

Labor Market Inalienability: College Athletics and Slavery
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In the predominantly free market economy of the U.S.,¹ there are very few productive labor activities of citizens whose rewards from that labor are made inalienable, not subject to sale, or even externally limited, not subject to the economic forces of demand and supply determining prices for that labor and comparatively rewarding those who provide the greatest services to others. Part of this policy, but only part, is the operation of our antitrust laws which prohibit restraint of trade, including the trade of labor services.²

In the modern world, labor services are prohibited in a very small number of markets. Most centrally, prostitution is prohibited, long on moral grounds though more recently on claims that the practice discriminates against women. A second is baby selling, presumably to prevent abuse, though there are many forms of market activity with respect to procreation and child rearing short of actual sales including surrogate births, adoption from foreign countries, and the like.³ There is a related prohibition on the selling of body organs. A fourth is drug dealing, though it is not the labor of dealing that is the target, but the product being dealt.

Of course, over the country's history, there was another great restriction on the market for labor activities—slavery. Slaves were given room and board and a minimal education, but were denied remuneration for the value of their services, which, instead, was retained by their enslavers.

Again in the modern world, a further prohibition on the market for labor activities is college and university athletics, in which college students' athletic abilities generate large entertainment monies for institutions that can recruit successful teams. With respect to college athletics, it is not quite accurate to state that there is no remuneration to these athletic entertainers for their services. The dominant cartel that controls the marketing of college and university athletics—the National Collegiate Athletic Association (NCAA)—allows participating athletes to receive room, board, and tuition, covering a minimal education, and reimbursement of other educational expenses, such as books, and has, more recently, relaxed some limitations on other forms of reimbursement, as will be discussed.

The prohibition on remuneration for college athletics does not resemble the prohibition of prostitution on moral grounds nor the prohibition of baby selling or the selling of body organs. It most resembles the institution of slavery.⁴

For some few athletes, there is a trophy economy feature unlike slavery: If the athlete is spectacularly successful in college sports, she or he may be chosen to participate in professional sports where the remuneration is vastly greater, constrained only by agreement with players' unions and generally related to relative productivity. These trophy awards, however, are available only to a small number: in its most recent recruiting factsheet, the NCAA reported that only two percent of college football players and one percent of college basketball players ever make the professional leagues.⁵

While slavery has long been abolished, what has led to these labor restraints and their persistence for college athletics? The NCAA was founded in 1906 as a mechanism for reducing injuries in college sporting activities and for standardizing collegiate athletic events.⁶ Part of the NCAA's modern work, though a minimal one, is standardization: maintaining rules of the various games; arranging tournaments; and undertaking other, similar efforts, surely important to the operation of the sports.

Early on, the NCAA adopted rules to try to preserve the image of amateurism for college and university athletics. Perhaps this was to distinguish college from professional sports activities, though professional sports leagues were not well developed at the time,⁷ and there were other available forms of distinction such as age or years out of secondary school. At the same time, many schools retained (and still retain) truly amateur sports activities—club or intramural sports—but of a lower entertainment value than varsity sports, which is to say no or few spectators; none paying to attend. The label of varsity sports as “amateurism” and the policies informing it, however, have allowed NCAA member colleges and universities to reap the entertainment value provided by student athletics, a value that has greatly increased over time, especially with the advent of television and cable sports production.

As would be predicted by economics, the ever-increasing monetary returns from college athletic entertainment plus the prohibition of direct payment to the student-athlete entertainers led to a shift in payment structure. Universities now compete heavily for coaches who can recruit the best teams (and for assistant coaches, whose salaries were earlier limited by NCAA rules) as well as make greater investments into training facilities attractive to student-athletes. According to the Supreme Court, today leading university football coaches earn up to \$11 million per year, not including endorsements.⁸ The President of the NCAA earns \$4 million per year.⁹ The athletes themselves, whose work generates these revenues, receive only room and board plus a minimal education.

The U.S. Supreme Court has reviewed, under antitrust laws, various monetary restrictions imposed by the NCAA. In *NCAA v. Board of Regents of the University of Oklahoma*,¹⁰ the Supreme Court struck down as a restraint of trade NCAA limitations on member schools’ television broadcasting rights,¹¹ which led to a vast expansion of televised games, especially by the most successful teams.

