NCAA Student-Athlete Eligibility Rules: From Post-Board of Regents Per Se Legality to Post-Alston Rule of Reason Legal Uncertainty

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The National Collegiate Athletic Association ("NCAA") is a billion-dollar[1] joint venture comprising 1,100 member schools and 100 member conferences that collectively provide athletic and academic opportunities to over 500,000 young men and women.[2] For more than 115 years, the NCAA has offered a unique brand of sports competition featuring amateur student-athletes instead of paid professionals.[3]

Since 1959, the NCAA has sought to maintain "a clear line of demarcation between intercollegiate athletics and professional sports"[4] by prohibiting member schools from compensating their student-athletes for their athletic performance.[5] While NCAA student-athlete eligibility rules have evolved to provide collegiate student-athletes with educational benefits of increasingly greater value, the NCAA consistently has prohibited member schools from giving cash or in-kind "pay for play" compensation,[6] regardless of how much additional revenue is generated by an athlete's participation in an intercollegiate sport.[7]

In 1984, in *National Collegiate Athletic Ass'n v. Board of Regents* the Supreme Court ruled that the NCAA should be given "ample latitude" to maintain its unique product.[8] Until *National Collegiate Athletic Ass'n v. Alston* nearly 40 years later, federal appellate courts generally held that the NCAA's student-athlete eligibility rules were lawful under the Sherman Act.[9] In short, intercollegiate athlete eligibility rules were not subjected to full reason of reason case-by-case judicial scrutiny because they are *per se* lawful. *Board of Regents* comports with established antitrust jurisprudence by recognizing that a joint venture's internal regulation to define and maintain its product brand should be upheld if its underlying history and purpose "make clear [the] rule [i]s a reasonable regulation of business consistent with [§1 of the Sherman Act]."[10] *Board of Regents* also foreshadows and is consistent with the Court's subsequent admonition that federal statutes should not be used to judicially modify a sport's "fundamental character."[11]

In 2021, in *Alston*, the Court revisited *Board of Regents* to consider and establish the appropriate scope of rule of reason scrutiny of challenged NCAA student-athlete eligibility rules.[12] A unanimous *Alston* Court rejected the NCAA's argument that *Board of Regents*, *American Needle, Inc. v. NFL*,[13] and circuit court precedent requires judicial validation of the rules under an abbreviated rule of reason (i.e., in the "twinkling of an eye").[14] In characterizing the NCAA's argument as "seek[ing] immunity from the normal operation of the antitrust laws," the *Alston* Court held that NCAA rules on eligibility are not entitled to an "abbreviated deferential review" under *Board of Regents*. The ordinary "rule of reason" applies to determine if the NCAA's prohibitions are necessary to preserve its unique product or if a less restrictive alternative is available to achieve the procompetitive purpose behind the challenged rules (e.g. preserving consumer demand for college sports).[15] The *Alston* Court upheld the district court's sua sponte finding of two least restrictive alternatives to the NCAA's existing compensation limits: uncapped in-kind education-related benefits (e.g., lab equipment, musical instruments, etc.) and a $5,980 annual cap on cash education-benefits. In his concurring opinion, Justice Kavanaugh strongly suggested that even NCAA rules limiting the value of athletic scholarships and student-athlete compensation and benefits *unrelated* to education may fail the full rule of

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reason analysis.[16] Although no other justices joined his opinion, future litigants bringing cases against the NCAA will surely seek to convert other judges to Justice Kavanaugh's view.

Alston is a relatively narrow ruling that invalidated the NCAA's limits on the education-related in-kind (non-cash) benefits and cash that member schools could give their student-athletes. While narrow, Alston has extremely broad implications and the potential for unintended adverse consequences. *Alston* effectively overrules nearly 40 years of predictable and consistent lower court application of a deferential standard of review since *Board of Regents* when considering the legality of NCAA student-athlete eligibility rules, which are input market restrictions without any proven adverse effects on consumers of intercollegiate sports. *Alston* narrowly construes *Board of Regents*, thereby creating significant doubt regarding the future of the "revered tradition of amateurism in college sports" and "the preservation of the student-athlete in higher education."[17] *Alston* invites future litigation and creates significant uncertainty regarding the legality of the NCAA's remaining student-athlete eligibility rules and its ability to effectively govern intercollegiate athletics.[18]

Future antitrust litigation challenging NCAA student-athlete eligibility and compensation rules will require courts to confront several issues *Alston* did not address, including:

- relevant market definition (e.g., only revenue-generating intercollegiate sports or all intercollegiate sports for which the NCAA sponsors championship competition (the NCAA does not sponsor a Division I FBS football championship));
- procompetitive justifications (e.g., increased output of intercollegiate athletics by cross-subsidizing non-revenue generating sports);
- production of intercollegiate athletics as double-sided market (which would require plaintiffs to prove challenged NCAA input market restraints harm consumer welfare at step 1 of full rule of reason analysis); and
- effects of changed market conditions (e.g., intercollegiate athletes' Name, Image, and Likeness ("NIL") rights; substantial reduction of NCAA, athletic conference, and schools' revenues caused by the pandemic).

