What Has SCOTUS Wrought?

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By my lights, the Supreme Court's (SCOTUS) legal reasoning in *National Collegiate Athletic Ass'n v. Alston*[1] was nearly impeccable. Congratulations to SCOTUS on getting it right for once. Legal clarity, however, may coincide with an operating quagmire. What does the decision portend for the future of college sports?

Although the decision in *Alston* was confined to the question of the National Collegiate Athletic Association (NCAA) limiting educationally tethered benefits, it has much broader implications. In the course of explaining its ruling that educationally tethered benefits could not be capped, SCOTUS dismissed the NCAA's longstanding argument (based on dicta in *National Collegiate Athletic Ass'n v. Board of Regents*[2]) that it had broad latitude to carry out its amateurism policies as it saw fit. The *Alston* decision, penned by Justice Gorsuch, makes it clear that the NCAA is still subject to the Sherman Act and that *any* of its restraints of trade will have to pass muster under the rule of reason.[3]

That is, a broad spectrum of NCAA activities is subject to antitrust scrutiny. At the time of the *Alston* ruling, the NCAA was pondering how it could regulate athlete name, image, and likeness (NIL) activity.[4] As of this writing (August 23, 2021), NIL legislation has been approved by twenty-eight states (fifteen of which are already in effect).[5]

Reaffirming the NCAA's vulnerability to antitrust liability, two days after the SCOTUS ruling, U.S. District Court Judge Claudia Wilken denied the NCAA and Power Five conferences' motions to dismiss two lawsuits brought against them by two current players and one former player on behalf of purported classes of Division 1 athletes.[6] The cases challenge the refusal by the NCAA and Power Five conferences to permit college players individually to monetize their NIL rights on social media and as groups to receive pay, *inter alia*, for broadcasting revenue generated from their competitions.

These types of future antitrust litigations will be costly for the NCAA. It has been reported that litigating the *O'Bannon v. National Collegiate Athletic Ass'n*[7] and *Alston* suits cost the NCAA upwards of $250 million.[8] Not only do these suits challenge NCAA authority, but they are also driving the Association to financial distress. It cannot afford ongoing litigation. Accordingly, the NCAA, while it lobbies Congress for a national NIL bill with extensive guardrails, is taking a hyper-defensive posture – telling schools in states without active NIL legislation that they can implement their own NIL policies without jeopardizing their athletes' eligibility, as long as NILs are not used by third parties as inducements to athletes to attend or stay in a particular school or as backdoor pay-for-play. But the NCAA has no effective enforcement structure to regulate NIL activity, even if it weren't fearful of antitrust litigation.

A similar conundrum prevails around educationally tethered benefits post-*Alston*. While SCOTUS ruled that the NCAA cannot limit such benefits, Justice Gorsuch's opinion did reiterate the District Court ruling by Judge Wilken that the NCAA can impose reasonable restraints to safeguard its basic product of amateur sports. Thus, the NCAA can set a "no-Lamborghini" policy; that is, the Association can prohibit schools from offering excessive benefits under the guise of being educationally tethered. Perhaps one can make a persuasive argument that student athletes need vehicles to drive to classes, but they certainly do not need $200,000 sports cars. A similar conundrum would apply to student internships: can a school offer a prospective student athlete a $50,000 summer internship with a professor? And there will be benefits that, though less extravagant, raise questions whether they are educationally related. The SCOTUS decision

seems to say that the NCAA would have the right to control this, and that if the NCAA is uncertain about the limits of its control, then it can go to Judge Wilken for clarification. But there may be too many such arrangements of suspicious provenance or beyond fair market value for the NCAA to get timely and clear judgments from the District Court. The Association's default policy might be to avoid litigation and to let the arrangements go forward unchallenged. Such a policy might persist until national legislation set guardrails on NIL and educationally tethered benefits.

While there are many specific areas open to interpretation, one that deserves attention is the purchase of Loss of Value (LOV) Insurance for athletes. Star players seek LOV insurance so that if they suffer a career-impeding injury in college, they can be partially covered for income they might have earned as a professional. The NCAA has permitted schools to pay premiums for star athletes to purchase LOV insurance in recent years using funds from the NCAA's Student Assistance Funds or Student Athletic Opportunity Fund. If LOV insurance is considered to be educationally tethered, as the NCAA claimed in oral arguments before the Supreme Court (because the insurance induces star athletes to stay in college), then schools would now be unlimited in how extensive a policy they could purchase from their own revenues to induce a prospective student to attend. A comprehensive policy could pay out several million dollars annually. But if all it takes to be deemed educationally tethered is inducing an athlete to stay in college, then just about any benefit could qualify.

