

NCAA v. Alston: The Future of Student-Athletes

Erin Foster, Rory Svoboda, & Reilly Dougherty
Student Fellows
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

I. Introduction

As early as 1852, American colleges and universities began taking advantage of student-athletes by acquiring private sponsorships and putting on large sporting events in order to increase school revenue.¹ In the beginning, these schools offered numerous forms of compensation to their high-performing football players, such as free meals and tuition, causing student-athletes to jump around from school to school depending on where they were able to make the most money.² The schools did not enforce safety requirements, however, and numerous football players died due to risky plays and a lack of adequate protective gear.

In the wake of these student-athlete deaths, the National Collegiate Athletic Association (NCAA) was formed to set standards for the game.³ Member schools continued to send teams to compete against one another to win games, but they now had to agree to follow certain safety standards and eligibility criteria that applied horizontally across all member NCAA teams.⁴ From its foundation, the NCAA was openly antagonistic toward compensation of college athletes.⁵ Nevertheless, colleges and universities across the country paid students hundreds of thousands of dollars to play for their football teams so that they could leverage their teams to “bring in revenue, attract attention, boost enrollment, and raise money from alumni.”⁶ Thus, rather than being

¹ *National Collegiate Ass’n v. Alston*, 141 S. Ct. at 2148.

² *Id.* at 2148.

³ *Id.*

⁴ “History,” NCAA, <https://www.ncaa.org/history>.

⁵ *National Collegiate Ass’n v. Alston*, 141 S. Ct. at 2148.

⁶ *Id.* at 2149.

centered on the students, college football was best characterized as “an ‘organized commercial enterprise’ featuring athletes with ‘years of training,’ ‘professional coaches,’ and competitions that were ‘highly profitable.’”⁷

To better enforce its disdain for compensation of student-athletes, the NCAA adopted the “Sanity Code” in 1948.⁸ While this Code permitted schools to compensate student-athletes by paying their tuition, it also provided for suspension or expulsion of students who violated their rules by receiving any other form of financial compensation.⁹ The principles behind the Sanity Code functioned to maintain amateurism in college sports by addressing financial aid, recruitment, and academic standards for student-athletes.¹⁰ Since then, the NCAA has expanded the allowable expenses paid to student-athletes to include compensation in the form of room, board, books, fees, and money for incidental expenses including laundry; awards of scholarships up to the full cost of attendance; and funding for school supplies and post-graduate degrees.¹¹

Today, college sports, particularly Division I football and basketball, bring in billions of dollars of revenue for their schools.¹² While those who help manage this enterprise pocket millions of dollars per year, compensation that the student-athletes may receive for their athletic performance is severely limited by the rules set in place by the NCAA.¹³ Consequently, both current and former Division I football and basketball players sued the NCAA. They claimed that the NCAA violated § 1 of the Sherman Act, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.”¹⁴ The plaintiffs alleged that that the Sherman

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ “History,” NCAA, <https://www.ncaa.org/history>.

¹¹ *National Collegiate Ass’n v. Alston*, 141 S. Ct. at 2150.

¹² *Id.* at 2151.

¹³ *Id.*

¹⁴ *Id.*

Act, which is designed to enforce competition in a way that best allocates the Nation’s resources, had been violated by numerous and interconnected NCAA rules that limit the compensation colleges and universities may provide to their student-athletes.¹⁵

II. Background

Initially, following a 10-day bench trial, the district court ruled in favor of both the NCAA and the student-athletes.¹⁶ On the one hand, it upheld the NCAA rules limiting undergraduate scholarships and other compensation related to athletic performance.¹⁷ On the other hand, it struck down the NCAA restrictions on educational-related benefits that schools may offer to their student-athletes, such as rules prohibiting schools from offering graduate or vocational school scholarships.¹⁸ Consequently, both the student-athletes and the NCAA appealed the district court’s ruling to the Ninth Circuit.¹⁹

Upon reviewing the case, the Ninth Circuit affirmed the district court’s holding. It permitted the NCAA to continue to limit undergraduate scholarships and other compensation relating to athletic performance, but the court prohibited NCAA rules limiting educational benefits schools may offer to student-athletes.²⁰ The Ninth Circuit reasoned that the district court “struck the right balance in crafting a remedy that both prevents anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.”²¹ In response, the NCAA appealed to the Supreme Court, requesting that the Court validate its existing restraints on educational benefits offered to student-athletes.²² The NCAA argued it should be

¹⁵ *Id.*

¹⁶ *Id.* at 2144.

