# *Alston* and the Dejudicialization of Antitrust

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A curious feature of *NCAA v. Alston*[1] is the shoe that didn't drop, at least not immediately. "Put simply," Justice Gorsuch wrote for a unanimous Court, "this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control."[2] Given that this pronouncement occurred on page fourteen of the Court's opinion, one might have expected that the opinion would end on, say, page fifteen, for if there has been one fixed point in American antitrust law it has been that horizontal price-fixing, *especially* but not only by those with monopoly power, is *per se* illegal. Instead, the Court pressed on for more than twenty additional pages, applying the Rule of Reason, before concluding that the NCAA had violated § 1 of the Sherman Act by limiting the education-related benefits that members may provide their student-athletes. Even Justice Kavanaugh's more thunderous concurrence, while proclaiming that "'[p]rice-fixing labor is price-fixing labor,' and that this is '*ordinarily* a textbook antitrust problem,'" appeared willing to accept that ultimately some constraints, such as a salary cap, would be deemed acceptable.[3]

Why the hesitation? I will suggest that there are material differences between college athletics and ordinary industries, such as the restaurants, law firms, hospitals, news organizations, and movie studios that Justice Kavanaugh raised by way of comparison. Much more broadly, I will argue that these differences, and the *Alston* case in general, highlight a problem at the core of antitrust: It does not belong in the courts. Our system of antitrust law should be replaced by an administrative apparatus that, subject to congressional oversight, will be able to make the policy judgments that antitrust requires in a sensible and efficient manner.

Two principal factors complicate the situation in *Alston*: games and students. Games require limits on the nature of the competition. Eligibility rules—who can play?—are one such limit. And certainly in *some* contexts—a beer league, for example—a rule against professional competitors would be perfectly acceptable. The NCAA, of course, is not a beer league. But neither is it, or its membership, an ordinary commercial promoter of sports. NCAA athletes are students at a given college; even Justice Kavanaugh did not doubt that the NCAA can require that athletes be students at the institution for which they play.[4] So the relationship between college and athlete is not merely one between purchaser and supplier of labor. And in many contexts, that description does not fit the relationship well, or at all. Colleges do not maintain sports teams merely to sell the spectacle to the outside world, or even to the non-participating members of the college community, and indeed, for most sports at most colleges, revenues are rather negligible and swamped by expenses. College sports, like the full range of extracurricular activities, are also maintained for the benefit of the athletes themselves.

I am not naïve. Obviously when a Division I university recruits a top football or basketball player it is not motivated primarily by thoughts of how much good it, the university, will do for that prospective student; it is thinking how much good that athlete can do for the university's team, and part of that good will be financial. And I am not arguing that *Alston* was wrong, or even that other constraints imposed by the NCAA should not be barred. I am only contending that equating college athletes to employees in ordinary industries does not convey the complexity of the situation, and that a fuller policy analysis is necessary.

Consider another comparison that might be closer to the mark. High school athletics also generate considerable revenue in some places; sometimes they are even profitable. High school athletic associations have monopoly power that is comparable to that of the NCAA. And those associations routinely bar compensation for athletes—but relatively few people object,[5] and it would be very surprising if a court rendered such policies illegal. This comparison is not meant to show that the NCAA rules should be permitted, or that the high school ones should not be; one can easily enough cite differences between the two contexts that justify a difference in result. But what the comparison does show is that the mere structural similarity between the two situations is not enough to indicate the appropriate result. One must make a policy assessment based on factual determinations and value judgments.

I believe that this difficulty, as it plays out in *Alston*, is symptomatic of a far broader problem: Courts are the wrong forum for making that assessment. Justices Gorsuch and Kavanaugh both suggested that Congress ought to get involved in the issues surrounding pay for college athletes[6] (Is name, image, and likeness income enough? What do we do if male athletes have far greater economic power than female athletes? Etc., etc.), and I agree. But more generally, I contend that antitrust involves basic issues of national industrial, economic, and social policy and there is no good reason for them to be resolved by the courts. In an ideal world, perhaps, Congress would decide all those issues and generate a comprehensive code of behavior, leaving it to some set of officials to make cut-and-dried factual determinations in particular cases. But Congress has not come close to doing that. Instead, it has essentially left the courts to develop a common law of antitrust. Section 1 of the Sherman Act, the core of American antitrust law and the key provision at stake in the *Alston* case, prohibits combinations in restraint of trade. But not all combinations, for an ordinary contract acts as a restraint. So which ones?

