

# If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for “Employee” Status

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*Beginning in the 1980s, innovations in television turned college sports from a modest, regional industry into a sprawling, billion-dollar enterprise. The various stakeholders in college sports did not benefit equally from these advancements, however. While those in charge of college sports rode the train of technological progress to extreme profits, the athletes under their care got left behind. Today, the college sports world is once again undergoing a period of transition and transformation—except this time, college athletes are the ones leading college sports into a new era.*

*In recent years, athlete activists and their allies have secured a series of major legal victories. Key victories have included the removal of the ban on college athletes profiting from their fame and the Supreme Court's watershed decision in the antitrust case *NCAA v. Alston*. This Note focuses on college athletes' recent efforts to improve their financial circumstances and to dismantle a system that deprives them of the basic right to fair compensation. This Note argues that Division I athletes' best shot at getting fair compensation is to continue fighting for employee rights—specifically, the right to collectively bargain and the right to a minimum wage.*

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## INTRODUCTION

College athletes perform real labor, make real sacrifices, bear real risks, and create real value. They devote significant time and energy to their sport, adhere to lengthy lists of rules, put their health and safety on the line, and collectively generate billions of dollars in revenue—all for the colleges they compete for.<sup>1</sup> Nevertheless, these athletes are not recognized as “employees” under the law.<sup>2</sup>

The failure of college athletes to win recognition as employees has not been for lack of trying. In 2014, Northwestern University football players petitioned to unionize.<sup>3</sup> Also that year, a former college athlete filed a lawsuit demanding that Division I<sup>4</sup> athletes receive a minimum wage.<sup>5</sup> Ultimately, however, both efforts ended in defeat. In 2015, the National Labor Relations Board (NLRB) denied the union petition,<sup>6</sup> and the Seventh Circuit discarded the minimum wage lawsuit.<sup>7</sup> History and tradition played a large role in these outcomes. Colleges have treated their athletes as “amateurs” for over a century,<sup>8</sup> and neither the NLRB nor the Seventh Circuit felt compelled to disturb this longstanding practice.<sup>9</sup>

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1. 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/33DF-TWCF].

2. See 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. & EML. L.J. 133, 134 (2017) (“[S]tudent-athletes are not recognized as ‘employees’ by any federal or state law and are therefore not entitled to the benefits or any protections that those laws afford.”).

3. Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), <https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured> [https://perma.cc/DVS5-Y5X2].

4. Division I is the highest tier of college athletes. NCAA, *Our Division I Members*, <https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx> [https://perma.cc/QRF5-ZARG]. Combined, Division I schools field more than 6,700 college teams and boast more than 170,000 college athletes. *Id.* These schools also manage the largest athletic budgets and disperse the most athletic scholarships. *Id.* About 57% of Division I athletes (approximately 104,000 athletes) “receive some level of athletic aid.” NCAA, NCAA RECRUITING FACTS 1 (2022), [https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA\\_RecruitingFactSheet.pdf](https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf) [https://perma.cc/63UK-ZKXS].

5. Complaint, *Sackos v. NCAA*, Civil Action No. 1:14-CV-1710-WTL-MJD (S.D. Ind. Oct. 22, 2014).

6. *Northwestern Univ.*, N.L.R.B. No. 13-RC-121359, at 1355–56 (Aug. 17, 2015).

7. *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

8. See *infra* Part I.A. (discussing the origins of the college sports amateurism model).

9. See *infra* notes 137 & 140.

After 2015, college athletes continued to struggle to acquire employee status because of an entrenched belief that amateurism was integral to college sports.<sup>10</sup> Many observers therefore advised these athletes to give up the fight for employee rights.<sup>11</sup> As this Note will show, the widespread pessimism regarding college athletes' chances of becoming employees proved to be unfounded. Since 2019, an avalanche of state Name, Image, Likeness (NIL) laws and the groundbreaking U.S. Supreme Court ruling in *NCAA v. Alston* have transformed the U.S. college sports landscape, demolishing the idea that amateurism is essential to college sports and clearing the way for college athletes to obtain employee rights.<sup>12</sup>

This Note focuses on the thorny and much-contested issue of college athlete compensation. Under the current amateurism model, college athletes produce over \$18 billion for the National Collegiate Athletic Association (NCAA) and its 1,100 member schools each year.<sup>13</sup> Yet, roughly eighty-five percent of these athletes live below the poverty threshold.<sup>14</sup> This disparity exists in part because a sizable fraction of athletic revenues get channeled away from athletes and spent on exorbitant coaching and administrative salaries and flashy infrastructure projects.<sup>15</sup> Amateurism policies have had a glaringly disparate impact on

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10. See *infra* Part I.D. (discussing the *Dawson v. NCAA* case).

11. See, e.g., Jonathan L. Israel, *Repeat After Me: College Athletes Are Not School Employees Under the FLSA*, NAT'L L. REV. (Nov. 6, 2017), <https://www.natlawreview.com/article/repeat-after-me-college-athletes-are-not-school-employees-under-flsa> [<https://perma.cc/NQD2-GD3G>] (insisting that “[i]t is time for student athletes to close the . . . door” on minimum wage claims); see also Sean Gregory, *Here's the Road Ahead for College Athletes After Union Setback*, TIME (Aug. 18, 2015), <https://time.com/4002245/after-union-setback-heres-the-road-ahead-for-college-athletes/> [<https://perma.cc/6UDK-2Z2V>] (opining that “the best bet for athletes is the courts” and that college athletes have a better chance of getting more compensation through antitrust litigation than unionization).

12. See *infra* Part II.

13. Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (June 2, 2021), <https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/> [<https://perma.cc/U9RN-LPLM>]. The NCAA is the main regulator of college sports. See *infra* Part I.A.

14. Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport*, NAT'L COLLEGE PLAYER'S ASS'N 4 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> [<https://perma.cc/H7PK-EVMY>].

15. See Lawrence M. Kahn, *Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSPECTIVES 209, 224 (2007); see also Laura McKenna, *The Madness of College Basketball Coaches' Salaries*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/> [<https://perma.cc/8ZEE-SY2B>] (criticizing the fact that top college basketball coaches continue to receive excessive salaries despite escalating college tuition costs and noting that “coaches are the highest paid public employees in several states”).

Black athletes, depriving Black football and basketball players at the Power Five level,<sup>16</sup> where “college sports are most commercialized and lucrative,” of approximately \$1.2 to \$1.4 billion per year.<sup>17</sup> They have also harmed women’s programs by, among other things, indirectly capping their funding.<sup>18</sup>

Activists have encouraged the current generation of college athletes to capitalize on the gains college athletes have made in recent years, but they have not reached a consensus on how these athletes should proceed. College athletes have multiple pathways to choose from in their fight for fairer compensation. They could increase their compensation through antitrust litigation, minimum wage litigation, or—in the case of Black athletes—civil rights litigation.<sup>19</sup> They could also attempt to unionize and collectively bargain for fairer compensation.<sup>20</sup> Finally, they could forgo the time-consuming and convoluted legal process altogether

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16. The Power Five “encompasses sixty-five schools . . . that make up the five largest and richest conferences in college athletics (ACC, Big Ten, Big 12, Pac-12, SEC) plus Notre Dame.” Dennis Dodd, *Majority of Power Five Schools Favor Breaking Away to Form Own Division Within NCAA, Survey Shows*, CBS SPORTS (Oct. 13, 2020), <https://www.cbssports.com/college-football/news/majority-of-power-five-schools-favor-breaking-away-to-form-own-division-within-ncaa-survey-shows/> [https://perma.cc/UA86-RZVE].

17. Ted Tatos & Hal Singer, *College Sports Amateurism Costs Black Athletes Billions*, GLOB. SPORT MATTERS (Oct. 25, 2011), <https://globalsportmatters.com/opinion/2021/10/25/college-sports-amateurism-costs-black-athletes-billions-nil/> [https://perma.cc/W546-M82R]. Black athletes have been disproportionately overrepresented in college football and basketball since the 1970s. Akuoma C. Nwadike et al., *Institutional Racism in the NCAA and the Racial Implications of the “2.3 or Take a Knee” Legislation*, 26 MARQ. SPORTS L. REV. 523, 528 (2016); see also Justin Schilke, *Overcoming Educational Stratification: Effect of Athletic Status and Race on Odds of Graduating at Western Kentucky University* 12 (2012) (M.A. thesis, Western Kentucky University) (on file with TopSCHOLAR, Western Kentucky University) (explaining that Black athletes have been chronically underrepresented in “socially elite, low spectator interest sports” due to racial barriers in those sports). During the 2019–2020 college football season, Black athletes comprised 55% of men’s basketball and football players and 48% of women’s basketball players within the Power Five, even though only 5.7% of students at Power Five schools were Black. Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *I Signed My Life Over to Rich White Guys: Athletes on the Racial Dynamics of College Sports*, GUARDIAN (Mar. 17, 2021), <https://www.theguardian.com/sport/2021/mar/17/college-sports-racial-dynamics> [https://perma.cc/5UZK-SETD].

18. See Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes Before the H. Comm. on Education and the Workforce, 113th Cong. 101 (2014) (statement of Andy Schwarz, Partner, OSKR LLC) (“[T]he cap on men also results in a cap on women”); see also *infra* Part IV.C.

19. Civil rights litigation is already underway. See Tyler Conway, *NCPA Files Civil Rights Complaint with Dept. of Education Against Division 1 Schools*, BLEACHER REP. (Mar. 22, 2022), <https://bleacherreport.com/articles/10030546-ncpa-files-civil-rights-complaint-with-dept-of-education-against-division-1-schools> [https://perma.cc/R72Z-6VDZ].

20. See *infra* Part III.B.2.

and concentrate on lobbying for legislative reforms<sup>21</sup> or pursuing NIL opportunities.<sup>22</sup>

In the wake of *Alston*, which held that certain NCAA limits on college athlete compensation violated federal antitrust law,<sup>23</sup> many scholars proposed an “antitrust approach” to achieve fairer college athlete compensation. These scholars recommended that college athletes build off the decision in *Alston* by challenging the NCAA’s surviving compensation limits under antitrust law.<sup>24</sup> This Note argues that compared to this antitrust approach, a “labor approach” offers college athletes a faster and more promising route to fair compensation. A so-called labor approach would involve fighting for “employee” status and standard employee rights, including the right to a minimum wage and the right to unionize and collectively bargain. Such an approach has had many detractors.<sup>25</sup> Much of the resistance to this labor approach has come from scholars who believe the approach would not be practically or legally feasible.<sup>26</sup> Only three college sports are

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21. See Gregory, *supra* note 11 (“Another avenue for athletes is Congress. Federal lawmakers can lift the compensation and benefits restrictions that the NCAA places on its member schools.”).

22. See *infra* Part II.B.1.

23. NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021); see also *infra* Part II.A.

24. See, e.g., Casey Faucon, *Assessing Amateurism in College Sports*, 79 WASH. & LEE L. REV. 3, 97 (2022), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4757&context=wlulr> [<https://perma.cc/XS6W-T8UD>] (“Not only is antitrust law the appropriate approach, but utilizing it appropriately can disrupt the [NCAA’s compensation] scheme[.]”); Amanda L. Jones, *The Dawn of a New Era: Antitrust Law vs. the Antiquated NCAA Compensation Model Perpetuating Racial Injustice*, 116 N.W. L. REV. 1319, 1363–64 (2022) (“In a turbulent time for college sports, antitrust law could be the key to student athletes successfully reforming a system that has exploited the labor of a disproportionately large number of Black student athletes for years and left many of them with little or nothing to show for it.”).

25. See, e.g., Travis Knobbe, *NCAA Athletes Shouldn’t Want to Be Employees*, LWOS (Feb. 27, 2020), <https://lastwordonsports.com/collegefootball/2022/02/27/ncaa-athletes-shouldnt-want-to-be-employees/> [<https://perma.cc/VJC3-KQEW>] (claiming that college athletes “shouldn’t want to be employees” because “that protection would come at a cost”); Corey Leff, *Treating College Athletes as Employees May Create New Problems*, SPORTICO (Dec. 16, 2021), <https://www.sportico.com/leagues/college-sports/2021/college-athletes-employees-problems-1234650280/> [<https://perma.cc/BQS9-HEBG>] (quoting a sports business executive as saying, “This whole idea that the continued expansion of athletes’ rights [to include a minimum wage and the ability to collectively bargain] is necessarily better for the athletes is likely a fallacy”).

26. See, e.g., Knobbe, *supra* note 25 (asserting that giving college athletes employee rights would bring a host of complications); Greg Wallace, *Making the Case Against a College Football Players’ Union*, BLEACHER REP. (Apr. 7, 2014), <https://bleacherreport.com/articles/2020286-making-the-case-against-a-college-football-players-union> [<https://perma.cc/8MKV-T646>] (“[U]nions aren’t the right way to fix what is broken about college athletics. There are far too many questions and too many variables to make a college football players’ union a viable option in our current system.”).

“revenue-generating,” meaning they consistently yield a financial surplus: Division I men’s basketball, women’s basketball, and men’s football.<sup>27</sup> The surplus revenues from these high-grossing sports keep colleges’ other sports programs afloat.<sup>28</sup> Because of these dynamics, cost could be a barrier to a labor approach, as could Title IX—a half-century-old law that guarantees equal opportunity for women who compete in college sports.<sup>29</sup> Neither hurdle presents an insurmountable obstacle to a labor approach, however.

This Note adds to the literature in several ways. Most importantly, it argues for a labor approach colored by the logic of a post-*Alston* antitrust framework. Before *Alston*, academics viewed the antitrust and labor approaches as mutually exclusive.<sup>30</sup> The antitrust and labor approaches need not, however, operate in their respective silos; rather, each approach can complement and buttress the other. This Note also contributes to the literature by laying out a roadmap for non-revenue-generating athletes to unionize. The pre-*Alston* literature focuses instead on revenue-generating athletes, giving little credence to the non-revenue-generating athletes who compose the vast majority of the college athlete population. Finally, this Note takes stock of recent court developments and delves into the implications of those new developments.

Part I of this Note describes how around 1950, the NCAA assumed control over the market for college athletes and began using this control and the concept of “amateurism” to suppress college athletes’ compensation and prevent them from becoming

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27. See *Revenue Redistribution in Big-Time College Sports*, NAT’L BUR. OF ECON. RSCH. (Nov. 2020), <https://www.nber.org/digest/202011/revenue-redistribution-big-time-college-sports> [<https://perma.cc/MCC4-AW6V>] (showing that in men’s college sports, only basketball and football generate a profit); see also David Berri, *For the NCAA, Building the Business of Women’s Sports Starts with Basketball*, GLOB. SPORT MATTERS (Mar. 11, 2022), <https://globalsportmatters.com/business/2022/03/11/for-the-ncaa-building-the-business-of-womens-sports-starts-with-basketball/> [<https://perma.cc/8MKV-T646>] (reporting that in 2019, “women’s Division I basketball reported more than \$600 million in revenue”).

28. Kahn, *supra* note 15, at 224 (detailing how college football and basketball programs “extract rents from revenue-producing athletes by limiting their pay” and then divert those rents to nonrevenue sports). The transfer of football and basketball revenues to nonrevenue sports, whose participants are more likely to be white, “amplifies racial inequities.” Sachin Waikar, *Big-Time College Athletes Don’t Get Paid. Here’s How This Amplifies Racial Inequities*, KELLOGG SCH. OF MGMT. AT NW. UNIV. (Feb. 4, 2021), <https://insight.kellogg.northwestern.edu/article/college-athletes-dont-get-paid-racial-inequities> [<https://perma.cc/4FDU-CLK6>].

29. See *infra* Part IV.C.

30. See *supra* note 11.

“employees.” Part II summarizes the *Alston* ruling and the events that unfolded in its aftermath. Part III outlines how these events and more recent judicial developments set the stage for both revenue- and non-revenue-generating Division I athletes to become “employees.” Finally, after Part IV argues that a labor approach has many advantages over an antitrust approach, this Note concludes by contending that some of the common critiques of the labor approach are not as relevant following *Alston* and that Division I athletes should not give up the fight for employee status.

## I. HOW AMATEURISM WENT FROM A LOFTY IDEAL TO A LEGAL DEFENSE

At the turn of the twentieth century, when the college sports industry was still in its infancy, amateurism helped to preserve college sports’ connection to education and the rigid social hierarchy of the time.<sup>31</sup> Amateurism stopped serving this antiquated purpose long ago, yet it has remained a central component of the college sports regulatory model.<sup>32</sup> This Part traces the origins of the NCAA and the evolution of amateurism from a high-minded ideal rooted in elitism to a cover for cartel activity and the NCAA’s main defense against antitrust and labor law claims.

### A. AMATEURISM AS AN ANIMATING CONCERN BEHIND THE CREATION OF THE NCAA

The NCAA grew out of an initiative to make college football less hazardous.<sup>33</sup> During the early days of college sports, chaos was the name of the game. Operating with little oversight, teams played without clear rules of conduct and often resorted to cheating and “excessive violence” to beat rival squads.<sup>34</sup> In 1905, a football crisis and a concerned U.S. President brought this era of unregulated

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31. See *infra* Part I.A.

32. See *id.*; see also *infra* note 74.

33. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215–17 (2009) [hereinafter Carter, *Age of Innocence*].

34. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10–11 (2000); Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (July 19, 2019), <https://www.history.com/news/how-teddy-roosevelt-saved-football> [https://perma.cc/L4HM-44YL].



competition to an end.<sup>35</sup> Without safety measures in place, conditions for football players had become alarmingly dangerous—so dangerous that players were dying on the field.<sup>36</sup> Amid calls to outlaw college football, avid sports enthusiast President Theodore Roosevelt summoned representatives from the Ivy League to the White House and implored them to intervene.<sup>37</sup>

Ultimately, a collection of university presidents decided the best way forward was to regulate *all* college sports at a national level.<sup>38</sup> In addition to mounting football fatalities, colleges had another pressing problem: the “disease of professionalism” had infiltrated college sports.<sup>39</sup> Many college stars were suspected of “parading in false college colors”—that is, taking money under the table while masquerading as amateurs.<sup>40</sup> Schools hoped a national regulator would not only bring order to college football but also restore the status quo of amateurism in college sports.<sup>41</sup>

College leaders wanted to rid college sports of professionalism because they worried college sports would “lose [their] academic moorings” if college athletes were paid for their athletic contributions.<sup>42</sup> They also wished to maintain a distinction between college athletes and “working class” athletes who relied on their athletic gifts to make a living.<sup>43</sup> The university leaders who opposed professionalism hailed from “society’s upper crust.”<sup>44</sup> These wealthy elites had a biased perception of the lower classes and feared that the reputation of their schools would suffer if the dividing line between college and professional athletes disappeared.<sup>45</sup>

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35. Carter, *Age of Innocence*, *supra* note 33, at 215–17.

36. See Smith, *supra* note 34, at 12 (“[I]n 1905 . . . there were over eighteen deaths . . . in [college] football.”).

37. Carter, *Age of Innocence*, *supra* note 33, at 215–16.

38. *Id.* at 217.

39. *Id.* at 233.

40. *Id.* at 218 (internal quotations omitted).

41. *Id.*

42. GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 5 (2017); see also *id.* (“If the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics.”).

43. See Carter, *Age of Innocence*, *supra* note 33, at 233 (“[T]he amateurism debate also had a class context.”).

44. W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 863 (2002) [hereinafter Carter, *Perversion of In Loco Parentis*].

45. See Carter, *Age of Innocence*, *supra* note 33, at 233 (“[A]mateurism’s values reflected some high-brow biases against the lower classes.”).

In 1906, the NCAA officially came into being.<sup>46</sup> On paper, it had a sweeping, dual mission: to ensure “fair play and eligibility” and to “remedy . . . abuses” in college sports.<sup>47</sup> In reality, it took decades for the organization to have much of an impact. After the NCAA was founded, college sports became a valuable source of revenue for schools,<sup>48</sup> and the movement to eliminate professionalism from college athletics lost momentum.<sup>49</sup> Consequently, when the NCAA released its first amateurism guidelines in the 1920s,<sup>50</sup> most schools disregarded them.<sup>51</sup> In the absence of a “credible enforcement threat,” the financial “temptation to ignore [these optional] standards . . . was simply too great.”<sup>52</sup> Eventually, around 1950, the NCAA introduced a series of bold measures that made its amateurism policies mandatory.<sup>53</sup>

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46. Carter, *Perversion of In Loco Parentis*, *supra* note 44, at 874.

47. Carter, *Age of Innocence*, *supra* note 33, at 220.

48. See e.g., BRAD AUSTIN, DEMOCRATIC SPORTS MEN’S AND WOMEN’S COLLEGE ATHLETICS DURING THE GREAT DEPRESSION 33 (2015) (noting that in the 1920s, Harvard University made a \$131,000 profit from college athletics). Public interest in college sports rose sharply after World War I. See Smith, *supra* note 33, at 13 (describing the factors that drove the college sports boom of the 1920s); William H. Freeman, *College Athletics in the Twenties: The Golden Age or Fool’s Gold?* 7–9 (1977), <https://files.eric.ed.gov/fulltext/ED175823.pdf> [<https://perma.cc/M8SG-448T>] (same). This surge in popularity translated to increased ticket sales. *Id.* at 10.

49. The democratization of access to higher education during the twentieth century may also help to explain why the uproar over rising professionalism in college sports died down. As colleges began opening their doors to students with less affluent backgrounds, classist concerns about preserving the distinction between college athletes and “lower class” professional athletes seem to have faded. See Smith, *supra* note 34, at 13 (describing how as the twentieth century progressed, students from different “segments of society” became eligible to attend college and play college sports). For a discussion of how college enrollment spiked during the early- and mid-twentieth century, and how post-war programs like the G.I. Bill contributed to this trend, see *id.* at 13–14.

50. E. Woodrow Eckard, *The NCAA Cartel and Competitive Balance in College Football*, 13 REV. OF INDUS. ORG. 347, 348 (1998). These guidelines specified that an amateur is “one who engages in sport solely for the physical, mental, or social benefits he derives therefrom, and to whom the sport is *nothing more than an avocation*.” Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OREG. L. REV. 329, 332 n.12 (2007) (citation omitted).

51. Lazaroff, *supra* note 50, at 332.

52. *Id.* In 1929, scandal ensued when the Carnegie Foundation uncovered evidence that 80 out of 112 NCAA schools had traces of professionalism. *College Sports Tainted by Bounties, Carnegie Fund Finds in Wide Study*, N.Y. TIMES (Oct. 24, 1929), <https://www.nytimes.com/1929/10/24/archives/college-sports-tainted-by-bounties-carnegie-fund-finds-in-wide.html> [<https://perma.cc/2YGS-772A>]. Despite this negative publicity, schools continued to disobey the NCAA’s amateurism guidelines. See Lazaroff, *supra* note 50, at 332.

53. See Eckard, *supra* note 50, at 348–49 (noting that between 1948 and 1952, the NCAA took unprecedented steps to enhance its enforcement authority, including adopting what came to be known as the “Sanity Code”).

With this move, the NCAA dramatically strengthened its power over athlete compensation and college sports as a whole.

## B. AMATEURISM AS A CLOAK FOR CARTEL BEHAVIOR

These mid-century reforms effectively converted the NCAA and its members into a buyer cartel, also referred to as a “monopsonist.”<sup>54</sup> A monopsonist enjoys a low degree of competition for a certain type of labor and can therefore fix the price for that labor below a competitive rate.<sup>55</sup> Separate employers can collude with each other to form a monopsony.<sup>56</sup> Such was the case in college sports. After the NCAA signaled that it would no longer tolerate defiance of its amateurism regulations, schools grudgingly united to enforce these policies.<sup>57</sup> They soon discovered that there was an advantage to coordinating with each other with respect to athletes’ compensation. By “engineering monopsony power as a group,” NCAA schools were able to dominate the market for rising college athletes and avoid paying these athletes market rate compensation.<sup>58</sup> The schools’ monopsony over the college athlete labor market enabled them to set these athletes’ compensation at zero and to cap the amount of scholarship aid and other benefits given to athletes at whatever level they desired.<sup>59</sup>

To solidify their grip over the market for young talent, the NCAA and its member institutions “restrict[ed] the alternatives available to prospective college athletes” with tacit assistance from several professional leagues.<sup>60</sup> The National Football League (NFL) and later the National Basketball Association (NBA) and

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54. *Id.* A buyer cartel is roughly the opposite of a “seller cartel” or “monopoly,” which consists of a single seller. *What Is Monopoly*, ECON. TIMES, <https://economictimes.indiatimes.com/definition/monopoly> [<https://perma.cc/G5XT-DPBF>].

55. See Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 2 J. LAB. & ECON. 203, 203–04 (2008) (delineating the key features of a monopsony).

56. See Nick Bunker, *Monopsony and Market Power in the Labor Market*, WASH. CTR. FOR EQUITABLE GROWTH (Apr. 24, 2015), <https://equitablegrowth.org/monopsony-market-power-labor-market/> [<https://perma.cc/W3PP-LCGF>]. For example, many technology firms in Silicon Valley collude with each other to “push down their workers’ wages.” Mike Konczal, *The Silicon Valley Labor Scandals Prove Minimum Wage Hikes Don’t Cost Jobs*, NEW REPUBLIC (Feb. 14, 2014), <https://newrepublic.com/article/116608/silicon-valley-labor-scandals-prove-minimum-wage-hikes-dont-cost-jobs> [<https://perma.cc/FD84-JPV2>].

57. Eckard, *supra* note 50, at 349.

58. Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSPECTIVES 115, 124–25 (2015).

59. *Id.*

60. *Id.* at 125.

Women's National Basketball Association (WNBA) enacted rules barring players from joining their teams straight out of high school.<sup>61</sup> These eligibility rules gave the NCAA cartel virtually unfettered control over the market for college athletes.<sup>62</sup>

### C. AMATEURISM AS AN ANTITRUST DEFENSE

By conspiring to impose an artificial ceiling on college athletes' compensation, the NCAA and its member schools exposed themselves to substantial legal liability. Wage-fixing schemes normally run afoul of the Sherman Act, the federal antitrust law that prohibits "contract[s] . . . [and] conspirac[ies] in restraint of trade."<sup>63</sup> Courts have interpreted the Sherman Act to proscribe only agreements among competitors that "unreasonably" restrain trade.<sup>64</sup> Courts determine whether an agreement has "unreasonably" restrained trade by applying one of three different methods: (1) the "per se" test; (2) the more lenient but still rigorous "rule of reason" test; or (3) an abbreviated version of the latter test known as the "quick look" test.<sup>65</sup> Courts usually employ the rule of reason test.<sup>66</sup> This test entails a comprehensive, fact-intensive

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61. *Id.*; see also Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective*, 3 NW. J.L. & SOC. POL'Y. 1, 11 (2008) (noting that since its inception, the WNBA has "prevent[ed] [its] teams from drafting players that still ha[ve] NCAA college eligibility"). The NFL, NBA, and WNBA instituted these rules, in part, because players who have been tried and tested at the college level generally make for better investments at the professional level. See Sanderson & Siegfried, *supra* note 58, at 125.

62. See Sanderson & Siegfried, *supra* note 58, at 125.

63. 15 U.S.C. § 1.

64. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 58–60 (1911); see also *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

65. Ted Tatos, *Deconstructing the NCAA's Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Lost Compensation: The Evidence Against NCAA Amateurism*, 68 ANTITRUST BULL. 184, 185 (2017); see also *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010) (explaining that the "quick look" test "is an intermediate standard . . . [that] applies in cases where per se condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint" (internal citations, quotations, and emphasis omitted)).

66. Courts used to apply the per se test more frequently, but "the domain of the per se rule has been narrowing." Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018). Today, the per se test extends only to "naked" price fixing. *Id.* (internal quotations omitted). Although the rule of reason test has become the predominant test, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 772 (8th Cir. 2004), the three tests are "less fixed" than they appear. *California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999). Regardless of the test used, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

inquiry that requires the court to weigh the challenged restraint's anticompetitive harms against its procompetitive benefits to identify whether the restraint is more procompetitive than anticompetitive overall.<sup>67</sup> If a restraint's procompetitive benefits offset its anticompetitive effects, the restraint passes muster under the Sherman Act.<sup>68</sup>

The first antitrust challenges to the NCAA's amateurism model occurred in the mid-1970s, but courts did not take these early challenges seriously.<sup>69</sup> During the 1980s and 1990s, innovations in media and television made college sports content more accessible to Americans, triggering a spike in demand for college sports contests and an "explosion in the number of . . . televised games."<sup>70</sup> Due to this enormous growth, which persisted into the 2000s, more money and more investment flowed into college sports than ever before.<sup>71</sup> Nowhere was this trend more apparent than in the world of men's college basketball. Between 1980 and 1990, television revenues from March Madness, the Division I basketball championship, jumped sevenfold from \$8.9 million to \$63.5 million.<sup>72</sup>

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67. Tatos, *supra* note 65, at 185–86 (summarizing the multi-step rule of reason test). Because the impact of a restraint on competition does not "lend itself easily to quantification," courts have ample discretion in conducting the rule of reason balancing test. *Id.* at 186.

68. See *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects.").

69. During the 1970s, two district courts declined to subject the NCAA's amateurism rules to Sherman Act review. See *College Athletic Placement Service, Inc. v. NCAA*, No. 74-1144, 1974 WL 998 (D.N.J. Aug. 22, 1974) (concluding, without much analysis, that the Sherman Act did not apply to certain NCAA amateurism rules because these rules did not serve a commercial purpose); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (same).

70. Sanderson & Siegfried, *supra* note 58, at 124. See also Garry Whannel, *Television and the Transformation of Sport*, 526 ANNALS AM. ACAD. POL. & SOC. SCI. 205, 209 (2009) ("During the 1980s and 1990s, television was . . . transformed by a second wave of technological innovation.").

71. See *NCAA v. Alston*, 141 S. Ct. 2141, 2158 (2021) (noting that by 1985, college football and basketball had become multi-million-dollar businesses and that by 2016, Division I sports had become a \$13.5 billion dollar enterprise).

72. *Television Revenue NCAA College Basketball Tournament from 1980 to 2013*, STATISTA, <https://www.statista.com/statistics/287522/ncaa-basketball-tournament-television-revenue/> [<https://perma.cc/MU4E-2GCX>]. Between 1990 and 2000, March Madness revenues continued to climb, reaching a staggering \$227.7 million. *Id.* These revenues largely came from men's college basketball. See Laine Higgins, *Women's March Madness Is Growing in Popularity—and Undervalued*, WALL ST. J. (Mar. 19, 2021, 8:09 AM), <https://www.wsj.com/articles/march-madness-womens-college-basketball-ncaa-tournament-11616155596> [<https://perma.cc/2CFA-SSTX>] (noting that "[t]he women's basketball tournament doesn't turn a profit").

As television boosted the profitability of college sports, coaching salaries skyrocketed, athletic department budgets swelled, and the NCAA morphed into a “financial behemoth.”<sup>73</sup> College athletes, by contrast, did not experience a meaningful improvement in their financial situation. The NCAA continued to limit the amount of compensation these athletes could accept.<sup>74</sup> As a result, while college sports profits soared, athlete compensation stayed relatively stagnant.<sup>75</sup> Against this backdrop, a vigorous debate emerged over whether the NCAA needed to amend its amateurism rules to allow for greater athlete compensation.<sup>76</sup> The NCAA’s amateurism model was designed to “protect[] athletes from . . . exploitation,”<sup>77</sup> yet it seemed to be having the opposite effect, enriching universities, coaches, and administrators at the expense of athletes.<sup>78</sup>

This controversy soon spilled over into the lower federal courts. Between 1988 and 2015, the NCAA faced a batch of lawsuits alleging that its compensation rules violated the Sherman Act.<sup>79</sup> Throughout this period, the NCAA stuck to its stance that college athletes must be amateurs.<sup>80</sup> Invoking the 1984 Supreme Court decision *NCAA v. Board of Regents*, the NCAA ardently insisted that amateurism was crucial to the survival of the college sports

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73. Sanderson & Siegfried, *supra* note 58, at 117; Gilbert M. Gaul, *How College Football Coaches Became Multi-Million-Dollar Money Pits*, TIME (Aug. 25, 2005), <https://time.com/4006558/college-football-coach-salaries/> [<https://perma.cc/F8J5-VFYJ>].

74. *Alston*, 141 S. Ct. at 2149–50 (2021). The NCAA has gradually loosened its compensation rules. *Id.* For example, it “expanded the scope of allowable payments to include room, board, books, fees, and cash for incidental expenses such as laundry” in 1956 and sanctioned scholarships up to the full cost of attendance in 2014. *Id.* (internal quotations omitted). The NCAA has never, however, wavered in its conviction that college athletes’ compensation should be set at an amateur level, rather than at fair market value or minimum wage.

75. *See supra* notes 15, 73–74.

76. *See, e.g.*, Marc Edelman, *Reevaluating Amateurism Standards in Men’s College Basketball*, 35 U. MICH. J.L. REFORM 861, 885–89 (2002) (proposing the overhaul of the NCAA’s amateurism model and the adoption of a new model that would allow athletes to “earn close to fair market value without disturbing academic integrity”).

77. Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 201 (1996) (quoting an NCAA manual).

78. *See* Edelman, *supra* note 76, at 874 (lamenting how amateurism restrictions in college basketball have “create[d] a windfall of payments to league administrators, directors, and coaches”).

79. Thomas A. Baker III, *Debunking the NCAA’s Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 670–74 (2018) (cataloging antitrust cases against the NCAA).

80. *See id.*

industry and that the procompetitive benefits of its amateurism regulations outweighed their anti-competitive effects.<sup>81</sup>

In *Board of Regents*, the Supreme Court held that an NCAA television plan forbidding schools from making their own television contracts amounted to horizontal price-fixing—a practice usually condemned as per se illegal under the Sherman Act.<sup>82</sup> Nevertheless, the Court examined the plan using the rule of reason test.<sup>83</sup> In dicta, the Court explained that it opted for the rule of reason test over the more stringent per se test because, unlike in other industries, horizontal restraints were “essential” to the NCAA’s ability to offer consumers the unique “product” of college sports.<sup>84</sup> The Court noted, for example, that the “character and quality” of college sports depended on athletes “not be[ing] paid.”<sup>85</sup> The Court also referenced the NCAA’s amateurism regulations as an example of a type of restraint that would probably pass the rule of reason test.<sup>86</sup> The Court commented that the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports” and “needs ample latitude to play that role.”<sup>87</sup> The Court further remarked that “the preservation of the [amateur] in higher education adds richness and diversity to [college sports] and is entirely consistent with the goals of the Sherman Act.”<sup>88</sup>

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81. See Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 251–53 (2014) (unpacking the Supreme Court’s *Board of Regents* opinion and discussing how it “spawned a two-headed amateurism defense for the NCAA”).

82. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) (holding that while “horizontal price fixing . . . [is] ordinarily condemned as a matter of law under an ‘illegal per se’ approach because the probability that these practices are anticompetitive is so high,” it would be “inappropriate” to apply the per se rule to the NCAA’s television plan). Courts apply the per se rule when “the [challenged] practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

83. See *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 104–08 (finding that the NCAA’s television plan “ha[d] significant potential for anticompetitive effects”); see also *id.* at 113–20 (rejecting the NCAA’s proffered justifications for the television plan).

84. See *id.* at 101 (“[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).

85. *Id.* at 102. The Court further opined that by “enabl[ing] a product to be marketed which might otherwise be unavailable,” the NCAA’s actions as a whole “widen[ed] consumer choice—not only the choices available to sports fans but also those available to athletes—and hence c[ould] be viewed as [net] procompetitive.” *Id.*

86. See *id.* at 117. After holding that the NCAA’s television plan flunked the rule of reason test, the Court distinguished the plan from the NCAA’s amateurism rules and hinted that it would uphold those rules if asked to do so. See *id.*

87. *Id.* at 120.

88. *Id.*

After 1984, the NCAA repeatedly used this dicta from *Board of Regents* to argue that its compensation rules were presumptively procompetitive. The NCAA reasoned that its compensation rules were clearly procompetitive because (1) they promoted amateurism, which *Board of Regents* had established was a legitimate procompetitive benefit, and because (2) without them, college sports would cease to exist—college competition would lose the quality that made it unique, causing demand for it to deteriorate.<sup>89</sup> As scholars have correctly pointed out, the NCAA’s “two-pronged” amateurism argument has several flaws. First, this argument contradicts prior Supreme Court precedent holding that the rule of reason test only considers a restraint’s impact on competitive conditions, not its impact on social welfare.<sup>90</sup> Second, it rests on the uncorroborated assumption that demand for college sports would plummet if colleges paid their athletes directly.<sup>91</sup> Third, it conveniently overlooks the fact that the NCAA’s definition of “amateur” has evolved over time.<sup>92</sup> Finally, it could excuse a parade of horrors. Under the NCAA’s faulty logic, any competitor could justify a patently unlawful restraint by portraying it as an indispensable feature of their product.<sup>93</sup> Tellingly, even Walter Byers, the NCAA’s first executive director and one of the architects of modern, “big-time” college sports, has ridiculed the NCAA’s amateurism argument.<sup>94</sup> In a memoir described as a “takedown of all he had built,”<sup>95</sup> Byers characterized amateurism as a

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89. Feldman, *supra* note 81, at 251–53.

90. *Id.* at 257–58.

91. Many scholars have cast doubt on this assumption. One economist has noted that rewarding college athletes by “build[ing] larger and better facilities with increasingly lavish amenities” has not impaired consumer demand for college sports, despite the public’s awareness of these expenditures. See Tatos, *supra* note 65, at 213, 216. Another scholar has pointed out that sports fans did not boycott the Olympic Games after the requirement that participants be amateurs was abolished but rather, welcomed the change. Alex Moyer, *Throwing Out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 818 (2015). In addition, surveys demonstrate that the public is warming to the idea of directly paying college athletes for their services. See, e.g., Chris Knoester et al., *Should College Athletes Be Allowed to Be Paid? A Public Opinion Analysis*, 38 SOCIO. SPORT J. 399, 399 (2021).

92. *NCAA v. Alston*, 141 S. Ct. 2141, 2163 (2021) (noting that the district court found that the NCAA “had not adopted any consistent definition of amateurism”).

93. Feldman, *supra* note 81, at 256.

94. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 347 (Univ. Mich. Press 1995).

95. Karen Given, *Walter Byers: The Man Who Built the NCAA, Then Tried to Tear It Down*, WBUR (Oct. 13, 2017), <https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa> [https://perma.cc/P4D6-JYJA].



smokescreen, calling it an “economic camouflage for monopoly practice.”<sup>96</sup>

Despite the glaring defects in the NCAA’s amateurism argument, courts initially accepted this defense without bothering to conduct a rule of reason analysis.<sup>97</sup> This era of extreme deference to the NCAA lasted from 1988 to 2012.<sup>98</sup> Then, in 2015, a circuit split developed over whether courts needed to analyze the NCAA’s compensation limits under the rule of reason test or whether giving them a “quick look” sufficed.<sup>99</sup> The Fifth and Seventh Circuits felt that only a quick look was necessary in light of the Supreme Court’s instructive dicta in *Board of Regents*.<sup>100</sup> The Ninth Circuit disagreed and proclaimed in *O’Bannon v. NCAA* that the validity of the NCAA’s compensation rules had to be “proved, not presumed.”<sup>101</sup> Many scholars heralded *O’Bannon* as the “beginning of the end” of the NCAA’s amateurism defense.<sup>102</sup> In *O’Bannon*, the Ninth Circuit embraced some aspects of this defense, however. Observing that the Supreme Court’s guidance in *Board of Regents* was “informative,” the court adopted the NCAA’s position that amateurism had a procompetitive effect.<sup>103</sup> Thus, although the *O’Bannon* court engaged in a more searching review of the NCAA’s amateurism restrictions than other courts

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96. BYERS, *supra* note 94, at 376.

97. Baker III, *supra* note 79, at 670–73.

98. *See id.* (describing how between 1988 and 2012, a number lower courts “ran with the [*Board of Regents* decision’s] loose dicta instead of its holding and “helped to indoctrinate . . . [the] myth that the NCAA’s amateurism rules, as a matter of law, conform with antitrust scrutiny”).

99. *See id.* at 674 (“In deciding *O’Bannon*, the Ninth Circuit deviated from more than twenty years of . . . case law from other circuits that interpreted *Board of Regents* in a way that fortified that NCAA’s amateurism rules from rule of reason review.”).

100. *See McCormack v. NCAA*, 845 F.2d 1338, 1343–44 (5th Cir. 1988) (summarily concluding that the challenged NCAA rules were “reasonable” without performing a true rule of reason analysis); *see also Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (finding that the Supreme Court gave courts “a license to find certain NCAA bylaws that ‘fit into the same mold’ as those discussed in *Board of Regents* to be procompetitive ‘in the twinkling of an eye’”) (citation omitted).

101. *O’Bannon v. NCAA*, 802 F.3d 1049, 1063–64 (9th Cir. 2015); *see id.* at 1064 (criticizing the *Agnew* court’s “aggressive construction” of the Supreme Court’s words in *Board of Regents*).

102. *See, e.g.,* Michael Steele, *O’Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 512–13 (2015); *see also* Matthew N. Korenoski, *O’Bannon v. NCAA: An Antitrust Assault on the NCAA’s Dying Amateurism Principle*, 54 DUQ. L. REV. 493, 515 (2016).

103. *O’Bannon*, 802 F.3d at 1064; *see id.* at 1076 (“[T]here is a concrete procompetitive effect in the NCAA’s commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers.”).

had in the past, the *O'Bannon* decision did not, in fact, mark the end of the NCAA's amateurism defense.

#### D. AMATEURISM AS A SHIELD AGAINST EMPLOYEE CLAIMS

Following the same playbook it has used to defend its compensation rules and insulate them from rule of reason review, the NCAA has tried to keep college athletes from becoming employees by exaggerating the importance of amateurism in college sports. The NCAA realized its member schools were vulnerable to employment lawsuits in 1953, after the Colorado Supreme Court held in *University of Denver v. Nemeth* that an injured college football player was an employee of his college and could therefore collect worker's compensation.<sup>104</sup> As former NCAA Executive Director Byers recounted in his 1995 memoir, the prospect of college athletes becoming employees ignited panic within the organization.<sup>105</sup> To save schools from having to foot the bill for athlete injuries, the NCAA set out to convince the courts and the public that the *Nemeth* decision was misguided and that college athletes actually belonged to a special category *in between* students and employees. To that end, the NCAA manufactured the term "student-athlete" and "embedded [it] in all NCAA rules."<sup>106</sup> A "deliberately crafted" piece of propaganda,<sup>107</sup> the term was intended to "conjure the nobility of amateurism" and perpetuate the narrative that college athletes' studies took precedence over their athletic responsibilities.<sup>108</sup> In addition, the NCAA told schools to insert language into their scholarship agreements requiring award recipients to agree to be "bound by" the "principles of amateurs."<sup>109</sup> This new language made such agreements read less like employment contracts.<sup>110</sup>

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104. *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953).

105. See BYERS, *supra* note 94, at 69.

106. *Id.*

107. Shaun Loughlin, *Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in the Profit-Making Enterprise of Collegiate Athletics*, 48 CONN. L. REV. 1737, 1741 (2016).

108. Ta-Nehisi Coates, *The Shame of the NCAA*, ATLANTIC (Oct. 17, 2011), <https://www.theatlantic.com/entertainment/archive/2011/10/the-shame-of-the-ncaa/246775/> [https://perma.cc/Q9HM-NP7N].

109. BYERS, *supra* note 94, at 75. To compete with schools that offered athletes four-year scholarships, many schools offering one-year scholarships had begun assuring recruits that their scholarships would be renewed as long as they remained on their teams. These verbal and written assurances came "perilously close to employment contracts." *Id.*

110. *Id.*

The NCAA's propaganda strategy succeeded. Between 1957 and 2000, NCAA schools prevailed in a handful of high-profile worker's compensation cases.<sup>111</sup> But these victories did not put the question of college athletes' employment status to rest. After 2000, the issue of worker's compensation faded into the background,<sup>112</sup> and two new issues came to the forefront: (1) whether college athletes were eligible for a minimum wage under the Fair Labor Standards Act (FLSA)<sup>113</sup> and (2) whether they had a right to collectively bargain for better compensation under the National Labor Relations Act (NLRA).<sup>114</sup> Courts evaluate whether two parties have an employer-employee relationship under the FLSA based on the "economic reality" of the situation.<sup>115</sup> Under the

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111. See *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288, 290 (Colo. 1957) (distinguishing *Nemeth* on the ground that the plaintiff in that case would have lost his part-time job had he been cut from the football squad); *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1173–75 (Ind. 1983) (denying a paralyzed football player worker's compensation benefits because his scholarship did not amount to an employment contract); *Coleman v. W. Mich. Univ.*, 125 Mich. App. 35, 39, 44 (1983) (holding that although the plaintiff's football scholarship constituted "wages," the plaintiff was not an employee under the state worker's compensation statute); *Waldrep v. Tex. Emp. Ins. Ass'n*, 21 S.W.3d 692, 698, 700 (Tex. App. 2000) (upholding a jury's finding that a former college football player paralyzed in 1974 had not proved he was a school employee at the time of his injury). A California court ruled that college scholarship athletes could qualify for worker's compensation in 1963, but this decision was "short-lived," as it was quickly undone by the state legislature. Loughlin, *supra* note 107, at 1753.

112. The Supreme Court's decision in *NCAA v. Alston*, discussed *infra* Part II.A, rekindled the conversation regarding college athletes' right to worker's compensation benefits. See Savannah Putnam, *Protection for Play: Student-Athletes and the Renewed Fight for Workers' Compensation Benefits*, CAMPBELL L. OBSERVER (June 23, 2022), <http://campbelllawobserver.com/protection-for-play-student-athletes-and-the-renewed-fight-for-workers-compensation-benefits/> [https://perma.cc/AF6M-5GLV]. Today, the NCAA offers all athletes catastrophic injury coverage and some "exceptional" athletes extra coverage, but this coverage does not provide athletes with sufficient protection. See Remington Slama, *College Sports, Enter at Your Own Risk: An Overview of the NCAA Insurance Policies Available to Its Student-Athletes*, NEB. L. REV. (Apr. 20, 2021), <https://lawreview.unl.edu/college-sports-enter-your-own-risk-overview-ncaa-insurance-policies-available-its-student-athletes> [https://perma.cc/53US-V6WF].

113. Codified at 29 U.S.C. §§ 201–219, the FLSA sets the minimum wage for U.S. employees in both the public and private sectors. U.S. DEPT OF LAB., *Wages and the Fair Labor Standards Act*, <https://www.dol.gov/agencies/whd/flsa> [https://perma.cc/2MFJ-7EB7].

114. Codified at 29 U.S.C. §§ 151–169, the NLRA affords most private-sector employees the right "to organize, to engage in group efforts to improve their wages and working conditions, to determine whether to have unions as their bargaining representative, [and] to engage in collective bargaining." *Introduction to the NLRB*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> [https://perma.cc/EG6S-R8FF].

115. See *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 301 (1985) ("The test of employment under the [FLSA] is one of economic reality." (internal quotations omitted)); see also *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) ("[S]tatus as an 'employee' for purposes of the FLSA depends on the totality of the circumstances rather

NLRA, on the other hand, courts assess whether a worker meets the criteria for being an employee by applying common law agency principles.<sup>116</sup> Although the economic reality and common law tests are both fact-specific, they require courts to consider a different set of factors.<sup>117</sup>

In 2014, the movement to expand college athletes' rights to include employee rights resurged. Members of the Northwestern University football team helped reignite this movement when they petitioned for union representation.<sup>118</sup> In partnership with a coalition of activists,<sup>119</sup> the Northwestern players raised awareness of how unfair it was that schools could profit from the "blood, sweat, and tears"<sup>120</sup> college athletes poured into their sports without having to take their voices, interests, and wellbeing into account.<sup>121</sup> Although the spokesperson for the Northwestern players expressed that the players cared more about getting adequate health care and a quality education than they did about getting "their piece of the pie,"<sup>122</sup> the players' union bid threatened

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than on any technical label." (citing *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961)) (additional citations omitted)).

116. See *Columbia University*, 364 N.L.R.B. No. 90, 2016–2017 NLRB Dec. ¶ 16,216, at \*4–5 (Aug. 23, 2016) (finding student assistants to be employees under the NLRA based on common law principles of agency). Under common law agency doctrine, an employee "perform[s] services for another and [is] subject to [their] control or right of control." *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999). Payment is "strongly indicative of employee status." *Id.*

117. See JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST 2, 6 (2021) (outlining the basic elements of the economic reality and common law tests).

118. *Nw. Univ. Emp. & Coll. Athletes Players Ass'n (CAPA)*, 198 L.R.R.M. (BNA) ¶ 1837, 2014 WL 1246914, at \*1 (N.L.R.B. Mar. 26, 2014). The petitioners only included players receiving grant-in-aid scholarships. *Id.*

119. A non-profit called the National College Players Association (NCPA) spearheaded the union effort. Rohan Nadkarni & Alex Putterman, *In Focus: From Locker Room to Courtroom: How the Union Movement Came to Northwestern*, DAILY NW. (Feb. 17, 2014), <https://dailynorthwestern.com/2014/02/17/sports/from-locker-room-to-courtroom-how-the-union-movement-came-to-northwestern/> [<https://perma.cc/NT5A-6WUR>]. The NCPA allied with the United Steel Workers (USW), an organization with more resources, "financial muscle," and institutional expertise. *Id.*

120. Transcript of Proceedings at 150, *Nw. Univ. Emp. & Coll. Athletes Players Ass'n (CAPA)*, 198 L.R.R.M. (BNA) ¶ 1837 (Mar. 26, 2014).

121. Ben Strauss, *At Northwestern, a Blitz to Defeat an Effort to Unionize*, N.Y. TIMES (Apr. 23, 2014), <https://www.nytimes.com/2014/04/24/sports/ncaafootball/at-northwestern-a-blitz-to-defeat-an-effort-to-unionize.html> [<https://perma.cc/M7VG-PPR8>].

122. See Mike Wise, *Kain Colter's Unionization Effort Is Fueled by Compassion*, *Common Sense*, WASH. POST (Apr. 12, 2014), [https://www.washingtonpost.com/sports/colleges/mike-wise-kain-colters-unionization-effort-is-fueled-by-compassion-common-sense/2014/04/12/0053300e-c285-11e3-bcec-b71ee10e9bc3\\_story.html](https://www.washingtonpost.com/sports/colleges/mike-wise-kain-colters-unionization-effort-is-fueled-by-compassion-common-sense/2014/04/12/0053300e-c285-11e3-bcec-b71ee10e9bc3_story.html) [<https://perma.cc/3SZP-6A7H>].

to destroy the NCAA's business model. A players' union had the potential to spark a chain reaction that would spell the end of the NCAA cartel. If college athletes could organize, they could, in turn, "be entitled to workers' compensation benefits, unemployment insurance[,] and some portion of the revenue generated by college sports."<sup>123</sup>

Later in 2014, a former women's college soccer player filed a first-of-its-kind class action lawsuit accusing the NCAA and Division I schools of violating the FLSA by failing to pay Division I athletes the federal minimum wage.<sup>124</sup> The suit, *Berger v. NCAA*, called into question why the work-study participants who sold popcorn and programs at school athletic competitions made an average hourly wage of \$9.03, while the athletes "whose performance create[d] such work study jobs in the athletic department [were] paid nothing," even though these athletes "perform[ed] longer, more rigorous hours," were "subject to stricter, more exacting supervision," and "confer[ed] as many, *if not more*, tangible and intangible benefits on [their] schools."<sup>125</sup>

Once again, the NCAA managed to fend off these efforts using amateurism as a shield. The Northwestern players' ambitious unionization plan did not materialize because, among other reasons, the NCAA waged a fierce battle against it.<sup>126</sup> Intervening as amicus curiae, the NCAA contended that granting scholarship players employee status would be a "drastic and unnecessary" action that would undermine its amateurism rules, "undercut the demarcation" between college and professional sports, and cause

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123. See Strauss, *supra* note 121.

