cases generally rejects offsetting harms in the relevant market with some exogenously derived justifications.[26]

Nonetheless, this prohibition has not dissuaded defense experts from arrogating to themselves the determination of antitrust's ambit and attempting to use merger litigation as a petri dish to concoct new justifications for anticompetitive conduct, regardless of their clear incongruity with either judicial precedent or welfare economics. The

23. *Topco Assocs., Inc.*, 405 U.S. at 609, 610.

24. *Id.* at 610; United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) (noting a bank merger is not appropriate even when it would bring business and stimulate economy).

25. Here the U.S. Department of Justice disavowed their obligation to enforce the antitrust laws and sided with the merging parties, embracing the claimed efficiency of faster 5G deployment in rural areas, despite the harms to consumers of prepaid services in urban areas. Statement of Interest of the United States of America at 2, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 19-cv-5434), 2019 WL 8403069 ("Specifically, T-Mobile has committed to providing 5G coverage to 85% of the rural population within three years, and 90% of the rural population within six years.").

26. *See Phila. Nat'l Bank*, 374 U.S. at 371 ("[A] merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.").

consumer demand offset used to justify the NCAA cartel's restraint reveals the same tortured logic as the one attributed to the merging parties' expert in a failed wireless merger—balancing the harm to consumers from higher prices for telephone services against benefits to shareholders from an increase in the price of the company's stock[27] (a logic that *Topco* expressly rejected). Certainly, this argument generates obvious inequality-exacerbating effects, and it requires extraordinary logical gymnastics to even attempt to reconcile it with the intent of antitrust policy. As we explain, the consumer demand offset that currently functions as the NCAA's sole foundational support under antitrust law rests on even less stable sand, although the permissive legal environment flowing from the *Board of Regents* dicta has permitted it to survive consecutive losses in *O'Bannon* and *Alston*.[28]

Although economic logic militates against the use of consumer demand offsets in antitrust enforcement generally, these cases reveal that balancing the harm to one party against a claimed benefit to another has found somewhat more fertile ground in defending Section 1 claims under the Sherman Antitrust Act.[29] The disparate treatment of this justification in conduct versus merger cases remains despite receiving little support. As even Chicago School luminary, Ward Bowman, acknowledged well over half a century ago:

> The merger case is not essentially different from the cartel

27. Jesse Eisinger & Justin Elliott, *These Professors Make More Than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers [https://perma.cc/BRW5-9XVB]. One economist consulting on antitrust litigation wanted to test a provocative new offset theory at trial:

> [Dennis] Carlton conceded that AT&T and T-Mobile would have found it hard to win at trial, according to an attendee. But he wished it had gone to court. He was eager to try out a new and provocative argument for mergers: That even though prices would have risen for customers, the companies would have achieved large cost savings. The gain for AT&T shareholders, he contended, would have justified the merger, even if cell phone customers lost out.

Id.

28. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984); O'Bannon v. NCAA, 802 F.3d 1049, 1063–64 (9th Cir. 2015); NCAA v. Alston, 141 S. Ct. 2141, 2158(2021) (Kavanaugh, J., concurring).

29. *See O'Bannon*, 802 F.3d at 1064–66; *see also Alston*, 141 S. Ct. at 2159–60.

> case which is so generally disparaged. In fact, it is likely to be worse. Mergers allow less freedom for independent action than do cartels, are less limited in the amount of monopoly power they can exercise, and represent much more permanent forms of organization.[30]

Judge Learned Hand's seminal opinion in *United States v. Aluminum Co. of America* likewise explained the economically substantive parallels between unilateral and collusive exercise of market power.[31] If merger cases have properly ignored such offsets, permitting conduct cases to do so implies a distinction in regulatory objective where none exists. After all, antitrust claims brought under the Clayton Antitrust Act and Sherman Act have a singular central purpose: to protect competition and to disperse economic power.[32] Why permit one type of anticompetitive conduct to benefit from specious defenses generally

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30. Ward S. Bowman, Jr., *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 640 (1953); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 165 (1978) ("Indeed, once efficiency is ignored, there appears to be no difference between a cartel and a company. They both eliminate competition internally.").

31. United States v. Aluminum Co. of Am., 148 F.2d 416, 427–28 (2d Cir. 1945). Judge Hand argues that the distinction between true monopoly and collusive power is merely formal:

> Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.

Id.

32. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978). The Sherman Act is at the center of the free market economy. *Id.* ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices[] but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."); *see also* Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

condemned under another?[33] One cannot but acknowledge the irony of labeling collusion as the apex of anticompetitive conduct when juxtaposed against the NCAA cartel's continued existence. Indeed, not only does its members' collusive restraint against athlete compensation endure but it does so based on a single defense: the claim that the restraint preserves consumer demand for the product in the output market (sporting events), thus offsetting the direct evidence of harm to athlete labor in the input market. The offset defense in conduct cases also runs afoul of precedent in *Philadelphia National Bank* in which the Court correctly noted that balancing harms and benefits across groups is the proper domain of the legislative branch, not the judiciary.[34]

Although both merger and conduct cases adjudicated under the rule of reason acknowledge netting intragroup effects, NCAA litigation has acknowledged intergroup offsets. Specifically, as we detail herein, *Board of Regents* opened the door to offsetting harms to athlete labor in the input market with claimed demand-enhancing benefits to downstream viewers of the sporting events produced in the output market.[35]

33. We expect some may argue that, rather than prohibiting intergroup offsets in both merger and conduct cases, both should permit them under certain conditions. But, as we explain herein, this is no more persuasive than claiming that two wrongs must make a right.

34. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 346–348 (1963).

35. Hemphill and Rose proffer the term "trading partner" to identify the target of harms and potential offsetting benefits. *See* Hemphill & Rose, *supra* note 18, at 2080. The NCAA operates in both output and input markets; both athlete labor and downstream consumers can be considered "trading partners" in these respective markets. To avoid confusion and to maintain consistency with our prescription of a prohibition on balancing across groups, we employ the terms intergroup and intragroup instead, defined in Part I.A. *See supra* Part I.A. Formal definitions aside, we concur with Hemphill and Rose in our disagreement "with commentators who would confine antitrust enforcement to conduct with demonstrated output market harms." Hemphill & Rose, *supra* note 18, at 2080.