In that case, the Court was not asked to address the limitations on payments to athletes, although it stated in a concluding paragraph:

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.¹²

In the years since, the NCAA has progressively, though slowly, expanded forms of competition for student-athletes and payments they may receive. As a result of separate antitrust litigation, the NCAA now allows players to receive compensation for commercial uses of their names, images and likenesses (NIL), the most personal exploitation of an athlete’s talents. These payments, however, typically come from outside university sources, not the universities themselves which still retain game-entertainment revenues.¹³

The NCAA has also recently established what is called the “transfer portal” which relaxes previous NCAA limitations on an athlete’s transfer from one university to another, allowing universities to compete for transferring athletes and for the athletes to place themselves in the most productive team environment.

Even more recently, again through antitrust litigation, the Supreme Court’s ruling in *NCAA v. Alston*¹⁴ forced the NCAA to allow universities to provide greater compensation to their most productive athletes, such as scholarships for graduate study, payment for tutors (to

supplement the otherwise minimal education athletes engage in in colleges), and the like, though still short of full compensation for the entertainment revenues generated by the student-athletes.¹⁵

The Supreme Court's *Alston* opinion is significant, however, first in its conclusion that the tribute in *Board of Regents* to collegiate athletics' definition of their product as "amateurism" is essentially dicta and not controlling.¹⁶ Second, Justice Kavanaugh issued a concurrence that questions at base the NCAA's limitation on remuneration for student athletes:

The NCAA couches its argument for not paying student athletes in innocuous labels [like amateurism]. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.¹⁷

Justice Kavanaugh's stirring words challenge whether the limitations on compensation to student-athletes for the entertainment they provide to millions of consumers can survive. I believe the limitations will not.

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¹ I say "predominantly free market" because roughly a third of economic activity in the U.S. is controlled by the government, though mostly implemented through market transactions.

² See, e.g., *Soc'y of Pro. Engineers v. United States*, 435 U.S. 679 (1978).

³ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856 (1987).

⁴ For more recent treatments analogizing college athletics to slavery, see, e.g., Kevin B. Blackistone, *It's not wrong to say college sports is like slavery. It's wrong that no one's trying to fix that.*, WASH. POST (May 8, 2018), https://www.washingtonpost.com/sports/colleges/its-not-wrong-to-say-college-sports-is-like-slavery-its-wrong-that-no-ones-trying-to-fix-that/2018/05/08/564b789c-52df-11e8-9c91-7dab596e8252_story.html; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, available at <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

⁵ *NCAA Recruiting Facts*, NFHS (Aug. 2014), <https://www.nfhs.org/media/886012/recruiting-fact-sheet-web.pdf> [<https://perma.cc/X72T-6PYJ>].

⁶ See *NCAA v. Alston*, 141 S. Ct. 2141, 2148–49 (2021).

⁷ *Sports and the Changing Tides of American Culture in the 1960s*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/sports-and-changing-tides-american-culture-1960s> (last accessed Aug. 26, 2021).

⁸ *See Alston*, 141 S. Ct. at 2151 (citation omitted).

⁹ The current figure for the NCAA President is \$2.9 million. Michael Shapiro, *How Much NCAA President Mark Emmert Made in 2019*, SPORTS ILLUSTRATED (July 19, 2021), <https://www.si.com/college/2021/07/19/mark-emmert-ncaa-salary-covid-19-revenue-drop> [<https://perma.cc/6TQD-E8D3>].

¹⁰ 468 U.S. 85 (1984).

¹¹ *See id.* at 120.

¹² *Id.* Justice Stevens, the author of the opinion, was reportedly a great fan as an alum of Northwestern University football at a time when Northwestern football more resembled a club sport.

¹³ Quite recently, however, the University of Michigan announced that it would begin selling sweatshirts with individual players' names and numbers, presumably compensating the individual players. Tom VanHaaren, *Michigan Athletics Official Retail Store Partners with Players to Sell Jerseys with Names on Back*, ESPN (July 17, 2021), https://www.espn.com/college-football/story/_/id/31834394/michigan-athletics-official-retail-store-partners-players-sell-jerseys-names-back [<https://perma.cc/J7WY-NMWF>].

¹⁴ 141 S. Ct. 2141 (2021).

¹⁵ *See id.* at 2166.

¹⁶ *See id.* at 2167.

¹⁷ *Id.* (Kavanaugh, J., concurring).