124. Complaint, *Sackos v. NCAA*, No. 1:14-CV-1710-WTL-MJD (S.D. Ind. Oct. 22, 2014). The plaintiffs later retracted their claims against the public schools (including Sackos' alma mater) because these schools could claim they were "state actors" and, as such, immune from suit under the FLSA. *Berger v. NCAA*, Cover Letter to Amended Complaint at \*1, 1:14-CV-1710-WTL-MJD. Sackos subsequently withdrew from the case and was replaced by three current and former track and field athletes from the University of Pennsylvania. *Id.*

125. Complaint, *Sackos*, at 10–11. To bolster its point that college athletes have an arduous schedule, the plaintiffs cited one NCAA study that found FBS football players were spending over 43 hours a week on athletics on average and other college athletes were spending 32 to 42 hours a week on athletics on average. *Id.* at 10.

126. The NCAA lambasted the athletes' union effort in the media. See, e.g., Dan Wolken, *NCAA President Mark Emmert Decries College Union Effort*, USA TODAY SPORTS (Apr. 6, 2014) <https://www.usatoday.com/story/sports/college/2014/04/06/mark-emmert-ncaa-structure-presidents-press-conference-unionization-labor/7382025/> [https://perma.cc/UA4F-H43W] ("NCAA president Mark Emmert characterized the unionization of college athletes as a 'grossly inappropriate' solution to the challenges facing college sports . . . [and] said [it] would blow up everything about the collegiate model of athletics.").

profound disruption in the college sports industry.<sup>127</sup> The NLRB appears to have taken the NCAA's complaints into consideration. After an NLRB regional director sided with the players,<sup>128</sup> an appeals panel declined to exercise jurisdiction over their petition, blocking the players from unionizing.<sup>129</sup> This panel concluded it would be inappropriate for it to adjudicate the players' petition due to the petition's "novel[ty]" and potentially destabilizing effect on college sports.<sup>130</sup>

The panel's motivating concern was that because the NLRA only covers private-sector employees, and the "overwhelming majority" of schools in the Football Bowl Subdivision (FBS)—the highest level of Division I football—were public schools,<sup>131</sup> approving the players' petition would send the college sports world into disarray.<sup>132</sup> At its core, the panel's concern about the potential destabilization of college sports was really a concern about competitive balance.<sup>133</sup> After *Board of Regents* lifted the NCAA's restrictions on the broadcasting of college football games, conferences took over the role of negotiating football broadcast rights on behalf of schools.<sup>134</sup> "Much of the big money" in college sports comes from these conference-negotiated broadcast deals.<sup>135</sup> The panel recognized that if private school athletes could bargain for a share of conference revenues, private schools would have a

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127. Brief for NCAA as Amicus Curiae Supporting Nw. Univ. at 2, 25–27, Nw. Univ., 362 N.L.R.B. 1350 (2015) (No. 13-RC-121359). The NCAA protested that if the Northwestern players were deemed to be employees under the NLRA, the "world of intercollegiate athletics . . . could shrink because of a lack of resources." *Id.* at 5.

128. Nw. Univ., 198 L.R.R.M. (BNA) ¶ 1837, 2014 WL 1246914, at \*2 (N.L.R.B. Mar. 26, 2014).

129. Nw. Univ., 362 N.L.R.B. 1350, 1355–56 (2015).

130. *Id.* at 1352.

131. *Id.* Schools in the FBS "generally feature[] the best teams." NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021).

132. See Nw. Univ., 362 N.L.R.B. at 1352 (finding that because of "the control exercised by the [regional] leagues over the individual teams" and because of the Board's lack of jurisdiction over most FBS schools, "it would not promote stability in labor relations" for the NLRB to issue a decision in the case).

133. Although scholars define the term differently, "competitive balance" generally refers to the degree of competitiveness between teams in a given league. See Eckard, *supra* note 50, at 347–48; see also Tatos, *supra* note 65, at 212 (defining competitive balance in college sports as "the equilibrium point where no school can leverage its resources to directly or indirectly compensate athletes at a higher level than any other school").

134. CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES 140 (2011).

135. Dan Levy, *Can College Athletes Unionize?*, BLEACHER REP. (Oct. 8, 2013), <https://bleacherreport.com/articles/1802827-can-college-athletes-unionize> [<https://perma.cc/8V65-LQBW>].

massive advantage over public ones.<sup>136</sup> The tradition of amateurism in college sports seems to have also factored into the panel's decision.<sup>137</sup>

Likewise, the Seventh Circuit tossed out the *Berger* class action at the motion-to-dismiss stage.<sup>138</sup> Echoing arguments put forward by the NCAA,<sup>139</sup> the court reasoned that the tradition of amateurism in college sports “defined the economic reality of the relationship between . . . athletes and their schools” and stated that “student athletic play [wa]s not work.”<sup>140</sup> College athletes endured another disappointment in 2019 when the Ninth Circuit dismissed a similar lawsuit, *Dawson v. NCAA*.<sup>141</sup> Citing *Berger*, the *Dawson* court held that the NCAA and Pac-12 Conference function as regulators of college sports, not as employers of college athletes.<sup>142</sup>

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136. See *Nw. Univ.*, 362 N.L.R.B. 1350, 1352 (2015); see also Edwin Rios, *College Athletes Just Lost a Big Battle. Here's Where the NCAA Pay War Is Headed Next*, MOTHER JONES (Aug. 19, 2015), <https://www.motherjones.com/politics/2015/08/northwestern-college-football-unionization-loss/> [<https://perma.cc/3L9L-NEUM>].

137. The panel seemed to endorse the view that college athletes belong to a unique category. See *Nw. Univ.*, 362 N.L.R.B. at 1353 (“[T]hat the . . . players are students who are also athletes receiving a scholarship to participate in what has traditionally been regarded as an extracurricular activity . . . materially sets them apart from the Board’s student precedent.”).

138. *Berger v. NCAA*, 843 F.3d 285, 288 (7th Cir. 2016).

139. See Memorandum in Support of Motion by the Misjoined Defendants to Dismiss Plaintiff’s Amended Complaint at 14, *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016) (No. 1:14-CV-01710-WTL-MJD) (“The Supreme Court has acknowledged the importance of amateur status in college athletics.”); see also *id.* at 11 (“Given the focus of the economic reality analysis on economic dependence . . . a student-athlete cannot be the employee of [their] school. . . . A student attends a college or university to pursue a degree.”).

140. *Berger*, 843 F.3d at 291, 293 (internal quotations omitted). The court noted that unlike work-study participants who “sell programs or usher at athletic events . . . in anticipation of some compensation,” college athletes have competed on behalf of their schools “without any real expectation of earning an income” for “over a hundred years.” *Id.* at 293 (internal quotations and citation omitted).

141. *Dawson v. NCAA*, 932 F.3d 905, 907 (9th Cir. 2019). Before *Dawson*, *Livers v. NCAA* had provided a glimmer of hope to college athletes. *Livers v. NCAA*, No. CV 17-4271, 2018 WL 3609839, at \*1, \*6 (E.D. Pa. July 26, 2018) (finding that a former scholarship football player had plausibly alleged an FLSA claim against the NCAA and Villanova University). The *Livers* case was withdrawn due to a statute of limitations issue, however. Sam C. Ehrlich, “*But They’re Already Paid*”: *Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 12 (2020).

142. *Dawson*, 932 F.3d at 911. The *Dawson* decision was “particularly crushing” for college athletes because unlike the *Berger* court, the *Dawson* court had not “summarily refused to extend FLSA employee protections” to college athletes. John Kealey, *Preserving Fabled Amateurism: The Benefits of the CAA’s Adoption of the Olympic Amateurism Model*, 29 J.L. & POL’Y 325, 350 (2020). Rather, it had conducted a thorough analysis of the economic relationship between the plaintiffs and defendants before granting the motion to dismiss. See *Dawson*, 932 F.3d at 910–11.

## II. NCAA v. ALSTON: AN ANTITRUST ATTACK ON THE NCAA'S AMATEURISM DEFENSE

In 2021, the Supreme Court struck down some of the NCAA's limits on college athlete compensation in *NCAA v. Alston*.<sup>143</sup> This unanimous decision brought the NCAA's string of court victories to an emphatic end.<sup>144</sup> Despite being a narrow judgment, the landmark *Alston* ruling had broad ramifications, "la[ying] the groundwork for . . . bigger changes in the NCAA's amateurism model"<sup>145</sup> and spurring a wave of further developments. This Part provides a detailed overview of the *Alston* ruling and its wide-ranging repercussions.

### A. NCAA v. ALSTON

The plaintiffs in *Alston* challenged the NCAA's entire suite of rules governing the compensation of FBS college football players and Division I men's and women's basketball players under the Sherman Act.<sup>146</sup> This "interconnected set of NCAA rules" capped the value of athletic scholarships at the "cost of attendance" and banned schools from paying their athletes anything beyond that amount, with some exceptions.<sup>147</sup> Permissible payments above the cost of attendance included money for tutoring and funding for graduate school.<sup>148</sup> They also included payments unconnected to education, such as athletic participation awards valued at several hundred dollars, cash stipends up to several thousands of dollars, and meal reimbursements.<sup>149</sup>

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143. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

144. Although the plaintiffs technically prevailed in *O'Bannon*, the decision was a "partial victory" for the NCAA because the court allowed it to cap NIL compensation. *Judge Rules Against NCAA*, ESPN (Aug. 8, 2014), [https://www.espn.com/college-sports/story/\\_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case](https://www.espn.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case) [https://perma.cc/RV3F-NL2H].

145. C.L. Brown, *How Supreme Court's NCAA Decision Could Affect ACC Schools Like UNC, Duke and NC State*, NEWS & OBSERVER (Raleigh) (June 21, 2021), <https://amp.newsobserver.com/sports/college/acc/article252263118.html>.

146. *Alston*, 141 S. Ct. at 2150, 2151.

147. *Id.* at 2149–51.

148. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1244–45 (9th Cir. 2020).

149. *Id.* The NCAA's Student Assistance Fund (SAF) and Academic Enhancement Fund (AEF) "act[] as a mechanism of pay-to-play, albeit restricted to the limited funds available." Daniel Libit, *Alston Case Turns Spotlight onto NCAA's Student Assistance Fund*, SPORTICO (July 20, 2021), <https://www.sportico.com/leagues/college-sports/2021/ncaa-student-assistance-fund-1234634735/> [https://perma.cc/V4ZT-GCGB]. "Without losing their eligibility, student-athletes may receive . . . disbursements—sometimes thousands of



Following an “exhaustive trial,”<sup>150</sup> the district court judge let the challenged limits tied to athletic performance stand but enjoined the limits on “tutoring, graduate school tuition, and paid internships” and other education-related benefits.<sup>151</sup> Judge Claudia Wilken—who also presided over the *O'Bannon* trial—predicted that unlike pure cash awards, education-related benefits would not become “vehicles for payments [comparable to] a professional’s salary.”<sup>152</sup> After the Ninth Circuit declined to vacate the injunction and held that the district court “struck the right balance in crafting a remedy” that “prevent[ed] anticompetitive harm” to athletes while also “preserving the popularity of college sports,”<sup>153</sup> the NCAA appealed.<sup>154</sup> The NCAA presumably appealed, rather than “lift the cap” on some modest “education expenses,” so it would not be inundated with a barrage of further challenges to its compensation rules.<sup>155</sup>

In a momentous ruling, the Supreme Court resoundingly affirmed the district court’s injunction of the education-related limits.<sup>156</sup> Writing for the Court, Justice Gorsuch confirmed that the NCAA’s compensation rules warrant a full rule of reason analysis.<sup>157</sup> The Court then rejected the argument that its *Board of Regents* decision “expressly approved” the NCAA’s compensation

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dollars—from the [SAF] and [AEF] for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid [i.e., funding for graduate school], health and safety expenses, clothing, travel, personal or family expenses, loss-of-value insurance policies, car repair, personal legal services, parking tickets, and magazine subscriptions. . . .” *In re NCAA Athletic Grant-in-Aid Cap*, 958 F.3d at 1244–45.

150. *NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021).

151. *In re NCAA Athletic Grant-in-Aid Cap Antitr. Litig.*, 375 F. Supp. 3d 1058, 1102 (N.D. Cal. 2019).

152. *Id.* at 1261. Although it diminished the NCAA’s control over college athlete compensation, Judge Wilken’s injunction “extended the NCAA considerable leeway.” *Alston*, 141 S. Ct. at 2164. Judge Wilken wrote that the NCAA could “develop its own definition of benefits that relate to education” and “continue fixing education-related cash awards” so long as those limits did not fall below the limit on “awards for academic performance.” *Id.* Judge Wilken added that the NCAA could continue to regulate how schools provide their athletes with education-related benefits. *Id.*

153. *Id.* at 1263.

154. Petition for Writ of Certiorari, *NCAA v. Alston*, 141 S. Ct. 1231 (2020) (No. 20-250).

155. Al Hood, *What Does the NCAA v. Alston Decision Mean?*, SB NATION TAR HEELS BLOG (July 22, 2021), <https://www.tarheelblog.com/2021/6/22/22544310/ncaa-alston-supreme-court-college-athletics> [<https://perma.cc/T8BT-VL9K>].

156. See *Alston*, 141 S. Ct. at 2166. To maximize their chance of winning the appeal, the *Alston* plaintiffs dropped their challenge to the NCAA’s athletic-related restrictions. See *id.* at 2144.

157. See *id.* at 2157 (“This dispute presents complex questions requiring more than a blink to answer.”).

limits.<sup>158</sup> Justice Gorsuch explained that in *Board of Regents*, the Court's "stray" remarks about the NCAA's compensation limits implied that courts should be "sensitive to [those rules'] precompetitive possibilities" but did not establish that they were procompetitive "in 1984 and forevermore."<sup>159</sup> The Court also refuted the argument that the district court should have "deferred to [the NCAA's] conception of amateurism" instead of "impermissibly redefining its product."<sup>160</sup> The NCAA, Justice Gorsuch wrote, could not evade Sherman Act liability by simply "relabel[ing] a restraint as a product feature and declar[ing] it 'immune from scrutiny.'"<sup>161</sup>

Justice Kavanaugh wrote separately to convey his doubts about the legality of the NCAA's remaining compensation rules.<sup>162</sup> In a spirited concurrence, Justice Kavanaugh lauded the decision as an "overdue course correction" and attacked the NCAA's amateurism argument, which he denounced as "circular and unpersuasive."<sup>163</sup> Emphasizing that the NCAA's business model constituted "textbook" price fixing and would be "flatly illegal in almost any other industry in America,"<sup>164</sup> Justice Kavanaugh admonished the NCAA for using the "innocuous" label of amateurism to obscure the fact that it was breaking the law.<sup>165</sup> While he conceded that "difficult policy and practical questions would undoubtedly ensue" if the NCAA's other compensation restrictions were overturned, Justice Kavanaugh stressed that these practical difficulties could be resolved through litigation, legislation, or collective bargaining.<sup>166</sup>

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158. *Id.* The Court also declined to give the NCAA's compensation rules special deference on the basis that they "serve[d] uniquely important social objectives beyond enhancing competition." *Id.* at 2159. Justice Gorsuch noted that the Court "regularly refused materially identical requests from litigants." *Id.*

159. *Id.* at 2158. Justice Gorsuch wrote that it would be "particularly unwise" to read "an aside in *Board of Regents*" so broadly considering the "sensitivity of antitrust analysis to market realities" and how much the college sports market had changed since 1984. *Id.*

160. *Id.* at 2144, 2162–63.

161. *Id.* at 2163 (citation omitted).

162. *Id.* at 2166–67 (Kavanaugh, J., concurring).

163. *Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring).

164. *See id.* at 2167. Justice Kavanaugh pointed out that "[m]ovie studios cannot collude to slash benefits to camera crews to kindle a 'spirit of amateurism' in Hollywood." *Id.* at 2168.

165. *See id.*

166. *Id.*

## B. ALSTON'S AFTERMATH

The *Alston* ruling sent shock waves that reverberated from the halls of Washington, D.C. to the NCAA's headquarters in Indianapolis and beyond. This section explains how the decision infused fresh energy into the college athlete rights movement and propelled that movement into a new phase.

### 1. *The NCAA's Policy Change Regarding NIL Compensation*

One of the most significant consequences of *Alston* was the removal of the NCAA's ban on NIL compensation.<sup>167</sup> Although scores of today's top professional athletes earn most of their money through NIL deals,<sup>168</sup> college athletes have historically been shut out of the NIL market. College athletes have been unable to partake in NIL deals because until recently, the NCAA forced them to forfeit their right to monetize their NIL.<sup>169</sup> The chief objection to college athlete NIL deals has been that such deals would make "pay for play"<sup>170</sup> a reality in college sports.<sup>171</sup>

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167. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/J6UJ-EEBD>].

168. Nasha Smith, *13 Athletes Who Make More Money Endorsing Products Than Playing Sports*, BUS. INSIDER (June 17, 2019), <https://www.businessinsider.com/athletes-endorsements-nba-golf-tennis-2019-6> [<https://perma.cc/T77M-22HR>].