B. Board of Regents*,* Alston*, and Broadening* American Express *Beyond Transactional Platforms*

The overlooked effect of *Board of Regents* lies in its effective broadening of *American Express* beyond transactional platforms by permitting the same arguments to materialize at step two of the rule of reason; *Alston*, by virtue of its limited scope, failed to cauterize this very wound.[36] In *American Express*, the Court defined the relevant market in step one of the rule of reason as "two-sided," encompassing two groups (merchants and consumers) and permitted benefits to the latter to offset harms to merchants flowing from American Express's anti-steering provision.[37] Of course, to the extent the restraint prevented merchants from using *discounts* from standard prices to steer cardholders to lower-cost payment platforms, the anti-steering provisions also harmed cardholders by causing prices in the goods markets to be artificially inflated. The Court mistook rising transactions on American Express's platform as proof of the *lack* of output effects when the proper counterfactual was whether transactions would have been even higher in the absence of the restraints (i.e., the "but-for" condition)—a requirement satisfied to the extent cardholders' demand for items purchased with the card is downward sloping in the items' price.[38]

Balancing occurred by eliding the two groups—merchants and consumers—within the same relevant two-sided market.[39] But *American Express* distinguished transaction platforms, such as credit card networks, which are characterized by indirect network effects from traditional markets.[40] For example, the Court argued that the

36. *See generally* NCAA v. Alston, 141 S. Ct. 2141 (2021).

37. We use the term "group" instead of "market" (e.g., cross-market balancing or market specificity) because it more accurately describes the recipient of both antitrust harm and procompetitive benefit, particularly in light of Supreme Court rulings in *American Express* and the NCAA litigation.

38. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2302 (2018) (Breyer, J., dissenting) ("But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower.").

39. *See id.* at 2276–77.

40. *Id.* at 2280 ("Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call 'indirect network effects.' Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different group participate." (citations omitted)).

relationship between advertisers, newspapers, and readers should be treated as single-sided given the lack of these indirect network effects between advertisers and consumers.[41] But distinction matters little if the judicial review permits balancing harmful and potentially beneficial effects of a restraint across markets in step two. In that case, labeling a platform as "transactional" and evaluating "indirect network effects" only serves to determine whether the offsets should be credited at step one or step two—a more formalistic than substantive distinction. Indeed, to the extent that the Supreme Court intended *American Express* to cabin its multi-sided prescription to transactional platforms, the NCAA litigation trampled over any such boundary, further departing from the Supreme Court's precedent in *Times-Picayune Publishing Co. v. United States*.[42] By permitting consumer demand to countervail labor harms—an offset that transcends markets not merely groups—the NCAA litigation, beginning with *Board of Regents* and culminating with the latest decision in *Alston*, effectively advanced to step two of the rule of reason, using the same market definition arguments properly addressed at step one.[43] Indeed, immediately subsequent to the *American Express* decision, the NCAA asked the court to reconsider its expert's multi-sided platform argument, which the court had previously excluded as a result of the parties stipulating to the same single-sided market definition as in *O'Bannon*.[44] Among his non-exhaustive list of "sides" to the market, however, the NCAA's

41. *Id.* at 2286.

42. *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 610 (1953) (noting that the dominance of one of the two "separate though interdependent markets" was decisive).

43. For a detailed review of the arguments offered therein, see generally Ted Tatos, *Relevant Market Definition and Multi-Sided Platforms After* Ohio v. American Express*: Evidence from Recent NCAA Antitrust Litigation*, 10 HARV. J. SPORTS & ENT. L. 147 (2019).

44. Order on Motions to Exclude Proposed Expert Testimony at 6, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541) ("Any testimony Dr. Elzinga gives regarding procompetitive benefits in his hypothetical multi-sided market is not relevant to procompetitive effects in the relevant market."); *see also* Expert Report of Kenneth Elzinga at 28 n.87, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541). In explaining that his list of sides to the platform is not exhaustive, Elzinga stated, "Public fans of the university's athletic teams are also a relevant constituency, as are broadcasters, who in a fashion analogous [to] the description of magazines, operate a two-sided platform, themselves, serving viewers (including public fans of the university's teams) and the broadcaster's advertisers." Expert Report of Kenneth Elzinga, *supra*.

expert included "sports fans," a clear nod to the consumer demand offset that would go on to survive exclusion under Federal Rule of Evidence 702 through a metamorphosis into a procompetitive justification at step two of the rule of reason.[45]

Upon review, the Court again excluded the NCAA's antitrust expert's opinion that both the NCAA and universities constitute multi-sided platforms "as irrelevant in light of the Court's summary adjudication of market definition, and as unreliable, under Federal Rule of Evidence 702 and *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*]."[46] Notably, the Court cited the expert's failure to "describe any platform analogous to a two-sided transaction."[47] The Court's ruling was entirely consistent with *American Express*, yet simultaneously ineffective at precluding the argument's substance from advancing to step two.[48] Indeed, the very same "consumer demand" argument proffered in the relevant market definition that the Court excluded has remained the sole claimed procompetitive justification for the restraint against payments in the name of amateurism.[49] Antitrust defendants, it appears, need not concern themselves if their attempt to broaden the market through claimed multi-sidedness fails at step one; they can recycle the very same arguments and present them at step two. Thus, fears that the Supreme Court would expand its interpretation of multi-sidedness beyond "transactional platforms" are now immaterial. The permissive attitude toward intergroup procompetitive justifications has already served that purpose, not only elevating the burden on Plaintiffs but also undermining any nexus to economic logic. We lay the blame for this confusion squarely on *Board of Regents*, whose tentacles still permit the NCAA to choke competition among buyers for intercollegiate athlete labor, a fact that Judge Smith

45. Expert Report of Kenneth Elzinga, *supra* note 44, at 102 ("In the face of these effects the inexorable logic of mutual dependency of demand in multi-sided platforms cautions that the diminishing effect of professionalizing intercollegiate sports would not be confined to athletes and sports fans, but its full effects could be felt all across every college and university.").

46. Order Reaffirming Exclusion of Certain Expert Testimony by Dr. Elzinga at 14, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.C. Cal. 2019) (No. 14-md-02541).

47. *Id.* at 13.

48. *Compare* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2302 (2018), *with In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070–1086.

49. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070–1086.

correctly illuminated in his Ninth Circuit *Alston* concurrence.[50] In the next Part, we explain how *Board of Regents* paved the way to the offset confusion that pervades the antitrust status quo.[51]

II. THE CONSUMER DEMAND OFFSET IN NCAA ANTITRUST LITIGATION

The Supreme Court's seminal decision in *Board of Regents* bears responsibility for sustaining "amateurism," the vernacular's anodyne description of the NCAA's collusive restraint; although, as irony would have it, the *Board of Regents* Court found that the NCAA's television plan violated Section 1 of the Sherman Act.[52] But the Court declined to apply the per se rule and opted for the more relaxed rule-of-reason standard instead, based on Judge Bork's logic that *some* activities require joint conduct for the product to exist (e.g., league sports).[53] The same logic guided both the Seventh Circuit and the Supreme Court in *American Needle, Inc. v. NFL*.[54] The latter cited to *Board of Regents*, and thus signaled its approval of Bork's argument in declaring that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[55] Therefore, the Court reasoned that when *some* ancillary restraint(s) exist, then *any* challenged restraint, even if not ancillary, must be adjudicated under the rule of reason.[56]

50. Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith J., concurring), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021) ("I write separately to express concern that the current state of our antitrust law reflects an unwitting expansion of the Rule of Reason inquiry in a way that deprives the young athletes in this case (Student-Athletes) of the fundamental protections that our antitrust laws were meant to provide them.").

51. *See infra* Part II.

52. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

53. *See* BORK, *supra* note 30, at 435; *see also* Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 SECTION ANTITRUST L. 211, 227 (1959) ("[T]he sole function of the concept of ancillarity under the Sherman Act should be to point out instances when *per se* illegality should not attach and to confine the exceptions thus made to their proper scope.").

54. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010).

55. *Id.* (emphasis omitted).

56. *Id.* For a detailed look at the ancillary restraints doctrine, see generally Gregory J. Werden, *The*

This argument significantly broadens the scope of restraints required for a product and its concomitant efficiencies to exist. It also represents a logical error that has insulated collusive conduct, particularly in sports markets, from condemnation under the per se rule. If—as Gregory Werden, a former Senior Economic Counsel at the Department of Justice's Antitrust Division argues—defendants have the burden of showing an ancillary restraint, but "that burden is not a heavy one," then the logic of *Board of Regents* lightens it even further.[57] Indeed, while *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* elevated output restraints as the nucleus of anticompetitive conduct, Judge Wald's concurring opinion therein signaled a need for further instruction from the Supreme Court regarding the as-yet unsettled debate over the ambit of antitrust laws.[58] That instruction would come in *Board of Regents*; although, as we explain, it launched antitrust into the very sea of doubt against which Judge Taft warned in *United States v. Addyston Pipe & Steel Co*.[59]

A. *The Inductive Fallacy in* Board of Regents*'s Reasoning*

Board of Regents's logical error represents an example of an inductive fallacy of the hasty generalization form.[60] To explain the

Ancillary Restraints Doctrine After Dagher, 8 SEDONA CONF. J. 17 (2007), and see also Statement of Interest of the United States of America at 24, Seaman v. Duke Univ., No. 15-cv-462 (M.D.N.C. Mar. 7, 2019), ECF No. 325 ("'To be ancillary,' an 'agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction,' and reasonably necessary to 'make the main transaction more effective in accomplishing its purpose.'" (quoting Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 225 (D.C. Cir. 1986)).

57. Werden, *supra* note 56, at 24.

58. *Rothery Storage & Van Co.*, 792 F.2d 210, 231 (Wald, J., concurring) ("I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising.").

59. United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898). Judge Taft cautioned against using a "shifting, vague, and indeterminate . . . standard":

> It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

Id. at 283–84.

60. This fallacy of relevance is commonly known as a "red herring fallacy." *See, e.g.*, JOHN WOODS,

nature of this error, consider the *NCAA* case and suppose only three agreements exist: (1) uniform numbers, (2) distance of the three-point line, and (3) athlete compensation. Applied to this example, the logical argument in *Board of Regents* and *American Needle* is as follows:

Premise 1: Agreements 1 and 2 require collusive agreement among universities.

Premise 2: Agreements 1 and 2 are ancillary to the universities' agreement not to pay athletes (Agreement 3).

Conclusion: Therefore, all three collusive agreements involved are ancillary.

A Venn diagram provides a graphical representation of this argument's error.[61] The fallacy above concludes that the two identically sized circles are concentric (i.e., share the same center and thus lie on top of each other). Accepting this argument would mean that all collusive restraints are ancillary.

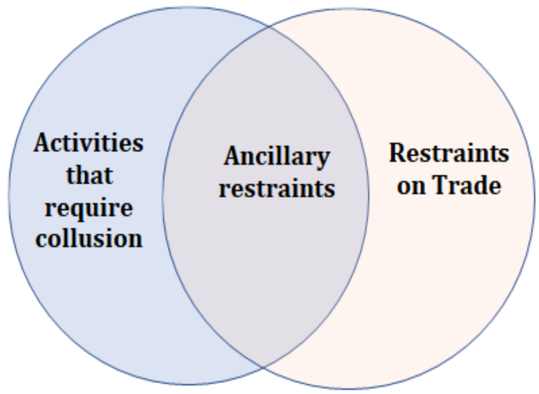
Figure 1: Graphical Representation of the Logical Fallacy in *Board of Regents*

THE DEATH OF AN ARGUMENT – FALLACIES IN AGENT BASED REASONING 311 (2004):

> Hasty generalization is usually classified as an inductive fallacy.
>
> . . . .
>
> . . . Aristotle discusses *secundum quid* in two places. In *On Sophistical Refutations*, it is the fallacy of omitting a qualification, as in an argument which concludes that Mr. Mandela is white from the [premise] that he is white-haired. An apparently different conception is proposed in the *Rhetoric*, suggestive of the fallacy of hasty generalization in the sense of a sampling error or a generalization drawn without adequate inductive support.

Id. (citations omitted).

61. *See infra* Figure 1.



The hasty generalization fallacy in *Board of Regents* and *American Needle* highlights the error of inferring causation from correlation. The third collusive restraint relating to athlete compensation is correlated with the first two restraints because all are part of the concerted agreement among members. Because the first two have a causal connection to the product's existence (i.e., the product could not exist in their absence), the logical fallacy lies in inferring that the third restraint must also share this causal relationship and thus the ancillary status that would prompt treatment under the rule of reason. Determination of whether a restraint is ancillary falls under the rubric of causal inference, an observation that Professor Steven C. Salop at Georgetown University Law Center and others have recently made in proposing a "causal contingency" test[62] to determine the legitimacy of an offsetting justification that occurs outside the relevant market at issue, an argument we address in Part III.[63]

Indeed, having acknowledged that some ancillary restraints are needed for the enterprise to exist, nowhere did the Court in *American Needle* signal its intent to cabin the scope of its opinion to those meeting the needed-to-exist criterion—perhaps a reflection that *Board*

62. Steven C. Salop, Daniel Francis, Lauren Sillman & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from* Ohio v. American Express, GEO. U. L. CTR., October 2021, at 1, 51, https://scholarship.law.georgetown.edu/facpub/2414 [https://perma.cc/RWT7-5UXD].

