



Student Athletes

March 2024 Public Forum Topic

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Notes on Evidence

- **Purpose:** This brief is intended to be:
 1. **A starting point:** Please continue researching interesting & fruitful areas as you make cases.
 2. **A toolbox:** Not all of the cards in this brief will be useful to you—use them at your discretion.
- **Tags:** Cards are written with summaries (also called tags) to make understanding and presenting the material easier. However, many coaches and some high-quality briefs simply omit them, preferring to have students work more directly with the material to help with understanding and avoid power-tagging (ie, giving an inaccurate summary of the material).

To avoid accusations of power-tagging and increase your ability to actually use the cards, please read and understand each card before using it.
- **Quality:** Evidence quality will vary. While we prefer to use high-quality sources from thinktanks, journals and seasoned experts, this won't cover all major topic angles. To provide more helpful evidence, we also mix in legitimate but less-vetted sources, like news articles. Please be cognizant of this variation in quality.
- **Navigation:** please use the Navigation Panel to view this brief (View→ Navigation Pane in Word)
- **Mistakes:** please let me know if you find any mistakes! Especially glaring ones. I'm happy to correct and re-release the brief as an update version.
- **Blocks:** Blocks, ATs are rebuttals are grouped interchangeably here. The difference between a block and a rebuttal is how you use it!
- For questions, comments or suggestions on evidence, please reach out to **Joel:** joel@debatetrack.com

Thank you for subscribing!

Your subscription fee keeps this project going and keeps PF lectures free and accessible to everyone who needs them. You're helping to power debate. Thank you.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Table of Contents

Background	8
International Students	9
Due to the regulations around of F-1 visas that prevent them from earning substantial incomes, international student-athletes would not be affected by a re-classification as employees.....	9
Johnson v. NCAA	10
On February 15, 2023, a three-judge panel for the Third District Court of Appeal heard oral arguments in Johnson v. NCAA. The NCAA believes student-athletes should not get paid because they are amateurs and amateurs don't get paid. The student-athletes argue they should be paid for the time they spend in practice and competitions.	10
The case has yet to be decided.....	10
Lobbying	11
The NCAA desperately wants lawmakers to pass laws prohibiting students from being classified as athletes—and they're lobbying hard to get what they want, including urging college presidents to try to sway lawmakers toward banning the 'employee' classification of student athletes	11
Models	14
There are various models of what paying student athletes would actually look like, including ii. college athlete unionization, ii. only money-making sports athletes being paid or ii. revenue-sharing agreements, where higher earners make more	14
Two-track Model: two admission tracks can be implemented: one for students and one for athletes, with the latter being treated as paid employees of the university, allowing them to earn a degree after their playing career.....	15
NCAA v Alston	16
The Supreme Court ruled in 2021 that NCAA rules aren't exempted from anti-trust laws, thus freeing universities to pay student athletes	16
NCAA Founding	17
The NCAA was founded in 1906 to 1. bring safety regulations to college sports and 2. prevent professionals from playing college sports while pretending to be students.....	17
Numbers	18
There were over half a million NCAA athletes as of 2022	18
Aff	19
Anti-Trust	20
The NCAA's amateurism model fosters a monopoly where coaches and administrators benefit disproportionately from the revenues.....	20
Compensation	21
Financial Burden: Paying college athletes would alleviate financial pressures on them and their families, allowing athletes to focus more on their studies and sports.	21
Impact: Education. Paying college athletes could alleviate financial pressure, enabling them to focus on academics and athletics without the need for additional work. This approach might encourage athletes to complete their education before pursuing professional opportunities.	22
Exploitation	23
The term 'student-athlete' was invented to make it easier to exploit college students	23
Injuries	24
Injuries: College athletes are prone to potentially career-ending injuries. Denying them payment undermines their contributions and aspirations.....	24

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

NLRB / NLRA	26
National Labor Relations Board General Counsel Jennifer Abruzzo asserts that certain college athletes should be considered employees under the National Labor Relations Act	26
The National Labor Relations Board may have jurisdiction over the NCAA and its student athletes— thus, NCAA students should be classified as athletes under the NLRA	27
Optics	28
Prison Analogy: not paying college athletes has been justified under the same law that prevents prisoners from being paid	28
Slavery Analogy: not paying college athletes has been justified under the same law that prevents prisoners from being paid	29
Prestige	30
Applications & Donations: Student-athletes can significantly boost their school's exposure and prestige that can increase the number of applications and donations	30
Rankings & Infrastructure: Athletic programs boost university branding, reputation, rankings, and state infrastructure	30
Profiteering	31
10 bil: The NCAA makes \$10+ billion per year – more than the NHL or the NBA	31
7%: Only 7% of NCAA revenue flows back to the students, mainly through scholarships and living expenses	31
Diversion: The current system, rewards profiting off of student athletes– the money that would have gone to athlete salaries is instead diverted into other aspects of the program, such as coaches salaries and facility upgrades	32
Black Markets: there are black markets in college sports, where some star athletes receive under-the-table payments or off-the-books compensation, often arranged by boosters or athletic directors	33
Racism	34
Racial Optics: most high-profit-generating sports players are black	34
Over half: Black students make up more than 50% of the highest-earning sports, despite making up less than 6% of the total student body	34
Impact: Black athletes are deprived of up to \$1.4 billion / year by the failure to get paid for their services	35
Service Providers	36
Student-athletes perform services for their college or university, similar to other students employed in athletic events such as ticket takers and concession workers. They fulfill roles that contribute to the institution's operations and therefore should be classified as employees entitled to the same rights and benefits	36
Support	38
Student Athletes: 62% of NCAA competitors want to unionize to bargain for more rights	38
Public: Nearly 70% of US adults believe student-athletes should receive compensation, and 64% believe they should be classified as employees	39
Unionization Good	41
Unions: College student-athletes should be allowed to unionize – this would afford them benefits like financial compensation and recompense for injuries, which often surface only later in life	41
Impact: College players could be paid up to \$2.4 million each season if they negotiate the same profit share as NFL & NBA players	42
Aff Blocks	43
AT: Amateurism	44
Saying that schools can't pay students because they're amateur leagues is “circular and unpersuasive”	44
AT: Education	45

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

The NCAA doesn't actually care about Education of student-athletes—players spend 3 times as many hours per week on athletics as they do on academics 45

AT: NIL.....46

No Impact: Most student athletes won't make any money from NIL programs..... 46

Turn: NCAA v Alston is the strongest argument yet to classify students as employees. Under the ruling, student-athletes are still being exploited while their programs rake in billions of dollars. 46

AT: Professional Track.....47

Only 2% of NCAA student athletes go on to play professionally – yet many more believe they'll 'make it' in the big leagues 47

AT: Sports Cuts48

Olympic Sports & Women's Sports won't be cut if student-athletes are classified as employees..... 48

Neg..... 49

Alternative Incomes.....50

NIL Collectives: college sports fans pay money to athletes for various levels of access, letting student athletes earn up to millions of dollars 50

Alternative Solutions51

CAPA: The College Athlete Protection Act would compensate college athletes by requiring schools participating in major college sports to pay athletes up to \$25,000 annually, plus additional benefits—such a law wouldn't require formally classifying student-athletes as employees 51

Amateurism.....52

Student-athletes should not be paid as they are classified as amateurs, emphasizing their commitment to sports as part of their educational experience rather than as a profession. 53

[Tim Tebow quotes on Amateurism in Collegiate Sports]..... 54

Arms Race55

Rich-Poor Gap: Allowing universities to pay athletes means that richer programs will be able to recruit from around the country at will, widening the gap between rich and poor athletic programs. 55