169. See Faucon, *supra* note 24, at 97 ("[T]he right of the NCAA and its member institutions to . . . commercialize student-athletes[] NILs [has been] exclusive"). The right to monetize one's NIL falls under the "right of publicity." See Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity*, ABA, [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/) [<https://perma.cc/2XNL-J9N2>] ("[I]n its most concise form[,] the right of publicity is the inherent right of every human being to control the commercial use of [their] identity." (internal quotations and citation omitted)). Although this right is not enshrined in federal law, most states recognize it by statute, common law, or both. *Id.* California, for example, has robust right of publicity protections, including a law that makes it a civil offense to use someone's NIL for a commercial purpose without their consent. Nora Dreyman, *John Doe's Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 673 n.7 (2017).

170. "Pay for play" is a shorthand for paying college athletes for their labor. Tatos, *supra* note 65, at 185 n.3.

171. See GABE FELDMAN, THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS 6 (May 2016), [https://www.knightcommission.org/wp-content/uploads/2008/10/feldman\\_nil\\_white\\_paper\\_may\\_2016.pdf](https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf) [<https://perma.cc/2ZB2-R4FD>] ("The NCAA . . . fears an NIL system would be abused . . . as a disguise for improper payments to induce a student-athlete to choose a particular school.").

In the lead up to *Alston*, the NCAA had faced escalating pressure to revise its NIL policy. This pressure began to build in 2015, after the Ninth Circuit’s decision in *O’Bannon*. In *O’Bannon*, the Ninth Circuit held that the NCAA could keep its NIL rules in place but only if it raised the amount schools could provide athletes to cover the full cost of attendance.<sup>172</sup> The decision drew attention to the NCAA’s NIL ban,<sup>173</sup> and in 2019, California passed a law making the policy illegal in the state.<sup>174</sup> California’s “Fair Pay to Play Act”<sup>175</sup> aimed to “lift colleg[e] athletes out of poverty” and to ensure that these athletes received a fair share of the value they helped generate.<sup>176</sup> Framed as a civil rights measure about “basic fairness,”<sup>177</sup> the Act garnered widespread praise<sup>178</sup> and inspired dozens of states—both red and blue—to implement their own NIL laws.<sup>179</sup> The ensuing deluge of bipartisan NIL legislation

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172. *O’Bannon v. NCAA*, 802 F.3d 1049, 1074–76, 1079 (9th Cir. 2015). After performing a rule of reason analysis, the Ninth Circuit determined that the NCAA’s NIL rules had the procompetitive effect of preserving demand for college sports and “integrating academics with athletics.” *Id.* at 1073. The court found, however, that this effect could have been attained through the less restrictive means of allowing schools to offer players grants for the “full cost of attendance,” *id.* at 1074–76, which encompasses the “incidental costs of attending college,” including transportation costs and miscellaneous expenses. Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 79 (2008) (citation omitted).

173. See Kevin B. Blackstone, *College Athletes Are Learning Their Worth. No Wonder the NCAA Is Concerned*, WASH. POST. (May 12, 2022), <https://www.washingtonpost.com/sports/2022/05/12/nil-rules-ncaa/> (“NIL was born only after lawsuits, most notably the . . . challenge from former UCLA basketball player Ed O’Bannon. . .”).

174. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, Sports Illustrated (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> [<https://perma.cc/3PKU-RCYX>]. The law also gave college athletes the right to hire agents to assist them in negotiating NIL deals. *Id.*

175. CAL. EDUC. CODE § 67456 (West 2022).

176. *Senator Nancy Skinner Announces the “Fair Pay to Play Act,”* SEN. NANCY SKINNER (Feb. 5, 2019), <https://sd09.senate.ca.gov/news/20190205-senator-nancy-skinner-announces-%E2%80%9Cfair-pay-play-act%E2%80%9D> [<https://perma.cc/3RQM-GVX5>].

177. *In Brief: State Senator Skinner Announces ‘Fair Pay to Play Act’*, E. BAY TIMES, <https://www.eastbaytimes.com/2019/02/07/in-brief-state-sen-skinner-announces-fair-pay-to-play-act/> [<https://perma.cc/3V3L-4GW7>].

178. Matt Norlander, *California Bill Nearing Passage Could Be Domino That Brings Down NCAA’s Amateurism Philosophy*, CBS SPORTS (Sept. 10, 2019), <https://www.cbssports.com/college-basketball/news/california-bill-nearing-passage-could-be-domino-that-brings-down-ncaas-amateurism-philosophy/> [<https://perma.cc/C9VX-K8VW>].

179. See Roshawn Colvin & Joshua Jansa, *California’s ‘Fair Pay to Play’ Law for College Athletes Has Other States Racing to Join Up. Here’s Why*, WASH. POST (Nov. 18, 2019), <https://www.washingtonpost.com/politics/2019/11/18/californias-fair-pay-play-law-college-athletes-has-other-states-racing-join-up-heres-why/> [<https://perma.cc/Y2US-EW66>]. By October 25, 2022, nearly every state had passed or proposed NIL legislation. *Tracker:*

heightened the pressure on the NCAA to scrap its NIL ban.<sup>180</sup> To appease proponents of NIL reform, the NCAA commissioned a working group to consider updates to its NIL rules.<sup>181</sup> This group had a limited mandate, however, as its only task was to consider minor “rule modifications tethered to education.”<sup>182</sup>

After *Alston*, the NCAA saw the proverbial “writing on the wall” and suspended its NIL ban, restoring college athletes’ ability to sell their NIL rights to third parties.<sup>183</sup> In doing so, it brought college athletes more in line with Olympic athletes, who can receive money for their NIL but not for competing in the Games.<sup>184</sup> In the absence of federal legislation, the NCAA has been hesitant to place parameters on college athlete NIL deals.<sup>185</sup> Rather than formulate its own NIL policies, the NCAA has “left schools on the hook to either navigate their state legislation or come up with their own institutional policies.”<sup>186</sup> It has, however, clarified that schools cannot negotiate on behalf of athletes<sup>187</sup> and that boosters cannot

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*Name, Image and Likeness Legislation by State*, BCS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/HHN3-JECV>].

180. Alan Blinder, *College Athletes May Earn Money From Their Fame, N.C.A.A. Rules*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html> [<https://perma.cc/2VNW-EFBV>].

181. Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image and Likeness*, NCAA (May 14, 2019), <https://www.ncaa.org/news/2019/5/14/ncaa-working-group-to-examine-name-image-and-likeness.aspx> [<https://perma.cc/W5N7-HKWB>].

182. *Id.* As one commentator noted, “it[] [was] clear that any NIL rules proposed by the NCAA would attempt to fit within the Ninth Circuit’s *O’Bannon* decision.” Matt Brown, *What Happens Next After California’s Governor Signed a Bill to Pay NCAA Players*, SB NATION (Sept. 30, 2019), <https://www.sbnation.com/college-basketball/2019/9/30/20891426/california-bill-sb-206-pay-player-likeness-ncaa> [<https://perma.cc/TE6J-Z6UX>]. Thus, it was “highly unlikely that the NCAA w[ould] propose a plan where athletes c[ould] be paid directly by third parties (such as for appearing in a commercial or signing autographs).” *Id.*

183. Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, *supra* note 167. The NCAA introduced this interim policy two days before several state NIL laws were slated to take effect. Gregory A. Marino, *The NCAA Declares Independence from NIL Restrictions*, FOLEY (Aug. 20, 2021), <https://www.foley.com/en/insights/publications/2021/08/ncaa-declares-independence-nil-restrictions> [<https://perma.cc/C75P-NV4R>].

184. Moyer, *supra* note 91, at 817 (“Olympic athletes are not paid for their participation, but rather are just not forbidden from profiting from the attention their participation brings them.”).

185. Burr & Forman, *The NCAA’s New Guidance Regarding NIL Collectives — Will the Guidance Shut Down NIL Collectives or Affect Their Abilities to Pay College Athletes?*, JD SUPRA (May 12, 2022), <https://www.jdsupra.com/legalnews/the-ncaa-s-new-guidance-regarding-nil-4436573/> [<https://perma.cc/UWG2-AMC9>].

186. Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year>.

187. NCAA, *NCAA DIVISION I INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE’S NAME, IMAGE AND LIKENESS ACTIVITIES 4* (2022), <https://ncaaorg.s3.amazonaws.com/ncaa/>

induce recruits to attend a given school by pooling donations into “collectives” and using the money to fund NIL opportunities for them.<sup>188</sup> NCAA officials have also pushed the message that NIL deals are fundamentally different from “pay for play,”<sup>189</sup> even though NCAA leadership formerly took the opposite view.<sup>190</sup>

## 2. *The NLRB’s Policy Shift Regarding College Athletes’ Employment Status*

The *Alston* ruling also provoked another major policy shift. In response to *Alston*, the NLRB’s General Counsel professed support for college athletes interested in unionizing.<sup>191</sup> Reversing course from the NLRB’s decision in the 2015 Northwestern case, General Counsel Jennifer Abruzzo announced in a memorandum (the “Abruzzo Memorandum”) that scholarship football players at FBS private schools and “similarly situated [p]layers” are employees under the NLRA.<sup>192</sup> Abruzzo defended this new interpretation of the NLRA by drawing on applicable precedent, common law agency principles, and *Alston*.<sup>193</sup> Abruzzo noted that in his *Alston* concurrence, Justice Kavanaugh speculated that collective bargaining could be “one mechanism by which colleges and [athletes] could resolve difficult questions regarding compensation.”<sup>194</sup>

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NIL/D1NIL\_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/P86L-P4WC] [hereinafter NCAA INSTITUTIONAL INVOLVEMENT POLICY].

188. NCAA, INTERIM NAME, IMAGE AND LIKENESS POLICY, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf) [https://perma.cc/AD6N-XKAY]; Liz Clarke, *NCAA Targets Boosters with New NIL Guidelines*, WASH. POST (May 9, 2022), <https://www.washingtonpost.com/sports/2022/05/09/ncaa-nil-boosters-collectives/> [https://perma.cc/AC5G-ZQ6C].

189. Michelle Brutlag Hosick, *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, NCAA (June 28, 2021), <https://www.ncaa.org/news/2021/6/28/di-council-recommends-di-board-adopt-name-image-and-likeness-policy.aspx> [https://perma.cc/R9Q7-AVR4] (“[T]he [interim NIL] policy leaves in place the commitment to avoid pay-for-play.”).

190. During the *O’Bannon* trial, the NCAA’s then-President Mark Emmett testified that he believed NIL compensation was tantamount to “pay for play.” See Transcript of Proceedings at 1776, *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. C-09-3329 CW) (“Payment is payment . . . and money is money.”).

191. See Jennifer A. Abruzzo, *Memorandum GC 21-08*, NLRB Gen. Couns. Memorandum (Sept. 29, 2021) [hereinafter *Abruzzo Memorandum*].

192. *Id.* at 9.

193. *Id.* at 2–5. In applying the common law test, Abruzzo underscored the fact that FBS schools like Northwestern “control[ ] various facets of . . . players’ daily lives to ensure compliance with NCAA rules.” *Id.* at 4.

194. *Id.* at 5.

The Abruzzo Memorandum contained two warnings. Abruzzo notified schools that she considered misclassifying college athletes as “student-athletes” to be a breach of the NLRA.<sup>195</sup> The label “student-athlete,” Abruzzo wrote, “has a chilling effect” on organizing activity by misleading athletes covered by the NLRA into thinking they have no protection from retaliation.<sup>196</sup> Abruzzo also informed athletic conferences and the NCAA that they could be held liable for misclassifying college athletes under a “joint employer theory of liability.”<sup>197</sup> Abruzzo cautioned that the NLRB would not refrain from taking action against a conference merely because its members included state schools, which fall outside of the NLRA’s jurisdiction as public-sector employers.<sup>198</sup> The Abruzzo Memorandum did not bind NLRB officials, but so far, regional officials have acted in accordance with it. Late last year, the NLRB’s Los Angeles office determined that an unfair labor practice charge against the University of Southern California (USC), the Pac-12 Conference, and the NCAA had merit—an “assessment that could ultimately allow [college] athletes to unionize.”<sup>199</sup>

### 3. Johnson v. NCAA

The *Alston* decision also had an impact in the lower courts. In particular, the decision affected the trajectory of *Johnson v. NCAA*. When the *Alston* Court issued its opinion, the *Johnson* case was pending in the U.S. Eastern District of Pennsylvania.<sup>200</sup> This case closely paralleled the *Berger* and *Dawson* cases and may have met the same demise if not for the *Alston* ruling. As in *Berger* and *Dawson*, the plaintiffs in *Johnson* sued the NCAA and Division I schools for violating the FLSA’s minimum wage provisions.<sup>201</sup>

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195. *Id.* at 4.

196. *Id.*

197. *Id.* at 9 n.34.

198. *Id.*

199. Nick Niedzwiedek, *Student Athletes Should Be Classified Employees, Labor Cop Says*, POLITICO (Dec. 15, 2022), <https://www.politico.com/news/2022/12/15/nlrb-ncaa-student-athlete-misclassification-00074250> [<https://perma.cc/2Q44-EGAR>].

200. See Katelyn Sullivan, *Student Athletes Oppose Motion to Dismiss FLSA Claims in Light of Supreme Court’s Alston Opinion*, PERKINS COIE (July 9, 2021), <https://www.wageandhourdevelopment.com/2021/07/student-athletes-oppose-motion-to-dismiss-flsa-claims-in-light-of-supreme-courts-alston-opinion/> [<https://perma.cc/NFF5-2PZW>].

201. Complaint at ¶ 6, *Johnson v. NCAA*, No. 19-5230 (E.D. Pa. 2019), 2019 WL 5847321.

Unlike in those previous cases, however, the district court judge permitted most of the plaintiffs' FLSA claims to go forward.<sup>202</sup>

Consistent with the *Alston* ruling, U.S. District Judge John R. Padova rebuffed the notion that the tradition of amateurism in college sports "defines the economic reality" between colleges and their athletes,<sup>203</sup> and instead applied the multi-factor "primary beneficiary test" devised by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.* to determine the plaintiffs' employment status.<sup>204</sup> In concluding that the *Glatt* factors weighed in favor of finding the plaintiffs to be employees of their schools, Judge Padova credited evidence that college sports do "not provide [athletes] with significant educational benefits" but in fact "interfere" with their education.<sup>205</sup> In a separate opinion, Judge Padova also held it was plausible that the NCAA was the plaintiffs' joint employer given the organization's ability to "hire and fire" them and its high degree of control over their compensation, benefits, work schedules, records, and day-to-day activities.<sup>206</sup>

At the defendant schools' request, Judge Padova certified the following issue to the Third Circuit: whether Division I athletes can be classified as employees of their schools for the purposes of the FLSA "solely by virtue of their participation in interscholastic athletics."<sup>207</sup> As discussed in more depth in Part III.B.1, the Third Circuit's response to this question has been heavily anticipated, as it could put Division I athletes on the fast track to becoming employees.

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202. Judge Padova threw out the plaintiffs' claims against the NCAA schools they did not attend because their connection to them was too tenuous but upheld the other claims. *Johnson v. NCAA*, 561 F. Supp. 3d 490, 507 (E.D. Pa. 2021); *Johnson v. NCAA*, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

203. *Johnson*, 556 F. Supp. 3d at 500–01.

204. *Id.* at 506–09.

205. *Id.* at 509–12.

206. *Johnson*, 561 F. Supp. 3d, at 503–05. Rather than follow the *Dawson* court's reasoning, Judge Padova employed the multi-factor "joint employer" test adopted by the Third Circuit in *In re Enterprise Rent-A-Car*, 683 F.3d 462 (3d Cir. 2012). *Id.* at 499–500.

207. *Johnson v. NCAA*, No. 19-5230, 2021 WL 6125095, at \*1 (E.D. Pa. Dec. 28, 2021). Judge Padova denied the NCAA's motion for interlocutory appeal. *Johnson v. NCAA*, No. 19-5230, 2021 WL 6125453 (E.D. Pa. Dec. 28, 2021).



### III. HOW *ALSTON* PAVED THE WAY FOR MANY COLLEGE ATHLETES TO BECOME EMPLOYEES

This Part makes the case that despite being an antitrust ruling, not a labor ruling, *Alston* set the stage for college athletes to become employees under the NLRA and FLSA. This Part further argues that due to *Alston*, college athletes on *both* revenue- and non-revenue-generating teams are poised to become employees. Before *Alston*, many commentators reckoned that FBS football players and Division I basketball players were the only viable contenders for employee status.<sup>208</sup> In their view, these big-time players fit comfortably within the NLRA's and FLSA's definitions of "employees" because their relationships with their schools were "clearly commercial in nature[ ] and only incidentally academic and for the[ir] benefit."<sup>209</sup> Conversely, non-revenue-generating athletes fell short of being employees because their relationships with their schools had less of a commercial dimension.<sup>210</sup> Since *Alston*, the odds have changed. Now that the NCAA can no longer lean on amateurism as a defense, all Division I athletes now have a fighting chance of becoming employees—not just the ones who are money-making machines for their schools.<sup>211</sup>

#### A. *ALSTON* MADE IT HARDER FOR THE NCAA TO USE AMATEURISM AS A SHIELD

*Alston* discredited the NCAA's main defense against employee claims—namely, that college athletes cannot be employees because the NCAA defines them as amateurs.<sup>212</sup> In both the NLRA and FLSA contexts, the NCAA has justified its refusal to treat college athletes as employees by insisting that longstanding policy and

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208. See, e.g., Roberto L. Corrada, *College Athletes in Revenue-Generating Sports As Employees: A Look into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 189 (2020) (maintaining that "only that student athletes in revenue generating sports should be (and will be) classified as employees"); Lucas Novaes, *It's Time to Stop Punting on College Athletes' Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. UNIV. L. REV. 1533, 1538–39 (2017) (arguing that Division I revenue athletes qualify for employee status under the NLRA but that their counterparts on non-revenue teams probably do not).