63. *See infra* Part III.

of Regents did not proffer that distinction either.[64] Even though it may have relied on the *Board of Regents*'s explanation that "a certain degree of cooperation is necessary" to sustain the product's existence, its erroneous treatment of ancillary restraints reflects a broad "if any then all" logic.[65] Whether the Court in *Board of Regents* and *American Needle* intended this expansive definition of ancillary restraints is now largely immaterial; in doing so, the Court opened the door for defendants to argue ancillary status applies to any restraint, no matter how peripheral (or even entirely untethered) to the product's existence, thus shifting adjudication to the rule of reason.[66] This represents a fundamental ideological shift from the per se condemnation accorded to collusive restraints of trade, as explained in both *Board of Trade of City of Chicago* and *United States v. Trenton Potteries Co*.[67]

Demonstrating how one error can lead to another, this rule of reason permitted the NCAA to claim that its restraint on athlete compensation promotes competition by increasing consumer demand, thus offsetting any harms it may cause.[68] As a result, *Board of Regents* laid the groundwork for judicial acknowledgment of consumer demand for intercollegiate athletics as a potential offset for worker harms, even though that offset did not take the form of lower prices, higher output, or improved quality.[69] It argued that the NCAA's actions widen consumer choice by offering sports fans a product distinguishable from professional sports by a nexus (however illusory) to academics.[70] The Court further added that preservation of this distinction meant that

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64. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186–204 (2010).

65. NCAA v. Bd. of Regents, 468 U.S. 85, 117 (1984); *Am. Needle, Inc.*, 560 U.S. at 203.

66. Notably, neither *Board of Regents* nor *American Needle* addressed issues related to the input market for labor. The challenged conduct in both cases dealt with restrictions in the output product markets; the former covered NCAA restrictions on television rights and the latter licenses for vendors to manufacture and sell NFL team-labeled apparel. *See Bd. of Regents*, 468 U.S. at 94–95; *Am. Needle, Inc.*, 560 U.S. at 187. The Court in both cases declined to apply the per se rule that governs naked price-fixing restraints and opted for the "quick-look" rule of reason instead. *See Bd. of Regents*, 468 U.S. at 100, 109 n.39; *see also Am. Needle, Inc.*, 560 U.S. at 203.

67. *See* Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918); *see also* United States v. Trenton Potteries Co., 273 U.S. 392, 401 (1927).

68. *See Bd. of Regents*, 468 U.S. at 120–21.

69. *See id.* at 102.

70. *See id.*

college "athletes must not be paid, must be required to attend class, and the like."[71]

The district court in *O'Bannon* correctly recognized that the *Board of Regents* decision "addressed limits on television broadcasting, not payments to student-athletes,"[72] and it interpreted the *Board of Regents*'s "incidental phrase" consistently with the Supreme Court's later clarification in *Alston*.[73] Nonetheless, bound by *Board of Regents* precedent, the *O'Bannon* district court explained:

> [S]ome restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA's products—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise—then the restrictions would be procompetitive.[74]

Although the Court disregarded the NCAA's consumer-demand survey as unpersuasive and riddled with methodological flaws, it nonetheless permitted the justification of harm to athlete labor by some undefined means of maintaining or enhancing the popularity of intercollegiate athletics—paradoxically, a product defined by the very

71. *Id.*

72. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014), *aff'd in part, vacated in part*, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015). In *NCAA v. Alston*, the Court clarified the nature of the restraint at issue in both cases, dismissing *Board of Regents's* reference to athlete compensation as a "passing comment." *NCAA v. Alston*, 141 S. Ct. 2141, 2146 (2021). The *Alston* Court explained:

> The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely consistent with the goals of the Sherman Act." But that sort of passing comment on an issue not presented is not binding, nor is it dispositive here.

Id. (citations omitted)

73. *See O'Bannon*, 7 F. Supp. 3d at 1000; *see also Alston*, 141 S. Ct. at 2158.

74. *O'Bannon*, 7 F. Supp. 3d at 1000.

restraint it imposed on labor wages.[75] Like *Board of Regents*, the *O'Bannon* district court's decision did not point to cognizable economic efficiencies such as lower prices or improved quality.[76] In doing so, the district court's interpretation of *Board of Regents* left open the possibility that any driver of consumer demand, regardless of its motivation, could serve as a procompetitive justification.[77] But these justifications refer to economic efficiencies that improve competition, not those that may assuage potential preference of athlete exploitation or those potentially motivated by racial animus.[78]

B. *The Specter of* Board of Regents *Haunts the* O'Bannon *and* Alston *Decisions*

The district court's reasoning in *O'Bannon* reverberated through subsequent decisions. On appeal, the Ninth Circuit concurred with the lower court's interpretation of *Board of Regents*'s "long encomium to amateurism" found at the conclusion of the Supreme Court's *Board of Regents* opinion as dicta.[79] Nonetheless, the Ninth Circuit accepted the district court's finding that "the NCAA's current rules serve a procompetitive benefit by promoting this understanding of amateurism, which in turn helps preserve consumer demand for college sports" and advanced to step two under the rule of reason.[80] Signaling its asymmetric view of anticompetitive harms and procompetitive justifications, the Ninth Circuit titled the headings

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75. In his concurring opinion in *Alston*, Justice Kavanaugh dismissed the *Board of Regents* Court's reasoning, noting:

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

Alston, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

76. *See generally O'Bannon*, 7 F. Supp 3d 955 (N.D. Cal. 2014).

77. *Id.* at 1000 ("'[M]aximiz[ing] consumer demand for the product' is a legitimate procompetitive justification." (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984))).

78. Ted Tatos & Hal Singer, *Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard*, 66 ANTITRUST BULL. 396, 429 (2021).

79. O'Bannon v. NCAA, 802 F.3d 1049, 1063 (9th Cir. 2015).

80. *Id.* at 1059, 1076 ("Both we and the district court agree that the NCAA's amateurism rule has procompetitive benefits.").

discussing harms and efficiencies as "Significant Anticompetitive Effects Within a Relevant Market" and "Procompetitive Effects," respectively.[81] As indicated and consistent with its acceptance of the district court's ruling, it did not cabin its analysis of procompetitive effects to either the same group or the same relevant market in which the anticompetitive conduct occurred.[82] In short, the Ninth Circuit accepted the claim that "the amateur nature of collegiate sports increases their appeal to consumers."[83] Yet it reversed the district court's prescription of a $5,000 cash payment to athletes as a less restrictive alternative to achieving this offset, finding that "the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses."[84] This finding laid the foundation for the *Alston* case, which, in an attempt to fit within the narrow confines of the Ninth Circuit's *O'Bannon* precedent, challenged the NCAA's collusive restraint on educationally related compensation for football and basketball players.[85]

Alston trods much of the same ground previously covered by the Ninth Circuit *O'Bannon* case, both cases initially falling under the purview of Judge Wilken in the Northern District of California. Following the rule-of-reason prescription set forth in the *Board of Regents* and *O'Bannon* precedents, the district court in *Alston* found the relevant market to be elite NCAA football and basketball.[86] The district court again found that universities organized by the NCAA

81. *Id.* at 1070–1074.