Ruins Athletic Competition: Paying college athletes could worsen disparities between wealthy and less affluent universities, potentially harming athletic competition nationwide – paying these athletes would make them professionals and ruin the purity of amateur sports..... 56

Culture57

Treating student athletes as employees will significantly alter the culture around American collegiate sports, including the student-coach athlete of mentorship..... 57

Education58

The primary purpose of college is to provide education and prepare students for their future careers—the focus, therefore, should remain on supporting student-athletes academically rather than introducing financial incentives that may distract from their educational goals. 58

FLSA59

The Department of Labor's position suggests that university or college students engaged in activities like interscholastic athletics are generally not considered employees under the Fair Labor Standards Act (FLSA)..... 59

Funding.....60

Logistics: Most questions around how funding student-athlete-employees don't have answers. Implementing a payment system faces logistical challenges, and the financial viability of compensating all athletes may be impossible, especially considering that only a few collegiate sports programs, like football and basketball, generate profits..... 60

HBCU: Historically Black Colleges don't have the funds to hire students to play sports – and therefore, most sports wouldn't be funded..... 61

Private Schools: Treating college athletes as employees could burden private colleges with financial and administrative challenges, while also diminishing their competitive edge in student recruitment. 62

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Impact: Tuition increases. Paying student athletes will require even more funding from tuition to cover increased athletic expenses.	63
Sports Bad	64
Collegiate sports should be dismantled – they take away from occupational education and social engagement, leave athletes in a poor position to compete on the job market, are a huge drain on financial resources, and promote a culture where college athletes often get away with sexual abuse	64
Sports Cuts	67
Forcing universities to pay student athletes might require cuts to programs that don't make money – namely, Olympic Sports like gymnastics or soccer	67
Athletic Directors: over 90% of surveyed athletic directors agreed that that college athletes employment status would affect non-revenue sports funding	67
Student Disadvantages	69
Lost Benefits: Student-athletes already receive substantial benefits such as room and board, scholarships and academic support, and classifying them as employees would put all these benefits at jeopardy	69
Management: Paying student-athletes could lead to legal classification as employees, allowing them to unionize, negotiate contracts, and manage professional conflicts	70
Title XI	71
Spending Gap: Classifying student-athletes as employees would widen the spending gap between men's and women's sports	71
Equal pay: Title IX would require equal pay for all athletes, potentially increasing program expenses, fees, or reducing individual pay.	71
Unionization Bad	72
College student-athletes shouldn't be allowed to unionize – it could cause issues in D1 sports, and form a relationship inappropriate to the school-student relationship, which should be about education rather than profit	72
<i>Neg Blocks</i>	73
AT: Anti-Trust Laws	74
Major sports leagues like the MLB all have some degree of anti-trust exceptions—the NCAA should be no exception	74
AT: Minimum Wage	75
Paying student athletes minimum wage may start a slippery slope, where club members like college debaters may end up demanding minimum wage as well	75
AT: NLRB Jurisdiction	76
The NCAA is not 'joint employer' of athletes, and the NLRB has no jurisdiction over the athletes—the NCAA can't be responsible for minimum wage for 187,000 student athletes under current law	76
AT: No Revenue	77
Whether or not students should be treated as employees has nothing to do with how much the colleges benefit—otherwise, any non-profitable business could well argue that it shouldn't pay its employees	77
AT: Professional	78
Non-unique: college sports are already professional, for everyone except the athletes	78
AT: Profits	79
Most college athletic departments run deficits of millions of dollars, leading to increases in tuition and athletic fees	79
AT: Worse Outcomes	80
Former student-athletes have better lives than non-student-athletes, in 4 out of 5 measured domains, and similar outcomes in financial terms	80

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Background

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

International Students

Due to the regulations around of F-1 visas that prevent them from earning substantial incomes, international student-athletes would not be affected by a re-classification as employees

Sugrue 23—[Sugrue, Liam. 2023. “THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT’S LATEST RULING on PAYING COLLEGE ATHLETES.” <https://www.hofstrajibl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

With the newly found compensation option, one might imagine that there may be a larger number of foreign and international students coming to American colleges because they can further develop their athletics. These international students receive compensation while getting the greatest exposure to scouts for professional leagues. Following the Alston ruling and NIL rule changes, there could have been a possibility for a massive influx of international college athletes. **The opportunity for international players was limited under the old NCAA compensation rule, with the new NIL rule, almost nothing has changed.**

International student-athletes are being left out of the new NIL benefits due to immigration and visa restrictions. NCAA international student-athletes are on F-1 visas, preventing them from earning a substantial income while studying in the U.S. Immigration attorney, Robert Sieger, said “I can see it opening a Pandora’s box on how the foreign student athlete will be able to come over here.” With international student-athletes being further restricted by the NCAA, the ongoing positive trend of international student-athlete participation may turn sour. **International athletes are some of the most marketable and exciting athletes in sports. However, these valuable individuals are now unable to achieve compensation whereas their domestic counterparts are.**

Munya Maraire, CEO of World Wide Scholarships, stated that “[t]he laws were designed to ensure that people applying to study in the United States via a student visa were not intending to earn a substantial income as a professional at the same time...” however, “...**international students will now be unable to benefit from the recognition that the students are actually the product that people pay to see.**” **International-students are no better off than they were before Alston.** Marraire further stated, “a full scholarship does not cover anything outside of university-related expenses for the most part”, after recalling how he had to save food money in order to have spending money on campus. The problem is not with the NCAA or the NIL ruling, it’s with the government and immigration. **Fighting against the NCAA is one thing, fighting against the U.S. government is an entirely separate beast.** The issue with international student-athletes and the mechanics of their student visas is of utmost importance.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Johnson v. NCAA

On February 15, 2023, a three-judge panel for the Third District Court of Appeal heard oral arguments in Johnson v. NCAA. The NCAA believes student-athletes should not get paid because they are amateurs and amateurs don't get paid. The student-athletes argue they should be paid for the time they spend in practice and competitions. The case has yet to be decided.

Goldberg 23 - [Goldberg, Josh. "What You Need to Know about Johnson v. NCAA." Greenspoon Marder LLP. May 1, 2023. <https://www.gmlaw.com/news/what-you-need-to-know-about-johnson-v-ncaa/>] Elene.

[Josh Goldberg is an associate in the Franchise Law practice group, as well as the Innovation & Technology and Entertainment & Sports practice groups at Greenspoon Marder. Mr. Goldberg is an active member of The Sports Lawyers Association and the Florida Bar's Entertainment, Arts & Sports Law Section.]

The outcome of *Johnson v. NCAA* will have a transformative effect on college sports if student-athletes are deemed employees of their universities, which may have unintended consequences.

For years, the NCAA has hidden behind its amateurism model to uphold the traditions of collegiate sports. The NCAA believes student-athletes should not get paid because they are amateurs and amateurs don't get paid.

The Facts in *Johnson v. NCAA*

The plaintiffs in *Johnson* include former Villanova football player Trey Johnson and other Division 1 student-athletes, who are arguing that student-athletes should be considered employees subject to the Fair Labor Standards Act (FLSA) and should be paid for their time related to their athletic activities.

The case was originally filed in the United States Eastern District Court of Pennsylvania in November 2019 against the NCAA and roughly two dozen colleges. The athletes are claiming that they are entitled to back pay and damages for unjust enrichment as the NCAA and member institutions profited at their expense.

