THE COLLEGIATE EMPLOYEE-ATHLETE

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The past two years have brought important legal changes to the intercollegiate sports industry, with the U.S. Supreme Court striking down aspects of the NCAA's bylaws that prevented colleges from providing unlimited educational benefits to their athletes and state legislatures passing new laws to ensure that college athletes enjoy the legal right to endorse products for money. These recent changes to the economic system of college sports have now heralded broader change in legal policy pertaining to the classification of college athletes. At present, the U.S. Court of Appeals for the Third Circuit is reviewing, on interlocutory appeal, the question of whether certain NCAA Division I college athletes may constitute employees for purposes of the Fair Labor Standards Act. In addition, on December 15, 2022, the National Labor Relations Board instructed its Los Angeles branch to move forward in pursuing an unfair labor practice charge against the University of Southern California, the Pac-12 Conference, and the NCAA for engaging in the ongoing misclassification of their college football and basketball players as mere "student-athletes."

This Article provides an in-depth and contemporary analysis of college athletes' employment status under both federal labor and employment law. It concludes by asserting that while the NCAA and its member institutions may be correct that certain college athletes fail to fall within the legal definition of employees, other college athletes, especially those in revenue-generating sports, fall clearly within the legal definition. The Article further provides guidance as to determining what types of college athletes constitute bona fide employees, as well as what entity, or entities, would constitute the employers of these employee-athletes.

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I. INTRODUCTION

Throughout history, there have been many battles over the proper classification of workers under labor and employment law.[1] One of these battles that is presently garnering substantial attention revolves around the proper legal classification of college athletes. At present, the U.S. Court of Appeals for the Third Circuit is reviewing, on interlocutory appeal, whether certain NCAA Division I

1. *See, e.g.*, Rachel M. Cohen, *The Coming Fight over the Gig Economy, Explained*, VOX (Oct. 12, 2022, 7:30 AM), https://www.vox.com/policy-and-politics/2022/10/12/23398727/biden-worker-misclassification-independent-contractor-labor [https://perma.cc/HDP8-EDDP] (describing the debate over gig economy workers employment classification).

college athletes may constitute employees for purposes of the Fair Labor Standards Act ("FLSA").[2] In addition, the National Labor Relations Board ("NLRB"), on December 15, 2022, instructed its Los Angeles branch to move forward and pursue an unfair labor practice charge against the University of Southern California ("USC"), the Pac-12 Conference, and the NCAA for purportedly misclassifying revenue-generating football and basketball employees as mere "student-athletes."[3]

While U.S. colleges and universities are no strangers to labor and employment disputes, the charges currently being pursued by both the NLRB and private plaintiffs in the Third Circuit can reasonably bring about monumental changes to the college sports industry, as well as to the broader world of higher education.[4] A ruling in either matter in favor of the underlying college athletes could result in one of the largest changes in employment status in the history of the United States—with potentially thousands of high-level football and basketball players, as well as perhaps other college athletes, transitioning from the legally dubious label of "student-athletes" into federally protected employees.[5] It would mark a monumental victory for the college athletes' rights movement.

Indeed, college athletes have been branded with the moniker of *student-athlete* since the 1950s when the NCAA's first executive director, Walter Byers, sought to find a way to protect schools from worker's compensation lawsuits following on-field injuries.[6] The term student-athlete evolved from the NCAA's steadfast commitment to the concept of *amateurism*.[7] The two terms had the effect of justifying a model whereby hundreds of thousands of college athletes generated billions of dollars for academic institutions, collegiate athletic conferences, and the NCAA itself over the last one hundred years, where the athletes have received scholarships in lieu of actual compensation for their time and efforts on the field or court.[8] It was a system that was well-received by most NCAA member colleges but widely criticized by many others.[9]

2. Johnson v. NCAA, No. 19-5230, 2021 U.S. Dist. LEXIS 246324, at *2–3 (E.D. Pa. Dec. 28, 2021).

3. Dan Murphy, *NLRB to Pursue Unlawful Labor Practices Against USC, Pac-12, NCAA*, ESPN (Dec. 15, 2022, 10:52 PM), https://africa.espn.com/college-football/story/_/id/35259868/nlrb-pursue-unlawful-labor-practices-usc-pac-12-ncaa [https://perma.cc/4H7P-KA4E].

4. *Id.*

5. Michael McCann, *NLRB USC Case Slouches Toward Employee Status for NCAA Athletes*, SPORTICO (Dec. 18, 2022, 11:01 PM), https://www.yahoo.com/now/nlrb-usc-case-slouches-toward-050100626.html [https://perma.cc/6WWT-49H9].

6. Daniel Libit, *NCAA Says Athletes Pushed Use of 'Student-Athlete' in Constitution*, SPORTICO (Nov. 10, 2021, 8:00 AM), https://www.sportico.com/leagues/college-sports/2021/ncaa-constitution-student-athlete-1234646254/ [https://perma.cc/6D3Y-PLA5].

7. *See* Matt Hinton, *The Origins of Amateurism; Or, Why College Sports Are So Fucked Up*, DEADSPIN (Apr. 25, 2014), https://deadspin.com/the-origins-of-amateurism-or-why-college-sports-are-s-1566714902 [https://perma.cc/J2KH-32SP].

8. *See* John T. Holden, Marc Edelman & Michael A. McCann, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV. 1, 30–31 (2022) [hereinafter *College-Athlete NIL Rights*].

9. *See, e.g.*, Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/AL4A-KGVP] (stating the college sports system has an "unmistakable whiff of the plantation").

This Article is a contemporary analysis of the modern collegiate athlete and their role within the collegiate environment. While there has been a fairly extensive library of work generated that examines the status of athletes from earlier eras,[10] this Article is the most comprehensive article to look at the role of the college athlete since the U.S. Supreme Court's decision in *Alston v. NCAA*, as well as since numerous state laws have ended the absolute restrictions on college athletes earning income.[11] Indeed, this Article recognizes that the total revenue generated by NCAA athletic departments presently exceeds $18.9 billion,[12] and the top college football programs in the country generate an estimated annual value of more than $100 million.[13] No other industry generates so much revenue without the businesses that make up the industry directly paying the workers who generate it.[14]

This Article proceeds in four substantive parts. Part II provides the historical context for the Article and discusses the NCAA's history, the emergence of the concept of amateurism, and the NCAA's steadfast opposition to athletes receiving employment status. Part III analyzes whether athletes could be considered employees at this time and examines the ongoing questions surrounding the status of athletes. Part IV provides a detailed evaluation of the prospect of athletes unionizing and what that would mean for the landscape of collegiate sports. Finally, Part V discusses what makes someone an employee or employer in the context of college sports and whether certain college athletes should be deemed employees and allowed to form variously structured bargaining units. As such, we suggest that, moving forward, the vision of college sports may need to undergo a paradigm shift, where athletics entitles athletes to a differing employment status depending on their institution, sport, and degree of revenue generation for their respective school.

10. *See, e.g.*, Robert T. Zielinski, *College Athletes as Employees*, 41 J. COLL. & U.L. 71, 72 (2015); Eric J. Sobocinski, *College Athletes: What is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 257 (1996); David W. Woodburn, *College Athletes Should Be Entitled to Workers' Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611, 643 (1995); William J. Judge, *Student-Athletes as Employees: Income Tax Consequences*, 13 J. COLL. & U.L. 285, 293–97 (1986).

11. *College-Athlete NIL Rights*, *supra* note 8, at 42.

12. Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (July 2, 2021), https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/ [https://perma.cc/EPF7-KXX4].

13. Brad Crawford, *Ranking College Football's Most Valuable Programs*, 247SPORTS (Dec. 12, 2021, 7:39 PM), https://247sports.com/LongFormArticle/Ranking-college-footballs-most-valuable-programs-Alabama-Michigan-Texas-Georgia-Ohio-State-Oklahoma-178007658/#178007658_1 [https://perma.cc/W4EN-KHGH].

14. This is not to say that athletes are not compensated. It is not uncommon for college athletes to typically receive scholarships, room and board, as well as money for books, and in the wake of the *Alston* decision, payments to compensate them for the full cost of attendance. None of the things that athletes receive, however, are tied to their on-field performance. *See* Matt Brown, *Here's What We Learned from One SEC School's* Alston *Payments*, EXTRA POINTS (May 16, 2022), https://www.extrapointsmb.com/p/alston-payments-college-sports-missouri-sec [https://perma.cc/AT57-CKXQ] (explaining that schools are taking different approaches with distributing the full cost of attendance, or "*Alston*-payments").

II. THE EMERGENCE OF AMATEURISM AND THE TERM "STUDENT-ATHLETE"

The emergence of the so-called "amateurism" model of college sports traces back to very early in the history of intercollegiate athletics when the sports themselves were structured much more akin to traditional extracurricular activities that are organized and overseen by the student body. Even as the oversight of intercollegiate sports has changed, however, the efforts exerted by colleges to maintain a perception that college athletes are "amateurs" and "student-athletes" rather than collegiate employees only grew stronger. This Part of the Article explores the history of college sports, with particular attention paid to the notion of amateurism and the creation of the arguably fictitious term "student-athlete." This Part begins by exploring the birth of the NCAA and continues through the period of time of the NCAA's rapid growth and commercialization. Throughout, it highlights how the term "student-athlete" evolved and why many of the individuals who oversee the college sports industry have expended so much effort to promote the use of this term as an intended shield to providing certain legal rights to college athletes under both labor and employment law.

A. The Birth of the NCAA

College sports have their origins with the first collegiate gymnasiums built at schools such as Harvard, Yale, Amherst, Brown, and the University of Virginia around 1830.[15] By the 1840s, students participated in a variety of campus activities, including football, baseball, regattas, and cricket.[16] In the mid-1840s, campus groups had begun moving from casual recreational endeavors to organized sporting pursuits, beginning with the Yale boat club, which formed in 1843, followed a year later by a similar club at Harvard.[17] The two schools would eventually compete in 1852, and, over time, periodic competitions would grow into annual regattas.[18]

By 1876, collegiate sports became organized by associations, and baseball, football, and track and field all became formalized intercollegiate activities.[19] In 1869, the College of New Jersey (now Princeton University) and Rutgers College played in the first collegiate football game, with Rutgers prevailing by a score of

15. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 223 (1970). Professor Lewis notes that prior to the recognition that physical education and health were a component of academic success, and preventing campus malfeasance:

> Riot and disorder were frequent, and each school year was marked by cases of personal assault upon members of the faculty, overturning of stoves and breaking of windows and doors. On occasion, dynamite and fire were used to destroy buildings. Most disturbances, often rebellious, grew out of disagreements over regulations, food and class procedures.

Id. Exercise would come to be viewed as a preventative measure for campuses. *Id.*

16. *Id.*

17. *Id.* at 224.

18. *Id.*

19. *Id.* at 229.

6-4.[20] This game soon morphed into the first true rivalry in college sports, with Rutgers playing Princeton in football seventy-one times between 1869 and 1980.[21] The rivalry became so intense that, at various points in time, students at Rutgers University attempted to steal the Revolutionary War cannons from Princeton's campus as part of the (perhaps not so) friendly rivalry.[22] In time, however, the decentralized, student-operated, and communal version of college sports transformed, with some schools, such as Princeton, attempting to maintain some semblance of the student-athlete, while other schools, including Rutgers, moved in the direction of greater commercialism.[23]

By 1905, collegiate sports had become a sizeable endeavor, but the lack of regulation raised significant health and safety concerns for observers.[24] President Theodore Roosevelt became concerned, perhaps after an injury to his son Teddy Roosevelt, Jr., who was on a freshman football team at Harvard and was injured during practice.[25] President Roosevelt's concerns were coupled with growing concerns of various New England university presidents, who were not only worried about the violence and injuries on the field but also with the competitiveness of intercollegiate sports off the field.[26] The President of the Massachusetts Institute of Technology facetiously suggested that the degree B.A. may soon stand for Bachelor of Athletics if changes did not come to collegiate athletics.[27]

As President Roosevelt invited the leaders of major universities to the White House to discuss safety concerns surrounding college football, the Chancellor of New York University, who had recently learned about a player death in a game against Union College,[28] sought to form a rules committee.[29] The result of the White House summit was the creation of the Intercollegiate Athletic Association.[30] This organization, with sixty-two initial members, would be renamed the National Collegiate Athletic Association ("NCAA") in 1910.[31] Initially, the

20. John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After* Alston, 74 FLA. L. REV. 427, 430–31 n.12 (2022) [hereinafter *Reimagining College Sports*] (citations omitted).

21. Steve Politi, *Love to Hate: 11 All-Time Villains for Rutgers Sports*, NJ.COM (Oct. 7, 2016, 12:00 PM), https://www.nj.com/rutgersfootball/2016/10/love_to_hate_here_are_11_all-time_villains_for_rut.html [https://perma.cc/8THX-YYFB].

22. *See* Linda Stamato, *Rutgers and Princeton: Tradition, Rivalry, and the Cannon Wars*, NJ.COM (Sept. 11, 2011, 2:41 PM), https://www.nj.com/njv_linda_stamato/2012/09/rutgers_and_princeton_traditio.html [https://perma.cc/75AY-6QZN].

23. *Reimagining College Sports*, *supra* note 20, at 431–32.

24. Marc Edelman, Thomas A. Baker III, John T. Holden & Andrew Shuman, *Exploring College Sports in the Time of COVID-19: A Legal, Medical, and Ethical Analysis*, 2021 MICH. ST. L. REV. 469, 495.

25. *Reimagining College Sports*, *supra* note 20, at 431.

26. *Id.*

27. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 (2000).

28. *See Union Football Player Dies After N.Y.U. Game*, N.Y. TRIB. (Nov. 26, 1905), https://www.newspapers.com/clip/25700367/halfback-harold-moore-football-death/ [https://perma.cc/6NAF-HXUS].

29. Smith, *supra* note 27, at 12.

30. *Id.*

31. *Id.*

NCAA's role was a very limited one, serving primarily as a rules-creating body.[32]

During the 1920s, intercollegiate sports grew significantly in popularity and became a focal point of many campuses.[33] Before the end of the 1920s, the influential Carnegie Foundation for the Advancement of Education expressed concerns about the commercialization of college sports.[34] As college sports grew in popularity during the 1920s and 1930s, so too did the importance to schools' alumni, who began to play a role in recruiting potential athletes to schools.[35] In this era, school boosters, as well as more nefarious characters, would occasionally hire nonstudents to play in games, and teams would intentionally injure players on other teams.[36]

Concerns about the commercialization of college sports came to a head, for the first time, when the NCAA adopted the "Graham Plan," named for Frank P. Graham, President of the University of North Carolina.[37] The Graham Plan entailed President Graham's "public crusade to purify intercollegiate athletics of what he regarded as widespread and rampant professionalism"—a crusade that emerged, in part, in response to the University of North Carolina's unexpected football loss to Duke University just six days earlier.[38] The Graham Plan forbade college athletes from receiving aid.[39] The Graham Plan, however, was short-lived. Within two years, most individual athletic conferences had rescinded their ban on athletic scholarships.[40] The plan faced ill-fated timing because as Graham was introducing the proposal to the Southern Conference, the Southeastern Conference was voting to expand aid to cover the entire cost of attendance for eligible athletes.[41]

In the wake of the failed Graham Plan, another attempt to rein in college athletics from the grip of commercialism and compensation came in the form of the "Sanity Code."[42] The Sanity Code was a response to the perceived "insanity"

32. *Id.*

33. *Id.* at 13.

34. *Id.*

35. John T. Holden, Thomas A. Baker III & Joanna Wall Tweedie, *The Collective Conundrum*, 76 OKLA. L. REV. (forthcoming Apr. 2023) (manuscript at 10).

36. Adam Harris, *The NCAA Sold Fans a Multibillion-Dollar Story. It May Finally Be Coming Apart.*, ATLANTIC: THE EXPERIMENT (July 29, 2021), https://www.theatlantic.com/podcasts/archive/2021/07/ncaa-supreme-court-ruling-student-athlete-exploitation/619571/ [https://perma.cc/K5V9-2ASU].

37. *Reimagining College Sports*, *supra* note 20, at 432.

38. Richard Stone, *The Graham Plan of 1935: An Aborted Crusade to De-emphasize College Athletics*, 64 N.C. HIST. REV. 274, 276 (1987).

39. *Id.* at 279.

40. *Id.* at 280.

41. *Reimagining College Sports*, *supra* note 20, at 432.

42. Lee VanHorn, *When the Sanity Code Becomes the Insanity Code: Following* O'Bannon*'s Lead Is the Key to Solving Group Licensing for NCAA Student-Athletes*, 74 ARK. L. REV. 117, 124–25 (2021). This post-War era between the Graham Plan and Sanity Code was marked by what some dubbed a "meat market" for players with top players going to the highest bidder and rumors that top programs had six-figure payrolls for athletes. KURT EDWARD KEMPER, COLLEGE FOOTBALL AND AMERICAN CULTURE IN THE COLD WAR ERA 13 (Benjamin G. Rader & Randy Roberts eds., 2009).

surrounding the rules, or lack thereof, governing collegiate athletes.[43] At the forty-second annual NCAA meeting, the organization adopted the Sanity Code, "with a minimum of opposition and surprisingly little discussion."[44] The Sanity Code, as reported by the *New York Times*, required that college athletes not be eligible for special scholarships and, instead, only qualify for the same aid packages as nonathletes.[45] The Code did, however, permit off-campus recruiting as long as promises of aid were not used to lure athletes to campus.[46] While the Sanity Code did allow for scholarships, provided they were not athletically tied and allowed athletes to receive some meals, the Sanity Code did not create an enforcement division within the NCAA.[47] Indeed, the Sanity Code's remedy for violators was to expel them from the organization, which required a vote of two-thirds of the members.[48]

The Sanity Code, however, also did not last. In 1950, the NCAA sent a compliance survey to member schools.[49] Seven schools responded that they were not in compliance, and the NCAA moved to expel the "Sinful Seven"—those schools being the University of Maryland, Boston College, Villanova University, the Citadel, the Virginia Military Institute, Virginia Tech, and the University of Virginia.[50] When a vote was held on these schools' expulsion, however, the vote failed to pass, as numerous southern schools voted against sanctions, believing that schools should determine what compensation athletes receive and not the NCAA.[51]

The collapse of the Sanity Code led then-NCAA President Karl Leib to "predict we will have chaos in college athletics."[52] The Sanity Code would officially be repealed by the NCAA in 1951 and replaced by the Committee on Infractions, which was given powers unavailable under the Sanity Code—most notably sanctions short of expulsion.[53] In 1951, the NCAA would also hire its first full-time employee, a twenty-nine-year old named Walter Byers.[54] Byers would

43. Marvin Washington, *Field Approaches to Institutional Change: The Evolution of the National Collegiate Athletic Association 1906–1995*, 25 ORG. STUD. 393, 397 (2004).