82. *See id.* at 1072–73 (noting that amateurism not only increases consumer demand for college sports but also increases choice for student-athletes).

83. *Id.* at 1073.

84. *Id.* at 1076, 1079.

85. NCAA v. Alston, 141 S. Ct. 2141, 2169 (2021).

86. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd sub nom.* Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1266 (9th Cir. 2020). The court reasoned:

> [T]he NCAA's Division I essentially is the relevant market for elite college football and basketball. And, because elite student-athletes lack any viable alternatives to Division I, they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.

Id. (emphasis omitted).

exercised monopsony power over athlete labor, with the opinion reflecting the definition of exploitation as restricting compensation below marginal revenue product.[87] And it yielded the same obvious conclusion: that the NCAA's challenged conduct has severe anticompetitive effects and harms athletes in the relevant labor market.[88] Indeed, even the NCAA's own expert, Nobel Laureate James Heckman admitted that college athletes would be "clearly better off" absent the collusive restraint preventing them from receiving such money.[89] At this point, one might rightfully exclaim *quod erat demonstradum* and expect that the restraint would be surely declared per se unlawful without any further inquiry, particularly given the *Trinko* Court's "supreme evil of antitrust" condemnation of collusion.[90]

Alas, no. Ever open to equivocation even in the face of the most direct evidence of harm, the consumer welfare standard can seemingly tolerate even "supreme evil" as long as a set of consumers can possibly derive some nebulous benefit from the harm to another group, including the labor that produces the very product. The well-worn aphorism attributed to Zachariah Chaffee's writings in the *Harvard Law Review* observed, "Your right to swing your arms ends just where the other man's nose begins."[91] Not so in the NCAA antitrust litigation, which deemed the protection of labor's noses as insufficient justification to constrain the choice of consumers to swing their arms

87. *Id.* ("Moreover, the compensation that class members receive under the challenged rules is not commensurate with the value that they create for Division I basketball and FBS football; this value is reflected in the extraordinary revenues that Defendants derive from these sports.").

88. *Id.*

89. Transcript of Dr. James Heckman at 597, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d. 1058 (N.D. Cal. 2019) (No. 14-md-02541) ("Clearly, if you just give the student alone the money, just give the student another dollar, another penny, another $10,000 and you don't account for what could be large systematic adjustments if everybody gets those, then the student is clearly better off. No question about it."); *see also In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d. at 1084 ("Dr. Heckman also conceded that additional compensation could improve outcomes for student-athletes, which contradicts the notion that the challenged compensation limits have a positive effect on student-athlete outcomes.").

90. Verizon Commc'ns. Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

91. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919). The aphorism has a rather long history prior to Chaffee. *See generally Your Liberty To Swing Your Fist Ends Just Where My Nose Begins*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2011/10/15/liberty-fist-nose/ [https://perma.cc/4F7S-6YFL].

at will. Indeed, even the limited scope of antitrust favored by the New Learning offshoot of the Old Chicago School has become too restrictive under the increasingly permissive standards.[92] Consistent with adjudication under the rule of reason, the burden of proof at the district court level then shifted to the NCAA to show any procompetitive efficiencies that justify the harm to competition caused by its restraint.[93] In response, the NCAA abandoned the majority of its procompetitive justifications, focusing only on the two that the district court accepted in *O'Bannon*, albeit only in part: (1) "amateurism" as a driver of consumer demand and (2) the integration of athletics and academics.[94] In its opinion, the district court dismissed the NCAA's second justification, pointing out, *inter alia*, that the vast athletic facilities that universities erect on campus already serve to create a "wedge" between athletes and their non-athlete peers.[95] Thus, consumer demand, an intergroup offset and one occurring across distinct antitrust markets (input and output markets), remained as the singular pillar insulating NCAA "amateurism" from condemnation under antitrust law.

On appeal, Judge Smith's concurring opinion underscored the limited victory that labor achieved by the district court in *Alston*, explaining that, "[a]lthough the district court correctly applied our precedents, the result of this analysis seems to erode the very protections a Sherman Act plaintiff has the right to enforce. Here, Student-Athletes are quite clearly deprived of the fair value of their services."[96] Thus, we argue that consumer demand should have never been considered as an offset for direct evidence of harm to athlete labor in NCAA litigation. That the district court ultimately found this evidence as unpersuasive is of small comfort, as Judge Smith

92. Walter Adams, James W. Brock & Norman P. Obst, *Pareto Optimality and Antitrust Policy: The Old Chicago and the New Learning*, 58 S. ECON. J., July 1991, at 1, 6 (stating that, for the New Learning school, "the only legitimate concern of antitrust should be blatant, garden variety price-fixing").

93. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1096.

94. O'Bannon v. NCAA, 802 F.3d 1049, 1072 (9th Cir. 2015).

95. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d. at 1103.

96. Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1270 (9th Cir. 2020) (Smith, J., concurring), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

observed.[97] Moreover, it highlights a critical flaw in the reasoning behind intergroup balancing: if fostering demand in Group B justifies the restraint on Group A, then, in the absence of the restraint, would antitrust permit a claim by Group B on the basis that it was harmed by the lack of restraint on Group A? If consumer demand considerations justify a collusive restraint on athlete compensation, then could consumers bring suit, for example, on the basis that relaxation of the restraint on NIL compensation has harmed their enjoyment of the sport? If so, this would represent a gross perversion of antitrust laws, signaling that, if one's free market enjoyment encumbers another's preferences for a restraint on others, antitrust injury would occur. If the court does not recognize this absurdity (which it should not, of course), then why permit it in the reverse? Why allow the restraint on the basis that it fulfills another groups' preference for seeing it imposed on others?