Student-athletes have reported spending more than 30 hours per week on athletically related activities, both Countable Athletic Related Activities (CARA) and non-CARA, while football players alone have reported spending more than 40 hours per week on these activities.

The NCAA moved for a motion to dismiss in the lower court and **argued plaintiffs failed to state a claim because plaintiffs did not allege facts that would establish whether they are employees, which is a requirement to bring a claim under the FLSA.** The motion to dismiss was denied and the NCAA appealed the decision to the 3rd Circuit.

On February 15, 2023, a three-judge panel for the Third District Court of Appeal heard oral arguments in *Johnson v. NCAA*.

The NCAA argued **student-athletes cannot be employees because they have never been considered employees before.** The NCAA is relying heavily on a 1992 decision in *Vanskike v. Peters*. *Vanskike* discusses **whether prisoners are employees of a prison**, and its ruling cites a "slavery loophole" in the 13th Amendment, stating that slavery is not legal unless it is being used as punishment for a crime. **While the NCAA is not comparing student-athletes to prison inmates, their willingness to use such a controversial case for a carve-out to avoid running an employment test is indicative of the lengths they are willing to go to make their argument.**

The student-athletes argued **they should be paid for the time they spend in practice and competitions, and if they are covered by the FLSA, student-athletes should receive minimum wage and overtime pay similar to a work-study student.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Lobbying

The NCAA desperately wants lawmakers to pass laws prohibiting students from being classified as athletes—and they’re lobbying hard to get what they want, including urging college presidents to try to sway lawmakers toward banning the ‘employee’ classification of student athletes

Perez & Niedzwiadek 24— [“College Sports Giants Struggle to Get Rescued by Congress.” 2024. POLITICO. January 26. <https://www.politico.com/news/2024/01/26/college-sports-ncaa-athletes-employees-congress-00137829>.] Joel.

[Juan Perez, Jr., is the education reporter for Politico, based in Washington D.C. He is a 2009 graduate of the UNL College of Journalism & Mass Communications where he majored in Journalism.

Nick Niedzwiadek is a labor reporter for POLITICO. He is a graduate of the University of North Carolina at Chapel Hill and has previously written for the Times Union and the Wall Street Journal.]

And **in recent months, the NCAA and its allies have refocused their attention on sweeping requests from Washington: A legal ban on players from being classified as school employees and broad protections from the country’s antitrust laws.**

“I know they have a lot of other things on their agenda that probably, to a lot of people, feel a lot heavier and more important than this,” said **NCAA President Charlie Baker, the former Republican governor of Massachusetts**, of congressional lawmakers in a recent interview. “But the disequilibrium that exists in a lot of college sports right now, they have an opportunity to fix.”

He added: “The one thing I know for sure is that not doing anything is a bad idea.”

Instead, **Baker has suggested the country’s biggest moneymaking athletics programs pay athletes tens of thousands of dollars a year under a model intended to offer an alternative to full-on employment.** Officials say **part of that effort is intended to show Congress college sports leaders can fix some of their own problems as they press lawmakers for a steadier lifeline.** The NCAA president is scheduled to huddle with lawmakers to press his case in Washington on Thursday.

While a broad spectrum of Senate and House lawmakers — including Sens. Cory Booker (D-N.J.) and Ted Cruz (R-Texas) — have sought to write bipartisan legislation, Congress remains distracted with wars, domestic funding, the southern border and an election. That combination has sapped Capitol Hill’s bandwidth for approving coveted legal cover for the NCAA and its allies, or a narrow measure that solves some of their concerns.

“It’s hard to imagine, in this Congress, getting to an agreement on an antitrust exemption and on employment,” Rep. Lori Trahan (D-Mass.), a onetime Georgetown University volleyball player and an influential Capitol Hill voice on college sports, said last week after a hearing on “discussion draft” legislation from Rep. Gus Bilirakis (R-Fla.). His bill includes legal exemptions for college sports’ overseers and bars athletes from employment.

“It’s a moment that people are preparing themselves for, and shame on them if they’re not,” she said of the prospect for athlete employment. “That is a scenario where the courts may definitely deem athletes as employees. ... But I don’t think the sky is falling in college athletics as a result of any of these decisions.” With Congress preoccupied, pro-labor members of the Biden administration might be next to press the issue in Washington.

The Department of Justice last week joined a lawsuit brought by a bipartisan group of attorneys general alleging that NCAA restrictions on athletes’ eligibility to play if they transfer schools multiple times amounts to illegal anti-competitive behavior.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Also leading the way for the Biden administration is Jennifer Abruzzo, the general counsel of the NLRB, who in fall 2021 articulated her belief that college athletes are employees under federal labor law and vowed to pursue violations as part of her aggressive efforts to empower workers.

Under her direction, NLRB prosecutors last year alleged that the University of Southern California, along with the Pac-12 Conference and NCAA, were illegally misclassifying athletes as non-employees and that the athletic department's social media policy violated workers' speech rights.

An agency judge is expected to issue a decision sometime after hearing testimony wraps up next month, and a ruling against the trio could scramble the way that private schools police athletes' conduct. (The NLRB does not police public universities, which are covered by their respective state's laws.)

Separately, members of the Dartmouth men's basketball team in September petitioned the NLRB to hold a union election, a request that remains pending before agency officials. If granted, the case would resurrect an issue that's laid dormant for several years after an effort by the Northwestern University football team to join a group backed by the United Steelworkers fizzled out.

Now Baker's team has kicked off months of internal NCAA deliberations with controversial proposals that would split the country's biggest-money athletics programs into a separate subdivision that pays at least half their players \$30,000 or more a year through an "enhanced educational trust fund."

Athletes could set up these agreements with schools through contracts, Baker said, instead of direct employment. Two other proposals would separately allow all Division I colleges and universities — more than 350 institutions — to offer athletes unlimited educational benefits and enter into direct publicity rights deals with players. "You have to make the case to them that there are alternatives that would work for student-athletes that don't require making them employees," Baker said of his pitch to lawmakers.

The NCAA is also willing to consider a "conditional" antitrust exemption, an association official told POLITICO, which could sunset and be subject to renewal based on certain actions from the organization to boost health care and educational benefits for athletes. The official was granted anonymity to discuss internal matters.

"The real question will be whether employment can be stopped in the future once some court or the NLRB weighs in," McMillen said. "What's the coalition to stop it, and what are you going to provide to make that happen? I don't think members of Congress want to wade into court cases right now."

University of Georgia President and NCAA official Jere Morehead put things more sharply.

"We're running out of time," Morehead recently told reporters. "I would say to every college president in every state: Be talking to your senators and congressmen about the importance of advancing legislation that will help stabilize the collegiate environment."

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

NCAA president Charlie Baker asked Congress to affirm that student-athletes (SAs) are not school employees, a move that would help keep regulation under the NCAA's umbrella, instead of the judicial system's

Gruber 23 - [Gruber, Jack. "NCAA President Charlie Baker Asks Congress to Affirm That Student-Athletes Are Not School Employees | the GIST." www.thegistsports.com. October 18, 2023. <https://www.thegistsports.com/article/ncaa-president-charlie-baker-asks-congress-to-affirm-that-student-athletes-are-not-school-employees/>.] Elene.

[Jack Gruber has been a journalist for USA TODAY since 2000. Jack graduated from the Ohio University School of Visual Communication and won the William Randolph Hearst National Photojournalism Championship in 1989.]