44. *Colleges Adopt The 'Sanity Code' to Govern Sports*, N.Y. TIMES (Jan. 11, 1948), https://timesmachine.nytimes.com/timesmachine/1948/01/11/96584115.html?pageNumber=144 [https://perma.cc/5CYZ-AKQA].

45. *Id.*

46. *Id.* Additionally, while the Sanity Code ended financial aid tied to incoming students it did not nullify existing grants-in-aid out of fear that would breach contractual arrangements. *Id.*

47. Alex Kirshner, *The NCAA Wants to Make Up Its Own Subpoena Power*, BANNER SOC'Y (Aug. 14, 2019, 10:24 AM), https://www.bannersociety.com/2019/8/14/20706902/ncaa-enforcement-policy [https://perma.cc/5654-ESKC].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *What Price Football?*, TIME (Jan. 23, 1950), https://content.time.com/time/subscriber/article/0,33009,858594,00.html [https://perma.cc/CJN6-AMNA].

53. Smith, *supra* note 27, at 14–15.

54. Karen Given, *Walter Byers: The Man Who Built the NCAA, Then Tried to Tear It Down*, WBUR: NCAA SHOW (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa [https://perma.cc/RFZ9-H5HM].

go on to become one of the most consequential figures in sports and would usher in what could be considered a second era of the NCAA.[55]

B. The NCAA Enters the Byers Era

The hiring of Walter Byers as the first Executive Director of the NCAA was an interesting choice, as Byers himself was a college dropout.[56] Yet, despite Byers's lack of academic or professional credentials,[57] Byers's presence was felt nearly immediately when a point-shaving scandal was spattered across the headlines and implicated basketball blueblood Kentucky as well as numerous other schools.[58] Despite pushback from legendary Kentucky coach Adolph Rupp, Byers instructed opponents to boycott playing the Kentucky basketball program for the 1952-53 season, a sanction that Rupp reluctantly accepted,[59] despite uncertainty about the NCAA's actual enforcement ability.[60]

The NCAA office under Byers, which began with five employees and 381 member schools, thereafter expanded rapidly.[61] The 1950s were an era when the federal government was directing increasingly large sums of money to research universities in order to combat perceived Soviet technological advances.[62] The increased money grew the size of colleges and universities, and sports interest grew alongside the larger universities.[63] College sports, football in particular, also became a sales pitch for the university, as the University of Notre Dame

55. Byers is an incredibly consequential figure in college sports. Modern college sports is largely built on an ideology that he created around the term amateurism. Ironically, beginning in the mid-1980s, Byers became an outspoken critic of the system that he had created, advocating for college sports to become more professionalized. *See* Jack McCallum, *In the Kingdom of the Solitary Man*, SPORTS ILLUSTRATED (Oct. 6, 1986), https://vault.si.com/vault/1986/10/06/in-the-kingdom-of-the-solitary-man-reticent-reclusive-walter-byers-the-executive-director-of-the-national-collegiate-athletic-association-will-retire-in-1988-but-as-byers-begins-to-relinquish-his-35-year-long-grip-on-the-ncaa-h [https://perma.cc/LU25-BEFR]. One could arguably divide the NCAA's existence into at least three eras: a pre-Walter Byers era; the Walter Byers era built on amateurism, which could likely be extended through the 2000s; and the current era, which seems to be built on reform around granting athletes additional rights. While it is perhaps difficult to choose an exact date for the beginning of the current era, Northwestern University football players' efforts to unionize in 2014 may be a starting place. *See* Marc Edelman, *The Future of College Athletes Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1635–42 (2017) (describing the efforts to unionize by Northwestern University football players and the response from the National Labor Relations Board).

56. Sean Braswell, *How the NCAA Seized Control of College Sports*, OZY (Mar. 22, 2015), https://web.archive.org/web/20210125041405/https:/www.ozy.com/true-and-stories/how-the-ncaa-seized-control-of-college-sports/39872/ [https://perma.cc/PTX3-SSMH].

57. Byers worked as a journalist but had been discharged from the Army during World War II because of vision problems. *Id.*

58. *Id.*

59. JOE NOCERA & BEN STRAUSS, INDENTURED: THE BATTLE TO END THE EXPLOITATION OF COLLEGE ATHLETES 17 (2016).

60. Mark Inabinett, *Walter Byers, First NCAA Executive Director, Inventor of 'Student-Athlete,' Dies at Age 93*, AL.COM (May 28, 2015, 4:12 PM), https://www.al.com/sports/2015/05/walter_byers_first_ncaa_execut.html [https://perma.cc/6GGX-BR9B].

61. *Id.*

62. KEMPER, *supra* note 42, at 15.

63. *Id.*

president, Father Theodore Hesburgh, described college football as a "public service" for the university, introducing the school to those who would otherwise be unfamiliar.[64] By the mid-1950s, college sports had grown in significance for many schools, but other schools, notably those in the Ivy League, began to distance themselves from the competitive atmosphere that the league's schools had helped create half a century earlier.[65]

Byers's early time as chief of the NCAA was marked by crackdowns on schools violating organization rules, as Byers moved swiftly to use the Infractions Committee to take action without waiting for the membership to authorize sweeping action.[66] Despite not having any actual authority, Byers created the appearance of authority, which, having gone unchallenged, effectively willed enforcement authority onto the NCAA.[67] Byers's first year at the helm saw him carve out an exception to a membership vote of 161-7 that banned television broadcasts of games by negotiating an exception for some specially licensed games to showcase college sports.[68] Notre Dame and the University of Pennsylvania objected as they had secured independent broadcast deals, but Byers organized the remainder of the association against the two holdout schools for the perceived betterment of the group.[69] In 1952, the NCAA signed its first broadcast contract with NBC, generating $1.14 million for the broadcast rights to the forthcoming season.[70]

C. The Birth of "Student-Athlete"

As Byers's organizational takeover began, schools were facing legal questions about the status of athletes on campus, notably when those athletes were hurt on the field.[71] During the spring practice season of 1950, a University of Denver football player injured his back playing football and sued, seeking worker's compensation.[72] The plaintiff in that case—*University of Denver v. Nemeth*—claimed that he was an employee of the University of Denver and thus was entitled to benefits resulting from his workplace injury.[73] In addition to playing on the football team, the plaintiff was also enrolled as a regular student in the College of Business Administration and worked at the on-campus tennis courts.[74]

When the plaintiff argued that he was "employed to play football at the University," the University objected to this argument, claiming that while he was

64. *Id.*
65. *Id.*
66. Branch, *supra* note 9.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. Sheldon Elliot Steinbach, *Workmen's Compensation and the Scholarship Athlete*, 19 CLEV. ST. L. REV. 521, 524 (1970).
72. Univ. of Denver v. Nemeth, 257 P.2d 423, 424 (Colo. 1953).
73. *Id.*
74. *Id.*

a University employee, he was not employed to play football.[75] Nevertheless, the Colorado Supreme Court sided with the college athlete—concluding that statements made to him about the connection between his continued status on-campus and playing football were such that it established that the plaintiff's continued employment was contingent on his continuing to be a member of the football team in good standing.[76] The Colorado Supreme Court's decision in *Nemith* sent fear waves throughout the burgeoning college sports industry, as university administrators feared that other courts might follow the lead of the Colorado Supreme Court and deem collegiate athletes to be employees under worker's compensation laws, or, even worse in their opinion, employees under labor laws.[77]

In response, Byers, in his new role as Executive Director of the NCAA, came up with a semantic plan to try to change both court and public impressions of the college sports industry. In a book he would write years after his career as Executive Director of the NCAA ended, Byers explained that, to distinguish college athletes from those who played the sport as an occupation, he, with help from colleagues, "crafted the term *student-athlete*," which became "embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes."[78] He also replaced all references of "football clubs" and "basketball clubs" in their own literature and press releases with the terms "college football team" and "college basketball team."[79] His goal was to change the societal impression of the employee status of college athletes for the purpose of securing more desirable legal outcomes moving forward.

Byers's marketing ploy would prove successful. A second case out of Colorado would emerge following the death of Ray Dennison, a player on the Fort Lewis A&M football team.[80] Dennison, a married father of three, was an Army veteran who attended Fort Lewis A&M on the GI Bill.[81] On the opening kickoff of a game, Dennison went to make a tackle but was struck in the helmet by the ball carrier's knee.[82] The blow caused a fracture to the top of Dennison's skull, and the base of his skull shattered. He would fall into a coma at the hospital and never regain consciousness.[83] Dennison's widow sued, arguing that Ray's death

75. *Id.* at 425–26.

76. *Id.* at 427. The plaintiff was reportedly told:

> [B]y those having authority at the University, that "it would be decided on the football field who receives the meals and the jobs." He participated in football practice, and after a couple of weeks a list of names was read, which list included Nemeth's [the plaintiff] name, and he was then given free meals and a job.

Id. at 426. A California court would reach a similar conclusion following the death of California State Polytechnic College football team members in a plane crash returning from a game in Ohio. *See* Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169, 175 (Cal. Ct. App. 1963).

77. WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

78. *Id.*

79. *Id.*

80. Chuck Slothower, *Fort Lewis' First 'Student-Athlete'*, DURANGO HERALD (Sept. 25, 2014, 4:04 PM), https://www.durangoherald.com/articles/fort-lewis-first-student-athlete/ [https://perma.cc/G7YM-XKR6].

81. *Id.*

82. *Id.*

83. *Id.*

arose out of a contractual relationship between employer and employee.[84] The Colorado Supreme Court, however, which just a few years earlier had recognized Nemith's employee status for worker compensation purposes, rejected Mrs. Dennison's claim to benefits resulting from her husband's death, holding that there was no "contractual obligation to play football," and thus an employment relationship was not created.[85]

After Dennison's death but before the Colorado Supreme Court's decision, the NCAA adopted a change to its rules that allowed college athletes to receive tuition, fees, room and board, and fifteen dollars per month for laundry expenses for nine months, which was deemed the full cost of attendance in order to "clean up college sports and establish true amateurism."[86] Further attempting to break from the appearance of an employment relationship and build on the notion of college athletes being students and amateurs, the NCAA also permitted the extension of scholarship awards to four years and noted that awards of aid could not be tied to continued participation in a sport.[87] Of course, the NCAA's concept of amateurism and the so-called "student-athlete" model is not essential to the viability of collegiate sports.[88] Nonetheless, the myth of the amateur "student-athlete" sustains to this day, thanks to the extreme amount of lobbying and public relations money NCAA member schools have placed into perpetuating this myth.[89]

Years later, Walter Byers, who no doubt was a brilliant political and marketing strategist, had come to have qualms about what he had done.[90] Byers eventually would write that "[c]ollegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice."[91] And yet still, Byers's calls for reform would go unanswered by those thereafter running the NCAA—the ubiquitous juggernaut Byers himself had created and that has since emerged into an anthropomorphic revenue-creating machine.[92]

84. State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 289 (Colo. 1957).

85. *Id.* The Court's decision hinged on the status of football within the University, stating:

> It is significant that the college did not receive a direct benefit from the activities [sic], since the college was not in the football business and received no benefit from this field of recreation. In fact, the state conducted institution, supported by taxpayers, could not as a matter of business enter into the maintenance of a football team for the purpose of making a profit directly or indirectly out of the taxpayers' money.

Id. at 290.

86. BYERS & HAMMER, *supra* note 77, at 72.

87. *Id.*

88. *See, e.g.*, Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 697 (2018) (finding that increases in college athlete compensation do not harm consumer interest in college football consumption).

89. Jayson Jenks, *The NCAA and the Myth of Amateurism*, ATHLETIC (Feb. 8, 2021), https://theathletic.com/2316801/2021/02/08/ncaa-amateurism-supreme-court/ [https://perma.cc/JZ4G-GA2X].

90. *See* BYERS & HAMMER, *supra* note 77, at 374–75 (recommending Congress should draft a "College Athletes' Bill of Rights," which should include freeing the athlete from NCAA restrictions on compensation).

91. *Id.* at 376.

92. NCAA RSCH., TRENDS IN DIVISION I ATHLETICS FINANCES (2021), https://ncaaorg.s3.amazonaws.com/research/Finances/2021RES_D1-RevExpReport.pdf [https://perma.cc/HN4S-XAHP].

D. The NCAA as a Billion-Dollar Enterprise

While Walter Byers may have been regretful about what he built at the NCAA, Byers created an organization that not only exerted a powerful disciplinary hand but also grew the college sports business into a colossal, revenue-generating enterprise.[93] Byers was responsible for bringing broadcasting contracts within the purview of the organization, which would prove to be the organization's chief money-making operation.[94] The revenue generated by the NCAA and its individual member schools is undeniably significant. While many athletic departments engage in fuzzy math and actuarial acrobatics so as not to appear overly profitable, if one looks at where a large portion of athletics revenue goes, the reality is that "[t]he changing economics of college athletics has played a significant role in the emergence of the NCAA as a cartel, which agrees to maintain wealth in the hands of a select few administrators, athletic directors, and coaches."[95]

Aspects of the college sports industry today have truly come to resemble their so-called "professional" counterparts. At the individual college level, upwards of thirty-eight NCAA member colleges currently bring in more than $100 million per year in annual revenue, with "the University of Texas collecting more than $200 million per year in revenue—more than many individual National Hockey League teams."[96] Meanwhile, sixty-four NCAA member colleges brought in more than $25 million in revenue from their intercollegiate football programs alone.[97] At the same time, collegiate coaches have become the highest paid state employee in forty-four of the fifty states.[98]

The monetization of college sports has also, quite ironically, eroded some of the *bona-fide* role of being students in the NCAA's dubiously named "student-athlete" model. According to Indiana University professor Murray Sperber, the 1990s saw schools transition to "mission-driven athletics"—meaning that regardless of any negatives surrounding athletics, schools would promote athletics

93. *See NCAA Earns $1.15 billion in 2021 as Revenue Returns to Normal*, ESPN (Feb. 2, 2022, 3:53 PM), https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal [https://perma.cc/N2SC-GNB8].

94. While the NCAA no longer controls the broadcast rights to football games, in 2016 the organization signed a new deal for broadcast rights to the men's basketball tournament for $8.8 billion, which lasts through 2032. Rodger Sherman, *The NCAA's New March Madness TV Deal Will Make Them a Billion Dollars a Year*, SB NATION (Apr. 12, 2016, 5:06 PM), https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner [https://perma.cc/7SLH-PBTF].

95. Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 889 (2002).

96. Marc Edelman, *Promoting College Athletes' Rights Through Economic Reform: A Healthy Confluence of Free Market Capitalism and Social Justice*, 91 UMKC L. REV. 717, 719 (2023) (quoting Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 178 (2020)).

97. *Id.*

98. J. Patrick Raines, *The Financial Structure of Big-Money College Sports is Broken*, TENNESSEAN (Dec. 30, 2021, 5:46 PM), https://www.tennessean.com/story/opinion/2021/12/30/financial-structure-big-money-college-sports-broken/9055211002/ [https://perma.cc/LZ6V-GCST].

as an essential part of the university's mission.[99] While athletics have long been prioritized within the university apparatus, athletes, on occasion, have been steered in the direction of college courses more focused on maintaining their athletic eligibility than based on academic rigor or interest.[100]

At the same time, the billion-dollar NCAA model raises serious questions in terms of social justice for low-income, African-American, and other college athletes from historically marginalized groups.[101] The majority of the athletes who generate revenue for commercial intercollegiate sports are Black.[102] Meanwhile, 84% of Division I college basketball coaches are White, and 91% of Football Bowl Subdivision ("FBS") level college football coaches are White.[103] Of the 131 college football coaches at the FBS level, all but fourteen earn $1 million or more, and the average salary is more than $3.5 million in 2022.[104] In Division I men's college basketball, at least twelve coaches earned more than $4 million per year.[105]

By contrast, a 2016 study found that 85% of college athletes live below the federal poverty line.[106] By 2019, that number had grown to 86%.[107] These disparities between coaches' salaries and athletes' compensation have been described as "a civil rights issue" by University of California, Berkeley sociologist Harry Edwards.[108] Similarly, Pulitzer-Prize-winning author Taylor Branch describes the current NCAA system that relies so heavily on unpaid labor as having the "unmistakable whiff of the plantation."[109] As such, it is hard not to methodically revisit the legal status of college athletes in America.

99. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 62 (2000).

100. *See generally* GARY SHAW, MEAT ON THE HOOF: THE HIDDEN WORLD OF TEXAS FOOTBALL 44–47 (1972) (describing athletes being steered into specific majors in order to ensure that they remain academically eligible). More recently, the University of North Carolina was embroiled in a scandal involving athletes taking classes with little academic rigor. *See* Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 AM), https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/B225-QXAX].

101. *See* Edelman, *supra* note 96, at 725.

102. *Id.*

103. Julia Chaffers, *Opinion: The Hypocrisy of the NCAA's Amateurism Model*, PRINCETON (Mar. 4, 2020), https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model [https://perma.cc/S9EY-GDFA].

104. *CFB Coaches Salaries*, COACHES HOT SEAT (Aug. 25, 2022), https://www.coacheshotseat.com/CFB-CoachesSalaries.htm [https://perma.cc/58UQ-NC49].

105. *NCAA Men's Basketball Highest-Paid Coaches for 2021-2022*, USA TODAY (Mar. 11, 2022, 7:51 PM), https://www.usatoday.com/picture-gallery/sports/ncaab/2022/03/11/ncaa-mens-basketball-highest-paid-coaches-2021-22-season/9424310002/ [https://perma.cc/E6DR-X6Q3].

106. Edelman, *supra* note 55, at 1632.

107. Ellie Simpson & Lauren Chaingpradit, *NCAA Says Amateurism is 'Educational' While Making Millions Off Student-Athletes*, GLOBAL SPORT MATTERS (Apr. 9, 2019), https://globalsportmatters.com/youth/2019/04/09/ncaa-says-amateurism-is-key-while-student-athletes-are-left-without-food/ [https://perma.cc/3AEM-KMHA].

108. Edelman, *supra* note 55, at 1630 (quoting Dr. Edwards referring to college sports as "the civil rights movement in sports of our lifetime").