Because the NCAA has market power (and is not a single entity but instead a joint venture of 1,100 schools), it would be prohibited by antitrust law from restraining certain economic benefits to students. Athletic conferences, however, can compete with each other and do not have market power. Hence, they can set their own limits on NIL and educational benefits. If the Big Ten's policies are restrictive, then the Pac-12 can set lower (or no) restrictions in hopes of attracting better athletes to its schools.

As the NIL market for individual or group licensing expands into potentially hundreds of millions of dollars, athletic departments will likely receive less revenue from third parties. Coaches and administrators should prepare to have their sails trimmed and all but the top twenty or thirty departments will finally realize that they are unable to compete against those top departments. The world of college sports, already bifurcated between the top half of the Power Five schools and everyone else, will further fracture.

As of August 2021, in just the first month of NIL activity, the number, value and dimensions of the contracts that athletes are signing is already surprising many pundits.[9] The emergence of work-around group licensing deals wherein a third party contracts separately with the university and with a group of students threatens to reach to broadcasting deals and blow the system wide open. Until constrained by national legislation, these deals will proliferate. We will be at the threshold of backdoor pay-for-play.

In *Alston*, Justice Gorsuch wrote that "rules aimed at ensuring 'student-athletes do not receive unlimited payment unrelated to education' could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletes."[10] This is sensible antitrust reasoning, but antitrust provides only a limited perspective. Sustaining consumer demand for college sports is just one desideratum; another is a valid education for student athletes. Over 98 percent of college football and men's basketball players will never play a single game in the NFL or NBA.[11] If they don't receive a real education, it will have a much bigger impact on their lives than would earning some NIL money while in college. If their health care is not provided, it too will have a bigger impact.

NIL money begins to balance the scales between the athletes, on the one hand, and the coaches and administrators, on the other, and it should be welcomed. But there's an implicit quid pro quo that inures to intercollegiate athletics: the athletes dedicate dozens of hours weekly to their sport and put their bodies on the line, and, in return, they get a real education. The relationship between the school and the athlete is supposed to be the relationship between an educator and a student. *Alston* and antitrust law have nothing to say about that.

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

[2] 468 U.S. 85 (1984).

[3] *See generally Alston*, 141 S. Ct. 2141.

[4] Ralph D. Russo, *NCAA Memo: Emmert Urges Schools to Act on NIL or He Will*, ASSOCIATED PRESS (June 18, 2021), https://apnews.com/article/entertainment-sports-043dc769b78c4098103aec5984e5f5b8.

[5] Julie Sommers, *Gambling Provisions State-by-State NIL Legislation*, THE DRAKE GROUP (on file with author).

[6] *See House v. Nat'l Collegiate Athletic Ass'n*, No. 4:20-CV-03919 CW, 2021 WL 3578572 (N.D. Cal. June 24, 2021); *Oliver v. Nat'l Collegiate Athletic Ass'n*, No. 4:20-CV-04527 CW, 2021 WL 3578572 (N.D. Cal. June 24, 2021).

[7] 739 F. App'x 890 (9th Cir. 2018).

[8] Steve Berkowitz, *Supreme Court Rules Against NCAA in Antitrust Case in Unanimous Decision*, USA TODAY (June 21, 2021), https://www.usatoday.com/story/sports/2021/06/21/shawne-alston-vs-ncaa-case-supreme-court-ruling/5237656001/ [https://perma.cc/RRX5-SJAX].

[9] Elizabeth Karpen, *Alabama QB Bryce Young Making 'Ungodly' Income from NIL Deals*, N.Y. POST (July 20, 2021), https://nypost.com/2021/07/20/alabama-qb-is-making-ungodly-amounts-from-nil-deals/ [https://perma.cc/55LE-UQK7].

[10] *Alston*, 141 S. Ct. at 2153 (citation omitted).

[11] *NCAA Recruiting Facts*, NFHS (Aug. 2014), https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf [https://perma.cc/X72T-6PYJ].