The legal pressure: This year's seen a massive labor movement across the American economy, and college sports are no exception. **From the Dartmouth men's basketball team to volunteer coaches, the world is questioning the line between amateur and pro — including how college athletes should be categorized.**

The NCAA's wishlist: **The NCAA President Charlie Baker begged the Senate Judiciary Committee to grant SAs "special status" yesterday, declaring them definitely-not-employees once and for all. He and fellow admins say classifying SAs as employees would doom the NCAA's amateurism ethos and destroy college sports as we know it.**

The NCAA claims that making SAs employees could legally require one-size-fits-all benefits for every athlete, from Alabama football's quarterback to Juniata's swimmers. That, Baker says, would be "untenable" for non-revenue programs, like Division II and III sports and women's teams.

A "special status" law would shield the NCAA from the antitrust suits, buying the org time and flexibility to create a workable solution to the myriad labor demands — before the courts do it themselves.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Models

There are various models of what paying student athletes would actually look like, including ii. college athlete unionization, ii. only money-making sports athletes being paid or ii. revenue-sharing agreements, where higher earners make more

Higgins 22— [Higgins, Laine. 2022. “Should College Athletes Be Paid? A Once-Radical Idea Gains Momentum.” Wall Street Journal, July 24, sec. Life. <https://www.wsj.com/articles/college-athlete-pay-ncaa-employees-11658502884>.] Joel.

[Laine Higgins is a sports reporter for The Wall Street Journal, primarily covering college sports in New York. Her coverage centers on the NCAA, both the results on the field and the ways the association is navigating this period of dramatic transformation. She grew up in Minneapolis and graduated from the University of Pennsylvania, where she was captain of the varsity women's swim team.]

These events galvanized moves that were already under way, including a handful of legal efforts that allege the NCAA and its member institutions have stifled athletes’ attempts to organize. Three charges of unfair labor practices relating to athletes are before the NLRB. A case arguing that schools have violated athletes’ ability to collect wages, brought against the NCAA by a former Villanova University football player, is being tried in the U.S. Court of Appeals for the Third Circuit in Pennsylvania. And, in Congress, several bills that aim to protect and expand college athletes’ rights have been introduced with bipartisan support.

That has some gaming out what athlete employment would actually look like.

In one scenario, only athletes in the handful of sports that generate a net profit, primarily football and basketball, would become salaried employees. Players could elect to unionize, either by team, conference or state, to collectively bargain their salaries—minimum wage, a predetermined share of the proceeds their program generates or some other amount—and working conditions, such as start times for morning practice, what meals they are served on road trips or vacation time.

“You could imagine revenue-sharing agreements... by which the higher earners do make more but the lower earners don’t make nothing,” Mr. Schwab says.

However, a model where a disproportionate amount of male athletes make money could violate Title IX, says Maddie Salamone, an attorney and former chair of the NCAA’s Student-Athlete Advisory Committee. The federal statute requires public institutions to provide equal benefits and financial assistance to men’s and women’s teams.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Two-track Model: two admission tracks can be implemented: one for students and one for athletes, with the latter being treated as paid employees of the university, allowing them to earn a degree after their playing career.

Eigen 14 – [Eigen J, Zev. “Why College Athletes Aren’t Really Employees - but Should Be.” HuffPost. March 31, 2014. https://www.huffpost.com/entry/why-college-athletes-aren_b_5063073] Elene.

[Zev. J. Eigen is the Global Director of Data Analytics at Littler Mendelson. He is a nationally recognized expert on data analytics as applied in the fields of human resources, labor and employment law, and contracts. His work focuses on developing artificial intelligence solutions to workplace problems. In 2013, Dr. Eigen was named one of forty under 40 “rising legal stars” in Chicago by the National Law Journal.]

Sometimes, there is a difference between how things should be, and how things are. Some college athletes should be employees, but they are not. **Many people seem to think it's unfair that some student athletes spend the majority of their time playing a sport, and the result is that the school profits from this.** They should be employees working for an employer. Not students. They should be athletes, playing in a minor league. That may be how it should be. But that is not how it is.

How much the university benefits or does not benefit has nothing to do with the question of whether the primary relationship is one of employment. That argument has always been a loser. If it were a winning argument, every non-profitable business could successfully argue that its workers are not eligible to form a union. Even so, some still feel like the current NCAA system doesn't seem fair since it appears to allow schools to take advantage of student athletes.

This gets us back from the world of "is" to the world of "should." Student athletes who receive free degrees in exchange for playing a sport are not employees. Should they be? Yes. What should change? **Universities should be required to use two "tracks" for admissions. There should be a "student" track, which is the traditional primary exchange of an education for money. "Students" may still try out for athletic teams, but they are students first and foremost. The second track is "Athlete." Athletes are paid employees of the universities. They would play in what is now like a defacto minor league in sports like basketball and football. The minor league would become more of a real thing than what it is now.** As part of their compensation, they could be permitted to earn a degree at the university sometime after their employment contract expires, up to a reasonable amount of time, say 20 years.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

NCAA v Alston

The Supreme Court ruled in 2021 that NCAA rules aren't exempted from anti-trust laws, thus freeing universities to pay student athletes

Totenberg 21— [“The Supreme Court Sides with NCAA Athletes in a Narrow Ruling.” 2021. NPR. June 21. <https://www.npr.org/2021/06/21/1000310043/the-supreme-court-sides-with-ncaa-athletes-in-a-narrow-ruling.>] Joel.

[Nina Totenberg is NPR's award-winning legal affairs correspondent. Her reports air regularly on NPR's critically acclaimed newsmagazines *All Things Considered*, *Morning Edition*, and *Weekend Edition*. Totenberg's coverage of the Supreme Court and legal affairs has won her widespread recognition. Totenberg has been honored seven times by the American Bar Association for continued excellence in legal reporting and has received more than two dozen honorary degrees.]

Faced with the prospect of reshaping college athletics, **the U.S. Supreme Court issued a narrow but potentially transformative ruling Monday in a case that pitted college athletes against the National Collegiate Athletic Association.**

At issue in the case were NCAA rules that limit educational benefits for college players as part of their scholarships.

The athletes maintained that the NCAA has, in effect, been operating a system that is a classic restraint of competition — in short, a system that violates the nation's antitrust laws. The NCAA countered that its rules are largely exempt from antitrust laws because they are aimed at preserving amateurism in college sports and because the rules "widen choices for consumers by distinguishing college sports from professional sports."

On Monday, however, **a unanimous court ruled that the NCAA rules are not reasonably necessary to distinguish between college and professional sports.**

Writing for the court, Justice Neil Gorsuch said that the NCAA "seeks immunity from the normal operation of the antitrust laws," an immunity which Gorsuch said is justified neither by the antitrust law nor the previous opinions of the Supreme Court. Noting that big-time NCAA sports have turned into a multibillion-dollar business, Gorsuch said that a couple of sentences from a 1984 opinion did not declare then or now that there is some sort of immunity based on the concept of amateurism.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

NCAA Founding

The NCAA was founded in 1906 to 1. bring safety regulations to college sports and 2. prevent professionals from playing college sports while pretending to be students

Shults 23—[Shults, Jennifer. 2023 “If at First You Don’t Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for ‘Employee’ Status.” <https://jlsplaw.columbia.edu/files/2023/04/Vol56-3-Shults.pdf>.] Joel.

[Jennifer Shults is Executive Managing Editor, Colum. J.L. & Soc. Probs., 2022–23. J.D. Candidate 2023, Columbia Law School. She’s a former women’s volleyball player for Harvard]

The NCAA grew out of an initiative to make college football less hazardous. 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. In 1905, a football crisis and a concerned U.S. President brought this era of unregulated competition to an end. Without safety measures in place, conditions for football players had become alarmingly dangerous— so dangerous that players were dying on the field. 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.