As such, we argue that the Supreme Court missed a significant opportunity to issue a broader ruling that would preclude defendants in wage-fixing or single-firm monopsony litigation from launching into NCAA-style fishing expeditions to find any nebulous consumer benefits that could offset worker harm in rule-of-reason cases. By failing to avail itself of the opportunity to condemn intergroup offsets, the Supreme Court has permitted the amateurism restraint to survive. As we explain below, antitrust law's anemic response in the face of clear and convincing direct evidence of harm to workers calls for a realignment of judicial interpretation with the statutory goals of protecting competition in both consumer and labor markets.[98]

III. How Antitrust Law Should Treat Offsets

Both economic scholarship and legal precedent recognize that the benefits of a procompetitive justification should not accrue to the same party that unreasonably restrains trade to the detriment of another group. The Tenth Circuit in *Law v. NCAA* specifically precluded cost

97. *Id.*
98. *See infra* Part III.

savings to the NCAA as a justification for its restraint on college coach compensation.[99] Economic efficiencies exclude pecuniary savings that accrue to the party that exercises market power to restrain trade.[100] The restraining party will always benefit from the anticompetitive conduct; otherwise, it would not engage in it and risk violating antitrust laws. Further, we argue that an economic logic does not support elevating the welfare of the consumer above that of the worker. Likewise, parties to no-poach agreements accrue financial benefits from the restraint, such as cost savings arising from restraining competition for worker wages, yet self-serving justifications do not enhance competition, thus precluding their consideration as offsets under the rule of reason.[101]

A. Benefits Offsetting Harms Should Accrue to the Injured Group

Economic logic prescribes that the procompetitive benefit should accrue to the party that suffered the injury from the restraint.[102] Indeed, this logic forms the basis for claims of merger "efficiencies," arguing that although the merger may reduce the number of competitors in an output market, the merged entity will ultimately reduce its marginal costs *and* pass along those savings to downstream consumers of the

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99. Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998). The Tenth Circuit issued the somewhat confusing opinion that "[w]hile increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws." *Id.* Operating (also known as "operational") efficiency includes cost savings, which the court correctly precluded from representing a procompetitive justification. *See id.* In doing so, the court implicitly distinguished between operating efficiencies that flow from cost savings that are passed on to customers through lower (competitive) prices and cost savings that simply result in higher margins for the restraining firm. *See id.*

100. *See* Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting it Right*, 168 U. PA. L. REV. 1941, 1958 (2020) ("Economic efficiencies are distinguished from purely financial gains by excluding pecuniary effects, and specifically excluding cost reductions that accrue from an increase of market power.").

101. Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 SANTA CLARA L. REV. 579, 602 (2020) ("The clear purpose and effect of both no-hire and no-poach agreements—whether in the franchise context or in the independent or unrelated competitor context—is to restrict employee mobility and compensation for purposes of reducing the employers' costs by paying the employees less."); *see also* Statement of Interest of the United States of America, *supra* note 56, at 22 (explaining that "no-poach agreements between competing employers have almost identical anticompetitive effects to wage-fixing agreements: they enable the employers to avoid competing over wages and other terms of employment offered to the affected employees").

102. This same logic reflects the aim of economic damages to place the injured party in the same position that the party would have occupied had the harmful event not occurred.

product(s) at issue.[103] Judge Smith's concurring opinion in the Ninth Circuit's *Alston* case succinctly and accurately described the error in ignoring this reasoning:

> If the purpose of the Rule of Reason is to determine whether a restraint is net procompetitive or net anticompetitive, accepting procompetitive effects in a collateral market disrupts that balancing. It weakens antitrust protections by permitting defendants to rely on a broader array of justifications that promote competition, if at all, in collateral markets where the restraint under analysis does not occur.
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> . . . Under the Rule of Reason analysis we affirm today, so long as the NCAA cites consumer demand for college sports, we allow it to artificially suppress competition for collegiate athletes' services by limiting their compensation. Instead of requiring the NCAA to explain how those limits promote schools' competition for athletes, we leave Student-Athletes with little recourse under the antitrust laws.
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> . . . .
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> Our Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification.[104]

He then queried whether "scholars or litigants can develop a purely economic, mathematically[] defensible method for cross-market analysis that does not depend on policy judgments that our antitrust

103. Whether such claimed efficiencies have manifested themselves in reality is a topic outside the scope of this Article.

104. Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1269–71 (9th Cir. 2020) (Smith, J., concurring), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

laws never meant to delegate to the courts."[105] We answer Judge Smith's proposition here: no purely economic and mathematically defensible method exists. Offsets that accrue to a group different than the one harmed depend on normative, not positive judgments. These assessments necessarily involve moral and ethical considerations that cannot be expressed in purely mathematical terms; they reflect the values that society seeks to promote. The field of economics has wrestled with this issue for the better part of three centuries—since Jeremy Bentham formulated the theory of utilitarianism. Indeed, if a simple mathematical formula could achieve this goal, then one would have certainly expected the NCAA, with its vast resources and army of highly credentialed expert economists at its service, to have at least proffered a plausible attempt at doing so. Yet even the expert opinions that survived exclusion offered nothing of the sort.[106] A decision to justify harms to college athlete labor, by claiming that it satisfies the consumer audience's taste for this level of exploitation, requires a value judgment that cannot be defended on empirically quantifiable grounds.

An exegesis of utility theory lies beyond the scope of this Article; fortunately, the economic issues here do not require it. Economists have long recognized that interpersonal comparisons of utility result in flawed judgments on both empirical and ethical grounds, a result plainly demonstrated by attempts to do so in NCAA antitrust litigation.[107] As British economist Lionel Robbins explained in 1938:

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105. *Id.* at 1271.

106. Not only did economic expert evidence not provide an argument of this sort but Wisconsin Chancellor and former economics professor, Rebecca Blank, also testified in the *Alston* trial that Wisconsin did not perform any survey of the impact on fan willingness to watch football if conferences were free to set their own rules. Transcript of Record at 898–99, *In re* Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (2019) (No. 14-MD-2541).

107. For a detailed discussion of interpersonal comparisons of utility, see generally Peter J. Hammond, *Interpersonal Comparisons of Utility: Why and How They Are and Should be Made* (European Univ. Inst., Working Paper No. 90/3, 1990), https://homepages.warwick.ac.uk/~ecsgaj/icuSurvey.pdf [https://perma.cc/BW22-XHRQ]. Hammond argues that utility comparisons come down to value judgements:

> The paper discusses reasons why interpersonal comparisons of utility (ICU's) have been eschewed in the past and argues that most existing approaches, both empirical and ethical, to ICU's are flawed. Either they confound facts with values, or they

> I still cannot believe that it is helpful to speak as if interpersonal comparisons of utility rest upon scientific foundations—that is, upon observation or introspection. . . . I still think, when I make interpersonal comparisons (as, for instance, when I am deciding between claims affecting the satisfactions of two very spirited children), that my judgments are more like judgments of value than judgments of verifiable fact.[108]

By claiming that benefits to consumers justify harms to athlete labor, this litigation attempted to expand the already economically inapposite comparisons across groups, not just across individuals. As far as intragroup comparisons are concerned, we can attempt to proxy the effect of the restraint by aggregating the dollar difference in compensation between the actual and the counterfactual. This approach requires no value judgment regarding whether one dollar to Athlete A is worth more than a dollar to Athlete B. It simply reflects the total dollar value of the damages suffered by the group.