¹⁷ *Id.* at 2147.

¹⁸ *Id.*

¹⁹ *Id.* at 2144.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

immune from the “normal operation of the antitrust laws” and that “the district court should have approved all of its existing restraints.”²³ Although the Ninth Circuit upheld some of the NCAA’s restrictions on student-athlete compensation, the student-athletes did not appeal.²⁴ Consequently, the Supreme Court did not need to consider all of the NCAA’s rules on compensation for student-athletes; rather it was asked only to review the education-related benefit rules enjoined by the district court.²⁵

III. Justice Gorsuch’s Majority Opinion

Before analyzing the merits of the NCAA’s arguments, Justice Gorsuch began with a colorful history of the interplay between college athletics and money. The opinion highlighted the financial benefits received by early football players and rowers from institutions like Harvard, Yale, and Princeton.²⁶ Notably, Justice Gorsuch pointed out the initial struggles of the NCAA to reconcile the highly organized commercial enterprise of college sports with the idea that games were for students.²⁷ That difficulty remains to the current day and was the center of the dispute in *NCAA v. Alston*. For over a hundred years, the NCAA slowly gave up ground on what colleges were allowed to pay student-athletes, including substantial payments to cover room, board, and books.²⁸

Justice Gorsuch continued by distinguishing the bygone days when smaller numbers of people gathered to watch a few universities compete in events such as rowing. He noted that the NCAA currently boasts nearly 1,100 college and university members.²⁹ Football and men’s basketball, the two most popular sports, are broadcast on television for hundreds of millions of

²³ *Id.* at 2147.

²⁴ *Id.* at 2144.

²⁵ *Id.*

²⁶ *National Collegiate Athletic Assn. v. Alston*, 594 US 2147, 2148-2149 (2021).

²⁷ *National Collegiate Athletic Assn.*, 594 US at 2149-2150.

²⁸ *Id.*

²⁹ *Id.* at 2150.

dollars to millions of viewers.³⁰ Lastly, Justice Gorsuch highlighted the immense salaries that NCAA executives, conference commissioners, and university athletic directors derive from those lucrative television broadcast contracts.

Justice Gorsuch’s opinion noted several important assumptions that the NCAA did not contest. The parties did not challenge the definition of a relevant market consisting of “athletic services in men's and women's Division I basketball and FBS football.”³¹ Nor did the NCAA contest its monopoly in the labor market of student-athletes, which may depress wages below competitive levels and restrict the amount of student-athlete labor.³² On appeal, it was given that the suit involved horizontal price fixing in a market where the NCAA exercises monopoly control.³³ Further, the Court assumed single market harm in the student-athlete labor market.³⁴ With these significant matters not before the Court, it expressed no views on them.³⁵ Thus, the NCAA’s appeal raised limited issues and two main arguments to the Court. First, the NCAA asserted that normal antitrust laws did not apply to it. Second, the NCAA argued that the district court should have approved all of its existing restraints under the rule of reason.

a. *Does the Rule of Reason Apply?*

The NCAA suggested that the lower courts erred by evaluating its student-athlete compensation restrictions under a rule of reason analysis, instead of an “at most” abbreviated deferential review.³⁶ The chief reason for this was that the NCAA considered itself a joint venture necessary to create the unique product of intercollegiate athletic competition by amateur athletes.

³⁰ *Id.*; Bassam, Tom. “March Madness men’s final draws 16.9m viewers.” *Sports Pro Media*. 7 Apr. 2021. <https://www.sportspromedia.com/news/ncaa-march-madness-mens-womens-final-2021-tv-ratings/>

³¹ *National Collegiate Athletic Assn.* at 2150.