The Supreme Court has tried to define some categories of conduct as *per se* illegal, and *Alston* indicates that at the other end of the spectrum in some situations a "quick look" should yield essentially a determination of *per se legality*. But *Alston* also illustrates that the boundaries of these categories are contestable, and they yield less certain results than one might wish; even horizontal price-fixing by a monopolist, it turns out, may be subject to the rule of reason.[7] And that, as *Alston* emphasizes—cutting back on prior attempts to give it form—is basically a case-specific free-for-all. It is not only the extraordinary cases of nationwide significance, like *Alston*, that raise policy issues that are inappropriate for judicial decision-making. Mundane cases do as well. To what extent should we worry about vertical restraints? How much incremental market power is too much if it promises greater efficiency? Such issues depend not only on the facts of the particular case but on prevailing economic conditions, a factor that judicially crafted doctrine cannot take well into account.

Committing antitrust decisions to the judiciary means assigning fact-finding on issues that may be of national significance to a randomly chosen single judge or jury, who must act under the severe constraints of the adjudicative system. It almost certainly entails long delays. It means that both at the trial and appellate level decisionmakers will almost certainly not have any expertise about the particular industry involved; for that matter, they are unlikely to have much economic expertise.[8] And, notwithstanding "the practical limits of judicial administration,"[9] it sometimes requires courts to oversee an entire industry, perhaps for decades.[10]

I believe that an administrative solution, under which an agency would develop and implement national competition policy subject to congressional oversight, would be far superior. But in 1890, when the Sherman Act was passed, an administrative solution was not in serious contemplation. Yes, there was one important administrative agency extant, the Interstate Commerce Commission, but it was only three years old, and it had a much narrower ambit. A stray economist might have suggested the creation of a commission to address competition issue modeled on state railroad commissions,[11] but those commissions were few and tended to be relatively weak. So far as I am aware, in the debates leading to the Sherman Act there was no suggestion of assigning implementation to an administrative body. Nor (with one caveat[12]) did the state antitrust laws passed at around the same time adopt an administrative solution. Instead, legislators drew on the common law, which had time-honored, though undeveloped, doctrines governing monopolies and trade restraints. And the courts provided a ready-made set of officers on the ground able to act on particular matters.

Less than a quarter century later, in the Progressive Era, the situation looked very different. Judicial decision-making under the Sherman Act had caused widespread dissatisfaction.[13] And by now, administrative agencies were an established part of both state and federal government.[14] Accordingly, Congress created the Federal Trade Commission. The FTC Act gave the Commission power to issue orders against "unfair methods of competition,"[15] and in passing the Act, Congress decided it would be best to "leave it to the commission to determine what practices were unfair."[16] But if enforcement was necessary the Commission still had to go through the courts, and before long, in *FTC v. Gratz* (1920), the Supreme Court declared that "[i]t is for the courts, not the commission, ultimately to determine as matter of law what [the statutory words] include."[17] Although the Court later decided that *Gratz* had erred in construing the Act "as giving the Commission very little power to declare any trade practice unfair,"[18] the courts continue to keep a tight rein on the FTC in competition matters; the vast majority of FTC competition enforcement actions concern matters that the courts deem to violate the antitrust laws.

So, I believe that Congress's intention to have a more administratively-based antitrust system has been largely stifled.[19] But in one important subrealm, that of mergers, though the courts lurk in the background, administrative decisions tend to control outcomes. If the enforcement agencies—the FTC and the Antitrust Division of the Department of Justice—decide to challenge a merger, they will often prevail without the need for a judicial decision, because the firms conclude that the possibility of being able ultimately to consummate the merger is not worth the delay and expense of battling for it.[20] And, though private actions against mergers are a possibility, expense and standing limitations constrain their significance. So, to a considerable extent, with respect to mergers, what the enforcement agencies say goes.[21]

Some observers might conclude that experience with respect to mergers provides a cautionary tale, because there is a fair amount of evidence that regulatory decisions on mergers are often affected by the ability of both acquirers and targets to leverage pressure through political actors, especially members of Congress.[22] But, though there are occasional outrages, I do not believe the problem is intolerable, and arguably no worse than the problem of disparity of resources in litigation. It is unlikely to be as bad in most other antitrust contexts as it is in that of high-value mergers. Nor, I believe, is it likely to be worse than in other contexts of high-stakes administration, where it is an enduring problem of living in an imperfect democracy.