We expect that the counterargument would immediately posit that the same dollar-value analysis lends itself to a mathematical comparison across groups. Suppose that a defendant decided to distribute to the second group some of the profits it garnered from imposition of the restraint on the first group. For example, suppose that the NCAA could show that the ticket prices fans must pay to attend games would be higher absent amateurism, thus depressing demand. In that case, we expect that the NCAA's expert would calculate the

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> are based on unrealistic hypothetical decisions in an "original position". Instead ICU's need to be recognized for what they really are — preferences for different kinds of people.
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> . . . .
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> . . . [E]thically relevant ICU's are tantamount to normative statements and so cannot be derived just from empirical observation.

Id. at 1, 5; *see also* Daniel M. Hausman, *The Impossibility of Interpersonal Utility Comparisons*, 104 MIND 473, 475 (1995) ("Most economists believe that interpersonal comparisons of utility are untestable, evaluative or even meaningless. In his classic defense of these conclusions, Lionel Robbins argues that evidence for preference rankings is introspective and thus unavailable when comparing the preferences of different individuals.").

108. Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635, 640 (1938).

demand elasticity for sporting contests and thus estimate the dollar impact of the restraint's removal on the consumer group (i.e., the output market). Continuing our extreme example of balancing through readily quantifiable effects, the expert would compare the dollar value of the demand effect against the dollar value of the restraint on the input side.

This superficial calculation relies on a veneer of mathematical precision that belies its counterintuitive and socially regressive ramifications. The problem lies in the fact that the dollar comparison reflects a cardinal representation of utility. But this ignores the concept of diminishing marginal utility. Suppose we applied the same logic in merger cases and the price appreciation from the merger of two major energy firms resulted in a higher financial benefit to stockholders than the concomitant financial harm to consumers through higher fuel prices. Permitting the merger based on the accounting of these offsets would ignore its regressive effects. Ten percent of Americans own nearly 90% of all stock.[109] Thus, acknowledgment of such intergroup offsets would benefit the highest earners by harming the general population of consumers. Alternating the metric from dollars to individuals offers no solution. This policy would tend to benefit the majority to the detriment of socially protected groups. Indeed, this is the very effect of the NCAA restraint—it has justified harms to primarily Black athletes on the basis of benefits to primarily White constituencies.[110] If the goal of antitrust enforcement were to implement a regressive policy that counteracts the social welfare and fosters the interracial transfer of wealth, permitting such intergroup offsets appears to be an effective way to go about it.

B. Compromise View: The Burden Should Be on Defendants to

109. Juliana Kaplan & Andy Kiersz, *The Wealthiest Americans Now Own Almost All of the Stock Market — 89% to be Exact*, BUS. INSIDER (Oct. 19, 2021, 11:53 AM), https://www.businessinsider.com/wealthiest-americans-now-own-record-high-share-of-stocks-2021-10 [https://perma.cc/2F96-MRNP].

110. Tatos & Singer, *supra* note 78; *see also* Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *'I Signed My Life to Rich White Guys': Athletes on the Racial Dynamics of College Sports*, GUARDIAN (Mar. 17, 2021, 5:00 AM), https://www.theguardian.com/sport/2021/mar/17/college-sports-racial-dynamics [https://perma.cc/TZY6-WNXC].

Prove the Offset Is Not Possible Absent the Restraint and to Quantify the Magnitude of the Offset

Some antitrust scholars have proffered various limitations on the nature of intergroup offsets. Professor Daniel A. Crane at University of Michigan Law School argues that "a presumption against balancing effects across market[s]" (the "market specificity rule") can be rebutted using "compelling evidence" in certain cases.[111] Professor Crane further claims that "it is far from inevitable that deviating from the market-specificity rule would require such balancing."[112] But, if anything, the NCAA litigation has demonstrated the ease with which defendants can succeed by offering even the most superficial arguments for balancing. Indeed, that litigation receives disproportionately little attention in antitrust scholarship given the degree to which it has refuted assumptions regarding the purported welfare-enhancing effects of intergroup offsets.

More recently, Professor Steven C. Salop and others proffered three criteria, whose collective satisfaction would permit cross-platform balancing.[113] These authors also argue that the Supreme Court should directly overrule *American Express*[114] and adopt the analytical framework they propose, which includes the following three prongs:

> (1) Causal contingency as the test for counting beneficial effects on other sides of the platform; (2) correct allocation of the burdens of proof (harms for plaintiffs; benefits for defendants); and (3) the principle that harms and benefits on all sides of the platform must be included to protect against cherry-picking that may give a court a misleading picture of the balance of a measure's effects.[115]

The prescription that a causal nexus must exist between the restraint and any procompetitive justifications is consistent with the arguments

111. Crane, *supra* note 17.
112. *Id.* at 405.
113. Salop et al., *supra* note 62, at 30.
114. *Id.* at 51. The notion that a 6–3 conservative Supreme Court will overturn itself is fairly naïve.
115. *Id.*

we offer in this Article. That the restraint must receive credit by causing the benefits reflects a logically correct position that should undergo little opposition. Our disagreement lies with the ambit of its justifications. Although a causal nexus should exist between restraint and procompetitive justifications when balancing *intragroup* effects, it has little, if any, effective application to *intergroup* differences. A defendant could easily meet the causal criteria by distributing even a small portion of the benefit onto a group other than the one injured by the restraint. Professor Salop and others' approach has the immediate defect of classifying the restraint as ancillary rather than naked and thus precluding condemnation under the per se rule, which is precisely how wage-fixing cases should be treated. Consider again the *NCAA* case: So long as the NCAA could show that "amateurism" benefited consumers by reducing stadium box seat prices, this effect may be sufficient to evade per se condemnation, even in the face of obvious and direct evidence of harm to labor. Because the amateurism restraint would likely satisfy their causal contingency test, the likely result would mirror the current status quo. Accordingly, we reject their proposal.