109. Branch, *supra* note 9.

III. THE LEGAL STATUS OF COLLEGE ATHLETES

The legal status of college athletes has long been a topic of debate, even as colleges—both individually and collectively through the NCAA—have invested lobbying and public relations dollars toward preserving the view that college athletes are mere amateurs.[110] While the legal status of college athletes may not be the choice of schools, conferences, or the NCAA,[111] there are good reasons to be skeptical of the NCAA's claims that paid college athletes would ruin university budgets and lead to the demise of college sports.[112] While it is uncertain how, when, or even if, college athletes will be classified as employees, the changing social and economic environment surrounding college sports suggests that this topic merits renewed examination. This Part examines foundational topics pertaining to college athlete employment status, including what constitutes an employee, efforts by students who are not college athletes to secure employee status, and past questions about the status of NCAA athletes. This Part concludes with an examination of the argument for recognizing the contemporary college athlete as an employee and how that might look within the college sports landscape.[113]

A. What is an Employee

The question of what constitutes an employee, in college sports and beyond, is not altogether new.[114] At the federal level, the National Labor Relations Act ("NLRA") is perhaps the most relevant source of guidance for looking to define employee, both for college athletes and in general.[115] While only

110. One estimate in 2011 projected that paying college athletes could cost $200 million. *See* Cork Gaines, *Paying College Athletes Would Cost $200 Million Each Year*, BUS. INSIDER (Aug. 20, 2011, 9:35 AM), https://www.businessinsider.com/paying-college-athletes-would-cost-200-million-each-year-2011-8 [https://perma.cc/9HD7-GUKK]. A study from the National Bureau of Economic Research estimated that if college athletes were able to collectively bargain, football players in the Power Five would earn an estimated $360,000, whereas men's basketball players would earn an average of $500,000. *See* Tom Huddleston, Jr., *College Football Stars Could Be Earning as Much as $2.4 Million Per Year, Based on NCAA Revenues: Study*, CNBC (Sept. 2, 2020, 3:01 PM), https://www.cnbc.com/2020/09/02/how-much-college-athletes-could-be-earning-study.html [https://perma.cc/PKU4-6SVW].

111. There exists a possibility that a school or conference could voluntarily elect to compensate athletes as employees, though that does not appear to be on the immediate horizon.

112. As Professors Robert and Amy McCormick noted back in 2006, NCAA rules dictate that all athletes receive the same compensation in the form of athletic scholarships of equal value. *See* Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 128 (2006). However, under a system where athletes were employees, schools would either collectively bargain with athletes over salaries if student-athletes formed a union, or alternatively, schools could negotiate with individual athletes where there is no union in place. In many scenarios, it is likely that aside from star players, salaries would be relatively low.

113. *See* Tyron P. Thomas, *Student Athletes Face Hurdles to Becoming Employees*, BLOOMBERG (Nov. 4, 2021, 3:00 AM), https://news.bloomberglaw.com/daily-labor-report/student-athletes-face-hurdles-to-becoming-employees [https://perma.cc/N6CH-4DMQ] (discussing some of the challenges facing athletes seeking to become employees).

114. For previous articles addressing aspects of this question see, for example, McCormick & McCormick, *supra* note 112, at 83; Jay D. Lonick, *Bargaining with the Real Boss: How Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 161–67 (2015).

115. McCormick & McCormick, *supra* note 112, at 88.

applicable to workers at private institutions, the NLRA has been a focal point of the movement for a change in status for college athletes since members of Northwestern University sought to unionize in 2014 and more recently when General Counsel for the National Labor Relations Board ("NLRB"), Jennifer Abruzzo, announced that certain "Players at Academic Institutions perform services for institutions in return for compensation and subject to their control" and are therefore included within the scope of the NLRA.[116] In her memo, General Counsel Abruzzo found that college athletes are employees based on the valuable service they provide, their compensation in the form of scholarships and stipends, the control under which they are placed, "the manner and means of the players' work on the field and various facets of the players' daily lives to ensure compliance with NCAA rules."[117] The determination of General Counsel Abruzzo was that the players satisfied Section 2(3) of the NLRA and the common law test for determining the status of a worker as an employee for coverage under the Act.[118]

Similarly, like the NLRA, the FLSA provides an unhelpful textual definition of employee.[119] Courts, however, have adopted an Economic Realities Test to provide clarity as to whether someone is an employee under the FLSA.[120] The Economic Realities Test is not a single test but instead a variety of applications across the federal circuit courts.[121] One useful articulation came from the *Coleman v. Western Michigan University* case.[122] In *Coleman*, the court articulated

116. *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/679U-KAQ8]; Memorandum from Jennifer Abruzzo, Gen. Counsel, Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, & Resident Officers, Nat'l Lab. Rels. Bd. 3 (Sept. 29, 2021) [hereinafter Abruzzo Memo].

117. Abruzzo Memo, *supra* note 116, at 3–4.

118. *Id*. For its part, Section 2(3) of the NLRA provides a particular unhelpful definition of employee:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (2018).

119. *See* 29 U.S.C. § 203(e)(4) (2018):

> The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (ii) such services are not the same type of services which the individual is employed to perform for such public agency. (B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

120. Geoffrey J. Rosenthal, *College Play and the FLSA: Why Student-Athletes Should Be Classified as "Employees" Under the Fair Labor Standards Act*, 35 HOFSTRA LAB. & EMP. L.J. 133, 139 (2017).

121. *Id*. at 140–41.

122. *Id*. at 142.

that the Economic Realities Test requires an analysis of four factors: the first factor analyzes the employer's right to control the activities of the employee; the second factor assesses the employer's right to discipline or terminate the employee.[123] The third factor requires an examination of an employee's dependence on the employer for his daily living expenses, and the final factor asks whether the tasks performed by the worker are an "integral part" of the employer's business.[124] The application of the FLSA to collegiate athletes is currently in question in *Johnson v. NCAA*.[125]

While there are also numerous state laws that could define employees in a particular way, our focus is on the two primary federal statutes that appear most likely to be implicated in a scenario where athletes are either recognized as, or declared, to be employees.[126] College athletes, however, are not the only on-campus workers that have challenged their status; in fact, graduate students and research and teaching assistants have been litigating their employment status for decades.[127]

B. The Non-Sports Quest for On-Campus Status

Like athletes, graduate assistants on college campuses have long existed in an uncertain labor law position.[128] Indeed, in the span of four years, the NLRB itself overturned its own decision, initially finding that graduate students at private universities could unionize[129] and then overturning that decision and ruling they could not unionize.[130] In *Brown University*, the NLRB overturned a decision from the year 2000, which reversed nearly twenty-five years of precedent finding that graduate teaching assistants and research assistants were not employees of universities.[131] The Board focused on the fact that the graduate assistants had to be enrolled students in order to receive their positions.[132] The Board also found that the money paid to graduate assistants was not for work but rather was a form of financial aid.[133] The Board, over dissents, argued that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process."[134] Ultimately, the *Brown University* decision would be temporary, as the NLRB would once again find that graduate

123. Coleman v. W. Mich. Univ., 336 N.W.2d 224, 225–26 (Mich. Ct. App. 1983).

124. *Id.*

125. Johnson v. NCAA, 561 F. Supp. 3d 490, 507–08 (E.D. Pa. 2021).

126. *See generally* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296–301 (2001) (describing the challenges in classifying workers).

127. *See, e.g.*, Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621 (1974) (finding that payments made to research assistants are not wages and that research assistants are not employees under Section 2(3) of the NLRA).

128. Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243, 243 (2004).

129. *See* N.Y. Univ., 332 N.L.R.B. 1205, 1205 (2000).

130. Brown Univ., 342 N.L.R.B. 483, 487–93 (2004).

131. *Id.* at 487.

132. *Id.* at 488.

133. *Id.*

134. *Id.* at 493.

assistants at private universities were employees under Section 2(3) of the NLRA.[135]

In *Columbia University*, the NLRB concluded that the Board erred in concluding that graduate assistants in the *Brown University* case could not be classified as employees.[136] The *Columbia University* Board further concluded that none of the exceptions to Section 2(3) excluded student workers from the statutory coverage, and as a result, the *Brown University* Board erred in its finding that the students were not employees.[137] The *Columbia University* Board concluded that finding student assistants to be employees is consistent with the goals of "Federal Labor Policy."[138] Importantly, the Board found that a graduate assistant can "occupy different institutional spheres," meaning they can be both a student and an employee; the two categories are not mutually exclusive.[139] Lastly, the Board rejected the contention of the dissent that the finite nature of graduate student status weighed in favor of not finding assistants to be employees, arguing the slow pace of case resolution "is simply not a basis on which to deny the Act's protections to student assistants. The alternative—to deny coverage because of the effects of procedural delays—would seem to countenance the denial of the Act's coverage to large groups of employees whose tenures are short or industries where there is a rapid pace of change."[140]

The classification of graduate students as employees was a nearly forty-year struggle, with graduate students frequently being defeated, only to succeed and then have their ability to organize taken away within five years.[141] The malleability of the NLRB to recognize errors and correct them perhaps provides support for the contention that things may have changed from the decision in *Northwestern University*.[142] While some advocated for immediate recognition of college athletes as employees after the *Columbia University* decision, that ultimately has not taken place; however, the changes that have taken place in college athletics merit a reexamination of the status of athletes.[143] The following Section discusses various past contemporary efforts by college athletes to be recognized as employees.

135. *See generally* Trs. of Columbia Univ., 364 N.L.R.B. 1080 (2016).

136. *Id.* at 1080.

137. *Id.*

138. *Id.* at 1085–86.

139. *Id.* at 1086.

140. *Id.* at 1091.

141. Andrew F. Boccio, Note, *Student Assistants and the NLRB: A Call for Notice-and-Comment Rulemaking*, 48 SETON HALL L. REV. 193, 195–98 (2017).

142. *See* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html [https://perma.cc/HSE8-3RW3] (noting that the NLRB declined to assert jurisdiction in the case).

143. *See* Lucas Novaes, Comment, *It's Time to Stop Punting on College Athletes' Rights: Implications of* Columbia University *on the Collective Bargaining Rights of College Athletes*, 66 AM. U. L. REV. 1533, 1583 (2017) (suggesting that college athletes should receive the same recognition as the graduate assistants in *Columbia University*); *see also* Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 40 (2018) (noting that the NLRB in *Columbia University* found that the statuses of student and employee were not "mutually exclusive roles").

C. Past Efforts for College Athletes to be Classified as Employees

The potential recognition of college athletes as employees is a topic directly confronting college sports in 2023, but it is not new. The first possibility of such recognition occurred in the 1950s when injured college players sought benefits under workers' compensation statutes.[144] Schools at the time successfully repelled lawsuits, arguing the athletes were "students," or more specifically "student-athletes," a term used to distinguish the athletes from university employees.[145] The topic was also confounded by the presence of hundreds of different employment statuses and overlapping opportunities to present claims.[146]

The highest-profile attempt to secure employee status for college athletes occurred in 2014 when the College Athletes Players Association ("CAPA") petitioned Region 13 of the NLRB on behalf of Northwestern University football players.[147] CAPA, a labor organization that had obtained a "substantial portion" of Northwestern players to sign union authorization cards, maintained that players who receive scholarships ought to be classified as Northwestern University employees under Section 2(3) of the NLRA.[148] The regional director, Peter Sung Ohr, stressed that in *NLRB v. Town & Country Electric*,[149] the U.S. Supreme Court held that in interpreting the meaning of "employee" under Section 2(3), it is "necessary" to consider the common law definition.[150] The common law definition, Ohr explained, contemplates multiple factors and regards an employee as "a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[151]

Ohr underscored that the Board utilized a practice of applying the common law test to assess if individuals qualify as statutory employees.[152] This approach is consistent with one ordinarily applied by U.S. courts but can be frustrated by the absence of a noncircular definition of "employee" within federal statutes and by the absence of direction on how to weigh factors.[153] Ohr illustrated his reasoning by referencing *Seattle Opera v. NLRB*,[154] which involved a group of "volunteer" auxiliary choristers at the Seattle Opera who maintained they were employees under 2(3) of the NLRA. The choristers were paid $214 at the end of a production in which they performed and were furnished tickets for dress rehearsals, too.[155] The opera, at some point, redescribed the $214 payment from an

144. *See generally* State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288 (Colo. 1957).

145. *See, e.g.*, *id.* at 289 (denying benefits after a football player died in the course of his labor).

146. Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 67 (2014).

147. *See* Nw. Univ., 362 N.L.R.B. 1350, 1350 (2015).

148. *Id.* at 1356, 1367.

149. 516 U.S. 85, 93–94 (1995).

150. *Nw. Univ.*, 362 N.L.R.B. at 1362–63.

151. *Id.* at 1363.

152. *Id.*

153. *See* Ryan Vacca, *Uncertainty in Employee Status Across Federal Law*, 92 TEMP. L. REV. 121, 123 (2019).

154. 292 F.3d 757, 761–62 (D.C. Cir. 2002) (enforcing Seattle Opera Ass'n, 331 N.L.R.B. 1072 (2000)).

155. *Seattle Opera Ass'n*, 331 N.L.R.B. at 1072–73.

"honorarium" to a "transportation expense" reimbursement, though neither receipts nor other forms of proof of expense were required to receive the payment.[156] A regional director rejected the choristers' petition, concluding that while they were paid, "one could not function as an auxiliary chorister primarily for immediate financial gain."[157] The Board rejected that conclusion, emphasizing that the choristers and the opera possessed an "economic relationship."[158] To that point, the choristers were paid $214 "whether or not they incur expenses" in their work on productions.[159] This exchange amounted to play-for-pay, the Board reasoned, and embodied "compensation for their work."[160]

The U.S. Court of Appeals for the D.C. Circuit agreed. Judge Karen Henderson acknowledged that the definition of employee may appear "hopelessly circular" but found clarifying the principle that when an individual is "not specifically excluded" from an enumerated exemption, that individual ought to be recognized as an employee if the individual works in return for compensation and if the employer "has the power or right to control and direct the person in the material details of how such work is to be performed."[161] Applying that framework, Henderson focused on how the opera "concedes" it pays a flat sum for work, "regardless of any transportation, parking and other miscellaneous expenses [the choristers] incur."[162] The opera, the judge stressed, also required the choristers to sign "letters of understanding and intent" which detailed the opera's right to control their work.[163] Commentators saw a parallel between college athletes and choristers. "Though the Seattle Opera and college athletics plainly cater to different audiences, in many significant respects—a prestigious non-profit employer, informal employment agreements, codified behavior guidelines, controlled and directed performances, disputed subjective motivations, and minimal (though artfully characterized) compensation," wrote Nicholas Fram and T. Ward Frampton, "the labor of their indispensable performers is virtually identical."[164]

Building on this same line of reasoning, Ohr found that Northwestern players who received scholarships to play football are employees under the Act.[165] He explained the players provided a service—participation in football games and practices—for the benefit of the University that paid them. The University relied on that service to generate revenue through "ticket sales, television contracts, merchandise sales and licensing agreements" and to procure additional benefits, such as augmenting fundraising and admissions efforts.[166] Players also signed a

156. *Seattle Opera*, 292 F.3d. at 760.
157. *Seattle Opera Ass'n*, 331 N.L.R.B. at 1073.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Seattle Opera*, 292 F.3d at 762.
162. *Id.* at 762–63.
163. *Id.* at 763.
164. Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1037 (2012).
165. Nw. Univ., 362 N.L.R.B. 1350, 1364 (2015).
166. *Id.* at 1363.

"tender" before each period of the scholarship that Ohr reasoned was tantamount to an employment contract in that it specified the compensation, outlined restrictions on outside compensation, and warned that a player could lose a scholarship (akin to being fired) under certain conditions.[167] Ohr's characterization resembled the employment relationship of an NFL player with his team: he's paid to play.[168]

Ohr also drew attention to the myriad ways football coaches, like bosses in the workplace, impose "strict and exacting control" over the players' time.[169] Although the NCAA caps countable athletically related activities to twenty hours per week, Ohr found that "players spend 50 to 60 hours per week engaging in football-related activities" during parts of the year.[170] Coaches also controlled the location of the athletes to perform their football duties and directed players to travel to other locations in order to "win a football game."[171] Even the players' dress attire while in travel status was governed by the coaches. At the same time, Ohr distinguished walk-ons as nonemployees since while they "may have aspirations of earning a football scholarship," they do not receive compensation in exchange for their labor.[172]

Northwestern petitioned the NLRB to review Ohr's ruling, with the University contending that the football players were not statutory employees.[173] The Board declined to exercise jurisdiction, reasoning that to do otherwise "would not serve to promote stability in labor relations."[174] The Board seemed determined to portray the question as so unprecedented and impactful that it ought to wait to hear from Congress and other decision-makers. "We emphasize that this case involves novel and unique circumstances," the Board wrote.[175] "The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind."[176] "There has never been a petition for representation before the Board in a unit of a single college team or, for that matter, a group of college teams . . . the scholarship players bear little resemblance to the graduate student assistants or student janitors and cafeteria workers whose employee status the Board has considered in other cases."[177] Some commentators were surprised by the Board's punt when it had previously exercised jurisdiction to determine if graduate assistants and teaching assistants at private universities were employees—which also arguably raised a risk of

167. *Id.*
168. *Id.* at 1366.
169. *Id.* at 1363–64.
170. *Id.* at 1364.
171. *Id.*
172. *Id.* at 1364–65.
173. *Id.* at 1350.
174. *Id.*
175. *Id.* at 1352.
176. *Id.*
177. *Id.* at 1352–53.

"instability."[178] One commentator who previously worked at the NLRB thought the "[B]oard blinked under some very bright lights."[179]

The failure of the Northwestern petition was followed by lawsuits that sought, and in one instance still seeks, a judicial declaration of college athletes as employees.[180] The key difference is the federal statute at issue. While the Northwestern petition drew from the NLRA, the lawsuits have primarily concerned the FLSA.[181] Signed into law by President Franklin D. Roosevelt during the Great Depression, the FLSA establishes that certain categories of employees in the private and public sector are guaranteed minimum wage and overtime pay when they work more than forty hours per week.[182] Many types of professionals are generally deemed exempt from the FLSA on account they earn a salary (rather than an hourly rate) or they fall within an exempt designation, such as for creative or seasonal work.[183] Exempt workers include doctors, attorneys, engineers, and teachers. Employers must correctly classify employees as exempt or nonexempt or face potential fines by the Department of Labor.[184]

The logic of classifying college athletes as FLSA employees was evidenced in *Berger v. NCAA*.[185] Gillian Berger and Taylor Hennig were members of Penn's women's track and field team who alleged they were FLSA employees of the University and entitled to at least minimum wage for their work as athletes.[186] Writing for a three-judge panel, Judge Michael Kanne of the Seventh Circuit rejected the argument.[187] He emphasized that whether a worker is an FLSA employee hinges on the "totality of circumstances" as opposed to a mechanically applied test or series of factors.[188] These circumstances, Kanne wrote, must attempt to unveil the "economic reality" of the relationship between worker and employer.[189] Kanne explained that this type of analysis occurred in *Vanskike v. Peters*, wherein a prison inmate (unsuccessfully) argued he was an FLSA employee.[190] Kanne cited as "defin[ing] the economic reality of the relationship between student athletes and their schools" Justice John Paul Stevens's remark in *NCAA v. Board of Regents*[191]—later deemed to be dictum in *NCAA v. Alston*[192]—

178. Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis [https://perma.cc/S5P8-YT25].