209. Corrada, *supra* note 208, at 206.

210. *Id.* at 190 ("With respect to sports funded completely by schools, there is no such incentive for schools to treat these athletes as anything but students.")

211. Whether non-Division I athletes have a claim to employee status falls outside the scope of this Note.

212. See *supra* Part I.D.

tradition dictate they must be amateurs.<sup>213</sup> In a sharp blow to the NCAA, the *Alston* ruling made clear not only that the NCAA cannot use “amateurism as an excuse to violate *antitrust law*,”<sup>214</sup> but also that the “NCAA is not above the law” *in general*.<sup>215</sup>

The *Alston* majority held that although the NCAA has been viewed as “play[ing] a critical role in the maintenance of . . . amateurism” in college sports,<sup>216</sup> ordinary antitrust principles still apply to it.<sup>217</sup> In his concurrence, Justice Kavanaugh took this point even further and told the NCAA that it cannot circumvent the Sherman Act by making “circular” arguments about amateurism and “couch[ing]” those arguments in “innocuous” language.<sup>218</sup> In particular, Justice Kavanaugh questioned whether the NCAA could continue to “justify not paying [college] athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay [their] athletes.”<sup>219</sup> Extending the above reasoning to the labor context suggests that the NCAA cannot justify denying college athletes employee benefits based on the circular theory that these athletes do not qualify for employee status because of their status as amateurs. It further suggests that when deciding whether college athletes are employees under the NLRA and FLSA, courts and labor officials should not simply defer to the NCAA’s judgment. Rather, these decisionmakers should apply the ordinary legal tests for employee status, as Judge Padova did in *Johnson*.<sup>220</sup>

The NCAA has tried to soften *Alston*’s impact by misconstruing the decision. In *Johnson*, the NCAA argued in its opening brief to the Third Circuit that *Alston* actually “reaffirmed” the notion that “the non-professional ideal [i.e., amateurism] merits ample

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213. *See id.*

214. Ross Todd, *Litigator of the Week: Jeffrey Kessler Takes the Fight to Get NCAA Athletes Compensated from the Trial Court to the High Court*, AM. LAW. LITIG. DAILY (June 25, 2021), <https://www.winston.com/images/content/2/4/v2/241862/AMLAW06242021497720Winston.pdf> [<https://perma.cc/4AUH-N7GE>] (emphasis added).

215. *NCAA v. Alston*, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

216. *Id.* at 2157 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

217. *Id.* at 2159.

218. *See id.* at 2168 (Kavanaugh, J., concurring) (calling the NCAA’s amateurism defense “unpersuasive” and saying the “innocuous” label of amateurism could not “disguise the reality” of the NCAA’s conduct).

219. *Id.*

220. *See supra* Part II.B.3.

latitude and respect from courts.”<sup>221</sup> The NCAA supported this argument by noting that the *Alston* majority had “praised the lower courts’ care in crafting a remedy that would not blur the distinction between college and professional sports.”<sup>222</sup> Exempting the NCAA from the normal legal tests used to differentiate employees from other workers would not, however, be in keeping with the spirit of the *Alston* ruling, the key takeaway of which was that the NCAA is not above the law. Moreover, the NCAA’s reading of *Alston* brushes over the fact that the *Alston* majority also indicated that it would be “unwise” to treat the *Board of Regents* Court’s “stray comments” about amateurism as anything more than an “aside.”<sup>223</sup>

The *Alston* ruling also indirectly weakened the argument that college athletes cannot be employees because they must be amateurs by prompting the NCAA to revoke its NIL ban.<sup>224</sup> The proliferation of college athlete NIL deals has eroded the boundary between college and professional sports. College athletes can now supplement their scholarships the same way professional stars augment their incomes: by appearing in advertisements, signing autographs, promoting brands on social media, and even entering into group licensing deals.<sup>225</sup> And while the NCAA has been careful to frame NIL deals as deals made between athletes and third parties, rather than “pay for play” arrangements, this depiction does not reflect today’s reality. Although schools are limited in how involved they can be in the NIL dealmaking process,<sup>226</sup> booster collectives founded by “well-resourced

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221. Appellants’ Opening Brief at 33, *Johnson v. NCAA*, No. 22-1223 (3d Cir. May 31, 2022) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)). Interestingly, the NCAA has gravitated away from the use of the term “amateur,” opting instead for the less controversial term, “non-professional.” See *id.*

222. *Id.* at 25 (quoting *NCAA v. Alston*, 141 S. Ct. 2141, 2164 (2021)).

223. *Alston*, 141 S. Ct. at 2158.

224. See *supra* Part I.B.1.

225. See Blinder, *supra* note 180; see also Amanda Christovich, *The Current Group Licensing Reality in the NCAA*, FRONT OFF. SPORTS (Oct. 4, 2021), <https://frontofficesports.com/the-current-group-licensing-reality-in-the-ncaa/> [<https://perma.cc/RXR2-BCSW>] (“The practice of selling multiple players’ rights together, often in conjunction with team logos, is common in the pros.”).

226. Some states permit schools to facilitate NIL deals on behalf of athletes. See Justin E. Klein & Thomas Bousnakis, *The Constantly Evolving Landscape of Student-Athlete NIL Contracting*, ICEMILLER (Feb. 15, 2023), <https://www.icemiller.com/ice-on-fire-insights/publications/the-constantly-evolving-landscape-of-student-athle/> [<https://perma.cc/758P-6TLM>] (“[M]any states have amended or are in the process of amending their laws to allow for greater university involvement in connecting student-athletes with NIL opportunities to make those states more attractive to potential recruits.”). The NCAA does not condone

alumni”<sup>227</sup> have become an indirect conduit for “getting money into the hands of players.”<sup>228</sup> The increasing professionalization of college sports begs the question: does preserving a sense of amateurism in college sports still matter?

The NCAA has yet to supply a satisfactory answer to this question. The NCAA can no longer successfully argue that amateurism is vital to the survival of college sports. The reaction to the NCAA’s NIL ban revocation has more or less debunked this myth. The inception of the college athlete NIL market ushered in a new era of college sports. In this new era, being a college athlete can lead to big bucks. College athletes made an estimated \$917 million the first year after the NCAA rescinded its NIL ban, with Division I athletes pocketing \$3711 on average<sup>229</sup> and some athletes raking in millions of dollars.<sup>230</sup> Yet, even with many college athletes making professional-level profits, demand for college sports has held steady.<sup>231</sup> Thus, in order for the NCAA’s

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this practice, however. See NCAA INSTITUTIONAL INVOLVEMENT POLICY, *supra* note 187, at 4.

227. Laine Higgins, *The Booster ‘Collectives’ Putting Money in the Pockets of College Athletes*, WALL ST. J. (May 5, 2022), <https://www.wsj.com/articles/ncaa-name-image-likeness-collectives-11651761397> [<https://perma.cc/L7YW-9NRC>].

228. Alex Kirshner, *‘Everything’s on Fire’: NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay*, GLOB. SPORT MATTERS (Jan. 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/> [<https://perma.cc/27C9-6GAF>]. Booster collectives “negotiate agreements with athletes to pay them a monthly amount in exchange, officially, for the use of [their NIL].” *Id.* These collectives cannot pay athletes for attending or transferring to a given school, but they often circumvent these restrictions. See *id.* (“[Collectives] often design contract language to push players in a school’s direction without being explicit enough to run afoul of NCAA rules that still ban payments as recruiting inducements.”); see also Josh Planos, *The NCAA Doesn’t Know How to Stop Boosters from Playing the NIL Game*, FIVETHIRTYEIGHT (May 16, 2022), <https://fivethirtyeight.com/features/the-ncaa-doesnt-know-how-to-stop-boosters-from-playing-the-nil-game/> [<https://perma.cc/FZ8P-S57G>] (“[Boosters] cannot push contracts to induce athletes to enroll [in a particular school]. . . . But that didn’t stop Texas’s Clark Field Collective from providing \$50,000 to every Longhorns offensive lineman on scholarship. . . .”).

229. Associated Press, *One Year of NIL: How Much Have Athletes Made?*, U.S. NEWS (July 6, 2022), <https://www.usnews.com/news/sports/articles/2022-07-06/one-year-of-nil-how-much-have-athletes-made> [<https://perma.cc/K3LN-KKZJ>] [hereinafter *One Year of NIL*].

230. See Associated Press, *NIL Turning Star College Football Players into Millionaires*, SPECTRUM NEWS (Aug. 31, 2022), <https://spectrumnews1.com/oh/columbus/news/2022/08/31/nil-turns-star-college-football-players-into-millionaires> [<https://perma.cc/AK7J-UEX6>].

231. Polls show that interest in college sports has not dipped. See Emily Giambalvo et al., *NIL Hasn’t Made a Difference for Most in Enjoyment of College Sports, Poll Finds*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/sports/2022/06/30/nil-college-sports-fans-poll/> [<https://perma.cc/R8ZM-JGM2>] (reporting that 60% of polled Americans said that the NCAA’s NIL policy change had no impact on their enjoyment of college sports and that 28% said the change had a positive impact); ARIZ. STATE UNIV. GLOB. SPORT INST.

amateurism defense to work in the post-NIL era, the NCAA must come up with another explanation for why amateurism is so important to college sports.

Instead of inventing new reasons for why amateurism matters, the NCAA's strategy has been to hearken back to the original purposes of amateurism. In its Third Circuit brief in *Johnson*, the NCAA stated that the "core" purpose of its amateurism policy has always been to keep professionals out of college sports and to protect college sports' connection to education.<sup>232</sup> But those purposes are outdated. Just as the line between college and professional athletes has become tenuous, so too has college sports' relationship to education.<sup>233</sup> Even though less than two percent of college athletes go on to become professionals in their sport,<sup>234</sup> college athletes are routinely asked to put their athletic commitments over their career goals. Such demands hinder college athletes from taking their preferred classes and "inhibit[ ] their ability to keep up with the classes they do take."<sup>235</sup> These

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& OH PREDICTIVE INSIGHTS, ASU GSI Q4 National Sports Public Opinion Pulse Update 14 (Nov. 9, 2021), [https://globalsport.asu.edu/sites/default/files/resources/global\\_sport\\_institute\\_national\\_snapshot\\_poll\\_december\\_2021\\_takeaways.pdf](https://globalsport.asu.edu/sites/default/files/resources/global_sport_institute_national_snapshot_poll_december_2021_takeaways.pdf) [<https://perma.cc/PD6J-PYPK>] (finding that about 60% of polled individuals watched sports more or the same amount after the NIL policy change). These findings may partially be explained by the fact that NIL deals have deterred some college stars from leaving prematurely for the professional leagues. Bruce Schoenfeld, *Student. Athlete. Mogul?*, N.Y. TIMES MAG. (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html> [<https://perma.cc/LC7Q-DNMX>].

232. Appellants' Opening Brief at 30–31 n.90, *Johnson v. NCAA*, No. 22-1223 (3d Cir. May 31, 2022) ("The 'Principle of Amateurism' in the NCAA's bylaws has long encompassed . . . [the] core non-professional ideal[ ] [that] '[s]tudent-athletes shall be amateurs . . . and their participation should be motivated primarily by education. . . .'" (quoting NCAA, 2021–22 NCAA DIVISION I MANUAL 3 (Sept. 12, 2022), <https://www.ncaapublications.com/productdownloads/D122.pdf>).

233. See *The Relationship Between Sports, STEM Education, Median Income & the Crime Rate*, MANIFEZT FOUND., <https://www.manifezt.org/the-relationship-between-sports-stem-education-median-income-the-crime-rate/> [<https://perma.cc/JVG4-FTHE>] ("What was intended to complement a good education, has begun to replace good education here in America.").

234. NCAA, NCAA RECRUITING FACTS, *supra* note 4.

235. *Johnson v. NCAA*, 556 F. Supp. 3d 491, 511 (E.D. Pa. 2021); see also Ben Strass, *Northwestern Quarterback Makes His Case for Players' Union*, N.Y. TIMES (Feb. 18, 2014), <https://www.nytimes.com/2014/02/19/sports/ncaaf/northwestern-quarterback-makes-his-case-for-players-union.html> [<https://perma.cc/9C3F-Y2HJ>] (quoting the spokesperson for Northwestern's union campaign as saying: "You can't ever reach your academic potential with the time demands. You have to sacrifice, and we're not allowed to sacrifice football.").

demands also impede their ability to major in high-paying fields like science and engineering.<sup>236</sup>

#### B. *ALSTON* BROUGHT DIVISION I ATHLETES CLOSER TO EMPLOYEE STATUS

Assuming the NCAA can no longer use amateurism to get an exemption from the ordinary applications of the FLSA and NLRA, the organization is left with only two options for stopping college athletes from becoming employees. The organization can either (1) lobby for legislation specifying these athletes are not employees or (2) demonstrate that college athletes do not meet the standard legal tests for employee status. Both approaches would likely be unavailing, however—the first because lawmakers do not have the appetite for such legislation<sup>237</sup> and the second because *Alston* and its aftereffects brought Division I athletes closer to employee status.

The “economic reality test” for employee status under the FLSA and the “common law agency test” for employee status under the NLRA differ but do have some overlapping elements.<sup>238</sup> Most pertinently, both tests incorporate the element of “control” and call for an investigation into the benefits the alleged employee generates for the alleged employer and how much compensation the alleged employee receives in return for their services.<sup>239</sup> Under both tests, revenue-generating athletes fare better than their non-revenue-generating counterparts. For this reason, much of the post-*Alston* literature regarding college athletes’ fight for employee status zeroes in on *Alston*’s implications for revenue-generating athletes.<sup>240</sup> The *Alston* ruling has implications for non-revenue-generating athletes too, however. This section explores those implications and argues that *Alston* put both revenue- and non-revenue-generating athletes within reach of employee status. This

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236. See NCAA, *Division I Diploma Dashboard*, <https://www.ncaa.org/sports/2018/5/15/division-i-diploma-dashboard.aspx> [<https://perma.cc/WJH6-M3BZ>] (showing that although approximately 27% of all students at Division I institutions major in STEM fields, only 16% of Division I athletes have declared STEM majors).

237. Riley Overend, *Grant House Seeking Class Status in Lawsuit for Lost NIL Pay*, SWIM SWAM (Oct. 25, 2022), <https://swimswam.com/grant-house-seeking-class-status-in-lawsuit-for-lost-nil-pay/> [<https://perma.cc/CB29-KF2V>].

238. For a discussion of these tests, see *supra* Part I.D and the accompanying notes.

239. See *id.*; see also Corrada, *supra* note 208, at 194, 205.

240. See, e.g., Corrada, *supra* note 208, at 189–90, 216; Novaes, *supra* note 208, at 1538–39.

section further argues that if non-revenue-generating athletes secure the right to a minimum wage, they will then be on their way to securing the right to collectively bargain.

### 1. *The Fight for a Minimum Wage*

The *Johnson* minimum wage case could be the game-changing case that carries both revenue- and non-revenue-generating Division I athletes over the line from amateurs to employees. If the Third Circuit finds that these athletes could be employees of their schools “solely by virtue of their participation” in the schools’ Division I sports programs,<sup>241</sup> the ruling would give rise to a circuit split involving the Third, Seventh, and Ninth Circuits, teeing up a Supreme Court battle that could deliver an even heavier blow to the NCAA than the blow *Alston* landed.<sup>242</sup> The plaintiff class in *Johnson* comprises athletes from a range of Division I sports, including the non-revenue-generating sports of swimming and tennis.<sup>243</sup> Accordingly, if the Supreme Court took up *Johnson* and ordered the case to go forward—and then the plaintiffs won at trial and again on appeal—all Division I athletes would become employees under the FLSA.

As it weighs the question of whether Division I athletes could potentially be employees, the Third Circuit must grapple with the differences between revenue- and non-revenue-generating athletes and the latter’s resemblance to students in extracurricular activities. A frequently cited U.S. Department of Labor Field Operations Handbook (FOH) states that while work-study participants constitute employees under the FLSA because their “duties are not part of an overall education program,” college students engaged in extracurricular activities for their own educational benefits do not.<sup>244</sup> Non-revenue-generating athletes have often been analogized to students in extracurricular organizations. In drawing this comparison in *Berger*, a concurring

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241. See discussion *supra* Part II.B.3.

242. Nicole Auerbach & Mike Vorkunov, *Understanding Johnson v. NCAA, The Next Case That Could Upend the College Sports Model*, ATHLETIC (Aug. 12, 2022), <https://theathletic.com/3497617/2022/08/12/johnson-v-ncaa-college-athletes-employees/> [<https://perma.cc/2AJH-BGV9>].

243. *Johnson v. NCAA*, 556 F. Supp. 3d 491, 495–96 (E.D. Pa. 2021).

244. *Id.* at 502. The FOH is an operations manual that provides guidance to Wage and Hour Division investigators and staff. *Id.* Although Wage and Hour Division regulations are “not technically law,” courts may “resort [to them] for guidance.” *Id.* at 503 (internal citations and quotations omitted).