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

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. They also wished to maintain a distinction between college athletes and **“working class” athletes who relied on their athletic gifts to make a living.** The university leaders who opposed professionalism hailed from “society’s upper crust.” 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.

In 1906, the NCAA officially came into being. On paper, it had a sweeping, dual mission: to ensure **“fair play and eligibility”** and to **“remedy . . . abuses”** in college sports. 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, and the movement to eliminate professionalism from college athletics lost momentum. Consequently, when the NCAA released its first amateurism guidelines in the 1920s, most schools disregarded them. In the absence of a **“credible enforcement threat,”** the financial **“temptation to ignore [these optional] standards . . . was simply too great.”** Eventually, **around 1950, the NCAA introduced a series of bold measures that made its amateurism policies mandatory.** With this move, the NCAA dramatically strengthened its power over athlete compensation and college sports as a whole.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Numbers

There were over half a million NCAA athletes as of 2022

NCAA 22—[NCAA.org. 2022. “NCAA Student-Athletes Surpass 520,000, Set New Record.” NCAA.org. NCAA.org. December 5. <https://www.ncaa.org/news/2022/12/5/media-center-ncaa-student-athletes-surpass-520-000-set-new-record.aspx>.] Joel.

The number of student-athletes competing in NCAA championship sports in 2021-22 jumped to over 520,000, an all-time high, according to the latest data in the NCAA Sports Sponsorship and Participation Rates Report. The total number of championship teams sponsored across all divisions rose to 19,769 in 2021-22, nearly three-quarters of a percent more than the previous year.

The participation data represents a one-year increase of nearly 30,000 student-athletes. Division III saw the largest growth, with 17,515 additional student-athletes, followed by Division II (7,212) and Division I (4,488).

The uptick in 2021-22 more than recouped the 2.5% drop in championship sports participation reported from the previous year. This drop was the result of a combination of factors, including programs being cut due to budget impacts from the COVID-19 pandemic and schools closing or leaving the NCAA. Possible factors contributing to the latest increase include athletics department budgets returning to pre-pandemic levels, as well as an additional season-of-competition eligibility being provided to student-athletes.

In the 2021-22 academic year, student-athletes in NCAA men's championship sports made up 57% of the total participation. In 1981-82, when the NCAA began tracking participation rates annually, men's sports participants accounted for 72% of the student-athlete population.

Among sports with the most student-athletes in 2021-22, those with the largest increases from the previous year were in football (up 6,377, 9%), men's soccer (up 2,792, 11%), men's indoor track and field (up 2,136, 8%), women's soccer (up 2,030, 7%), women's indoor track and field (up 1,562, 6%), and women's volleyball (up 1,107, 6%).

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Aff

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Anti-Trust

The NCAA's amateurism model fosters a monopoly where coaches and administrators benefit disproportionately from the revenues.

Siegfried & Sanderson 19 - [Siegfried, John. Sanderson, Allen. "The case for paying college athletes" Interview by Chris Fleisher. September 18, 2019 <https://www.aeaweb.org/research/case-to-pay-student-athletes-sanderson-siegfried-interview>.] Elene.

[John J. Siegfried is Professor of Economics, Emeritus, at Vanderbilt University, and Secretary-Treasurer of the American Economic Association.

Allen Sanderson is a senior instructional professor in economics at the University of Chicago. He served eight years as associate provost of the University; and has also been a senior research scientist at NORC. He has also led three interdisciplinary team-taught courses: "Inequality: Origins, Dimensions & Policy"; "UChicago Economics: The People and the Seminal Ideas"; and "Sport, Society and Science." He has received a Quantrell Award for Excellence in Undergraduate Teaching]

Allen Sanderson and John Siegfried have been arguing for years that the system needs to change.

John Siegfried: Economists usually accept the competitive market outcome as acceptable and fair. **But in this case there is not a competitive market outcome. There are rampant market imperfections here, and as a result, there are a monopoly profits going to people who control things. That includes coaches and administrators at the universities, staff and administrators at the NCAA.**

AEA: Could you give us a sense of how profitable these programs are and what has led to this revenue growth at these large programs?

Allen Sanderson: I think you need to separate out revenue from profits. As an example, in men's basketball in 1984, CBS paid the NCAA \$12 million (adjusted for inflation) to broadcast March Madness, the men's basketball tournament. For the 2019 tournament, they paid them more than \$1 billion. That's a gigantic increase in revenue. **There are a lot more revenues, huge amount, of which the athletes are getting approximately none of it. In terms of profitability, there aren't that many division one teams that actually turn a profit because the revenues are gobbled up by other expenditures on campus.** It could be from the stadiums to the practice facilities, to the locker room, to whatever, so in the end, they spend more than what they get.

Siegfried: Their main argument goes back to the early 1950s when the then executive director of the NCAA Walter Byers coined the term "student athlete." **It's very important to the NCAA that it be "student athlete", not "athlete student." They emphasize that these players are students and that's their first responsibility and this is just a side activity that they're participating in.** At the beginning, that was a pretty fair representation of it. But the revenues have grown to astronomical amounts that make it sort of silly to think of this as a hobby rather than as a business today.

Sanderson: **Also, "student athlete" has a much nicer appeal than "exploited worker."**

AEA: What would the structure of a fair compensation system look like?

Sanderson: That's a good question. **I agree that the current model isn't sustainable. The NCAA is going to continue to lose in the courts** and, at some point, universities having most of them losing money in Division 1 football, are going to have to figure out at what point we stop doing this because it's costing them. So it's not clear whether paying the players could move to a development league, a minor league in football or basketball like you have in baseball. It could be that the athletes are paid or some money is put into a pot that later on post graduation or post graduate experience, former players could draw on to go back and finish their degrees, or get an MBA, or start a small business. There are a variety of ways in which that compensation could get to them.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Compensation

Financial Burden: Paying college athletes would alleviate financial pressures on them and their families, allowing athletes to focus more on their studies and sports.

Miller 17 - [Miller, Keith. "6 Advantages and Disadvantages of Paying College Athletes." FutureofWorking.com. January 14, 2017. [https://futureofworking.com/6-advantages-and-disadvantages-of-paying-college-athletes/.](https://futureofworking.com/6-advantages-and-disadvantages-of-paying-college-athletes/)] Elene.

[Keith Miller has over 25 years of experience as a CEO and serial entrepreneur. As an entrepreneur, he has founded several multi-million dollar companies. As a writer, Keith's work has been mentioned in CIO Magazine, Workable, BizTech, and The Charlotte Observer.]

Paying athletes would eliminate the need for additional employment. Scholarships might pay for books, tuition, and the other common costs of going to college, but they don't pay every expense that a student might have. **It is not unusual for athletes to find a job outside of their sport and classroom schedule so that they have some spending money to use. Some students don't qualify for a scholarship, so they're forced to pay their way while also participating in their sport as a walk-on.** This process gives them an opportunity to earn one in the future, but paying them for their service would allow them to concentrate on their studies and athletics without as many distractions.

Student-athletes receive thousands of dollars in support from their families as they pursue the college experience. **Failing to abide by the NCAA rules, including the offer of an autograph for compensation, can make someone ineligible to play. Unless there are grants, student loans, or scholarship funds available, the cost of going to school falls on the support system of the student unless they earn a chance to play professionally.** Since less than 2% of today's student-athletes will become tomorrow's pro players, paying them while in school would become the equivalency of a work-study program.