179. *Id.*

180. *See infra* notes 212–46 and accompanying text (discussing Johnson v. NCAA, 561 F. Supp. 3d 490, 493–96 (E.D. Pa. 2021), *appeal docketed*, No. 22-01223 (3d Cir. Feb. 8, 2022)).

181. Rosenthal, *supra* note 120, at 135.

182. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22, 28 (1978).

183. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 213.

184. *Id.* § 216(a).

185. 162 F. Supp. 3d 845, 856–57 (S.D. Ind. 2016), *aff'd*, 843 F.3d 285 (7th Cir. 2016).

186. *Berger*, 843 F.3d at 289.

187. *Id.* at 288.

188. *Id.* at 290–91 (citing Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992)).

189. *Id.*

190. *Id.* at 291.

191. *Id.* at 291.

192. 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

that there is a "revered tradition of amateurism in college sports."[193] He insisted that a multifactor test would "not take into account this tradition of amateurism or the reality of the student-athlete experience."[194] Kanne also explained that courts have usually deemed college athletes not employees in the context of workers' compensation claims.[195] The Department of Labor's "Field Operations Handbook" was also cited.[196] Although Kanne acknowledged the manual, which advises investigators and staff, is not "dispositive" on the question of whether Berger and Henig were employees, he found it nonetheless persuasive.[197] To that end, the Handbook distinguished students in work-study programs from those who partake in "intramural and interscholastic athletics and similar endeavors."[198] The former are classified as FLSA employees in part because of anticipation of compensation, while the latter are employees.[199] Although Kanne acknowledged that NCAA-regulated sports "are very different from club sports," that distinction is not made in the "clear language" of the Handbook.[200]

The same outcome befell former USC football player Lamar Dawson, who in *Dawson v. NCAA*, sued the NCAA, Division I FBS, and the Pac-12 Conference, arguing he was an employee under the FLSA and that the three defendants were his joint employers.[201] His FLSA arguments tracked those in the Northwestern petition and *Berger*.[202] Dawson went further, however, to contend that because the NCAA sets and adopts rules that both forbid pay-for-play and impose various obligations on athletes while playing FBS football, and because the PAC-12 adopted those rules, the NCAA and the Pac-12 were his joint employers.[203] As joint employers, the NCAA and the Pac-12 would constitute independent and separate legal entities that both function in the capacity of an employer and share or co-determine essential terms of employment.[204] Under labor law, joint employers are often jointly and severally liable for an unlawful act, with an

193. *Berger*, 843 F.3d at 291 (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).

194. *Id.*

195. *Id.* at 292 (citing Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983); State Comp. Ins. Fund v. Indus. Comm'n, 314 P.2d 288 (Colo. 1957); Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692 (Tex. App. 2000); Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983)).

196. *Berger*, 843 F.3d at 292.

197. *Id.* (citing Driver v. Apple Ill., LLC, 739 F.3d 1073, 1075 (7th Cir. 2014); Yi v. Sterling Collision Ctrs, Inc., 480 F.3d 505, 508 (7th Cir. 2007)); FIELD OPERATIONS HANDBOOK (FOH), U.S. DEP'T LAB. (2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf [https://perma.cc/9ZS3-ZVGM].

198. *Berger*, 843 F.3d at 292–93 (citing FOH, *supra* note 197, § 10b03(e)).

199. *Id.*

200. *Id.* at 293.

201. Dawson v. NCAA, 250 F. Supp. 3d 401, 403, 407–08 (N.D. Cal. 2017), *aff'd*, 932 F. 3d 905 (9th Cir. 2019).

202. *See generally Berger*, 843 F.3d at 285; *Dawson*, 250 F. Supp. 3d at 401; *supra* notes 147–51 and accompanying text.

203. *Dawson*, 250 F. Supp. 3d at 401.

204. NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1122–23 (3d Cir. 1982) (citing NLRB v. Checker Cab Co., 367 F.2d 692, 698 (6th Cir. 1966)).

unlawful practice committed by one interpreted to have been committed by both.[205]

U.S. District Judge Richard Seeborg relied on *Berger* to conclude that, given the "long tradition of amateurism in college sports" and the "entirely voluntary" status of college athletes, their play does not count as "work" under the FLSA.[206] Seeborg was similarly dismissive of the distinction between a college football player who plays a sport that generates billions of dollars in revenue versus a track and field athlete at Penn.[207] As Seeborg saw it, this was a distinction without a difference under the FLSA.[208]

On appeal, the Ninth Circuit expressed similar skepticism toward *Dawson*'s reasoning. Judge Sidney Thomas emphasized that "[*Dawson*] cannot demonstrate that the NCAA or the Pac-12 had the power to fire or hire him" nor could he show they "exercise any other analogous control."[209] Although Thomas observed NCAA bylaws "pervasively regulate college athletics," including by capping what a player may receive in a scholarship, neither the NCAA nor the Pac-12 select players for teams, have the capacity to remove them from teams, maintain their student records, or "engage in the actual supervision of the players' performance."[210] Thomas likened the NCAA and Pac-12 to a "regulator" with the USC and other NCAA member schools enforcing regulations.[211]

After falling short in *Berger* in the Seventh Circuit and *Dawson* in the Ninth Circuit, proponents of the recognition of college athletes under the FLSA may have found an opening in the Third Circuit. Former Villanova football player Ralph "Trey" Johnson is leading a group of current and former Division 1 ("DI") college athletes in a lawsuit that raises similar arguments as those found in *Berger* and *Dawson*.[212] *Johnson v. NCAA* contends that the NCAA and member schools are joint employers of college athletes and are in violation of the FLSA as well as applicable state minimum wage and unjust enrichment laws.[213] Paul McDonald, the lead counsel for *Johnson*, finds it incongruous that students who work at games as ticket-takers, seating attendants, and food concession workers are paid under the FLSA, but the athletes playing those games are not.[214] He adds that the role of a scholarship is not an explanatory distinction since some of the work-study students are, like some of the athletes, on scholarships.[215]

205. Caroline B. Galiatsos, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 B.U. L. REV. 2083, 2101 (2016).

206. *Dawson*, 250 F. Supp. 3d at 405 (quoting *Berger*, 843 F.3d at 293).

207. *Id.* at 406.

208. *Id.*

209. Dawson v. NCAA, 932 F. 3d 905, 910 (9th Cir. 2019).

210. *Id.* at 910–11.

211. *Id.* at 910.

212. Johnson v. NCAA, 561 F. Supp. 3d 490, 493 (E.D. Pa. 2021); Berger v. NCAA, 162 F. Supp. 3d 845, 849 (S.D. Ind. 2016); *Dawson*, 250 F. Supp. 3d at 403.

213. *Johnson*, 561 F. Supp. 3d at 493.

214. *See* Michael McCann, *NCAA Leans on Slavery Loophole as Attorney Fights for Athlete Minimum Wage*, SPORTICO (June 10, 2022, 11:00 AM), https://www.sportico.com/law/analysis/2022/johnson-v-ncaa-interview-1234678454/ [https://perma.cc/KT5W-VS9U].

215. *Id.*

In September 2021, U.S. District Judge John Padova denied the NCAA's motion to dismiss.[216] Drawing from *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*,[217] Padova stressed four factors in assessing whether two entities constitute joint employers of a worker: (1) whether the entity has authority to hire and fire the worker; (2) whether the entity has authority to promulgate work rules and set workers' compensation, benefits, and work schedules; (3) the degree of involvement by the entity in day-to-day supervision; and (4) the degree of control over the workers' records.[218]

Padova found the players had offered sufficient arguments under each of the four factors for purposes of defeating the NCAA's motion to dismiss. First, Padova reasoned that the NCAA acts in ways that resemble those of an employer that can hire and fire workers.[219] He emphasized the NCAA's suasion over the recruitment of athletes, such as restricting the number of phone calls that can be made to a recruit and capping face-to-face encounters between school officials and athletes and their families.[220] Padova also noted that "NCAA Bylaws require member schools to suspend or fire student athletes who are determined to be ineligible to play by NCAA Enforcement Staff."[221] From that lens, Padova deduced, the NCAA is not only a mere regulator in imposing rules—as the Ninth Circuit had determined in *Dawson*—but also an active enforcer by "investigating violations of those rules and imposing penalties, "including the firing of student athletes."[222]

The *Johnson* plaintiffs also made a compelling argument that the NCAA possesses the authority to promulgate work rules and dictate compensation levels for workers. Padova found multiple ways in which the NCAA controls the work lives of college athletes, including by governing "eligibility, awards, benefits, expenses, and each sport's playing and practice seasons."[223] NCAA Bylaw 17, for instance, offers instruction on "required athletically related activities" as well as limiting hours the NCAA classifies as "countable athletically related activities" or "CARA," which are permissible hours college athletes can spend on sports.[224] The NCAA also considers any payments by the school to the athlete a violation.[225] The scope and degree of NCAA authority led Padova to conclude the NCAA "issues work rules that apply to Plaintiffs and imposes conditions not only on the payment of compensation and other benefits to Plaintiffs but also on how much time Plaintiffs may spend in connection with NCAA intercollegiate

216. *Johnson*, 561 F. Supp. 3d at 507.

217. 683 F.3d 462 (3d Cir. 2012). The litigation involved Enterprise car rental branch managers portraying the parent company as their joint employer under the FLSA. *Id.* at 464.

218. *Johnson*, 561 F. Supp. 3d at 500.

219. *Id.* at 501.

220. *Id.* at 500.

221. *Id.* at 501.

222. *Id.*; *see* Dawson v. NCAA, 932 F.3d 905, 910 (9th Cir. 2019) ("Rather, the allegations of the complaint, taken as true, demonstrate that the NCAA functions as a regulator.").

223. *Johnson*, 561 F. Supp. 3d at 501.

224. *LSDBi*, NCAA, https://web3.ncaa.org/lsdbi/search/bylawView?id=15715 (last visited Oct. 11, 2023) [https://perma.cc/9RGJ-74ZP].

225. *Johnson*, 561 F. Supp. 3d at 501.

athletic activities."[226] This nature of authority, Padova surmised, points in the direction of the NCAA functioning as an employer.

Padova reached the same conclusion on the NCAA's involvement in day-to-day supervision, the third factor. The NCAA, the judge observed, possesses multiple ways in which it "control[s]" the ability of member schools to discipline athletes, such as by requiring a school to suspend or "fire" an athlete for violating an eligibility bylaw or dictating procedures for reviews and appeals of disciplinary actions.[227] Similarly, Padova found the players to have crafted a sufficiently credible argument for the fourth factor, which concerns the NCAA's control of players' records.[228] He accentuated the role of the NCAA Eligibility Center to maintain records that determine if a prospective athlete is eligible and how the NCAA maintains records regarding athletes' health and compliance with drug testing.[229]

As an additional line of reasoning, Padova incorporated U.S. Supreme Court Associate Justice Brett Kavanaugh's concurring opinion in *Alston*, in which Kavanaugh described the NCAA as a cartel.[230] "As Justice Kavanaugh noted," Padova wrote, the argument "that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid . . . is circular and unpersuasive."[231] Padova added the mere fact that there is a "long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship" between players and schools does not furnish a defense against the athletes' claims they are entitled to minimum wages under the FLSA.[232]

Padova also declined to place the same degree of high deference to the Department of Labor's "Field Operations Handbook" as the Seventh Circuit had adopted in *Berger*.[233] To that end, he observed that an internal agency is "not subject to the kind of deliberateness or thoroughness that gives rise to significant deference."[234] Padova found that it is at least plausible while the Handbook mentions student participation in "interscholastic athletics" alongside participation in intramurals, glee clubs, debating teams, and similar club-like activities as non-employee work, the Handbook might not be referring to or contemplating modern-day D1 college athletics.[235] This is because, he explained, D1 interscholastic

226. *Id.* at 502.

227. *Id.* at 503.

228. *Id.* at 504.

229. *Id.*

230. *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 501 (E.D. Pa. 2021); Michael McCann & Daniel Libit, *NCAA, PAC-12 Accused of Athlete Labor Violations in New Filing*, SPORTICO (Feb. 8, 2022, 5:08 PM), https://www.sportico.com/leagues/college-sports/2022/ncaa-pac-12-ucla-and-usc-1234660311/ [https://perma.cc/ERB2-XKU2] (discussing Kavanaugh's reasoning).

231. *Johnson*, 556 F. Supp. 3d at 501 (Kavanaugh, J., concurring) (quoting NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021)).

232. *Id.*

233. *Id.* at 504; Berger v. NCAA, 843 F.3d 285, 292 (7th Cir. 2016).

234. *Johnson*, 556 F. Supp. 3d at 504 (quoting Ebbert v. DaimlerChrysler Corp., 319 F.3d 103, 115 (3d Cir. 2003)).

235. *Id.* at 502, 506 (citing FOH, *supra* note 197, § 10b03(e)).

athletics are arguably conducted primarily "for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend" instead of "for the benefit of the student athletes who participate in them."[236] Padova also drew a distinction between the possibility that D1 interscholastic athletics are, unlike intramurals and student clubs, "not part of the educational opportunities provided to the student athletes by the colleges and universities that they attend."[237] Instead, they could be construed as activities that "interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities."[238]

Johnson is currently before the U.S. Court of Appeals for the Third Circuit. In December 2021, Padova certified for interlocutory appeal the following question: "Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act, solely by virtue of their participation in interscholastic athletics."[239] If the Third Circuit answers in the affirmative, a circuit split between the Third, Seventh, and Ninth Circuits would surface on whether college athletes are employees.[240] The U.S. Supreme Court might be inclined to review such a controversy given that it would impact whether the "more than 350 D-I schools need to pay wages to approximately 175,000 athletes and, possibly, back pay to hundreds of thousands of former D1 athletes."[241] While empirical data indicates the Court agrees to hear only about 1% of petitions,[242] the Court is more inclined to grant certiorari to resolve circuit splits.[243] As scholars have noted, the existence of a split leads to "litigants obtaining different outcomes under the same federal law merely because of the geographic location where their case is decided."[244]

In the absence of a Supreme Court review where the Third Circuit concludes college athletes are employees, the NCAA would seem hard-pressed to deny recognition of college athletes' employment rights nationally. The

236. *Id.* at 506.

237. *Id.*

238. *Id.*

239. Johnson v. NCAA, No. 19-5230, 2021 U.S. Dist. LEXIS 246423, at *2–3 (E.D. Pa. Dec. 28, 2021).

240. *See* Michael McCann, *NCAA Athletes-as-Employees Case Heads to Federal Appeals Court*, SPORTICO (Jan. 5, 2022, 12:01 AM), https://www.sportico.com/law/analysis/2022/college-athletes-employee-case-12346 57539/ [https://perma.cc/Q7W7-BG2B].

241. *Id.*

242. Ralph Mayrell & John Elwood, *The Statistics of Relists over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022, 4:14 PM), https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same/#:~:text=Relists%20and%20cert%20grants%3A%20Together,cases%20fare%20far%2C%20far%20better [https://perma.cc/MS3Z-XASY].

243. Shelby A. Mars, *An Unconstitutional Constitutional Amendment in the Context of Article III: Why We Can't—and Shouldn't—Tell United States Supreme Court Justices When to Retire*, 14 SETON HALL CIR. REV. 203, 231 (2017).

244. Jonathan M. Cohen & Daniel S. Cohen, Iron-*ing out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990 (2020). *But see* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 356 (2006) (noting that the Supreme Court does not have a Constitutional obligation to ensure harmony in interpretation of law among the federal circuits).

alternative would consist of college athletes in the Third Circuit enjoying employment rights while those in the Seventh (*Berger*) and Ninth Circuit (*Dawson*) continue to be barred from such rights. The NCAA has argued that uniformity in amateurism rules is an essential ingredient to its system of rules.[245] In *NCAA v. Miller*, the NCAA insisted that "its ability to accomplish its goals of scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis. In order to satisfactorily achieve these goals, the NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis."[246] If *Johnson* or an analogous case in another federal circuit prevails, in other words, amateurism as it has long been understood would face potential extinction.

D. NLRB General Counsel Interjects On Athlete-Employee Status

Another ongoing front in the potential classification of college athletes as employees is occurring within the national and regional offices of the NLRB. In September 2021, General Counsel Abruzzo sent a memorandum to regional directors and other agency officials in which she opined that college athletes possess statutory rights consistent with employee recognition under Section 2(3) of the NLRA.[247] "Players at Academic Institutions perform services for institutions in return for compensation and subject to their control," Abruzzo maintained.[248] She also suggested that colleges using the phrase "student athletes" when deployed to misclassify athlete employees and procure a "chilling effect" on labor activity shall constitute an independent violation of Section 8(a)(1), which makes it unlawful for an employer to interfere with employees' labor activities.[249] Abruzzo's most provocative assertion arose in a footnote in which she warned she "will consider pursuing a joint employer theory of liability" against the NCAA and conferences "even if some of the member schools are state institutions."[250] Abruzzo reasoned that athletes "perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university. . . ."[251]

Abruzzo, a union attorney who previously worked for the Communications Workers of America, highlighted recent legal developments to bolster her reasoning.[252] First was *Alston*.[253] Although the case concerned antitrust law and a

245. NCAA v. Miller, 795 F. Supp. 1476, 1484 (D. Nev. 1992), *aff'd*, 10 F.3d 633 (9th Cir. 1993).

246. *Id.*

247. *See generally* Abruzzo Memo, *supra* note 116.

248. *Id.*

249. *Id.*; *see also* Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. REV. 43, 55 (2011) (discussing how Section 8(a)(1) is used to prevent coercive acts on employees' exercise of labor rights).

250. Abruzzo Memo, *supra* note 116, at 9 n.34.

251. *Id.*

252. *See* Timothy Puko & Ken Thomas, *Biden and Union Leaders Huddle on Infrastructure, Stimulus Plans*, WALL ST. J., Feb. 18, 2021, at A4 (detailing Abruzzo's background).