Seventh Circuit judge voiced the concern that paying non-revenue-generating athletes a minimum wage would be the beginning of a slippery slope—one that could lead to a host of other groups on campus including “college musicians, actors, journalists, and debaters” being owed minimum wage, too.<sup>245</sup> Fortunately, non-revenue-generating athletes can counter the claim that they bear too many similarities to extracurricular students to be employees by enumerating all the ways the NCAA exerts control over them<sup>246</sup> and by highlighting how much their athletic commitments distract from their educational pursuits.<sup>247</sup>

During oral argument, the NCAA’s representative reminded the Third Circuit that *Johnson* is “not a case about football and basketball.”<sup>248</sup> This fact was crucial, the NCAA attorney alleged, because a critical factor in the economic reality analysis is whether the alleged employees have bargained for compensation, and the majority of Division I athletes do not receive a scholarship or any other form of compensation that could arguably count as bargained-for-compensation.<sup>249</sup> The judges did not appear to be swayed by this argument, however.<sup>250</sup> Rather, they seemed to share the plaintiffs’ view that the factor of control should be given substantial weight in the context of college sports.<sup>251</sup> The judges also seemed amenable to the notion that even if the *Glatt* test does

245. *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring) (“Because the plaintiffs . . . did not receive athletic scholarships and participated in a non-revenue sport, they pursued a broad theory. The logic of their claim would have included not only any college athlete in any sport and any NCAA division, but also college musicians, actors, journalists, and debaters. That broad theory is mistaken.”).

246. Although “different jurisdictions use different analyses to determine whether a worker is an employee under the FLSA . . . every test begins with and places a large emphasis on is control.” Tyler J. Murry, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 800 (2022). As Judge Padova noted in *Johnson*, the NCAA and its member schools “exercise significant control” over Division I athletes’ “performance and conduct both on and off the field.” *Johnson v. NCAA*, 556 F. Supp. 3d 491, 497–98 (E.D. Pa. 2021). This control extends not only to what kind of compensation these athletes can accept but also to how long they can practice for, whether they can transfer schools, whether they can gamble, what they can post to social media, and what discipline they can receive. *Id.*

247. See discussion *supra* III.A.

248. Oral Argument at 11:38–11:41, *Johnson v. NCAA*, No. 22-1223 (3d Cir. Feb. 15, 2023), <https://www2.ca3.uscourts.gov/oralargument/audio/22-1223RalphTreyJohnson;etalv.NationalCollegiateAthleticAssociation;etal.mp3>.

249. *Id.* at 16:39–19:15.

250. *Id.* at 19:15–28:15. One judge pointed out that one reason college athletes do not bargain for wages or have expectations of compensation is because college sports is not a “free market universe.” *Id.* at 23:31–24:30.

251. *Id.* at 7:29–7:35; 8:55–9:43; 18:54–19:01; 21:00–21:35.



not come out exactly the same for revenue- and non-revenue-generating athletes, because all Division I athletes are subject to the same level of institutional control, both categories of athletes may be employees.<sup>252</sup>

## 2. *The Fight for Collective Bargaining Rights*

Revenue-generating athletes are on the cusp of being able to collectively bargain. If USC, the Pac-12 Conference, and the NCAA do not settle the unfair labor charge against them,<sup>253</sup> and opt to challenge the charge in court, a court would likely agree with NLRB General Counsel Abruzzo's claim that conferences and the NCAA jointly employ FBS football players and similarly situated athletes.<sup>254</sup> If a court deemed these institutions to be "joint employers" of revenue-generating athletes, thereby extending the NLRA to cover public school athletes, all revenue-generating athletes within a given conference could be free to band together and collectively negotiate for a reasonable portion of conference broadcast revenues. Recently, the NLRB "move[d] to ease the legal standard for deciding when one [entity] jointly employs another [entity's] workers," making this outcome all the more likely.<sup>255</sup>

As this Note novelly argues, non-revenue-generating athletes also have a pathway to unionize, albeit a more winding one. For non-revenue-generating athletes, becoming employees under the FLSA could be a stepping stone to becoming employees under the NLRA. If the *Johnson* plaintiffs win and all Division I athletes become entitled to a minimum wage, non-revenue-generating athletes could leverage this success in the NLRA context. Under the common law agency test, the more benefits workers produce and the more compensation they receive in exchange, the closer

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252. *Id.* at 20:33–21:35.

253. See discussion *supra* Part II.B.2.

254. *Abruzzo Memorandum*, *supra* note 191, at 9 n.34.

255. Ian Kullgren & Robert Iafolla, *Labor Board Proposes Tossing Trump Joint Employer Regulation (3)*, BLOOMBERG TAX: DAILY LAB. REP. (Sept. 6, 2022, 10:34 AM), [https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X41RJKCS000000?bna\\_news\\_filter=daily-labor-report#cite](https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X41RJKCS000000?bna_news_filter=daily-labor-report#cite) [https://perma.cc/QNR3-J5XY]. Under the NLRB's new standard, which is expected to take effect before the end of 2023, schools, conferences, and the NCAA would likely be considered joint employers of college athletes because together they determine the "essential terms and conditions of [these athletes'] employment." Patrick L. Egan, *Could Leagues and Teams Be Joint Employers Before the NLRB?*, NAT'L L. REV. (Sept. 14, 2021), <https://www.natlawreview.com/article/could-leagues-and-teams-be-joint-employers-nlr> [https://perma.cc/84DE-QD2J].

they come to being employees under the NLRA.<sup>256</sup> Non-revenue-generating teams place financial strains on college athletic departments<sup>257</sup> and hand out fewer scholarships.<sup>258</sup> As a result, scholars have been skeptical that non-revenue-generating athletes could ever unionize.<sup>259</sup> But if non-revenue-generating athletes receive compensation in the form of minimum wage, as other undergraduate workers do,<sup>260</sup> they could have stronger claims to employee status under the NLRA. As a result, these athletes would then be better positioned to launch union bids or to lobby for legislation awarding them the right to unionize.<sup>261</sup>

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256. For a discussion of the common law test, see *supra* note 116.

257. See Kahn, *supra* note 15, at 224; see also *Revenue Redistribution in Big-Time College Sports*, *supra* note 27.

258. See Cristina Gough, *Number of College Sport Scholarships Available in the United States in 2020/21, by Sport and Gender*, STATISTA (Sept. 23, 2021), <https://www.statista.com/statistics/1119899/college-sport-scholarship-number/> [<https://perma.cc/NQ4N-BHBN>].

259. See, e.g., Corrada, *supra* note 208, at 190 (contending that non-revenue-generating athletes do not qualify for employee status because “there is no . . . incentive for schools to treat these athletes as anything but students”). *Alston* did not extinguish this skepticism. See, e.g., Dan Eaton, *Paying Student-Athletes for Play*, SAN DIEGO UNION-TRIBUNE (July 5, 2021), [https://www.scmv.com/\\_images/content/Column\\_-\\_Paying\\_Student-Athletes\\_for\\_Play.pdf](https://www.scmv.com/_images/content/Column_-_Paying_Student-Athletes_for_Play.pdf) [<https://perma.cc/9WGG-VHBB>] (arguing that although *Alston* brought revenue-generating athletes “closer to being treated as employees,” students in “non-revenue-generating sports or activities such as marching band” will still have difficulty rebutting the claim that they “are . . . the primary beneficiar[ies] of their participation” in those activities).

260. Unions formed by undergraduate workers are not a novel phenomenon. Indeed, undergraduate unions have been popping up across the country. See, e.g., Sam Levine & Ashley Cai, *CS TAs Vote to Unionize, Become First Undergraduate Labor Union on Campus*, BROWN DAILY HERALD (Mar. 2, 2023), <https://www.browndailyherald.com/article/2023/03/cs-tas-vote-to-unionize> [<https://perma.cc/GK4X-34MZ>]; Kay Perkins, *In Connecticut and Across the U.S., Undergraduate Student Employees Are Forming Unions*, CONN. PUB. RADIO (June 7, 2022), <https://www.ctpublic.org/news/2022-06-07/in-connecticut-and-across-the-u-s-undergraduate-student-employees-are-forming-unions> [<https://perma.cc/756C-JBQ9>]. NLRB General Counsel Jennifer Abruzzo and NLRB Chairman Lauren McFerran “have been unwavering in their support of labor organizing rights among [these] student workers.” Natale V. Dinatale & Emily A. Zaklukiewicz, *Undergraduate Student Workers as Union Employees*, UNIV. BUS. (May 19, 2022), <https://universitybusiness.com/undergraduate-student-workers-as-union-employees/> [<https://perma.cc/4CZU-A5RT>].

261. A bill that would make some college athletes employees is pending in the Senate, but this bill excludes non-scholarship athletes and thus most non-revenue-generating athletes. See College Athlete Right to Organize Act, S. 1929, 117th Cong. (2021). Non-revenue-generating athletes could, nevertheless, petition for this bill to be amended to cover all Division I athletes.

#### IV. WHY COLLEGE ATHLETES SHOULD KEEP FIGHTING FOR EMPLOYEE RIGHTS

After the *Alston* Court created an opening for college athletes to challenge the NCAA's athletic-related compensation rules under the Sherman Act, scholars urged college athletes to act on this invitation.<sup>262</sup> This Part argues that although college athletes should continue to use antitrust law to fight for more compensation, they should also keep fighting for the right to a minimum wage and the right to collectively bargain.

##### A. THE LIMITATIONS OF AN ANTITRUST APPROACH

Scholars writing after *Alston* touted antitrust law as a “powerful weapon” that could be used to dismantle the NCAA's compensation model<sup>263</sup> and “correct racial inequalities perpetuated by that model.”<sup>264</sup> While antitrust law is indeed a potent tool, it is not the most appropriate tool for dealing with the inequities in college sports.

An antitrust approach has two notable downsides. The first is that it may not leave college athletes much better off. Because the *Alston* Court only dealt with the NCAA's education-related restrictions, the “vast majority” of the NCAA's compensation restrictions are “still up for judicial review.”<sup>265</sup> Further challenges to these compensation rules would enable courts to “establish a floor of acceptable limitations below which the NCAA [and its members] . . . c[ould] not fall.”<sup>266</sup> There is no guarantee, however, that courts would set that floor at an appropriate level. The *Alston* opinion unambiguously held that courts must apply the rule of reason to the NCAA's compensation rules, but it also sent a mixed message as to the legality of the NCAA's remaining compensation restrictions.<sup>267</sup> Thus, lower courts may draw divergent conclusions about whether the NCAA's athletic-related restrictions have a

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262. See, e.g., Faucon, *supra* note 24, at 97; Jones, *supra* note 24, at 1319, 1363–64.

263. Faucon, *supra* note 24, at 98.

264. Jones, *supra* note 24, at 1326.

265. *Id.* at 1348.

266. Faucon, *supra* note 24, at 97.

267. Justice Kavanaugh's concurrence told the NCAA that the law was coming for them, while the majority's more tempered opinion told the NCAA to “go clean up your own mess.” Billy Witz, *Ruling Dings N.C.A.A., But It Keeps Rule-Making Power*, N.Y. TIMES (June 21, 2021), <https://www.nytimes.com/2021/06/21/sports/ncaabasketball/ncaa-athletes-supreme-court-ruling.html> [<https://perma.cc/ED6H-ABJX>].

procompetitive effect. Some courts may end up being overly generous to the NCAA. Because the rule of reason test “focus[es] solely on consumer preference,” courts would not have the latitude to take fairness and other equitable considerations into account.<sup>268</sup> Courts may also be reluctant to override the NCAA’s judgment regarding college athlete compensation because they feel ill-suited to make policy decisions regarding how college sports should be run.

The second downside of the antitrust approach is that it could take time for athletes to chip away at the rest of the NCAA’s compensation rules. This delay would “prevent thousands of [college] athletes from reaping [the] benefits [of reform] while they are still students.”<sup>269</sup> College athletes could lighten their financial burdens by selling their NIL rights, but NIL opportunities are not a substitute for fair compensation. In many cases, what athletes are earning from NIL deals pales in comparison to what they could earn under a fair market system.<sup>270</sup> Furthermore, factors unrelated to athletic performance including race<sup>271</sup> and gender<sup>272</sup> often influence who gets selected for NIL opportunities, reinforcing already pervasive inequalities.

An antitrust case modeled after *Alston* is currently before Judge Claudia Wilken, the same California district court judge who handled *Alston* and its predecessor, *O’Bannon*.<sup>273</sup> In this case, captioned *In re College Athlete NIL Litigation*, the plaintiffs—current and former Division I athletes—are targeting NCAA and

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268. Faucon, *supra* note 24, at 97.

269. Jones, *supra* note 24, at 1349.

270. The average FBS football player has a fair market value of \$163,000 per year according to 2017 data. Zachary Crockett, *College Football Players Are Worth a Ton of Money to the Schools They Play For*, HUSTLE (Nov. 20, 2017), <https://thehustle.co/college-football-players-worth/> [<https://perma.cc/78WB-DASP>]. The average football deal during the first year of NIL was worth only about \$3,400, however. *One Year of NIL*, *supra* note 229.

271. See Lou Moore, *The Smaller Scope of Black Women Athletes’ NIL Deals Was Predictable*, GLOB. SPORT MATTERS (Dec. 7, 2021), <https://globalsportmatters.com/culture/2021/12/07/black-women-athletes-nil-deals-predictable-paige-bueckers/> [<https://perma.cc/6UMY-NDXL>] (“When women athletes first started to sign major NIL deals in basketball, it was the blonde ballers who hit big.”).

272. See *One Year of NIL*, *supra* note 229 (“When it comes to total NIL activities . . . football (29.3%) is the leader, then baseball (8%), men’s basketball (7.6%), women’s track and field (5.6%) and women’s volleyball (5.5%).”).

273. Chase Goodbread, *Pay for College Athletes Could Be on the Horizon: Will the NCAA Crumble?*, TUSCALOOSA NEWS (May 12, 2022), <https://www.tuscaloosaneews.com/story/sports/college/football/2022/05/12/house-vs-ncaa-case-could-far-more-impactful-than-nil/9714185002/> [<https://perma.cc/38GK-2E45>].

conference broadcast revenues.<sup>274</sup> They assert, among other things, that the NCAA and Power Five conferences are violating antitrust law by prohibiting Division I athletes from being paid for the use of their NIL in television broadcasts.<sup>275</sup> Commentators have projected that the case will radically alter college sports.<sup>276</sup> But given how much “leeway” Judge Wilken gave the NCAA in *Alston*,<sup>277</sup> and given how narrow her injunction was in the case, it is unlikely that Judge Wilken would completely invalidate the NCAA’s NIL rules pertaining to broadcast revenues. If Judge Wilken follows the same approach she used in *Alston*, she will likely hold that these rules have some procompetitive benefit but are blatantly more restrictive than necessary and then issue a limited injunction—a more moderate result than expected.<sup>278</sup>

## B. THE ADVANTAGES OF A LABOR APPROACH

Compared to an antitrust approach, a labor approach has several advantages. First, a labor approach could be a faster way for Division I athletes to enhance their compensation. Even though a labor approach would also involve years of time-consuming litigation, an antitrust approach would likely drag out longer. As explained above, because of the flexibility judges have

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274. *Id.*

275. See Amended Complaint at 1, 5–6, *In re College Athlete Name, Image, Likeness Litig.*, No. 4:20-cv-03919 (N.D. Cal. July 26, 2021), ECF No. 164 (“The NCAA and its members have committed violations of the federal antitrust laws and common law by engaging in an overarching conspiracy to . . . fix the amount that student-athletes may be paid for the licensing, use, and sale of their names, images, and likenesses—at zero.”); see also *id.* at 38 (“The NCAA’s ‘zero compensation’ policy for the use of student athletes’ NILs is not necessary to achieve the NCAA’s purported goals of promoting consumer demand for college sports. . . .”).

276. See, e.g., Goodbread, *supra* note 273; Jared Yaggie, *The Next Step for NIL: How a New Lawsuit is Promising Shared Broadcasting Revenue for Student-Athletes*, UNIV. CIN. L. REV. (Nov. 25, 2022), <https://uclawreview.org/2022/11/25/the-next-step-for-nil/> [<https://perma.cc/X8PX-H9YD>].

277. See *NCAA v. Alston*, 141 S. Ct. 2141, 2164 (2021).

278. “[T]he use of less restrictive alternatives is uneven, both among and within circuits.” Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine*, 45 SEATTLE UNIV. L. REV. 587, 592 (2022). In both *O’Bannon* and *Alston*, the Ninth Circuit “inserted less restricted alternatives as a formal step in the rule of reason analysis. . . .” *Id.* Although the Supreme Court took the opportunity in *Alston* to clarify that “antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes,” 141 S. Ct. at 2161, the Court took no issue with Judge Wilken’s approach below. The Court noted that “it was only after finding the NCAA’s restraints ‘patently and inexplicably stricter’ than is necessary’ to achieve the procompetitive benefits the [NCAA] had demonstrated that the district court proceeded to declare a violation of the Sherman Act.” *Id.* at 2162.

in fashioning antitrust remedies, college athletes who pursue an antitrust strategy will probably only make piecemeal progress.<sup>279</sup> By contrast, a decision that some or all Division I athletes are employees under the FLSA or NLRA would have an immediate, seismic impact on college sports, translating to a sizable increase in compensation for many college athletes.