³² *National Collegiate Athletic Assn.*, 594 US at 2154-2155.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

However, the NCAA’s potential status as a joint venture did not preclude the Court from conducting a rule of reason analysis. The compensation rules at issue were not fundamental rules of competition that applied on the field or on the court. Rather, they were compensation rules that were only arguably related to the unique, intercollegiate sports products offered by the NCAA. The Court reasoned that the NCAA’s desire to restrict the student-athlete labor market in order to benefit fans of intercollegiate sport “present[ed] complex questions requiring more than a blink to answer.”³⁷

Further, the NCAA argued that the 1984 decision *NCAA v. Board of Regents of the University of Oklahoma* prevented any review of the NCAA’s limits on student-athlete compensation.³⁸ The Court disagreed. While the *Board of Regents* decision did not condemn the NCAA’s television rules as per se unlawful, it evaluated them with an abbreviated quick look review. Thus, if a quick look was previously adequate, any more careful and thorough evaluation of the NCAA’s procompetitive rationales should not be refused by the NCAA.³⁹

Next, the NCAA believed it had its trump card in this quote from the *Board of Regents* decision:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.⁴⁰

Again, the Court disagreed. Justice Gorsuch clarified that the NCAA’s role in maintaining amateurism is consistent with the goals of the Sherman Act. Still, it does not give the NCAA a blanket shield against all reviews of compensation issues. The 1984 decision did not declare the

³⁷*Id.* at 2157.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.* (Quoting *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 120 (1984)).

NCAA's compensation restrictions procompetitive for the rest of time. Citing *American Express Co.*, the Court highlighted that in evaluating the existence of an antitrust violation, a court must do a careful analysis of current market realities.⁴¹ In the context of the NCAA, the market reality changed dramatically since 1984. Amateurism has waned while the overall revenue and number of allowed benefits to student-athletes has increased.

Finally, the NCAA attempted to evade antitrust review under the pretense that it exists to play a vital part in the undergraduate experience, not as a commercial enterprise. The NCAA based this last attempt of avoiding review on the idea that college athletics provide an essential non-commercial objective of higher education. The Court saw through this weak argument by quoting from *Board of Regents*, stating, "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to maximize revenues."⁴²

Further, the Court has routinely dealt with arguments that restraints "serv[e] a public interest" in antitrust cases throughout the decades. The Court has refused materially identical requests from parties seeking protection from the Sherman Act on the ground that the restraints of trade serve social objectives beyond promoting competition. So, while some restraints on trade might be motivated to further the public interest, the Court does not hold such restraints to be reasonable on public interest grounds alone. Instead, the Court looks to Congress and state legislatures to determine whether a countervailing regulation that advances that public interest should apply. Justice Gorsuch pointed to two notable examples in *National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978) and *FTC v. Superior Court of Trial Lawyers Assn.*,

⁴¹ *Id.* at 2158.

⁴² *Id.* at 2159.

493 U.S. 411 (1990).⁴³ Further, the Court acknowledged the unique circumstances that led to the aberrational decision and the quasi exemption for professional baseball in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).⁴⁴ Simply put, if the NCAA wanted to make the argument that its exceptional circumstances serve some societal good other than competition, Justice Gorsuch told the NCAA that it should address those concerns to Congress rather than the Court.

b. *The Rule of Reason Properly Applied*

Besides the argument that the rule of reason analysis did not apply to the NCAA, the NCAA also argued that the district court misapplied the test. The rule of reason analysis includes a three-step, burden-shifting framework to distinguish anticompetitive restraints from those affording procompetitive benefits to consumers. First, the plaintiff has the burden to show that the restraint has a substantial anticompetitive effect.⁴⁵ Second, the burden shifts to the defendant to establish a procompetitive rationale for the restraint.⁴⁶ If the second burden is met, it goes back to the plaintiff to establish that “the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”⁴⁷

In reviewing the district court’s findings, the Court affirmed the district court’s determination of a substantial anticompetitive effect based on the NCAA’s power to depress wages in the market for student-athletes’ labor.⁴⁸ The NCAA did not dispute this finding, but it claimed the district court erred in the second part of the test, when it required the NCAA to establish the procompetitive benefits of each rule individually rather than collectively.⁴⁹ The NCAA claimed

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2160 (citing *Ohio v. American Express Co.*, 138 S.Ct. 2274, 2284 (2018)).