253. In *NCAA v. Alston*, the Supreme Court, in a unanimous ruling, held that NCAA limits on academic aid constituted a violation of Section I of the Sherman Act. The decision also clarified that the NCAA did not have

fact pattern—the NCAA and its member schools capping the ability of individual members to reimburse or pay for education-related costs—arguably far afield from whether college athletes are employees, Abruzzo underscored how the Court's ruling both "recognized that college sports is a profit-making enterprise" and debunked the NCAA's attempt to defend its actions by portraying amateurism as a justification.[254] She also amplified Justice Kavanaugh's concurring opinion, particularly where he questioned how the NCAA and member schools can persist in denying athletes a "fair share" of revenue and where he advocated for the wisdom of collective bargaining on behalf of college athletes.[255]

Secondly, Abruzzo suggested that the NCAA acquiescing to state name, image, and likeness ("NIL") statutes in 2021, which entailed permitting college athletes to sign endorsement deals and profit from sponsorships without running afoul of amateurism rules, was a tacit acknowledgment of the professionalization of college athletes.[256] "The freedom to engage in far-reaching and lucrative business enterprises," Abruzzo wrote, "makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income."[257] From the lens of *Alston* and NIL, Abruzzo appeared to view employment recognition of college athletes as a part of a broader transformation in protecting college athletes' economic rights.

The Abruzzo memorandum sparked dramatic—and overstated—headlines. "Some college athletes are employees, federal agency says—here's what that means," CNBC.com claimed.[258] Similarly, the *New York Times* posited, "Labor Memo Amounts to New Stance From Feds Against the NCAA."[259] Meanwhile, the *National Law Journal* posited the provocative teaser, "Are College Athletes Employees? NLRB Reverses the Call on the Field."[260] Not to be outdone, "Biden Administration Deems Some College Athletes Employees under the National Labor Relations Act," a Ropes & Gray alert exclaimed.[261]

a de facto antitrust exemption justified by the organizational desire to maintain amateurism. 141 S. Ct. 2141, 2160, 2162–63, 2166 (2021).

254. *See* Abruzzo Memo, *supra* note 116, at 5.

255. *Id.* (citing *Alston*, 141 S. Ct. at 2168).

256. *Id.* at 6; *see also College-Athlete NIL Rights*, *supra* note 8, at 22–31 (discussing the emergence of NIL in college sports).

257. Abruzzo Memo, *supra* note 116, at 6.

258. Abigail Johnson Hess, *Some College Athletes are Employees, Federal Agency Says—Here's What That Means*, CNBC (Sept. 29, 2021, 2:02 PM), https://www.cnbc.com/2021/09/29/college-athletes-can-be-considered-employees-says-top-nlrb-lawyer.html [https://perma.cc/5TZT-N228].

259. David W. Chen, *Labor Memo Amounts to New Stance from Feds Against the N.C.A.A.*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/09/29/sports/ncaafootball/ncaa-labor-memo-student-athletes-unionize.html [https://perma.cc/Q5VH-KPXZ].

260. Colleen Naumovich, *Are College Athletes Employees? NLRB Reverses the Call on the Field*, NAT'L L. REV. (Sept. 30, 2021), https://www.natlawreview.com/article/are-college-athletes-employees-nlrb-reverses-call-field [https://perma.cc/Q9JM-N9XR].

261. Christopher P. Conniff, Evan Gourvitz & Kaitlin O'Donnell, *Biden Administration Deems Some College Athletes Employees Under the National Labor Relations Act*, ROPES & GRAY (Oct. 5, 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/october/biden-administration-deems-some-college-athletes-employees-under-the-national-labor-relations-act [https://perma.cc/2P3Z-38LA].

Abruzzo's memorandum changed neither federal law nor federal policy. As her agency's General Counsel, Abruzzo does not hold one of the Board's five votes, which are instead assigned to the Board's five members.[262] Abruzzo also acknowledged in an interview that her memo only spoke for her views and not those of the agency at large and stressed that she is "not in discussions with the administration about any of the memos that [she] put out or any of the positions that [she is] taking."[263] Abruzzo's memorandum was also not unprecedented for NLRB General Counsels. In 2017, then-agency General Counsel Richard Griffin authored a memorandum expressing the viewpoint that D1 FBS scholarship football players at private colleges and universities are employees.[264] Griffin explained how the Board broadly defined "employee" under Section 2(3) with an understanding that captured "the breadth of the ordinary dictionary definition of the term, a definition that includes any person who works for another in return for financial or other compensation."[265]

Despite memorandums from two NLRB General Counsels asserting that college athletes are employees under the NLRA, not one college athlete has filed a responsive charge with the NLRB since Northwestern football players did so in January 2014.[266] This is true despite the recent advocacy of college athletes on behalf of their interests and rights, such as by promoting the hashtag #NotNCAAProperty and upholding civil rights during the Black Lives Matter movement in 2020.[267] Filing an unfair labor practices charge is also not especially complicated or arduous; it is a process that takes less than an hour and can be started and finished online at the NLRB's website.[268] In 2022, Abruzzo speculated that college athletes are deterred by potential retribution should they claim employment status under the NLRA.[269] "Look at Colin Kaepernick," she told *Sportico*, referring to the famed NFL player whom teams declined to pursue after

262. *See* Nathan Newman, *Reengineering Workplace Bargaining: How Big Data Drives Lower Wages and How Reframing Labor Law Can Restore Information Equality in the Workplace*, 85 U. CIN. L. REV. 693, 753 (2017); Michael McCann, *College Athletes are Employees, NLRB Counsel Says*, SPORTICO (Sept. 29, 2021, 1:01 PM), https://www.sportico.com/law/analysis/2021/nlrb-college-athlete-memo-1234641056/ [https://perma.cc/P2D9-6578] (noting limitations of Abruzzo's position in relationship to her memorandum).

263. Daniel Libit & Michael McCann, *NLRB Waits for Athlete Plaintiffs as NIL Money Quells Labor Pains*, SPORTICO (June 27, 2022, 9:00 AM), https://www.sportico.com/leagues/college-sports/2022/nlrb-counsel-abruzzos-ncaa-1234679678/ [https://perma.cc/CS2C-3VK6].

264. Memorandum from Richard F. Griffin, Jr., Gen. Counsel, N.L.R.B, on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context to all Reg'l Dirs., Officers-in-Charge, and Resident Officers 16 (Jan. 31, 2017) [hereinafter Memo from Gen. Counsel, N.L.R.B.] ("[S]cholarship football players in Division I FBS [schools] are employees under the NLRA . . . ."); *see also* Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 196 (2020) (explaining how Griffin's memo fit into the context of other developments regarding college athletes' rights).

265. Memo from Gen. Counsel, N.L.R.B, *supra* note 261, at 12 (citation omitted).

266. *See* Press Release, N.L.R.B., Office of Congressional and Public Affairs, Northwestern University Decision (Aug. 17, 2015), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3034/Northwestern%20Fact%20Sheet%202015-08.pdf [https://perma.cc/4PXV-73QS] (noting the date the Northwestern matter began).

267. *See* Libit & McCann, *supra* note 260.

268. *Id.*

269. *Id.*

he kneeled during the playing of the national anthem.[270] Alternative explanations include that college athletes are more focused on expanding individual brands through NIL, or they are not as eager to gain employee status as are some legal and policy advocates.[271]

E. The Latest NLRB Challenge

Since General Counsel Abruzzo issued her memorandum, which provides something of a roadmap for challenging the employment classification of college athletes, two college athlete advocates have pursued unfair labor practice ("ULP") charges for what they see as the betterment of college athletes. In November 2021, Michael Hsu filed a charge on behalf of the College Basketball Players Association, contending that "within the last six months, the NCAA has violated section 8(a)(I) by classifying college athletes as student-athletes."[272] Four months later, the National College Players Association ("NCPA"), which is led by Ramogi Huma, filed an unfair labor practice charge against the NCAA, Pac-12 Conference, the University of California, Los Angeles ("UCLA"), and USC.[273] The NCPA argues these organizations are employers of college athletes and "have interfered with, restrained, and coerced its employees . . . by repeatedly misclassifying employees as 'student-athlete' non-employees" and restricting the use of social media and third-party communications.[274]

There is no standing requirement for filing a ULP charge.[275] As the NLRB has stated in court filings, the function of a charge is to alert the agency "to the fact that certain unfair labor practices are alleged to have been committed."[276] To that end, "a charge is merely the means whereby action on the part of the Board is instituted and is not a formal pleading filed by a party to the proceeding."[277] A charge sets off a multistep process where field agents at one of the NLRB's twenty-six regional districts compile evidence and, in some instances, pursue affidavits from parties and witnesses.[278] If the regional director concludes there is "sufficient evidence to support the charge," the agency attempts to

270. *Id.*

271. *Id.*

272. Daniel Libit & Michael McCann, *Unfair Labor Charge Against NCAA May Offer NLRB a New Test Case*, SPORTICO (Nov. 16, 2021, 12:00 PM), https://www.sportico.com/leagues/college-sports/2021/ncaa-nlrb-unfair-labor-charge-1234646629/ [https://perma.cc/Q2P4-RSK4].

273. Daniel Libit, *NLRB Targets USC, Pac-12 for Unfair Labor Charge*, SPORTICO (Dec. 9, 2022, 2:32 PM), https://www.sportico.com/leagues/college-sports/2022/usc-gets-nlrbs-ncaa-1234698029/ [https://perma.cc/F4WE-NMH4].

274. McCann & Libit, *supra* note 230.

275. 29 C.F.R. § 102.9 (2017) ("Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce."); *see also* Lopatka, *supra* note 246, at 46–47 (discussing the absence of a standing requirement).

276. *In re* Gen. Furniture Mfg. Co., 26 N.L.R.B. 74, 76 n.3 (1940); *see also* NLRB. v. Local No. 42, Int'l Ass'n Heat & Frost Insulators, 469 F.2d 163, 165 (3d Cir. 1972) (upholding the validity of the any person rule).

277. *Gen. Furniture Mfg. Co.*, 26 N.L.R.B. at 76 n.3.

278. *Investigate Charges*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Oct. 10, 2023) [https://perma.cc/U9W2-KHTQ].

negotiate a settlement between the parties.[279] Should settlement talks fail, the regional director may issue a complaint, which brings on a hearing before an NLRB administrative law judge who can find a violation and order remedies or dismiss the complaint.[280] Additional steps can involve the petitioning of a federal district judge for a temporary restraining order, a hearing before the agency's Board, an appeal of the Board's ruling to the U.S. Court of Appeals for the D.C. Circuit or the federal circuit court where the charge was brought and, ultimately, review by the U.S. Supreme Court.[281]

The Board decided to pursue further investigation into the NCPA's narrower charge involving athletes at USC and UCLA.[282] In December 2022, Los Angeles Regional Director Mori Rubin determined there was merit in the argument that USC, the Pac-12, and the NCAA are joint employers.[283] Assuming the charge is reviewed by an administrative law judge, various forms of evidence—including expert statements, depositions, and subpoenas—would consider how the NCAA's and Pac-12's control of USC dictates the relationship between USC and its athletes, including in regard to eligibility, time management, scheduling, and hours devoted to athletics.[284] Most ULP charges fail. From 2020 to 2022, there were 48,948 charges. They generated 2,225 complaints (4.5%) and 15,417 settlements (31.5%).[285]

Should the NLRB eventually recognize college athletes as employees under the NLRA, the scope of that recognition would govern athletes at private colleges. Whether an athlete at a public university is an employee is a question for state law and interpretation of that law by a state labor board and state courts.[286] This is an important, and often overlooked, distinction since some states prohibit certain categories of public employees from unionizing.[287] Take South Carolina, where in *Branch v. City of Myrtle Beach*,[288] South Carolina's highest court held that public employees are not governed by applicable labor relations statutes and, therefore, lack the right to engage in collective bargaining.[289] The practical effect

279. *Id.*

280. *Id.*; *see also* Calvin William Sharpe, *NLRB Deferral to Grievance-Arbitration: A General Theory*, 48 OHIO ST. L.J. 595, 598–99 (1987) (detailing the administrative process for a ULP charge).

281. *See* Libit & McCann, *supra* note 263.

282. *See* Libit, *supra* note 273.

283. Michael McCann, *NLRB USC Case Slouches Toward Employee Status for NCAA Athletes*, SPORTICO (Dec. 19, 2022, 12:01 AM), https://www.sportico.com/law/analysis/2022/nlrb-college-athlete-decision-1234698857/ [https://perma.cc/5883-PE4B].

284. *Id.*

285. *Unfair Labor Practice Charges Filed Each Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges (last visited Oct. 10, 2023) [https://perma.cc/7WDF-LUNS].

286. Edelman, *supra* note 55, at 1646.

287. Zachary Angulo, Note, *The NLRB and Graduate-Worker Employee Status: Past, Present, and Future*, 41 BERKELEY J. EMP. & LAB. L. 187, 188–89 (2020).

288. 532 S.E.2d 289 (S.C. 2000).

289. *Id.* at 292–93; *see also* Harold Datz, *Stripping Public Employees' Rights for the Sake of Wisconsin Budget Repair: Reality or Rhetoric?*, 2 AM. U. LAB. & EMP. L.F. 145, 146 n.5 (2011) (citing *Branch*, 532 S.E.2d at 293) (discussing how the Supreme Court of South Carolina concluded that public sector employees are excluded from the operative definition of "employee").

of such a ruling is that even if an athlete at Clemson University, the University of South Carolina, or another public university in the state were deemed an employee of the university, he or she would need to negotiate their employment with the university.[290] The same outcome would arise if the athlete, be they in South Carolina or elsewhere, were deemed an employee under the FLSA but not the NLRA.[291] FLSA employment, unlike under the NLRA, does not authorize unionization and bargaining.[292] Abruzzo's interpretation of joint employment, however, would construe the NCAA and a conference as the joint employers of an athlete under the NLRA, even if that athlete is enrolled at a public university where state law does not recognize employment.

F. The Non-Unionized Employee Path Forward

A non-unionized path for college athletes as employees would mean the athletes function as do most American workers. Recent data from the U.S. Bureau of Statistics indicates that 10.3% of American workers are members of a union, a sizable drop from 1983, the first year such data was collected and when 20.1% of Americans were in unions.[293] The athletes and their schools could individually negotiate terms of employment, such as salary or wages, minimum and overtime pay conditions, restrictions on speech including via social media postings, health care benefits, retirement provisions, the circumstances in which a firing would be classified as for cause, and, where lawful, noncompete clauses. A noncompete might, for example, prohibit the athlete from joining a rival school (in this context, a rival employer) through the NCAA's transfer portal.[294] Professional athletes are ordinarily employed through employment contracts.[295] The same could prove true of college athlete employees, though most American workers, including at colleges and universities, are employed at-will.[296] At-will employees can be fired for any reason other than an unlawful one.[297] They may obtain protections through company handbooks and other employer-issued

290. Michael McCann, *College Athletes Union Faces Hurdles Beyond #WeAreUnited and #WeWantToPlay*, SPORTICO (Aug. 20, 2020, 9:45 AM), https://www.sportico.com/law/analysis/2020/college-players-union-1234610792/ [https://perma.cc/EKG5-235V].

291. *See* Brief for Lewis Roca Rothgerber Christie, LLP as Amici Curiae Supporting Respondents, Allen v. O.G. Eliades, LLC, 481 P.3d 877 (2020) (No. 79632), 2020 WL 6599766 (Nev. 2021), at *23 ("That the same person can occupy distinct legal statuses for different laws is no more anomalous than the idea that a worker may be an 'employee' under the FLSA, but not the NLRA, SSA, ADA, or ERISA.").

292. Sarah F. Carter, Note, *What is an Employee? Crafting a More Effective Test for the Modern Workforce*, 47 FLA. ST. U. L. REV. 501, 505 (2020).

293. Press Release, U.S. Bureau Lab. Stat., Union Members Summary (Jan. 19, 2023), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/2BH4-9EBF].

294. *See* Robert Harding, Note, *Calling Time: The Case for Ending Preferential Antitrust Treatment of NCAA Amateurism Rules After* Alston, 2022 U. ILL. L. REV. 1637, 1659 (2022) (discussing how the transfer portal permits college athletes to transfer colleges and preserve their NCAA eligibility under certain conditions).

295. *See* Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2099 (2009).

296. Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 44 (2017).

297. Kenneth D. Kinney, Comment, *Wrongful Termination in Violation of Public Policy: The Viability of the "Encouraged Acts" Exception in Missouri*, 81 UMKC L. REV. 967, 967–68 (2013).

writings, but the default presumption is they lack job security.[298] A player that loses his or her employment would presumably lose their roster spot, which is tantamount to a position at an employer. That, in turn, could render them ineligible for their athletic scholarship, which is predicated on (among other conditions) participating in a sport.[299] It would, thus, behoove college athletes, should they be recognized as employees, to memorialize the terms of their duties and protections through employment contracts rather than take their chances with at-will employment.

Some athletes, particularly star players, might reason they are better off without a union. It has been said by economists that LeBron James has been "extremely underpaid" during his National Basketball Association ("NBA") career because his union, the National Basketball Players' Association, and the NBA, have negotiated a maximum salary for NBA players and James's value to his team has exceeded that salary.[300] If a union for players and a corresponding college negotiated a pay scale that capped salary opportunities, star players might earn less money so that lesser players earn more.[301] To the extent pay ought to reflect "merit" or "worth," a player might believe he or she should be able to directly negotiate the terms of their employment.[302] On the other hand, union membership is generally viewed as correlated with increasing wages and other benefits for members.[303] This is particularly true in professional sports, where unions have been credited with negotiating massive pay increases as well as obtaining free agency and other labor rights on behalf of members.[304]

In many labor settings, individual workers are deemed replaceable and thus lack the power to effectively negotiate terms of employment.[305] To that point, consider minor league baseball players, who some commentators contend have been grossly underpaid and, in the absence of union representation, wield limited

298. J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 388–89 (1995); *see also* Pamela A. Nadler & Seth D. Amera, Note, *Recent Developments in New York Law*, 71 ST. JOHN'S L. REV. 487, 489 n.2 (1997) (discussing holdings where a court found that an employer created additional protections from discharge through company handbooks and manuals).

299. Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972), *cert. denied*, 192 S.E.2d 197 (N.C. 1972).

300. *LeBron James is Still Underpaid*, NPR: PLANET MONEY (July 18, 2018, 5:54 PM), https://www.npr.org/transcripts/628132840 [https://perma.cc/H9NY-R6KU] (quoting economist Victor Matheson).

301. *See* Brandon S. Ross, Note, *The NBA's New Media Rights Deal: A Look into the Multi-Billion Dollar Cause of What May Become the Next NBA Lockout*, 33 HOFSTRA LAB. & EMP. L.J. 291, 324–25 (2016) ("[T]he vast majority of NBA players benefit from LeBron James[] being relatively underpaid . . . .").

302. Joshua M. Javits & Matthew L. Luby, *Gig Workers: Walking a Tightrope Without a Safety Net*, 2022 J. DISP. RESOL. 27, 42 (explaining how, when sufficiently empowered, an employee can bargain superior terms of employment).

303. *See* Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 396 (2014).

304. Michael J. Cozzillio, *From the Land of Bondage: The Greening of Major League Baseball Players and the Major League Baseball Players Association*, 41 CATH. U. L. REV. 117, 119 n.6 (1991).