Since all student-athletes would likely earn a paycheck for their activities, walk-ons could earn an opportunity to reduce the financial impact of their tuition, room, and board. That means the cost of going to college would go down if you were willing to take up a sport and make the team. Students would gravitate toward the programs that offered them the most money or additional playing time, which means there could be a surge in facility upgrades throughout all of the NCAA divisions.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Impact: Education. Paying college athletes could alleviate financial pressure, enabling them to focus on academics and athletics without the need for additional work. This approach might encourage athletes to complete their education before pursuing professional opportunities.

Bouchrika 22 – [Bouchrika, Imed. “Why Should College Athletes Be Paid?” Research.com. Research.com. November 22, 2022. <https://research.com/education/why-should-college-athletes-be-paid>.] Elene.

[Professor Imed Bouchrika, PhD is the chief data scientist contributing to the foundation of the academic research portal Research.com where he is responsible for the categorization of academic entities into various academic disciplines using machine learning methods.]

The relationship between athletics and academics is unique in the United States. Academics may criticize the impact of intercollegiate sports on student cultures, institutional spending, and campus priorities, but intercollegiate athletics helps explain American higher education's global dominance.

Paying athletes reduces the need for additional work. Student scholarships may pay for books, tuition, and other common college costs, but they do not cover all of a student's expenses. Other athletes pay their expenses and compete as walk-ons because they do not meet the scholarship requirements. **As a result, athletes frequently work outside of sports and academics to supplement their income, making this a primary argument for why should college athletes get paid. Paying them for their services would allow them to concentrate on their studies and athletics without being distracted.**

Paying college athletes would be equivalent to a work-study program. Unless there are grants, student loans, or scholarships available, the cost of attending school falls on their family or other support systems. **It is fortunate if a student is allowed to play professionally, but since it can be true for less than 2% of the students, paying them while they are still in school would benefit many families financially.**

College athletes who are paid may be more willing to stay at their school for a longer time. Star athletes frequently leave school after receiving a professional offer, with many never returning to finish their education. Ensuring that student-athletes are paid may not only alleviate the financial burden that some families face when sending their children to college. It may also encourage college athletes to stay for education before going pro.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Exploitation

The term ‘student-athlete’ was invented to make it easier to exploit college students

Sugrue 23—[Sugrue, Liam. n.d. “THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT’S LATEST RULING on PAYING COLLEGE ATHLETES.” <https://www.hofstrajbl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

[³⁴ Taylor Branch, The Shame of College Sports, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.]

While student-athletes earn nothing for their labor, their coaches profit greatly. Data from 2013 showed that the highest paid public official in each of the fifty states in the U.S. were primarily coaches; only eleven states had highest paid public officials who were noncoaches. In 2020, not a single public official on this list is unrelated to a school or university, and there are now only ten states whose highest paid public officials are non-coaches.³⁰ As Justice Kavanaugh said in his Alston concurrence,

The bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student-athletes. College presidents, athletic directors, coaches conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish facilities. But the student-athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, wind up with little or nothing.

The term “student-athlete” itself is a progeny of the NCAA’s exploitive past and practices. It is a legal term that the NCAA created in the 1950s in order to combat worker’s compensation claims for injured collegiate athletes.

The term student-athlete was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). **That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies.**³⁴

The first “student-athlete” was Ray Dennison, who died from a head injury he received while playing college football for Fort Lewis A&M in Colorado. **When Dennison’s estate filed for workmen’s compensation death benefits, the NCAA created the designation of “student-athlete” and argued he was not eligible for benefits due to the fact the college was “not in the football business;”** the Colorado Supreme Court affirmed this argument. With the exploited class now defined, the next step is to correct the many mistakes of the past.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Injuries

Injuries: College athletes are prone to potentially career-ending injuries. Denying them payment undermines their contributions and aspirations.

Patterson 23 - [Patterson, Tiffany. "Should College Athletes Be Paid?" SmartAsset. September 8, 2023. <https://smartasset.com/retirement/should-student-athletes-be-paid>.] Elene.

[Tiffany Patterson has a BA in Political Science from Temple University and an MBA from La Salle University Business School with a concentration in Finance. She is an expert on topics including home buying, life insurance and credit cards.]

The debate over whether college athletes should be paid for their services has existed for decades. Proponents of paying athletes contend that many of **these students spend almost a conventional work week participating in athletic activities. They also bring in mountains of revenue for their universities.**

College athletes put their bodies on the line each game they play. There have been numerous instances of players becoming paralyzed by hits or tackles on football fields, or suffering career-ending ligament injuries on the basketball court. While professional athletes who suffer such injuries may have already made millions over the course of their careers, it's a very different story for unpaid college athletes. Elite college athletes on the cusp of an eventual professional career may be faced with the prospect of never realizing their professional dreams – and never earning a dollar for their skills.

Student-athletes generate serious revenue. In 2017, the NCAA reached a financial milestone when it reported \$1.1 billion in revenue. College athletes, especially those who excel in football or basketball, help their schools generate revenue through ticket sales, appearances at alumni fundraising events and, more abstractly, through promotion of the school's brand.

According to a 2017 NCAA survey, **Division I student athletes spend an average of 35.4 hours per week on athletic activities during the season. If a college athlete were to spend those 35.4 hours working at the federal minimum wage, they'd have an extra \$1,000 a month.** That's not insignificant to a college student.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

College athletes face significant financial risks when they get injured, lacking the protections afforded to employees. Without compensation or workers' rights, they may lose scholarships, face medical bills, and struggle to continue their education.

Borken 18 - [Borken, Joshua. Law Office of Joshua Borken. "Are College Athletes Considered Employees?" minnesotacomp.com September 9, 2018. <https://www.minnesotacomp.com/blog/2018/09/are-college-athletes-considered-employees/>] Elene.

[Joshua Borken is an attorney who received his Bachelor of Arts degree in political science from the University of Minnesota. He went on to attend Hamline University School of Law, where he received his Juris Doctor. In addition to making the Dean's List four semesters in a row, Josh also represented clients with employment law claims in the school's clinic program.]

While the argument over whether or not to pay college athletes may never be resolved, **what is most concerning is what happens when an athlete gets hurt. Like an employer, universities with sports teams are required by law to have insurance that covers their medical expenses.** However, even with insurance, there are things that they might not cover. **This leaves players and their families responsible for the cost of copays, surgeries, and physical therapies.**

Worse yet, **if an injury prevents a college athlete from playing, they could lose their scholarship that pays for their education.** This can mean they could not only become financially responsible for continuing their education, but forced to pay medical bills that can amount to the equivalent of a college education.

It doesn't seem very fair, does it? In a way, college athletes are treated way worse than an employee because they are not afforded the same rights. If an employee anywhere in the United States got hurt at work, they would be entitled to worker's compensation to cover their medical expenses and they would be protected from losing their wages by law. **Student athletes are afforded no such rights and yet their schools profit immensely from their skill.**

So what can injured school athletes do about it? **As many believe that the NCAA uses the term "student athlete" specifically to avoid compensation and workers compensation claims, for student athletes that are unfamiliar with the law, it may seem very hopeless.** They may have to drop out of school and even get a job while still hurt specifically because they lost their scholarship and have medical bills to pay. That means so much potential is essentially buried under a mountain of debt.