⁴⁶ *Id.* (citing *American Express Co.*, 138 S.Ct. at 2284).

⁴⁷ *Id.* (citing *American Express Co.*, 138 S.Ct. at 2284).

⁴⁸ *Id.* at 2161

⁴⁹ *Id.*

that the district court erroneously required proof that each individual rule achieved the stated collective procompetitive purpose of differentiating college athletics from professional athletics. The Court agreed with this legal premise but denied it on a factual basis, as it noted that the district court had determined much of the NCAA's proffered evidence was unpersuasive on a general level as well.⁵⁰ The district court found that only some of the NCAA's rules prohibiting compensation unrelated to education had the overall procompetitive benefits asserted by the NCAA. Some of procompetitive rules passed step two.⁵¹ Thus, the NCAA questioned the lower court's analysis of the third prong and holding that "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."⁵²

Further, the NCAA claimed that the injunction threatened to micromanage how the NCAA operates its business. The Court broadly agreed with the NCAA's legal arguments against continuing supervision and hampering industry. However, the Court again reasoned that the district court respected the NCAA's business decisions and created an injunction that barred only unreasonably anticompetitive restraints on education-related benefits.⁵³

First, the Court denied the NCAA's broad reading of the injunction and claims that the injunction would lead to the corrupt use of post eligibility internships as a competitive compensation mechanism. The district court allowed the NCAA broad leeway to propose rules defining what benefits do not relate to education. Second, the NCAA attacked the district court's requirement that the limit on "education related cash awards" be no lower than its limit on similar athletic awards. Again, the Court highlighted that the district court provided ample leeway for the

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing *American Express Co.*, 138 S.Ct. at 2284).

⁵³ *Id.* at 2162.

NCAA to create a structure that meets this requirement.⁵⁴ Further, the NCAA did not prove to the district court that a limitation on corresponding academic awards would hamper consumer interests. Third, the NCAA feared that the in-kind educational benefits would pose a problem if schools exploited the rule to give students extremely valuable items that could tangentially be related to education, like a luxury car to get to class. Again, the Court highlighted the NCAA's freedom to create rules to prevent such abuses, such as a "no Lamborghini" rule.⁵⁵

Justice Gorsuch concluded the majority opinion by acknowledging that the Court had not been asked to address other, potentially problematic aspects of the NCAA's behavior that were left intact by the district court. While the future of athletic amateurism in the U.S. is in flux, the majority stressed that the broader system was not at issue in the matter appealed to the Court. The Court's job was to review only aspects of the district court judgment appealed by the NCAA.

IV. Kavanaugh's Concurrence

While Justice Kavanaugh agreed with the Court's opinion in full, his concurrence serves as a warning shot for the remaining NCAA compensation rules. Kavanaugh did not mince words, concluding flatly, "the NCAA is not above the law."⁵⁶ His reasoning was just as direct.

Justice Kavanaugh's overarching point was that although the majority did not address the legality of the NCAA's remaining compensation rules, the decision establishes the analysis to be used for reviewing such rules—that being, ordinary rule of reason scrutiny.⁵⁷ The NCAA acknowledged that it controls the market for college athletes, conceding that its compensation rules set a below-market rate for the price of student-athlete labor with no meaningful way for these students to negotiate with the NCAA about the compensation rules. Thus, under the rule of reason,

⁵⁴ *Id.* at 2164.

⁵⁵ *Id.* at 2165.

⁵⁶ *Id.* at 2169.