305. *See* Thomas J. Freeman, Aaron McKain & Destynie J.L. Sewell, Janus *and the Future of Collective Bargaining: Rhetorically Predicting a First Amendment Right to Negotiation*, 11 WM. & MARY BUS. L. REV. 609, 616 (2020).

bargaining power.[306] The decision of the Major League Baseball Players Association ("MLBPA") in 2022 to bargain on behalf of minor league players is expected to boost player pay and confer other workplace benefits, such as superior housing and improved training facilities.[307] On the other hand, Major League Baseball ("MLB") has portrayed minor league baseball as an extremely unprofitable enterprise, with the league claiming it spent at least $1.03 billion to operate the minors in 2022 and, in return, generated just $25 million.[308] Minor league players also tend to have short careers, with the MLB estimating the average minor league player plays three seasons and, on average, leaves to pursue school or another profession by age twenty-three.[309] It remains to be seen if the MLBPA is able to negotiate significantly superior terms of employment for minor league players. That outcome could prove suggestive for the potential success of a union for college players, who, like minor league baseball players, have relatively short careers and are sometimes perceived as expendable.[310]

Union negotiations would advantage the NCAA, conferences, and colleges in an important respect: The negotiated terms of athlete employment, provided they primarily pertain to a mandatory subject of bargaining (*i.e.*, wages, hours, and other working conditions), would gain immunity from scrutiny under Section I of the Sherman Antitrust Act.[311] The exemption was created by several Supreme Court decisions[312] and would enable the NCAA to bargain with a players' union for restrictions on compensation without fear of running afoul of antitrust law. The NCAA is reportedly anxious about how to enforce amateurism rules in the aftermath of *NCAA v. Alston*,[313] where the Supreme Court, in holding that the NCAA and its member schools and conferences violated Section I by agreeing to limit how much each can compensate athletes for academic-related costs, made clear that NCAA rules are subject to ordinary, nondeferential

306. *See generally* Shauna Teresa DiGiovanni, Note, *Underpaid, Unrepresented, Unprotected: A Call for a Change in the Status Quo of Minor League Baseball*, 22 SPORTS LAWS. J. 243 (2015).

307. *Secure with 5-Year Deal, Clark Pushes to Make MLBPA Stronger*, USA TODAY (Nov. 30, 2022, 7:19 PM), https://www.usatoday.com/story/sports/mlb/2022/11/30/secure-with-5-year-deal-clark-pushes-to-make-mlbpa-stronger/50991475/ [https://perma.cc/N547-7UFL]. How well minor league players fare in bargaining remains to be seen.

308. Michael McCann, *MLB's Manfred Defends Antitrust Exemption, Cites Minor League Costs*, SPORTICO (Aug. 2, 2022, 10:00 AM), https://www.sportico.com/law/analysis/2022/rob-manfred-letter-senate-1234684280/ [https://perma.cc/XKM2-A8QU].

309. Michael McCann, *MLBPA Recruits Minor Leaguers as Baseball and Its Players Plead Poverty*, SPORTICO (Aug. 29, 2022, 3:00 PM), https://www.sportico.com/law/analysis/2022/mlbpa-minor-league-player-union-1234687014/ [https://perma.cc/WG3N-YFUP].

310. *See* Justin Reed, *'You were Replaceable': Gonzaga Runner Kristen Garcia Advocates Mental Health, Finds Boost with Transfer from Wisconsin*, KHQ: NONSTOP LOCAL SPORTS (May 23, 2022, 6:49 PM), https://www.spokesman.com/stories/2022/may/23/you-were-replaceable-gonzaga-runner-kristen-garcia/ [https://perma.cc/UJX3-LEBD].

311. *See* Michael A. McCann, *The NBA and the Single Entity Defense: A Better Case?*, 1 J. SPORTS & ENT. L. 39, 45 (2010).

312. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689 (1965); United Mine Workers v. Pennington, 381 U.S. 657, 664–65 (1965).

313. 141 S. Ct. 2141 (2021).

scrutiny.[314] An NCAA that collectively bargains workplace rules with a players' union would be able to extinguish that concern.

While college athletes as employees might comport with labor and antitrust laws relevant to the NCAA, conferences, and schools, there would be other complications. Athletic departments at private universities and at some public universities qualify for federal tax-exemption under the education requirements of 501(c)(3) of the Internal Revenue Code ("IRC").[315] Other public universities are regarded as not subject to income tax under Section 115, which enables state schools to not classify as income funds "derived from any public utility or the exercise of any essential governmental function . . . ,"[316] or on account of implied statutory immunity in that no provision of the IRC explicitly taxes them.[317] Athletic departments have successfully relied on these sources of exemption in spite of spending numerous millions on high-salaried coaches and staff and state-of-the-art stadiums, arenas, rinks, and training facilities.[318] This spending, of course, confers benefits onto the athletes, who are coached by industry leaders, can hone their skills in elite venues, and gain national recognition by their association with a famed program. It is not certain that also conferring wages and additional employment benefits onto athletes would necessarily imperil the use of these tax exemptions. Accountants for universities, conferences, and the NCAA, however, would need to closely examine the impact.

Lastly, the proverbial "elephant in the room" is how employee recognition would impact universities' budgets and whether they would reduce or even terminate their athletic program.[319] In *Johnson*, the Southeastern Conference and a group of thirteen education associations have filed amicus briefs in which they warn that only 2% of NCAA member schools generate enough revenue to cover operating costs and that the vast majority of college athletes play on teams that generate "little or no revenue."[320] The education groups add a dire prediction: "If

314. *Id.* at 2160–62 (applying Rule of Reason).

315. *See* Karla M. Nettleton, *I.R.C. § 4960's Impact on College Sports: In Light of IRS Guidance Certain Universities Will Need to Engage in Tax Planning*, 32 MARQ. SPORTS L. REV. 117, 120 (2021) (quoting I.R.C. § 501(c)(3) (2021)).

316. *Id.* (quoting 26 U.S.C. § 115(1) (2021)).

317. *Id.* at 121 (citing Ellen P. Aprill, *Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates*, 23 FLA. TAX. REV. 73, 83 (2019)).

318. *See* David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 235–42 (discussing the massive amounts of money spent on "amateur" college athletics); *see also* John D. Colombo, *The NCAA, Tax Exemption, and Collegiate Athletics*, 2010 U. ILL. L. REV. 109, 112–13 (2010) (outlining how university spending on athletics is harmonious with existing understandings of tax law).

319. There have been any number of justifications for why paying athletes is unfeasible; however, on closer examination, many appear to be either easily worked around or less burdensome than often presented. *See, e.g.*, Marc Edelman, *When It Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014, 9:30 AM), https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/?sh=7c13f5cb1bde [https://perma.cc/T93H-LJ2Y] (explaining that justifications for not paying athletes based on Title IX do not appear to hold up upon closer examination).

320. *See* Michael McCann, *SEC Fears of Johnson v. NCAA Labor Case Laid Out in Amicus Briefs*, YAHOO NEWS (June 19, 2022), https://news.yahoo.com/sec-fears-johnson-v-ncaa-040141879.html [https://perma.cc/D7HM-BMLW].

colleges and universities are forced to pay their student-athletes . . ., it is inevitable that many schools will simply eliminate athletics teams, with non-revenue sports teams the most likely to be on the chopping block."[321] Whether these types of ominous admonitions prove correct remains to be seen. Universities gain a wide range of benefits through athletics that go beyond direct revenue. Those benefits include increased fundraising, improved marketing, and more applications from high school students.[322] It stands to reason that while employment recognition of athletes would increase labor costs for universities, those universities would still have incentives to maintain their programs and perhaps shift spending strategies, such as paying coaches less.

IV. THE PROSPECT OF COLLEGE ATHLETES UNIONIZING

Although the non-unionized path forward may be a tolerable path for college-athlete employees and employers alike, presuming that certain college athletes constitute employees as a matter of law, there emerges an altogether different question: whether these college athletes could, or should, attempt to form a union. Indeed, while employee status is a necessary condition for unionizing, employee status is hardly a sufficient one. This Part begins by providing a brief history of labor unions in America, proceeds to discuss the history of sports labor unions, explores historic efforts to unionize college athletes, and concludes with a roadmap for reasonable future efforts to unionize college athletes and a discussion of the potential antitrust tradeoffs to actually unionizing college athletes.

A. Brief History of Labor Unions

The history of labor unions in what is today the United States dates back at least as far as our country itself.[323] While there is evidence of organized strikes by artisan traders as far back as the American colonial period, the first known organized trade union was the Federal Society of Journeymen Cordwainers, which was formed by a collection of Philadelphia shoemakers in 1794.[324] At first, labor unions emerged with local scope.[325] By 1852, however, national and international unions began to take form, with membership encompassing individuals who worked for multiple different employers, such as was the case with the International Typographical Union, which came into existence in 1852.[326] These earliest unions, for the most part, were trade unions composed of skilled or semi-skilled laborers.[327]

321. *Id.*

322. Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 552 (2011).

323. *Labor Movement*, HIST. (Mar. 31, 2020), https://www.history.com/topics/19th-century/labor [https://perma.cc/XUF6-DH94].

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

In 1886, Samuel Gompers formed the American Federation of Labor ("AFL") with the goal to ensure workers across various industries were "furnished with the weapons which shall secure his industrial emancipation."[328] Then, in 1935, John Lewis broke away from the AFL and formed the Committee for Industrial Organization ("CIO") to serve as the broad overseeing body for a wide range of factory workers, including those in the automotive and steel industries.[329]

Labor unions, however, were limited in their ability to effectuate change until July 5, 1935, when President Franklin Roosevelt signed into law the NLRA, which granted private employees the right to self-organize and "engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[330] Since the passing of that Act, private employers in a unionized workplace have maintained an "affirmative duty to bargain collectively with their workers over the mandatory terms and conditions of bargaining—hours, wages, and working conditions."[331] In addition, private employers in a unionized workplace must bargain over disciplinary procedures, such as the right to discipline for "just cause."[332]

Labor unions gained their greatest strength in the 1960s during the presidencies of John F. Kennedy and Lyndon B. Johnson.[333] But since then, union membership has been in a relatively continuous decline.[334] According to the U.S. Bureau of Labor Statistics, the percentage of U.S. wage and salary workers that are members of a union has declined from 20.1% in 1983 all the way down to 11.1% in 2015.[335] There are many reasons for the decline in union membership in recent decades, ranging from the growth of high-tech service jobs,[336] political efforts to thwart union power,[337] a growing belief that certain unions are straying too far from their core mission of bargaining on behalf of workers' economic interests,[338] and even the legal tradeoffs to having NLRB-recognized union

328. *Id.*

329. *Id.*

330. National Labor Relations Act, ch. 372, § 7, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 157 (2012)).

331. Edelman, *supra* note 55, at 1630.

332. *Id.*

333. *Labor Movement*, *supra* note 323.

334. *Id.*

335. MEGAN DUNN & JAMES WALKER, U.S. BUREAU LAB. STATS., UNION MEMBERSHIP IN THE UNITED STATES 2 (2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf [https://perma.cc/N2HU-47C3].

336. *Labor Movement*, supra note 323.

337. *See, e.g.*, Kenneth R. Peres, Opinion, *Why the Republican Party Wants to Destroy Labor Unions*, COMMON DREAMS (Oct. 23, 2020), https://www.commondreams.org/views/2020/10/23/why-republican-party-wants-destroy-labor-unions [https://perma.cc/ZC4J-8ADF].

338. *See, e.g.*, Bill McMorris, *Union's Focus on Woke over Work Rankles Rank and File*, NAT. REV. (Aug. 9, 2021, 6:30 AM), https://www.nationalreview.com/2021/08/unions-focus-on-woke-over-work-rankles-rank-and-file [https://perma.cc/H2MY-SYPR] (quoting a Los Angeles schoolteacher who left his union in opposition to the union's political activism); K.C. Johnson, *How CUNY's Union Bet on Israel Hatred and Lost*, TABLET (Aug. 12, 2021), https://www.tabletmag.com/sections/news/articles/cuny-kc-johnson [https://perma.cc/UME3-98NA] (explaining how the CUNY faculty and staff union's voice of support for the boycott of Israel led to numerous faculty departures).

status, especially as it comes to certain multiemployer bargaining units where having labor rights may mean surrendering certain antitrust remedies.[339]

B. History of Sports Labor Unions

Although federal labor law only dates back to 1935, the history of athlete organization in professional sports dates back much earlier—to when in the early 1880s, New York Giants star pitcher and infielder John Montgomery Ward led the formation of the Brotherhood of Professional Base Ball Players.[340] Ward, himself educated at Columbia Law School and the author of an 1887 *Lippincott's Monthly Magazine* article entitled "Is a Baseball Player Chattel?,"[341] used the Brotherhood of Professional Base Ball Players to try to pressure National League club-owners to drop their "reserve system," under which the clubs-owners agreed with one another not to compete against one another to hire each other's players.[342] Analogizing the "reserve system" to both an anticompetitive restraint of baseball labor markets and as a practice that bore mild similarities with the recently outlawed practice of slavery, Ward proceeded to schedule meetings with the National League's ownership group to discuss the matter.[343] By 1890, Ward's labor movement had gained support from beyond just National League players, with Samuel Gompers, the founder of the AFL, joining him in support, and the Central Labor Union, in published writing, condemning the National League owners for being "monopolists."[344]

In late 1889, Ward also sought to improve the fate of baseball players by helping to fund the Players League—a league in which the players themselves were supposed to own the enterprise.[345] Over 200 National League players initially fled in 1890 to the Players League, which enjoyed some initial success competing against the National League for fan interest.[346] The Players League, however, quickly ran into financial trouble and had to sell a large share of equity to outside businessmen, who ultimately sold the league back to the National League owners and folded.[347] Many of the 200 players who had joined the Players League in 1890 had returned to the National League in 1891, with the Brotherhood of Professional Base Ball Players perhaps retaining even less bargaining

339. *See, e.g.*, Edelman, *supra* note 55, at 1656 (explaining how, in certain contexts, the non-statutory labor exemption from antitrust law excuses certain collective, concerted restraints of trade by employers in the industry).

340. *See* Paul D. Stadohar, *The Baseball Strike of 1994–95*, 120 MONTHLY LAB. REV. 21, 22 (1997).

341. Glenn Moore, *Ideology on the Sports Pages: Newspapers, Baseball, and the Ideological Conflict in the Gilded Age*, 23 J. SPORT HIST. 91, 231, 235–236 (1996) (the reserve system "restricted the freedom of players who were out of contract to move to a new club").

342. *See* Stadohar, *supra* note 340, at 22.

343. Moore, *supra* note 341, at 231, 237.

344. *Id.* at 232.

345. *See* Stadohar, *supra* note 340, at 22.

346. Moore, *supra* note 341, at 231, 247.

347. *Id.* at 231, 247–49.

power than they had before.[348] There is no record of labor activity by the Brotherhood of Professional Base Ball Players much beyond 1891.

Even though Ward was correct to interpret the National League's reserve system as posing *bona fide* questions under both antitrust law and basic principles of workers' rights, it would be more than another half of a century before players' organizational efforts made any real progress in reforming MLB's reserve system.[349] Subsequent efforts to organize baseball players, including the Players' Protective Association in 1900, the Fraternity of Professional Baseball Players in America in 1912, and the American Baseball Guild in 1946, each gained relatively little traction.[350] Even where wildcat strikes occasionally broke out—for example, by the Detroit Tigers, in response to American League president Ban Johnson suspending Tigers star hitter Ty Cobb for ten games for jumping into the stands to assault a heckling fan—the strikes were short-lived and relatively fruitless.[351]

The 1960s, however, brought a renewed interest in player unionization in organized sports.[352] In 1965, MLB players turned to Marvin Miller, previously an economist for the United States Steelworkers union, both to help create a group licensing arm for players' names, images, and likenesses, as well as to try to form an NLRB-recognized union to bargain against the Baseball teams over the mandatory terms and conditions of player employment.[353] Upon transforming the MLBPA into Baseball's first NLRB-recognized union, Miller, in 1968, negotiated on behalf of MLB players their first collective bargaining agreement, which raised the league's minimum salary from $6,000 to $10,000.[354] Miller also negotiated for neutral arbitration to player grievances,[355] which paved the way for a successful labor grievance against aspects of Baseball's reserve system in 1976,[356] which was thereafter upheld by the U.S. Court of Appeals for the Eighth Circuit in *Kansas City Royals v. Major League Baseball Players Ass'n*.[357] Presently, MLB players that have obtained more than a certain level of seniority have freedom of movement when outside of contract that far exceeds anything imaginable in the pre-union era. The average MLB player salary, as of April 2021, exceeded $4 million per year,[358] and the league minimum salary for players on

348. *See* Stadohar, *supra* note 340, at 22; *see also* Moore, *supra* note 338, at 231, 233 (the reserve system "restricted the movement of players who were out of contract to move to a new club").

349. *See History*, MLB ASS'N, https://www.mlbplayers.com/history (last visited Oct. 10, 2023) [https://perma.cc/7FJV-S6NY].

350. *Id.*

351. *See* Stadohar, *supra* note 340, at 22.

352. *History*, *supra* note 349.

353. *Id.*

354. *Id.*

355. *Id.*

356. *See generally* Nat'l & Am. League Pro. Baseball Clubs v. Major League Baseball Players Ass'n, 1975 LAB. ARB. LEXIS 602 *1 (1976).

357. *See* Kansas City Royals v. Major League Baseball Players Ass'n, 532 F.2d 615, 617 (8th Cir. 1976).

358. *See* Associated Press, *Average MLB Salary at $4.17 Million, Down 4.8% from 2019*, ESPN (Apr. 16, 2021, 1:39 PM), https://www.espn.com/mlb/story/_/id/31270164/average-mlb-salary-417-million-48-2019 [https://perma.cc/WE88-ZJ44].

the 26-man Major League roster stands at $720,000.[359] In addition, MLB players earn endorsement money on top of their salaries from group licensing deals arranged by a marketing arm of the MLBPA, which performs non-NLRA related functions for the players.[360]

Similar legal and economic results have also been obtained through unionization by the professional athletes who play in the NBA, the National Football League ("NFL"), and, to a somewhat lesser extent, the National Hockey League ("NHL").

C. Efforts to Unionize College Athletes

While the organizational efforts of MLB, NBA, NFL, and NHL substantially took root in the 1960s and grew over the past sixty-plus years, meaningful efforts to organize college athletes did not emerge until far more recently—perhaps due to the dubious notion that all college athletes were "student-athletes" or "amateurs." Nonetheless, as the revenues from certain college sports continued to rise and the argument grew stronger that certain college athletes constituted "employees" under the NLRA, the movement to potentially unionize college athletes grew stronger.