However, while the area of student athletes and workers compensation or wage loss in terms of losing a scholarship is a very vague and new area of law, it will likely be a growing one. **There have been numerous pushes for injured athletes to receive lost wages after they lost their scholarship, such as the case of former Rice University football player Joseph Agnew who sued the NCAA after losing his scholarship due to shoulder and ankle struggles.**

In the case of Agnew, he actually won back his scholarship for his junior year, but he was still forced to pay for his senior year as well as his medical bills.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

NLRB / NLRA

National Labor Relations Board General Counsel Jennifer Abruzzo asserts that certain college athletes should be considered employees under the National Labor Relations Act

Abruzzo 21 - ["NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions | National Labor Relations Board." Www.nlr.gov. September 29, 2021. <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of>] Joel.

[Jennifer Ann Abruzzo is an American attorney and government official who serves as General Counsel at the NLRB. She previously was Special Counsel for Strategic Initiatives for Communications Workers of America (CWA), the largest media and communications union in the United States.]

Today, National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum to all Field offices providing updated guidance regarding her position that certain Players at Academic Institutions (sometimes referred to as student athletes), are employees under the National Labor Relations Act, and, as such, are afforded all statutory protections.

The memo further advises that, where appropriate, **she will allege that misclassifying such employees as mere "student-athletes" and leading them to believe that they are not entitled to the Act's protection has a chilling effect on Section 7 activity and is an independent violation of Section 8(a)(1) of the Act.**

"Players at Academic Institutions perform services for institutions in return for compensation and subject to their control. Thus, the broad language of Section 2(3) of the Act, the policies underlying the NLRA, Board law, and the common law fully support the conclusion that **certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment,**" said General Counsel Abruzzo. "My intent in issuing this memo is to help educate the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, about the legal position that I will be taking regarding employee status and misclassification in appropriate cases."

Recent developments bolster General Counsel Abruzzo's position, including: the U.S. Supreme Court's recent unanimous decision in *NCAA v. Alston*, that recognized that college sports is a profit-making enterprise, rejected the NCAA's antitrust defense based in the notion of amateurism in college athletics, and expanded permissible types of education-related compensation that had been limited by the NCAA, such as payments for tutoring or scholarships for graduate or vocational schools; and the Players' recent collective actions about racial justice issues and demands for fair treatment, as well as for safety protocols to play during the pandemic, which all directly concern their terms and conditions of employment.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

The National Labor Relations Board may have jurisdiction over the NCAA and its student athletes—thus, NCAA students should be classified as athletes under the NLRA

Fisher Phillips 23 — [“Labor Board Advances Claims That Student-Athletes Are Employees: What Does Your Athletic Department Need to Know?” 2024. Accessed February 3. <https://www.fisherphillips.com/print/v2/content/32120/labor-board-advances-claims-that-student-athletes-are-employees%3A-what-does-your-athletic-department-need-to-know.pdf>] Joel.

[Fisher Phillips, LLP is one of the largest U.S. law firms representing management in the areas of labor, employment, civil rights, corporate compliance and governance, data security, employee benefits, and immigration law.]

Fast forward to 2021 and **GC Abruzzo issued a nine-page memorandum announcing her belief that student-athletes were “employees” under the NLRA and that she would look to prosecute colleges, conferences, and the NCAA itself for alleged labor law violations** — which practically invited groups to file unfair labor practice charges. Two organizations came off the bench in response to GC Abruzzo’s call. First, the College Basketball Players Association filed a charge in Indianapolis, naming only the NCAA as the supposed employer. That case remains under investigation but has evidently been put on ice.

Second came **the case against Southern California, which was filed in February 2022 by a different “advocacy” group, the National College Players Association. This charge claimed that USC, its athletic conference, and the NCAA all jointly employ USC’s student-athletes and are thus jointly liable for any alleged labor law violations.** After a lengthy investigation by the NLRB’s regional office in Los Angeles, GC Abruzzo and her team filed the pending complaint late last week on May 18.

At its heart, **the complaint alleges that USC’s football and men’s and women’s basketball players are statutory employees, and the various rules imposed on student-athletes violate their supposed right “to engage in protected concerted activity.”** **The complaint also alleges that merely calling the athletes “student-athletes” is an independent violation of the NLRA in that the term “student-athlete” is allegedly used to deprive the athletes of their labor law rights.**

Though these charges are significant on their own, **naming USC’s athletic conference and the NCAA as putative joint employers is particularly noteworthy.** One of the reasons the NLRB declined to pursue the Northwestern case was because the NLRB lacks jurisdiction over public entities that sponsor the overwhelming majority of Division I football and basketball programs.

The Board was unwilling to have a few teams with employee status and the right to unionize, while others would not have such rights. **GC Abruzzo’s untested (and unsupported) joint employer theory seeks to pull public institutions into the NLRB’s ambit by claiming that because athletic conferences and the NCAA are private entities subject to the NLRB’s jurisdiction and because the conferences and the NCAA allegedly exert control over certain terms and conditions of the student-athlete’s playing conditions, even student-athletes at public institutions can all be considered “employees” of a conference or the NCAA.** This, GC Abruzzo believes, is sufficient to confer NLRB jurisdiction over all of college football and basketball.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Optics

Prison Analogy: not paying college athletes has been justified under the same law that prevents prisoners from being paid

Saporito 23 - [Saporito, Bill. "Opinion | the NCAA's Position on Not Paying Athletes Is Worse than Tone Deaf." Washington Post, May 22, 2023. <https://www.washingtonpost.com/opinions/2023/05/22/college-athletes-payment-ncaa-lawsuit/>] Elene.

[Bill Saporito is an assistant managing editor of TIME and directs the magazine's coverage of business, the economy, personal finance and sports. He directed TIME's coverage of the global financial crisis, writing and editing stories about the stock market, investing, the mortgage industry. Previously, he was a senior editor at Fortune, where he was a member of the publication's board of editors. He began his career at the New York Daily News. Saporito received a B.A. from Bucknell University and an M.A. from Syracuse University. He and his wife live in Manhattan.]

It's true that if you play football for Penn State or Alabama or UCLA in the Power Five conferences, you get compensated in the form of one of the 85 full-ride football scholarships each school dole out, worth some \$100,000 apiece — never mind that only 11 of those guys can be in any one play. Depending on your school, you are also entitled to things such as laptops and other help, including academic performance bonuses.

But if you are a middling middle linebacker at Not Quite the Ohio State U and need to buy toothpaste or a burger and don't have the funds, the NCAA still says, "Too bad. Ask Mom and Dad." Meanwhile, some of your classmates are working in the bookstore or at the dining service for beer money. Why shouldn't you be compensated like the hot-dog sellers in the stadium where you perform?

The NCAA takes the position that student-athletes shouldn't be paid minimum wage for the hours they spend on the field because playing sports has long been part of the educational experience, so they aren't covered by the Fair Labor Standards Act. In the NCAA's view, sports teams are more like the glee club, the marching band or other student groups.

The NCAA is citing case law, specifically a case called Vanskike v. Peters, as an example of an exempted class of workers. That exemption is contained in the 13th Amendment, the one that outlawed slavery, with the exception of prison labor. The condensed version of the NCAA's argument is thus: College athletes are like prison laborers.