Furthermore, suppose five competing firms entered into a no-poach agreement not to hire each other's employees. Suppose further that, consistent with the causal contingency test that Professor Salop and others propose, the competitors defended the restraint as ancillary because they passed a portion of the wage savings onto consumers. The restraint would meet the causal nexus test and thus wrongly remit adjudication to the rule of reason. Proponents of the consumer welfare standard might argue that, in the name of efficiency, one could calculate the total dollar savings to consumers and balance them against the lost wages to laborers. This reasoning reflects the ideological belief that antitrust review should ignore distributive justice and focus solely on efficiency, a prescription which University of Utah Professor Mark A. Glick and Associate Professor Gabriel A. Lozada refer to as "the Separation Hypothesis," based on the proposition that the latter lends itself to positive rather than normative identification and quantification.[116] But as these authors note, outcomes that result in Pareto Improvements depend on the starting distribution.[117] Indeed, the NCAA argued that paying college athletes would have a negative financial impact on other sports that depend on the redistribution of revenues from football and basketball—the primary revenue generators. But, of course, this ignores the fact that athletes in those sports were made worse off in the first place by the restraint, and removing it only serves to redress the original antitrust harm.

Finally, on purely conceptual grounds, divorcing antitrust policy from the holistic ambit of social policy makes little sense. Consumer welfare is a normative concept; it prescribes that society should embrace lower prices and greater output because these values signal some benefit to the individual *as a consumer*. Further, if society has decided to safeguard minority classes on the basis of race, gender, religion, and other protected characteristics from the tyranny of the majority, then why permit antitrust policy to counteract such efforts? As we and others have explained elsewhere, and as Justice Kavanaugh noted in his concurring opinion, the NCAA's restraint does exactly that.[118] In raising the possibility that economists can develop a mathematically defensible method for cross-market analysis, Judge Smith concluded that "we do not currently have such a method, and it may equally be the case that no such method is possible or desirable."[119] We argue that that is precisely the case, both from an economic and a moral standpoint.[120]

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116. Glick & Lozada, *supra* note 15, at 26.

117. *Id.* at 27–28 ("However, the set of points which are Pareto Improvements completely depends on what the original distribution was, and distribution affects prices, which in turn affect the valuation of any commodity bundle.").

118. NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) ("College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.").

119. Alston v. NCAA (*In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig.), 958 F.3d 1239, 1271 (9th Cir. 2020) (Smith, J., concurring), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

120. In doing so, we echo MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 590 (Cambridge Univ. Press, 4th ed. 1990) ("Thus, the long discussion on welfare criteria—from Pareto through Barone to Hicks, Kaldor and Scitovsky—has brought us no further in evaluating policy changes which benefit some people

C. The Need for Legislative Intervention

The extent to which cross-market balancing pervades antitrust litigation has largely evaded attention, although *Alston* should serve to thrust this issue squarely into the limelight. In his *American Express* dissent, Justice Breyer argued that "[a] Sherman Act §1 defendant can rarely, if ever, show that a procompetitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[121] As a counterpoint, this very argument has permitted the NCAA cartel to evade condemnation under antitrust law. In *Alston*, the Supreme Court had the opportunity to clarify the incongruity of cross-market balancing within the ambit and precedent of antitrust law, and in the face of a blatant wage-fixing conspiracy, yet it demurred. In doing so, the Court permitted a cavalcade of cross-market justifications from defense experts in various Section 1 of the Sherman Act cases that, given Justice Breyer's comment, the Supreme Court might be expected to reject. Even more glaringly, the NCAA's survival serves as a reminder that antitrust law has failed to curtail cartel behavior in the face of incontrovertible and direct evidence of harm by justifying it as a nebulous benefit to another group.[122]

Consistent with Judge Smith's aforementioned concurrence in the Ninth Circuit's *Alston* case and the Supreme Court's precedent in *Topco*,[123] we submit that broad policy judgments that affect the social welfare are best suited for legislative intervention and should not be delegated to the judiciary. That is not to say that antitrust has no role in effectuating those policy choices. It most certainly does, but the

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but harm others on purely 'positive' grounds. Efficiency questions appears to be inseparable from equity questions.")

121. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2303 (2018) (Breyer, J., dissenting).

122. *Alston*, 958 F.3d at 1270 (Smith, J., concurring) ("It was enough for the NCAA to meet its Step Two burden that it could show (however feebly) a procompetitive effect in a collateral market.").

123. *See generally* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972). Unlike the legislature, the courts are not equipped to make broad policy judgements:

> If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this [] is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking.

Id. at 611.

impetus should have a statutory origin that the judiciary will enforce. As such, we argue that legislative intervention should reverse *American Express* and prohibit, via a "no-offset rule," the type of misguided "balancing" of one group's interests against another's regardless of whether the groups operate in the same multi-sided market or in separate markets altogether. In wage-fixing cases involving multiple defendants, the no-offset rule would bar courts from considering any claimed efficiencies, regardless of whom they benefit. In single-firm monopsony cases, the no-offset rule would bar courts from considering any offsetting benefits to parties other than the injured group of workers or input providers.

The legislation should make clear that harm to a worker or any input provider should be *sufficient* to generate antitrust liability, without any need to explore effects to different parties. As *Alston* demonstrated, defenses in the latter can mirror those in the former, elevating form over substantive function, a prescription that courts have repeatedly rejected.[124] The legislature should enjoin any attempts to balance the harms to labor or other input providers by some perceived benefit to consumers. Failure to do so only serves to sustain the confusing antitrust environment that *American Express* and *Alston* have so clearly illuminated.

CONCLUSION

The practice of offsetting harms to labor input by claimed output benefits, exemplified in the logical error that characterized the consumer preference justification for not compensating the athlete labor in *Board of Regents*, has created an artificial friction between workers and consumer interest. As observed in NCAA antitrust litigation, the search for even the most specious offsets has resulted in the justification of harms to labor even in the presence of direct evidence of antitrust injury to a group of workers. This practice has eroded per se adjudication of cartel behavior by expanding the definition of ancillary restraints.

124. *See generally Alston*, 141 S. Ct. 2141.

We argue that, consistent with the intent of the Sherman Act, antitrust law should protect workers and consumers equally, rather than elevating the interests of the latter over the former. To achieve this goal, in addition to arguing for a statutory repeal of the *American Express* decision, we propose a prohibition on judicial balancing of claimed benefits to any group other than the group that suffered an antitrust injury. Prohibiting such balancing would be consistent with the broader policy of protecting labor from anticompetitive conduct, including the exercise of monopsony power. In wage-fixing cases involving multiple defendants, the no-offset rule would immediately condemn the restraint as *per se* illegal and bar courts from considering any claimed efficiencies, regardless of whom they benefit. In single-firm monopsony cases, the no-offset rule would bar courts from considering any offsetting benefits to parties other than the injured group of workers or input providers.