⁵⁷ *Id.* at 2167.

the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules to avoid culpability for antitrust law violations. Justice Kavanaugh was overwhelmingly unconvinced such a justification is possible, opining “price fixing labor is price fixing labor...a textbook antitrust problem.”⁵⁸

The NCAA asserted the compensation rules are essential to defining the product of college sports (i.e., amateurism) and are therefore procompetitive. Justice Kavanaugh viewed the NCAA’s logic regarding procompetitive justification as circular and criticized the argument as an attempt to pass off the price-fixing of labor as a defining product characteristic.⁵⁹ He also re-emphasized the majority’s acknowledgment that comments in the 1984 *NCAA v. Board of Regents of Univ. of Oklahoma* case regarding college sports and amateurism are dicta, not law and therefore have no bearing on the definition of college sports as a product.⁶⁰

Justice Kavanaugh pointed to the billions of dollars student-athletes generate for the NCAA and its member-colleges. He questioned how the procompetitive justification offered by the NCAA—or any procompetitive justification for that matter—could rationally explain student-athletes exclusion from receiving their fair share of the revenues they generate. He provided examples of how poorly the NCAA’s argument would fare in other industries. For example, this argument might allow restaurant to fix cooks’ wages on the theory that customers prefer to eat from low-paid cooks to hospitals to cap nurses’ incomes in order to create a purer form of helping the sick.⁶¹ In all of these other industries, the restraints in the labor market would violate the antitrust laws.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

Justice Kavanaugh noted that some complicated questions will arise from changes to the NCAA's remaining compensation rules, but he allowed that litigation is not the only avenue to address these questions. Legislation, collective bargaining between colleges and student-athletes, and other negotiated agreements are all possible solutions.⁶² Ultimately, Justice Kavanaugh did not see the consequences of an "overdue course correction" to the NCAA's compensation rules as compelling reasons to prevent student-athletes from receiving their fair share of the revenues they generate.⁶³

V. Conclusion

Both Justice Gorsuch's majority opinion and Justice Kavanaugh's concurrence hinted that the NCAA's remaining compensation rules may be at issue in the future. Notably, however, the majority opinion did not address the unique antitrust issues posed by a two-sided market. Instead, the Court assumed single market harm because the two-sided market issue was not on appeal after the district court had dismissed the NCAA's claims of procompetitive benefits in a two-sided market. Usually, a two-sided market has two defined groups, with a critical component being that both groups need the other to derive any benefit from the shared platform. Here, the platform is the NCAA, and one side of the market is consumers and the other, labor provided by student-athletes. Undoubtedly, college sports consumers desire competitive intercollegiate sports leagues that differ from the NFL, NBA, and WNBA.

On the labor side, restrictions needed to preserve a separate, intercollegiate league may involve certain limitations on the compensation that colleges and universities may offer student-athletes. Here, the NCAA has prevented student-athletes from deriving their fair share of platform benefits at no real increased benefit to consumers on the other side of the market. As explained

⁶² *Id.* at 2168.

⁶³ *Id.* at 2167.

above, the NCAA's supposedly amateur intercollegiate league makes billions of dollars off college athletes. So, the issue is not that compensating student-athletes fairly would harm consumers by increased ticket prices or the like. Rather, the real problem is that the NCAA has hoarded benefits for athletic directors, administrators, and schools at the expense of student-athletes who play for the member schools.

The Court also did not have occasion to address additional arguments against compensation limits, like the effect sports have on students' abilities to actually receive the educational benefits they're promised. Non-educational compensation was not at issue in this case, but it should be in the future. Educational benefits alone will not be sufficient to compensate student-athletes. For many student-athletes the reality is that their sports programs don't allow them the time or energy to receive such educational benefits.⁶⁴ Ultimately, future legislation, litigation, collective bargaining, or other negotiated solutions will be required to address these issues.

⁶⁴ Daniel Oppenheimer, *Why Student Athletes Continue to Fail*, TIME (2015), available at <https://time.com/3827196/why-student-athletes-fail/>.