In addition, although one sports scholar has said that “[i]t would be a cold day in hell before the NCAA wakes up and says, ‘We want college athletes to unionize,’” the NCAA and its member schools may ultimately concede that college athletes are employees.<sup>280</sup> The last few years have seen increased support for the idea of paying college athletes<sup>281</sup> and the advent of new professional basketball leagues intended to offer an alternative to playing college ball.<sup>282</sup> As these alternative professional leagues gain traction, and as support for college athletes continues to grow,<sup>283</sup> the NCAA’s resolve may falter. As one commentator has noted, collective bargaining could provide an “ironic solution” to the NCAA’s “antitrust woes.”<sup>284</sup> If a group of college athletes came to an agreement with the NCAA or its members regarding compensation, such an agreement would likely be shielded from

279. See discussion *supra* Part IV.A.

280. Dan Papsun, *For NCAA’s Antitrust Woes, Athlete Unions Pose Ironic Solution*, BLOOMBERG L. (Aug. 6, 2021, 5:56 AM), <https://news.bloomberglaw.com/daily-labor-report/for-ncaas-antitrust-woes-athlete-unions-pose-ironic-solution> [https://perma.cc/6H9T-XFLE].

281. See, e.g., Jeff Tracy, *Survey: About Half of Americans Support Paying College Athletes*, AXIOS (Mar. 16, 2022), <https://www.axios.com/2022/03/16/paying-college-athletes-survey> [https://perma.cc/4P6T-B8N9] (reporting that a 2022 study of American adults found that 70% of young adults and 57% of adults ages 30 to 44 support paying college athletes, with significantly more support coming from Black Americans than white Americans); Abigail Johnson Hess, *Majority of College Students Say Student-Athletes Should Be Paid, Survey Finds*, CNBC, <https://www.cnbc.com/2019/09/11/student-athletes-should-get-paid-college-students-say.html> (Sept. 11, 2019) [https://perma.cc/8NY5-YENN] (reporting that a majority of the college students polled in a 2019 survey “support[ed] initiatives to pay college athletes”). The growing support for paying college athletes aligns with the broader trend of growing support for labor unions. See Megan Brennan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), <https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/66G8-6DWQ] (reporting that 68% of Americans approve of unions).

282. See Eric Jackson, *March Madness Endures as Alt Leagues Offer Toehold for Pro Hoop Dreams*, SPORTICO (Apr. 5, 2019), <https://www.sportico.com/leagues/basketball/2022/ncaa-alt-leagues-ote-nbl-1234670475/> [https://perma.cc/UX4J-CURS] (“[T]he nation’s elite players can consider more options beyond playing [in college or] overseas, whether it’s competing as a teenager with Overtime Elite . . . or skipping college to play in G League Ignite for a \$500,000 salary.”).

283. See Tracy, *supra* note 281; see also Hess, *supra* note 281.

284. Papsun, *supra* note 280.

antitrust review.<sup>285</sup> Because antitrust litigation is costly—both financially and reputationally—for the NCAA, the organization “may find that negotiating terms of employment with . . . athletes is preferable to continued legal scrutiny under antitrust [law].”<sup>286</sup>

The other main advantage of a labor approach is that it would address some of the deep-rooted inequities in college sports. Year after year, season after season, the Power Five conferences and the NCAA record over a billion dollars in revenue.<sup>287</sup> If Division I athletes formed unions, they would be able to bargain for a reasonable percentage of those revenues “akin to how professional football and basketball players have negotiated for a share of league revenues.”<sup>288</sup> Revenue-generating athletes, including Black athletes who have been disproportionately harmed by the NCAA’s amateurism model, stand to benefit immensely from the switch to a revenue-sharing model.

NFL and NBA players have negotiated for approximately half of their respective league’s revenues.<sup>289</sup> If Power Five football players and men’s basketball players did the same, Power Five football players would receive between \$360,000 and \$2.4 million each season, depending on their position, and the average men’s basketball player would receive \$500,000 per season.<sup>290</sup> Because

285. See Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, OXFORD HANDBOOKS ONLINE (Sept. 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.0001/oxfordhb-9780190465957-e-10> [<https://perma.cc/GXQ8-V66W>]. The Supreme Court has carved out a “non-statutory labor exemption” that allows employers and employees to bargain without antitrust interference. *Id.* The theory behind this exemption is that “antitrust law must give way to labor law when necessary to allow the collective bargaining process to work.” *Id.* Courts have consistently applied this exemption in cases involving the NBA and NFL, making it likely that a collective bargaining agreement negotiated by college players would pass antitrust review. See *id.*

286. Papsun, *supra* note 280.

287. See Associated Press, *NCAA Earns \$1.15 Billion in 2021 as Revenue Returns to Normal*, ESPN (Feb. 2, 2022), [https://www.espn.com/college-sports/story/\\_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal](https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal) [<https://perma.cc/A97N-YCJJ>]; see also Steve Berkowitz, *Power Five Conferences Had Over \$2.9 Billion in Revenue in Fiscal 2019, New Tax Records Show*, USA TODAY (July 10, 2020) <https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002/> [<https://perma.cc/X4Z5-6YXX>]. The NCAA derives the lion’s share of its revenues from selling media rights to the Division I men’s basketball championship March Madness. See CLOTFELTER, *supra* note 134, at 140.

288. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

289. Charles Grantham, *It’s Time to Share Revenue with Collegiate Athletes*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), <https://harvardjssel.com/2020/08/it-is-time-to-share-revenue-with-collegiate-athletes/> [<https://perma.cc/29SL-MBL6>].

290. Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27734, 2020).

of the need to spread football and basketball revenues across non-revenue-generating sports in order to keep those other sports alive,<sup>291</sup> and colleges' need to comply with Title IX,<sup>292</sup> it is unrealistic to assume that revenue-generating athletes will be able to bargain for a 50% cut of their sport's revenues. Revenue-generating players should be able to extract a fair deal from the NCAA and their conferences, however.<sup>293</sup> These players would be represented by a sophisticated bargaining representative during the negotiation process, and this representative would help them to counter the collective might of the NCAA and its member schools.<sup>294</sup>

### C. ADDRESSING THE MAIN CRITIQUES OF A LABOR APPROACH

This section addresses two related criticisms that have been levied against a labor approach: first, that it would drain schools' budgets, thereby hindering their ability to comply with Title IX, and second, that it would bring more harm than good to women's athletes. Title IX is a 1972 civil rights law that revolutionized college sports by banning sex discrimination against any person in an "educational program or activity" receiving federal assistance.<sup>295</sup> Credited with greatly increasing women's access to

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291. See discussion *supra* Introduction.

292. See discussion *infra* Part IV.C.

293. It would make the most sense for FBS football players to unionize by conference given that conferences are in charge of negotiating deals with television networks. See CLOTFELTER, *supra* note 134, at 140. In addition to more compensation, college athletes could also bargain for better working conditions and health benefits. See Nathan Kalman-Lamb, Derek Silva & Johanna Mellis, *There's Never Been a Better Time for US College Athletes to Unionize*, GUARDIAN (May 27, 2021), <https://www.theguardian.com/sport/2021/may/27/college-sports-union-right-to-organize-act> [<https://perma.cc/PV5E-A5TM>] (quoting Rutgers University Associate Professor of Labor Studies and Employment Relations Rebecca Givan as saying, "College players could negotiate for the right to choose their majors and course schedules, the right to opt out of so-called voluntary workouts that are essentially mandatory, and the right to physical and mental healthcare that extends beyond their time as a college athlete").

294. The NCPA—the same organization that drove the effort to unionize Northwestern's football team—would be well-suited to serve as college athletes' bargaining representation. See Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html> [<https://perma.cc/8X2V-C3NQ>].

295. 20 U.S.C. § 1681(a); see also *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> [<https://perma.cc/43S7-W3MF>].



college sports,<sup>296</sup> Title IX requires that college women receive “not only equal opportunities for [athletic] participation, but also equal treatment and benefits.”<sup>297</sup> Although the scope of the law is disputed, many scholars have opined that Title IX would still apply to college athletes with employee status.<sup>298</sup> If Title IX does reach such athletes, any school that entered into a revenue-sharing agreement with its football team or men’s basketball team would be bound to provide athletes on women’s teams with comparable treatment and benefits.<sup>299</sup> According to some scholars, sharing revenues with men’s football and basketball players and giving women’s athletes commensurate benefits could be “prohibitively expensive” for schools and put their athletic departments in danger of bankruptcy.<sup>300</sup> The high cost of complying with Title IX, these scholars say, could create a perverse incentive for schools to eliminate non-revenue-generating sports, reducing the number of athletic opportunities available to women.<sup>301</sup>

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296. See *Requirements Under Title IX of the Education Amendments of 1972*, *supra* note 295.

297. Thomas R. Hurst, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 71–72 (2000).

298. See Claudine McCarthy, *Consider How Title IX Could Apply to Employment of Student Athletes*, 19 COLLEGE ATHLETICS & L. 1, 1 (2023) (quoting a law partner as saying that Title IX will still apply if college athletes become employees because “Title IX applies to employment in colleges and universities . . . that receive federal funding, just as it applies to any other aspect of a university”); see also Michael P. Cianfichi, *Varsity Blues: Student Athlete Unionization Is the Wrong Way Forward to Reform Collegiate Athletics*, 74 MARYLAND L. REV. 583, 606 (2015) (“Labeling student athletes on a men’s team as employees without doing so for a women’s team could lead to Title IX violations.”); but see Eric Prisbell, *Johnson v. NCAA: Why College Sports Fans Need to Pay Attention to This Court Case*, ON3 (Feb. 21, 2023), <https://www.on3.com/news/johnson-v-ncaa-why-college-sports-fans-need-to-pay-attention-to-this-court-case/> [<https://perma.cc/296L-JMVR>] (noting that it is uncertain whether Title IX would apply to college athletes who are “athlete-employees”).

299. See Prisbell, *supra* note 298 (“If Title IX still applies under the employee model, the protection would require the benefits that a university provides male and female athletes to be comparable, thus creating a sizable financial stress test for schools.”).

300. Erin Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon*, 15 W. NEW ENG. UNIV. SCH. L. 297, 298 (2015); see also Cianfichi, *supra* note 298, at 605 (arguing that if all scholarship athletes were employees, “the total amount of benefits, including potential wages, that could be bargained for by so many student athletes would quickly bankrupt a university or force it to abandon academic priorities to stabilize its athletic department’s bloating budget”).

301. See, e.g., Corrada, *supra* note 208, at 216 (“[E]xtending employee status to students in non-revenue generating sports may lead to the elimination of those sports. Men’s college football and basketball are popular enough to survive the change.”); Cianfichi, *supra* note 298, at 606 (“[A] unionized football team could eventually bargain for so many benefits that the result would be only two male sports teams (football and basketball) and enough women’s sports teams necessary to maintain Title IX compliance, eliminating all other male sports teams.”).

Many scholars label these concerns regarding Title IX as overblown. These scholars posit that schools would be able to enter into revenue-sharing agreements with athletes and still fulfill their Title IX obligations if they did not make such large payouts to football and basketball coaches and athletic administrators.<sup>302</sup> Data from 2018 lends support to this theory. That year, NCAA Division I public schools devoted far more money to salaries for athletic staff than to financial aid for athletes, spending \$3.4 million on coaching and administrative salaries but only around half that amount—\$1.9 billion—on athletic scholarships.<sup>303</sup> Scholars who believe that coaching and administrative salaries should be kept within reasonable limits emphasize that college football and basketball players are predominantly Black whereas their coaches and athletic directors are overwhelmingly white.<sup>304</sup>

This Note concurs with the view that Title IX and the potential costs of complying with that law are more of a “red herring” than a serious concern.<sup>305</sup> In addition to the fact that many schools could lower coaching and administrative salaries to maintain compliance with Title IX, there are several other reasons to be suspicious of the argument that a labor approach would be detrimental to women’s sports. First, the cap on football and men’s basketball players’ compensation inherently “results in a cap on women[’s] compensation.”<sup>306</sup> Second, under the existing amateurism system, the NCAA and its member schools do not have a strong incentive to invest in the untapped potential of women’s college sports.<sup>307</sup>

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302. See, e.g., Kevin Trahan, *Why the NCAA’s Title IX Excuse No Longer Works*, SB NATION (Apr. 14, 2014), <https://www.sbnation.com/college-football/2014/4/14/5613112/ncaa-title-9-ed-obannon> [<https://perma.cc/ZNH3-EU9W>] (explaining that if needed, the NCAA could “[m]andate that a certain percentage of football money go to fund non-revenue sports,” forcing schools to reduce football coaches’ salaries).

303. Steve Berkowitz (@ByBerkowitz), TWITTER (Aug. 12, 2018, 12:36 PM), <https://twitter.com/byberkowitz/status/1160953266890596353> [<https://perma.cc/32UK-7QCS>] (citing a graphic from USA TODAY SPORTS titled “Colleges’ sports compensation spending vs. athletic scholarship spending”).

304. See, e.g., Grantham, *supra* note 289; Patrick Hruby, *Lonely at the Top: Few College Athletic Directors Are Women and People of Color*, GLOB. SPORT MATTERS (May 7, 2021), <https://globalsportmatters.com/business/2021/05/07/few-college-athletic-directors-minorities-ncaa/> [<https://perma.cc/T4EM-VA7V>].

305. See Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, FORBES (Feb. 4, 2014), <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=70773021bde0> [<https://perma.cc/XJV2-K5JG>].

306. Big Labor on College Campuses, *supra* note 18; see also *id.* (“Shunting money to coaches also deprives women athletes of Title IX matching funds.”).

307. If college athletes were able to negotiate for a portion of league revenues, the NCAA and its members would face greater pressure to search for new revenue streams. Many

Third, many of the concerns surrounding Title IX presuppose that football and basketball players are the only athletes with a chance of securing the right to collectively bargain when in fact *all* Division I athletes are close to obtaining this right.<sup>308</sup> Finally, many schools have a poor track record of complying with Title IX.<sup>309</sup> This troubling fact undermines the argument that allowing college athletes to unionize would be inadvisable because it would render schools unable to comply with Title IX. For these reasons, concerns about Title IX should not dissuade Division I athletes from pursuing a labor approach.<sup>310</sup>

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women's sports have the potential to become significant revenue-generators. *See, e.g.,* Remy Tumin, *N.C.A.A. Women's Tournament Shatters Ratings Record in Final*, N.Y. TIMES (Apr. 3, 2023), <https://www.nytimes.com/2023/04/03/sports/ncaabasketball/lsu-iowa-womens-tournament-ratings-record.html> [<https://perma.cc/Y9L4-VTJC>] (noting that a record number of viewers tuned in to watch the 2023 women's March Madness championship game); Amanda Christovich, *Potential for Women's Volleyball 'Untapped'*, FRONT OFF. SPORTS (Apr. 14, 2021), <https://frontofficesports.com/womens-volleyball-potential/> [<https://perma.cc/E8ZA-5ELH>] ("While the sport appears to be overlooked, growth and revenue opportunities are booming at all levels of women's volleyball.").

308. If athletes on non-revenue-generating women's teams could collectively bargain, they could use their increased bargaining power to press for greater investment in their sport, which could, in turn, lead to greater college sports revenues. These new revenues could be used to subsidize lower-revenue sports.

309. *See* NCAA, *THE STATE OF WOMEN IN COLLEGE SPORTS 31–32* (2022), [https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022\\_State\\_of\\_Women\\_in\\_College\\_Sports\\_Report.pdf](https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf) [<https://perma.cc/Y446-2XRN>] (finding that FBS schools spend "almost three times more [on men's athletics] than what is reported for women's athletics" and that the gap in spending on women's athletics at FBS schools doubled from \$12.7 million during the 2008–2009 season to \$25.6 million during the 2018–2019 season). Likewise, the NCAA has not shown that it is committed to gender equity. *See, e.g.,* Alan Blinder, *N.C.A.A. Acknowledges \$13.5 Million Budget Gap Between Men's and Women's Tournaments*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/03/26/sports/ncaabasketball/mens-womens-tournament-gap.html> [<https://perma.cc/YC8Z-8VCM>] ("The N.C.A.A. budgeted nearly double for its men's basketball tournament in 2019 than what it planned for its women's competition, a \$13.5 gap that [called into question] the organization's commitment to gender equity.").

310. Title IX is ripe for reform. *See* Rachel Axon, *What Happens if a School Doesn't Comply with Title IX? Not a Whole Lot*, USA TODAY (Dec. 15, 2022), <https://www.usatoday.com/in-depth/news/investigations/2022/12/15/title-ix-enforcement-essentially-toothless-mired-red-tape-delays/10803850002/> [<https://perma.cc/ZC2A-3SVH>] (reporting that dozens of schools violate Title IX by "shortchang[ing] female athletes of playing opportunities and scholarships"). The current debate over college athlete compensation presents an opportunity to revisit this legislation.

## CONCLUSION

College athletes deserve fair compensation. These athletes form the backbone of the college sports industry. Without them and their labor, there would be no basketball championships or bowl games or billion-dollar profits.<sup>311</sup> Although antitrust law provides a vehicle for Division I athletes to incrementally increase their compensation, these athletes' best chance at obtaining fair compensation is through a labor approach. College athletes must therefore not abandon the fight for employee status.

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311. NCAA schools would also have less school spirit and receive fewer alumni donations. See *Abruzzo Memorandum*, *supra* note 191, at 3 (noting that college athletes can positively impact their school's reputation by "boost[ing] student applications and alumni donations").