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[1] 141 S. Ct. 2141 (2021).

[2] *Alston*, 141 S. Ct. at 2154.

[3] *See id,* at 2167-68 (Kavanaugh, J., concurring) (emphasis added).

[4] *See id.* at 2168.

[5] *But see* Jeré Longman and Alanis Thames, *Forget Friday Night Lights: High School Stars Seek a Better Deal*, N.Y. TIMES (Aug. 13, 2021), https://www.nytimes.com/2021/08/13/sports/ncaa-high-school-sports-endorsements.html [https://perma.cc/Z5XK-SG9E].

[6] *See Alston*, 141 S. Ct. at 2160; *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

[7] Consider also *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (holding that agreement among universities that financial aid would only be awarded on the basis of need, and setting a uniform amount of aid for a needy student, was "a price fixing mechanism impeding the ordinary functioning of the free market," *id.* at 674, but reversing judgment condemning it and remanding for full rule of reason consideration). Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016), discusses the agreement as an example of "private regulatory activity designed to achieve a more progressive wealth distribution than the market would otherwise produce under the shadow of antitrust law." *Id.* at 1213.

[8] *Alston*, 141 S. Ct. at 2166 (majority opinion) ("Judges must be mindful . . . of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships.").

[9] *Id.* at 2163.

[10] *See* United States v. Paramount Pictures, Inc., 2020 WL 4573069 (S.D.N.Y. 2020) (terminating wide-ranging decrees after 71 years, with a two-year sunset period for some provisions).

[11] William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. CHI. L. REV. 221, 239 (1956) (comment of Arthur T. Hadley).

[12] A Missouri statute, copied virtually verbatim by North Dakota, required the secretary of state, "upon satisfactory evidence" that a corporation had violated the statute's prohibitions against combinations to fix prices or limit production, to give notice that if the corporation did not withdraw from the combination within thirty days its charter would be revoked. Act of May 18, 1889, 1889 Mo. Laws 96, sec. 7; Act of Mar. 3, 1890, ch. 174, 1890 N.D. Laws 503.

[13] *See, e.g.*, Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 230-33 (1980).

[14] William J. Novak, *Antimonopoly, Regulated Industries, & the Social Control of Capitalism*, in DANIEL A. CRANE & WILLIAM J. NOVAK, ANTIMONOPOLY AND AMERICAN DEMOCRACY (forthcoming).

[15] Federal Trade Commission (FTC) Act § 5, 15 U.S.C. §45(a)(1).

[16] S. REP. No. 63-597, at 13 (1914), *quoted in* FTC v. Gratz, 253 U.S. 421, 436 n.7 (1920) (Brandeis, J., dissenting). The Brandeis dissent is illuminating on the origins of the FTC.

[17] 253 U.S. at 427.

[18] FTC v. Brown Shoe Co., Inc., 384 U.S. 316, 320 (1966).

[19] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359 (2020) ("Antitrust law today is developed exclusively through adjudication[, which] yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.").

[20] *See*, *e.g.*, Andrew Ross Sorkin et al., *Biden's Antitrust Team Talks Its Way to a Win*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/07/27/business/dealbook/aon-deals-antitrust.html [https://perma.cc/2524-VE3Z] (describing how Aon called off proposed merger with rival Willis Towers Watson because of delays caused by Justice Department suit).

[21] *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159 (2008) (arguing that, though adjudication is the dominant model for solving antitrust problems, an administrative model, exemplified by merger enforcement, is growing in influence, and that this is a positive development).

[22] *See*, *e.g.*, Mihir N. Mehta et al., *The Politics of M&A Antitrust*, 58 J. ACCOUNTING RES. 5 (2017); *but see*, *e.g.*, Malcolm B. Coate & Andrew N. Kleit, *The Political Economy of Federal Trade Commission Administrative Decision Making in Merger Enforcement* (Fed. Trade Comm'n, Working Paper No. 210, 1995), available at https://www.ftc.gov/sites/default/files/documents/reports/political-economy-federal-trade-commission-administrative-decision-making-merger-enforcement/wp210.pdf [https://perma.cc/W25K-AY37].