Much as how in Baseball NLRA-recognized unionization of the 1960s was long proceeded by efforts by John Montgomery Ward and others to form a baseball player brotherhood as far back as the 1880s, there were similarly meaningful, albeit limitedly successful, efforts to organize college athletes that precede the present era. Most notably, Ramogi Huma, who was a linebacker at UCLA in the mid-1990s,[361] founded the Collegiate Athletes Coalition ("CAC") in 2001 as an informal trade association that enjoyed general support from the duly recognized United Steelworkers of America.[362] Although CAC was not an NLRB-recognized union, Huma's association was still able to provide a number of important services for college athletes, including the advocacy for broader health insurance and concussion testing protocols for athletes.[363] In 2013, Huma then came together with former University of Massachusetts men's basketball player Luke Bonner to form the College Athlete Players Association—again, not as an NLRB-recognized union but as an association with the goal of becoming one.[364]

359. *See* Mark Feinsand, *MLB, MLBPA Agree to New CBA, Season to Start April 7*, MLB (Mar. 11, 2022), https://www.mlb.com/news/mlb-mlbpa-agree-to-cba [https://perma.cc/V3HL-HMQX] (listing the minimum Major League Baseball player salary for the 2023 season as being $720,000).

360. *See MLB Players Inc*., MLB ASS'N, https://www.mlbplayers.com/mlbpi (last visited Oct. 10, 2023) [https://perma.cc/X6KL-5CXG] ("MLB Players, Inc. is the for-profit corporate subsidiary of the Players Association [that] brings to market products and services featuring the publicity rights [NIL] . . . to . . . 100+ partners all over the world when more than two Players are featured").

361. *See* Rohan Nadkarni, *College Football Players Need a Union Now More than Ever*, SPORTS ILLUSTRATED (July 2, 2020), https://www.si.com/college/2020/07/02/college-football-needs-a-union-now-more-than-ever [https://perma.cc/7KXZ-UP7K] (providing the time period of position of Huma as a college football player).

362. Edelman, *supra* note 55, at 1630.

363. *Id.* at 1634–35.

364. *Id.* at 1635.

Since 2013, CAPA has made one meaningful attempt to unionize a class of college athletes when, in January 2014, it filed a petition before the NLRB's Region 13, seeking to unionize the grant-in-aid college football players at Northwestern University, a private college in the Big Ten Conference.[365] Region 13 recognized that the Northwestern grant-in-aid college football players constituted "employees" under Section 2(3) of the National Labor Relations Act;[366] however, on appeal, the Board Members of the NLRB in Washington, D.C. declined to assert jurisdiction over the Northwestern University grant-in-aid football players, even presuming they constituted employees, because the Board Members believed that asserting jurisdiction would not support a "symbiotic relationship" or "promote stability in labor relations" within commercialized college sports.[367]

While the Board Members seemed largely concerned about the idea of having the college athletes from only a single college in a single conference bargaining over their terms and conditions of employment, the NLRB decision in *Northwestern University* did not entirely reject the possibility of asserting jurisdiction over a different, or future, bargaining unit of college athletes.[368] To the contrary, the *Northwestern University* decision only addressed "the facts in the record before [it]"—leaving open the possibility for CAPA, or any organizing body, to attempt to form an NLRB-recognized union based on a somewhat different proposed bargaining unit.[369] Nevertheless, to date, neither CAPA nor any other entity has attempted to file for NLRB-recognition of any group of college athletes.

D. Roadmap for Future Efforts to Unionize College Athletes

Even though there have been no meaningful efforts to unionize college athletes since the *Northwestern University* decision, the General Counsel for the NLRB, among others, have seemed to provide subtle hints about how future labor-union organizers may approach unionizing college athletes without running afoul to the same concerns that derailed unionization efforts in *Northwestern University*. One of our Article's authors, Marc Edelman, in a 2017 *Cardozo Law Review* article, suggested three alternative types of bargaining units that, if proposed before the NLRB, might be better received than the proposed bargaining unit in *Northwestern University*.[370] These alternative bargaining units include: (1) bargaining units composed of athletes at a single private college that compete in a conference with more private-college members than the Big Ten Conference, in which Northwestern University is a member; (2) bargaining units consisting

365. *Id.* at 1637.

366. Nw. Univ. & College Athletes Players Ass'n, 362 N.L.R.B. 1350, 1350 (2015).

367. *Id.* at 1353–54.

368. Edelman, *supra* note 55, at 1640 (citing *Nw. Univ.*, 362 N.L.R.B. at 1353).

369. *Nw. Univ.*, 362 N.L.R.B at 1355.

370. Edelman, *supra* note 55, at 1642–53. This article also suggests a fourth potential type of bargaining unit that consists of a single public college, attempting to unionize under state law, rather than federal law; this fourth type of bargaining unit is beyond the scope of this particular article, which analyzes alternatives under federal labor law. *See id.* at 1645–48.

of athletes at all of the private colleges that compete in a conference with more private-college members than the Big Ten Conference; and (3) bargaining units consisting of all of the athletes at both private and public colleges in either a single NCAA conference or a collection of NCAA conferences.[371]

Attempting to unionize college athletes based on each of these three alternative bargaining units entails different sets of risks and benefits. Simply unionizing one, or even a few, colleges in a given athletic conference, in light of the Board's decision in *Northwestern University*, remains susceptible to a potential Board Member finding that the proposed bargaining unit still does not "promote stability in labor relations," given that the athletic conference would still include both unionized and nonunionized teams.[372] Meanwhile, attempting to unionize all of the public colleges in one or more NCAA conferences presents different and novel challenges because public state colleges are typically not subject to the NLRB's jurisdiction.

To address the challenge of securing NLRB jurisdiction over athletes throughout the entire NCAA or in a single conference within the NCAA,[373] Edelman suggests in his *Cardozo Law Review* article that a union organizer would need to make the successful argument that the NCAA, or an NCAA member conference, "serves as a joint employer of . . . college athletes."[374] At the time of his article, Edelman acknowledged that this argument was "novel" and "with little to no precedent directly on point."[375] Since 2017, however, individual athletic conferences and the NCAA overall have only increased their revenues derived from offering sports broadcasts featuring college athlete entertainers. And, in the aftermath of the Supreme Court's *Alston* decision, individual conferences have gained additional "control" over college athlete compensation. Even more importantly, footnote thirty-four of the Abruzzo Memo states that "[b]ecause Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability."[376] This statement reads as the NLRB General Counsel's very strong support for the NLRB asserting jurisdiction over a bargaining unit consisting of an athletic conference composed of both public and private colleges.

Another reasonable question to address is how broad of a classification of athletes should be included within that athletic-conference bargaining unit. To obtain NLRB recognition, a proposed bargaining unit must have "community of interest,"[377] which is determined on the basis of factors that include "(1) whether the employees are organized into a single department; (2) whether the employees

371. *Id.* at 1642–53.

372. *Nw. Univ.*, 362 N.L.R.B. at 1354.

373. Edelman, *supra* note 55, at 1649–50.

374. *Id.* at 1650.

375. *Id.*

376. Abruzzo Memo, *supra* note 116, at 9 n.34.

377. Edelman, *supra* note 55, at 1652; *see also* NLRB v. Action Auto, Inc., 469 U.S. 490, 494 (1985) ("A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining . . . .").

have distinct skills and training; (3) whether there is strong overlap between job type and classifications, and (4) whether the employees have regular contact with one another."[378] The proposed bargaining unit of Northwestern University grant-in-aid college football players, while rejected by the NLRB on other grounds, clearly meets the test for "community of interest" because all athletes on a given sports team are in the same "department," undergo to same daily training for their sport, are regularly classified by their sport, and spend upwards of forty hours per week playing, practicing, and travelling together.[379] By contrast, a bargaining unit that were to include athletes across various sports, even if these athletes all generate similar levels of revenue, would not likely meet the test for "community of interest" because each individual sports team has its own travel demands and training schedule, athletes on different sports teams do not generally play, practice, or travel together, and athletes on different sports teams are not "working in tandem to achieve a single goal."[380] The need to maintain a "community of interest" thus favors bargaining units where all of the athletes play the same sport.

E. Potential Antitrust Tradeoff to Unionizing College Athletes

College athlete organizers further must be cognizant of how forming a college athlete players union might affect college athletes' antitrust rights. Indeed, in certain circumstances, unionization may derail college athletes' potential antitrust remedies against the NCAA or against an individual athletic conference based on what is known as the Sherman Act's "non-statutory labor exemption"—a court-created exemption that insulates from antitrust scrutiny certain concerted conduct in unionized labor markets."[381] Although "[t]he interaction of the Sherman Act and federal labor legislation is an area of law marked more by controversy than clarity,"[382] the broadest interpretation of the non-statutory labor exemption to date insulates from antitrust scrutiny any collective conduct by employers that, if deemed illegal, would "subvert fundamental principles of our federal labor policy."[383] Meanwhile, most circuits limit the application of the non-statutory labor exemption to employer conduct involving "restraints related to mandatory subjects of bargaining, which primarily affect parties to a collective bargaining relationship, and that are reached through bona-fide arm's length bargaining."[384]

378. Edelman, *supra* note 55, at 1652.

379. *See id.* at 1652–53.

380. *Id.*

381. *Id.* at 1655; *see also* Brown v. Pro Football, Inc., 518 U.S. 231, 237–38 (1996) (explaining that the non-statutory labor exemption applies where a multiemployer bargaining unit bargains in good faith with their unionized employees over their hours, wages, or working conditions).

382. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).

383. *Id.*; Clarett v. Nat'l Football League, 369 F.3d 124, 135 (2d. Cir. 2004).

384. Edelman, *supra* note 55, at 1656; *see also* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976). The court held that the non-statutory labor exemption applies where "the restraint on trade primarily affects only the parties to the collective bargaining relationship[,] . . . the agreement sought to be exempted concerns a mandatory subject of collective bargaining[,] . . . [and] the agreement sought to be exempted is the product of bona fide arm's length bargaining."; Marc Edelman & Brian Doyle, *Antitrust and "Free Movement"*

The role that unionization might play in the ability of college athletes to prevail in an antitrust lawsuit against the NCAA or an individual athletic conference would likely depend on the breadth of membership of any NLRA-recognized union. If a single sports team at a single college were to form a union (much as the Northwestern University grant-in-aid football players attempted to do in 2014), the non-statutory labor exemption would be unlikely to derail any athletes' potential antitrust claims, at least under the majority view, because the NCAA or athletic conferences' purported restraints would still primarily affect non-unionized athletes because non-unionized athletes affected by the restraints would far outnumber those affected who are unionized.[385] By contrast, if labor organizers were to unionize a multi-employer bargaining unit consisting of all of the colleges in a single athletic conference or in the NCAA overall, the NLRB's recognition of this union would likely derail an athlete within the unit's ability to prevail in an antitrust lawsuit against the employer members of the bargaining unit, especially if the employer members of the bargaining unit engaged in good faith bargaining with the established union.[386]

None of this should create any hesitation for college athletes' rights advocates in attempting to form a broad-based college sports trade association to benefit the general welfare of athletes, such as the informal CAC that Huma had launched in 2001. At the same time, the non-statutory labor exemption would not preempt college athletes from coming together for non-NLRA purposes, such as engaging in group licensing of players' names, images, and likenesses—an activity in which even the MLBPA engaged prior to becoming a recognized labor union.[387] But, it should create real hesitation by those seeking to gain Board recognition for a bargaining unit of college athletes, and the need to ask oneself whether the potential benefits for the athletes of bargaining with the chosen employer unit over the mandatory benefits of employment outweighs the advantages of having a potential antitrust remedy. Indeed, where a union is newer and less stable, this might not always be the case. Even the players in the National Football Players Association, on at least two occasions, have attempted to decertify their union based on the players' collective preference to proceed with antitrust action against the leagues' clubs rather than collective bargaining over their terms of employment.[388]

Risks of Expanding U.S. Professional Sports Leagues into Europe, 29 NW. J. INT'L L. & BUS. 403, 416 (2009) (explaining that most federal circuit courts have adopted the same three-prong test applied in *Mackey* for applying the non-statutory labor exemption to antitrust law).

385. Edelman, *supra* note 55, at 1657 (noting, however, that under the seemingly broader Second Circuit test for the non-statutory labor exemption, this outcome would be less certain because under the Second Circuit's minority test for the non-statutory labor exemption it is not explicitly required that the restraint primarily affect the parties to a collective bargaining relationship—affording the reviewing court far more discretion in terms of whether to apply the non-statutory labor exemption).

386. *Id.* at 1657–59.

387. *History*, *supra* note 349.

388. *See* Kristi Dosh, *Do Not Panic: Player's Union Decertification Does Not Mean No Football*, FORBES (Mar. 11, 2011, 6:06 PM), https://www.forbes.com/sites/sportsmoney/2011/03/11/do-not-panic-players-union-decertification-does-not-mean-no-football/?sh=133ac7c7197e [https://perma.cc/NWA4-5V4F] (explaining that

V. MODEL CRITERIA FOR ASSESSING EMPLOYEE AND EMPLOYER STATUS OF COLLEGE ATHLETES

The first four Parts of this Article explore the broad legal importance as to whether college athletes are classified as employees for purposes of labor and employment law. This final Part begins by proposing a reasonable framework for courts and labor boards to determine the outer contours of where the working conditions of college students would reasonably constitute employee-athletes. It then explores how to determine what entity (or entities) constitute the athletes' employers.

A. Determining the Outer Contours of Employee-Athlete Status

The preceding Parts discuss court and labor board decisions that have involved determining the proper employment status of college athletes. The problem with these decisions, however, is that applying the traditional definition of "employee" to college athletes might lead to a singular outcome, where not all college athletes are similarly situated in economic reality. Stated more bluntly, "Are college athletes employees?" is the wrong question to ask of a sensible legal system. The right question, we contend, is "Are *any* college athletes employees and, if yes, which ones?"

To that end, when one removes artificial labels like "student-athlete" and "amateurism" from the equation, there are far more differences than similarities among college football players at schools such as the University of Texas—where their labor contributes nearly $160 million to the school annually—[389] and college golfers or fencers at Division III schools—individuals who typically receive substantial benefits from their colleges while contributing little, if anything, back in terms of revenues. A reasonable application of tests for employment status must recognize this.

Understanding that the traditional tests for determining employee status, absent some legal realism, are "hopelessly circular,"[390] courts and labor boards should consider three specific factors in ascertaining the dividing point between employee-athletes and true student-athletes. These factors include whether a team of college athletes provides meaningful revenues to their school ("Meaningful Revenue Test"), whether the athletes' athletic participation substantially enhances their colleges' goodwill in a manner beyond team-specific, quantifiable revenues ("Public Relations Goodwill Test"), and whether the proceeds derived from a college sports team are passed along to their team's coaches and administrators in the form of above-market salaries ("Windfall Coaching Salaries Test"). Each of these three factors are consistent with traditional labor and

the NFL players' rationale for twice decertifying their union was to facilitate filing antitrust lawsuits against the league).

389. *See* Crawford, *supra* note 13.

390. Seattle Opera Ass'n v. N.L.R.B., 292 F.3d 757, 762 (D.C. Cir. 2002).

employment law tests for employee status and, at the same time, dive into the uniquities of college sports.

1. Meaningful Revenues Test

Assessing the revenues derived from a college sports team is perhaps the most straightforward way to determine whether the athletes on that team are employees. In terms of assessing team-related revenues, any revenue derived from the sale of admission tickets is not, in itself, strongly indicative of employee status. This is because many traditional student extracurricular groups—ranging from dance troops to theater groups to acapella groups—also regularly sell tickets to watch their performances to the student body and local community.

Employee activity would be more detectable if the workers generate revenue streams that are unassociated with extracurriculars. Specifically, the sale of luxury box seats, club suites, and uniquely expensive seats, the sale of television broadcast rights, and the sale of certain types of high-end sponsorship opportunities would all be indicative of professional (rather than amateur) status.[391] The key distinction here is that these latter sources of revenues rarely, if ever, exist for traditional student extracurricular clubs.

The amounts of revenue are also instructive. It may be reasonable to presume that *de minimis* payments to a college, even for non-gate purposes (*e.g.*, very localized television broadcast rights or licensing rights), may not be definitive of the employee status. As the revenues become more substantial, however, the legal argument for finding college athletes who partake in these activities to be employees grows substantially stronger. This is because one can reasonably tie the on-field labor of college athletes to derivation of these revenues.

As such, without attempting to draw a specific line as to which college athletes constitute employees, it would be extremely safe to conclude that all sixty-five of the college football teams that compete in one of the Power Five football conferences—each of which generated $24.7 million or more in revenue during the 2019 fiscal year and each of which reasonably appears on broadcast television—fit comfortably within a reasonable definition for employee-athletes under both labor and employment law.[392] The same almost certainly can be said about each of the fifty college basketball teams that brought in more than $10 million in annual revenue during that same time frame.[393] In addition, any other college

391. *See, e.g.*, Bryan Beasley, *Sports Media Contracts: Evaluating Revenue to Leagues and Universities*, BLEACHER REP. (Dec. 29, 2010), https://bleacherreport.com/articles/556188-sports-media-contracts-evaluating-revenue-to-leagues-and-universities [https://perma.cc/74AZ-EKZF] (comparing various league broadcasting contracts and showing that some NCAA contracts compare favorably to other leagues).

392. Crawford, *supra* note 13 (providing revenues generated in 2018-19 by the sixty-five colleges that compete in one of the Power Five football conferences).

393. *See* Anthony Raimondi, *NCAA Basketball: Revenue Rankings for Top 55 Programs*, CAMPUS SPORTS (Oct. 1, 2020, 10:37 AM), https://campussports.net/2019/04/11/ncaa-basketball-revenue-rankings-for-top-55-programs/ [https://perma.cc/N64J-WQ7S]; *see also* George Malone, *Which College Sports Make the Most Money?*, YAHOO (Mar. 21, 2022, 9:00 AM), https://ca.sports.yahoo.com/news/college-sports-most-money-130012417.html [https://perma.cc/4ACR-NGEL] (listing revenue for various athletic programs).

sports teams may likewise meet the definition of "employees" based on a fact-specific analysis of each case.[394]

2. Public Relations Goodwill Test

In addition to looking at derived revenues, courts and labor boards also may consider the monetary value of any goodwill derived from the performance of a given college sports team. A Public Relations Goodwill Test supplements the Meaningful Revenues Test by recognizing that there may be certain intercollegiate sports activities that greatly, if indirectly and at times ambiguously, enhance their colleges' bottom line and thus too may constitute employees.