Prior to *Alston*, I cautioned against the use of federal antitrust law to externally regulate the production of intercollegiate athletics by piecemeal antitrust litigation for several reasons.[19] NCAA student-athlete eligibility rules, which collectively define the very popular brand of sports competition produced by its member educational institutions and conferences, are input market restraints that do not have any readily identifiable adverse effects on college sports fans. Consumer welfare will be harmed if the full rule of reason is used to professionalize college sports by judicial application of less restrictive alternative analysis on a case-by-case basis. I proposed a solution that avoids the inevitable post-*Alston* uncertainty and tempers the potential for unintended adverse consequences of a full rule of reason analysis to the NCAA's eligibility rules: Congressional creation of a federal regulatory commission authorized "to establish rules that effectively prevent intercollegiate athletics from crossing the line between a commercial/education model and a commercial/professional model for intercollegiate sports, enhance the academic integrity of intercollegiate athletics, promote more competitive balance in intercollegiate sports competition, and require university athletic departments to operate with fiscal responsibility," which "would be the product of a transparent process in which all stakeholders (including student-athletes) and members of the public would have a full opportunity to be heard." All proposed commission rules voluntarily adopted by the NCAA, athletic conferences, and their member institutions would be immune from antitrust scrutiny.[20]

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[1] *See* Steve Cameron, *The NCAA Brings in $1 Billion a Year -- Here's Why it Refuses to Pay its College Athletes*, BUS. INSIDER (Mar. 26, 2019), https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3 [https://perma.cc/W5MG-7WW3]; *see also* Steve Berkowitz, *NCAA Revenue for 2020 Down 50% Due to Pandemic-Forced Cancellation of Basketball Tournament*, USA TODAY (Jan. 25, 2021), https://www.usatoday.com/story/sports/college/2021/01/25/ncaa-revenue-decrease-due-to-no-basketball-tournament/6699352002/ [https://perma.cc/J9HR-JCQ3].

[2] *See Overview*, NCAA, https://www.ncaa.org/overview [https://perma.cc/E94S-SB4U] (last accessed Aug. 23, 2021).

[3] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101–02 (1984) ("[T]he NCAA seeks to market a particular brand of [a sport]. The identification of this 'product' with an academic tradition differentiates college [sports product] from and makes it more popular than [the] professional sports [product] .... In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and
the like.").

[4] NCAA, 2021-2022 NCAA Division I Manual art. 1.3.1 (2021) (discussing the NCAA's "Fundamental Policy"; *see also* Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213, 216 (2004).

[5] Cash is the most obvious form of "pay-for-play" that the NCAA outlaws, but impermissible compensation can also include tattoos and charity fundraising calendars. *See* Ryan Fagan, *Ohio State's Tattoo Gate, Alabama's T-Town and Other Scandals That Would Be Legal Under New NIL Rules*, SPORTING NEWS (Apr. 30, 2020), https://www.sportingnews.com/us/ncaa-football/news/ncaa-nil-rules-scandals-ohio-state-tattoo-gate-alabama-t-town/1aq3iu8fem9nm1x1kuds68rnre [https://perma.cc/N23K-8Z4A].

[6] NCAA, 2021-2022 NCAA Division I Manual art. 12.1.2.1 (2021) (defining prohibited forms of pay that render a student-athlete ineligible).

[7] *See, e.g.*, Kurt Streeter, *Zion Williamson's Year in College Was Worth More Than He Got*, N.Y. TIMES (May 7, 2021), https://www.nytimes.com/2021/05/07/sports/ncaabasketball/zion-williamson-adidas-lawsuit.html [https://perma.cc/67ZW-YT9E].

[8] *Regents*, 468 U.S. at 120.

[9] *See, e.g.*, Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018); Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008); Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998); McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).

[10] Chicago Bd. of Trade v. United States, 246 U.S. 231, 239 (1918).

[11] PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001).

[12] NCAA v. Alston, 141 S. Ct. 2141 (2021).

[13] 560 U.S. 183 (2010).

[14] *Id.*

[15] *Id.*

[16] *Alston*, 141 S. Ct. at 2166-67 (Kavanaugh, J., concurring)

[17] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984).

[18] After *Alston*, to avoid potential antitrust liability, NCAA Divisions I, II, and III adopted a uniform interim policy suspending the current NCAA rules prohibiting intercollegiate athletes from earning any Name, Image, and Likeness rights income. Michelle Brutlag Hosick*, NCAA Adopts Interim Name, Image and Likeness Policy* (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/W5VS-MGY4].

[19] Matthew J. Mitten, *Why and How the Supreme Court Should Have Decided* O'Bannon v. NCAA, 62 ANTITRUST BULL. 62 (2017); Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 ORE. L. REV. 837 (2014).

[20] Mitten & Ross, *supra note 20,* at 877.