Quantitively assessing goodwill is undoubtedly more difficult than simply calculating revenues. Nonetheless, there are several metrics that courts or labor boards could adopt to assess the goodwill generated by the athletes on a college sports team. One way is to evaluate the amount of positive coverage that a sports team, and the underlying school, receives through television broadcasts, Internet streams, social media impressions, and news reporting of the team.[395] This value is reasonably quantifiable by assessing the costs that a college would need to pay to obtain similar positive public relations if working through a private public relations company and the private placement of advertisements.

Another factor that a court or labor board could adopt to assess a sports team's level of goodwill is the college's use of athletes' names, images, and likenesses in the school's own promotional materials.[396] Although colleges typically do not pay to use college athletes' likenesses in their promotional materials, it would be reasonable to recognize that if the same, limited subsegment of the student body regularly appear in a college's promotional materials, these college students are providing a tangible, monetary contribution. If this number were sufficiently high, it would also buttress the argument that athletes at certain colleges are providing a service to their school that is suitably different in both kinds of value than that provided by a traditional member of the student body. Such a distinction would augment a finding of employee status.

An additional way to quantify the goodwill generated through athlete work product is to contemplate any increase in a school's application rate or the academic caliber of applicants in the year following a given sports team's on-field success. Indeed, there is a growing understanding within academic circles that the successful performance of certain college sports teams drives an increase in

394. For instance, some schools may have programs that play an outsized role within an athletic department generating revenue that is not typical for that particular sport. At some schools, hockey, baseball, and even equestrian can generate revenue to such a level that their contribution may merit close examination under the proposed tests. *See* Malone, *supra* note 393.

395. For a general discussion on quantifying goodwill, see Marshall Hargrave, *Goodwill (Accounting): What It Is, How It Works, How To Calculate*, INVESTOPEDIA (Mar. 25, 2023), https://www.investopedia.com/terms/g/goodwill.asp [https://perma.cc/Q548-4SWD].

396. *See* Karen Weaver, *Determining An Athlete's Fair Market Value is the Next Hurdle For NIL Rights. There Two Companies Could Solve That.*, FORBES (May 25, 2021, 8:30 AM), https://www.forbes.com/sites/karenweaver/2021/05/25/determining-an-athletes-fair-market-value-is-the-next-hurdle-for-nil-these-two-companies-could-solve-that/?sh=242b71f319e2 [https://perma.cc/UE2B-JVGR].

the quantity and quality of new applicants to a school. This phenomenon has regularly been described as the Flutie Factor—named after former Boston College quarterback Doug Flutie, whose historic quarterback performance in 1984 during a nationally televised game against the University of Miami is believed to be the primary cause for the substantial increase in Boston College undergraduate applicants the following year.[397]

3. Windfall Coaching Salaries Test

While a Meaningful Revenues Test and a Public Relations Goodwill Test both look directly at the value of the services provided by college athletes, a third, somewhat more indirect factor that courts and labor boards may also consider is the payments that colleges provided to the coaches of given sports team via the "Windfall Coaching Salaries Test." In almost all cases where a college sports team easily meets the criteria for employment under a Revenues Test and the Public Relations Goodwill Test, they will also meet the requirement under a Windfall Coaching Salaries Test. For example, it should not be at all surprising that at the University of Alabama, a college where the football team in 2019 produced $94.6 million in annual revenue,[398] the team's head football coach, Nick Saban, received a windfall salary of $11.7 million per year.[399] And, at Duke University, where the basketball program in 2019 brought in upwards of $36 million,[400] the school's longstanding and famous head coach Mike Krzyzewski received $9.7 million in pay.[401]

Nonetheless, there may also be cases where assessing employee status based on a Meaningful Revenues Test and/or a Public Relations Goodwill Test presents some ambiguity, but a review of the windfall salary earned by that team's head coach elucidates that the sports team is not a mere extracurricular activity that is viewed on par with the general college experience. A good example of this might be in ascertaining the employee status of the players on the Iona University men's basketball team—a team that presumably generates well below $10 million in annual team revenues.[402] Although Iona University is a small, private institution with an undergraduate enrollment of less than 3,000 students,[403] the school currently pays its head basketball coach nearly $1.1 million

397. *See* Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INT. PROP. L. 177, 179 (2020) (discussing the Flutie Factor).

398. *See* Crawford, *supra* note 13.

399. *See* Julia Elbaba, *Looking at the Top College Football Head Coach Salaries in 2022*, NBC SPORTS (Sept. 8, 2022, 11:25 AM), https://www.nbcsports.com/chicago/college-football-head-coach-salaries-kirby-smart-2022-new-contract [https://perma.cc/F7BG-XHUE].

400. *See* Raimondi, *supra* note 393.

401. *See* Nick Dimengo, *The 20 Highest Paid Coaches in Men's College Basketball*, WORTHLY, https://worthly.com/richest/20-highest-paid-head-coaches-mens-college-basketball (last visited Oct. 10, 2023) [https://perma.cc/PBZ4-2TW3].

402. *Iona College Sports Information*, COLL. FACTUAL, https://www.collegefactual.com/colleges/iona-college/student-life/sports (last visited Oct. 10, 2023) [https://perma.cc/C3R4-FDM6].

403. *Iona University*, NICHE, https://www.niche.com/colleges/iona-university/ (last visited Oct. 10, 2023) [https://perma.cc/3V7M-MGQZ].

in annual salary,[404] and it has paid its past two men's head basketball coaches more than its paid its past two university presidents.[405] Given as much, it seems reasonable to surmise that the members of the Iona University men's college basketball team are employees, who, while unpaid based on the NCAA's collective restraints on athlete compensation, generate substantial revenues that are allocated to the pay of their sport's head coach.[406] Indeed, where the salaries for certain coaches become so disproportionate to the pay on the academic side of the university, it becomes much easier to divorce the academic side from a meaningful analysis under labor and employment law.

B. Determining Who Constitutes the Employer of College Athletes

The aforementioned guidance should help courts and labor boards determine where employment relationships exist within the world of college sports, and yet, based on some of the more recent labor and employment disputes, it may only resolve half or even a third of the battle. Presuming that certain groups of college athletes are indeed employee-athletes, the next question courts and labor boards need to address is whether these employees are solely employed by their college or whether they are part of a joint employer relationship with a broader private entity such as their athletic conference or the NCAA, or both. The appropriate nature of the employment relationship matters for many reasons, perhaps most importantly because NLRB jurisdiction is limited to where employees have at least one private employer.

This latter question never meaningfully emerged in *Northwestern University*. There, the only theory of employment status raised was that the Northwestern University grant-in-aid football players were employed exclusively by their college. Nevertheless, in footnote thirty-four of the Abruzzo Memo, the NLRB's General Counsel expressed some support for the possibility of there being a joint employer theory of employment involving college athletes because "[p]layers at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference."[407] While General Counsel Abruzzo's memorandum has put the joint employment doctrine in a spotlight, others have

404. *See* Zack Braziller, *Rick Pitino on His NCAA Standing after Landing 'Perfect' Iona Job*, N.Y. POST (Mar. 14, 2020, 8:57 PM), https://nypost.com/2020/03/14/rick-pitino-on-his-ncaa-standing-after-landing-perfect-iona-job/ [https://perma.cc/P4AA-QNK4] (stating that Rick Pitino's five-year coaching contract would pay him annually just under the $1.1 million per year that the previous Iona head coach had received).

405. *Cf. id.* (providing estimated head coaching salaries of Pitino and his predecessor head men's basketball coach at Iona College); *Iona College*, NON-PROFIT LIGHT, https://nonprofitlight.com/ny/new-rochelle/iona-college (last visited Oct. 10, 2023) [https://perma.cc/G62Q-ZMXL] (showing the highest salary at the college being the men's head basketball coach—above that of the school's president, and more than double that of the provost).

406. Eugene Rapay, *Rick Pitino Hired as Iona's Next Men's Basketball Coach*, WESTCHESTER J. NEWS (Mar. 14, 2020, 7:28 PM), https://www.lohud.com/story/sports/college/iona/2020/03/14/rick-pitino-hired-ionas-next-mens-basketball-coach/5051312002/ [https://perma.cc/CS62-KLFJ].

407. Abruzzo Memo, *supra* note 116, at 9 n.34.

highlighted that the relationship between the NCAA and schools may create a joint employment relationship.[408]

Given that the potential joint employment status of college athletes represented just a single footnote in a much longer memorandum, the context behind General Counsel Abruzzo's support is somewhat opaque. The footnote, however, includes a citation to a long-forgotten 1986 NLRB decision in which the Board asserted jurisdiction over the Big East Conference for purposes of reviewing a labor grievance filed by a union of college basketball officials.[409] In finding that the Big East Conference constituted an employer of college basketball officials, the Board explained in *Big East Conference* that the chief revenue source for the conference was its television revenues, which, like the selection of basketball game officials, was handled entirely on the conference level.[410] In addition, Abruzzo's footnote includes a citation to a student note about how the Board's decision in *Browning-Ferris* may also support a joint employment theory because "the NCAA exercises strict control over certain Players at Academic Institutions, beginning with establishing eligibility standards and terms pursuant to which they may enter the workforce (athletic team)."[411]

Unfortunately, the Labor Board's ruling in *Big East Conference* is not a perfect analogy in support of a joint employer bargaining relationship because the Board in *Big East Conference* found the conference to be the sole employer of the basketball officials and not joint employers—thus perhaps adopting an either/or standard.[412] In addition, the college sports conference relationship has fundamental differences from the franchise model—most notably, the conference is a bottom-up association controlled by members, whereas the franchise model is a top-down association controlled by a parent.

Nevertheless, the decision in *Big East Conference* does show support for a private athletic conference, composed on individual private and public members, being found to constitute an employer within the NLRB's jurisdiction—a finding that is, in itself, important.[413] And the Board rendered its decision in *Big East Conference* nearly thirty years before its 2015 decision in *Browning-Ferris Industries of California*, which expanded the conventional purview of the joint employer relationships by recognizing that the parent company McDonald's and one of the company's many franchisees were joint employers of McDonald's workers at a given franchise.[414] Although a 2017 Board decision limited the ruling in *Browning-Ferris*, NLRB chair Lauren McFerran issued a public statement

408. *See* Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 161 (2015) (describing the NCAA's "strict control" over college athletes as plausibly constituting the existence of a joint employment relationship).

409. Abruzzo Memo, *supra* note 116, at 9 n.34 (citing Nw. Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. 1350, 1354 n.17 (2015); Big E. Conf., 282 N.L.R.B. 335, 340–42 (1986)).

410. Big E. Conf., 282 N.L.R.B. 335, 340–41 (1986).

411. Abruzzo Memo, *supra* note 116, at 9 n.34 (citing Lonick, *supra* note 408, at 161–67).

412. *Big E. Conf.*, 282 N.L.R.B. at 341–42.

413. *Id.*

414. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1600 (2016).

on September 6, 2022, that once again indicated broad support for joint employer relationships.[415] The shared public-private nature of college sports is not the first area where "fissuring" has occurred between regulations affecting labor law. In the 2014 Supreme Court case, *Harris v. Quinn*,[416] Justice Samuel Alito referenced in-home healthcare aids in Illinois as quasi-public employees.[417] The aids, Alito underscored, were employed by private companies, and the state government was responsible for a reimbursement scheme via Medicaid, which was significant to the operation of the business, and as such, dictated many conditions of employment.[418] The *Harris* case has led to calls for expanding the use of the joint-employer doctrine in order to provide greater protections to workers in similar situations.[419]

There was an effort to rein in the joint employer doctrine in 2017, following a change in NLRB composition under former President Trump,[420] but this decision was vacated by the U.S. Court of Appeals for the D.C. Circuit.[421] The 2022 decision from the D.C. Circuit reinstalled the previous policy of an expanded joint employer doctrine, [422] which found a joint employer relationship even where the putative employer did not directly dictate working conditions to employees or have an unexercised right to control employees.[423] On September 6, 2022, the NLRB proposed a new rule for determining joint employer status.[424] Under the NLRB's proposal, "two or more employers would be considered joint employers if they 'share or codetermine those matters governing employees' essential terms and conditions of employment,' such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules."[425] In light of yet another Board effort to expand the view of joint employer status, courts and labor boards reasonably should recognize athletic conferences to be employers of college athletes where the conference maintains a television contract and distributes revenues to the individual colleges, much as was seen in *Big East Conference.*

It still, however, may be more equivocal as to whether to recognize the NCAA as a joint employer of college athletes, at least outside of those sports where the NCAA itself holds a national television contract. While recognizing

415. Jonathan J. Spitz, Richard F. Vitarelli, James M. Stone & James P. Verdi, *Browning Ferris Returns: NLRB Again Proposes New Broader Rule for Determining Joint Employer Status*, JACKSON LEWIS (Sept. 7, 2022), https://www.jacksonlewis.com/publication/browning-ferris-returns-nlrb-again-proposes-new-broader-rule-determining-joint-employer-status [https://perma.cc/W6KT-D4QQ].

416. *See* 573 U.S. 616, 646 (2014).

417. *Id.*

418. Kyle Bigley, *Between Public and Private: Case Workers, Fissuring and Labor Law*, 132 YALE L.J. 250, 253–54 (2022).

419. *Id.* at 324–25.

420. *See generally* Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. 156 (2017).

421. Sanitary Truck Drivers & Helpers Local 350 v. N.L.R.B., 45 F.4th 38, 48 (D.C. Cir. 2022).

422. *Id.*

423. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1600 (2016).

424. *NLRB Issues Notice of Proposed Rulemaking on Joint-Employer Standard*, NLRB (Sept. 6, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-joint-employer-standard [https://perma.cc/F97H-BMZA].

425. *Id.*

that the NCAA operates a heavy degree of control over college athletes through their Principle of Amateurism, some of which likely represents an illegal restraint under antitrust laws, the NCAA nonetheless represents more than 1,200 different schools that are dissimilar in numerous ways. As such a large umbrella organization, the Board's assertion of jurisdiction over the entire NCAA each time they exercise jurisdiction over a class of college athletes, their college, and perhaps their athletic conference seems onerous for purposes of asserting joint and severable liability. It also seems increasingly inappropriate and unnecessary as the Big Five athletic conferences—those conferences that include many, if not most, of the schools where athlete labor produces meaningful revenue streams—continue to assert greater independence from the broader NCAA.

The NCAA's continued overinvolvement with the operation of big-time, commercial college sports and the association's efforts to prevent the paying of college athletes by misclassifying them as "student-athletes" is undeniably a problem. Perhaps it is best to resolve the collusive restraints imposed on college athletes collectively by NCAA member colleges through the proper use of antitrust law and to limit the recognition of employee status of certain college athletes to joint employer relationships, including a college and their individual athletic conference. Such a finding would spare those NCAA member schools where their athletes are not *bona fide* employees from becoming enmeshed in further labor and employment litigation involving intercollegiate sports. At the same time, it might leave the door open for college athletes to bring future antitrust lawsuits against the NCAA, even if certain employee-athletes ultimately unionize at the conference level.

On the other hand, if the NCAA were to be included as a joint employer of all employee-athletes, the gravity of the NCAA being held jointly and severally liable for all labor law transactions might lead to a sufficient divergence in interest among member schools to naturally break apart the NCAA. If one perceives the NCAA as a cartel that exists to maintain the wealth of college sports in a select few administrators, athletic directors, and coaches, any tensions that facilitate the breaking apart of the NCAA, even outside of the formal channels of antitrust law, might be perceived in a positive light.

VI. CONCLUSION

Since the summer of 2021, the governance of college sports has undergone meaningful reforms that have ensured college athletes, much like all other college students, have the opportunity to endorse products for money.[426] Nevertheless, college athletes still lack many of the legal protections granted to traditional workers because the NCAA and its member schools continue to attempt to define college athletes as "student-athletes"—a label that is intended to prevent even

426. Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021, 10:59 AM), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate [https://perma.cc/7EGU-KA2F].

the most highly commercialized of college athletes from seeking the benefits afforded to employees.

While the NCAA and its member schools have used the "student-athlete" label since the 1950s to attempt to justify excluding college athletes from the protections of federal and state labor laws, the economic realities of college athletics are far different today than they were seventy—or even ten—years ago.[427] In some sports, college athletics programs are now the beneficiaries of multimillion-dollar broadcast contracts and sponsorship deals, and some coaches, as a result to the influx of revenues, now earn multimillion-dollar salaries.[428] Yet, even at these schools with highly commercialized college sports programs, the athletes are still only directly compensated, at best, with the cost of attendance.[429]

Despite the commitment of the NCAA and its member schools to the position that college athletes should not be classified as employees, there has been movement on both the judicial and labor board front, pushing back against their seventy-year-old classification scheme.[430] While the NLRB and the Third Circuit continue to evaluate the legal status of college athletes, we propose that courts and labor boards should apply a three-pronged analysis to determine whether specific college athletes meet the legal status of employee at a particular school and on a particular team—looking particularly at the teams' generated revenues, public relations goodwill, and coaches' salaries.[431] Each of these three prongs are grounded in traditional criteria used for determining that the primary beneficiary of labor is the employer as opposed to the worker, and, at the same time, each of these prongs recognizes the uniquities of the college sports marketplace.[432]

Furthermore, we recommend that courts and labor boards, where they find college athletes to be employees, recognize joint employer bargaining units that, at a minimum, include the athletes' college and their athletic conference. Although the topic of joint employer bargaining was never meaningfully addressed in *Northwestern University*, the growing involvement of college athletic conferences, and especially the Big Five conferences, in securing revenues through conference-wide television contracts and licensing deals more than justifies recognizes both colleges and their athletic conferences as joint employers of college-athlete labor.

427. Liz Clarke, *The NCAA Coined the Term 'Student-Athlete' in the 1950s. Its Time Might Be Up*, WASH. POST (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/ [https://perma.cc/7MQG-Q8AZ].

428. *See* Nick DePaula, *Breaking Down College Football's Apparel Brand Partners*, BOARDROOM (Oct. 28, 2021), https://boardroom.tv/ncaa-football-apparel-brand-partners/ [https://perma.cc/7D6Z-SA83].

429. *See* Ivan Maisel, *Full Cost of Attendance Gains Traction*, ESPN (July 14, 2011, 3:00 AM), https://www.espn.com/college-sports/story/_/id/6765762/full-cost-attendance-student-athletes-gaining-traction [https://perma.cc/JFE6-EMXU]; David Cloninger, *NCAA's New Baseball Scholarship Rules Will Help Some Colleges More Than Others*, POST & COURIER (Sept. 14, 2020), https://www.postandcourier.com/sports/college/ncaas-new-baseball-scholarship-rules-will-help-some-colleges-more-than-others/article_391e1c66-d59b-11ea-8b0c-0393de0a1bfc.html [https://perma.cc/QF8B-CGZT].

430. *See supra* Part III.

431. *See supra* notes 389–406 and accompanying text.