Come fall, many of the nation's more than 520,000 college athletes will be taking the field again. Schools with enough money can pay, helping them attract top athletes; others will do what they've always been doing, recruiting athletes who are willing to pay to play, as I was, just for the joy of sport — and then the joy of lying about how good we once were as we get older.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Slavery Analogy: not paying college athletes has been justified under the same law that prevents prisoners from being paid

Sugrue 23—[Sugrue, Liam. n.d. “THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT’S LATEST RULING on PAYING COLLEGE ATHLETES.” <https://www.hofstrajibl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

[25 Kevin B. Blackstone, It’s not wrong to say college sports is like slavery. It’s wrong that no one’s trying to fix that, THE WASH. POST (May 8, 2018, 5:20 PM), https://www.washingtonpost.com/sports/colleges/its-not-wrongto-say-college-sports-is-like-slavery-its-wrong-that-no-ones-trying-to-fix-that/2018/05/08/564b789c-52df1e8-9c91-7dab596e8252_story.html (quoting Kyla Carter, mother of NBA player Wendell Carter Jr.).]

The NCAA “purports as one of its major principles: ‘Student-athletes shall be amateurs...and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived...[S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.’” However, **despite the NCAA’s aim to protect student-athletes from exploitation, their actions demonstrate a masterclass in hypocrisy.** In 2019, the NCAA athletics programs had an annual revenue of approximately \$11 billion. Their revenue production surpassed the estimated totals of two major professional leagues; namely the National Hockey League (“NHL”) and the National Basketball Association (“NBA”). Yet, unlike student-athletes, professional leagues athletes are granted contracts and endorsements as compensation. In 2018, the University of Alabama alone generated more revenue through their athletics program than twenty five NBA teams. The student-athletes who laboriously generated this revenue for the university received no compensation. Labor without compensation has historically gone by another name: slavery.

[W]ith a system like the only system that I have ever seen, where the laborers are the only people that are not being compensated for the work that they do, while those in charge receive mighty compensation. The only two systems that I’ve known that to be in place, is slavery, and the prison system. And now I see the NCAA as overseers of a system that is identical for that.²⁵

Of course, student-athletes are not literal slaves since they are free individuals and receive compensation from their universities through scholarships and education. However, the comparison between student-athletes and slaves has been common in the past and even addressed, albeit satirically, in media and television shows such as South Park.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Prestige

Applications & Donations: Student-athletes can significantly boost their school's exposure and prestige that can increase the number of applications and donations.

Drozdowski 23 - [Drozdowski, Mark. "Should College Athletes Be Paid?" BestColleges.com. March 10, 2023. <https://www.bestcolleges.com/news/analysis/2021/09/07/should-college-athletes-be-paid/>] Elene.

[Mark J. Drozdowski, Ed.D., is a senior writer and higher education analyst with BestColleges. He has 30 years of experience in higher education as a university administrator and faculty member and teaches writing at Johns Hopkins University. Mark holds a bachelor's degree in American history from the University of Pennsylvania and a master's degree and doctorate in higher education from Harvard University.]

Some argue student-athletes are "paid" through full scholarships, something most college students can only dream about — and that's partially true. According to the NCAA, over 150,000 Division I and Division II student-athletes receive \$2.9 billion in scholarships each year (Division III schools don't offer athletic scholarships).

The exposure student-athletes bring to their schools can boost applications and donations. The Flutie Effect on college admissions - named for Doug Flutie, the Boston College quarterback who put his institution on the map in 1984 with his famous Hail Mary pass against the University of Miami and his Heisman-winning season - can be dramatic. **For BC, the effect was a 30% increase in applications over two years. A study showed that when a football team "rises from mediocre to great," applications increase 18.7%.**

Sports considerable time commitment cuts into students' study time. Leaving aside barbs about the "student" part of "student-athlete," **how is an athlete supposed to keep up with academics during their playing season? What about earning good grades and positioning oneself for the competitive job market? Might some form of financial compensation make this compromise easier to take?**

Like other college students, athletes need spending money. Even if a student receives a full-ride scholarship, the award doesn't provide pocket money for incidentals and entertainment. If a student doesn't hold a part-time job, where does that money come from (besides their parents)?

Rankings & Infrastructure: Athletic programs boost university branding, reputation, rankings, and state infrastructure

Sugrue 23—[Sugrue, Liam. n.d. "THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT'S LATEST RULING on PAYING COLLEGE ATHLETES." <https://www.hofstrajbl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

Collegiate sports are far more than just games being played by teenagers and young adults; they are a staple of American entertainment. College sports represent an essential and important aspect of American society; having indispensable impacts on a plethora of public arenas, including economics and the mass media. **"College athletics programs represent a multi-billion dollar industry and are integrally linked to school branding and reputation." These programs bring many benefits to colleges and universities having far-reaching implications on their admissions, rankings, students, faculty and communities.** It is fair to say that the scope of college athletics has permeated every portion of American higher education, affecting students enrollment decisions, town and state infrastructure, and many other socioeconomic areas.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Profiteering

10 bil: The NCAA makes \$10+ billion per year – more than the NHL or the NBA

Sugrue 23—[Sugrue, Liam. n.d. “THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT’S LATEST RULING on PAYING COLLEGE ATHLETES.” <https://www.hofstrajibl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

The NCAA “purports as one of its major principles: ‘Student-athletes shall be amateurs...and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived...[S]tudent-athletes should be protected from exploitation by professional and commercial enterprises.’” However, despite the NCAA’s aim to protect student-athletes from exploitation, their actions demonstrate a masterclass in hypocrisy. **In 2019, the NCAA athletics programs had an annual revenue of approximately \$11 billion.** Their revenue production surpassed the estimated totals of two major professional leagues; namely the National Hockey League (“NHL”) and the National Basketball Association (“NBA”). Yet, unlike student-athletes, professional leagues athletes are granted contracts and endorsements as compensation. **In 2018, the University of Alabama alone generated more revenue through their athletics program than twenty five NBA teams.** The student-athletes who laboriously generated this revenue for the university received no compensation. Labor without compensation has historically gone by another name: slavery.

7%: Only 7% of NCAA revenue flows back to the students, mainly through scholarships and living expenses

Murry 22— [Murry, Tyler J. 2022. “The Path to Employee Status for College Athletes Post-Alston.” Scholarship@Vanderbilt Law. <https://cdn.vanderbilt.edu/vu-URL/wp-content/uploads/sites/356/2022/06/20025358/4.-Murry-Note.pdf>] Joel

[Tyler Murry is an Attorney, a Capital Markets/Securities Associate at Haynes and Boone, LLP. He graduated from Vanderbilt University Law School with a JD, and from University of Missouri with a journalism major.]

College athletics is a multibillion-dollar industry that grows each year, yet only about 7 percent of profits make it back to the industry’s key players, student athletes, solely through scholarships and living expenses. From 2003 to 2018, the annual revenue of college sports programs soared from \$4 billion to \$14 billion; this exceeded the revenues of three professional sports organizations, the National Hockey League, the National Basketball Association, and Major League Baseball, in 2016. **Some universities sign lucrative apparel deals and also earn up to \$250 million per year from creating their own school specific television channels for athletics.** The NCAA itself generates large amounts of revenue from college sports and, starting in 2025, will earn more than \$1.1 billion annually by licensing the television broadcasting rights for March Madness games. Meanwhile, conferences within the NCAA generate millions of dollars in profit; the Power Five (an informal designation for the five conferences with the highest quality sports programs) had a combined revenue that rose by nearly 260 percent from 2008 to 2018. Many college coaches also have six- or seven-figure salaries—a college coach is the highest-paid state employee in 80 percent of states, while at least eighty-six college coaches make at least \$1 million per year.

Student athletes can only benefit from these profits through scholarships, meals, or living stipends, and on average are no better off financially than the average American at their age. Depending on the sport, student athletes typically spend upwards of fifty hours per week on athletic activities. The amount of time spent on athletics causes many student athletes to feel as though they do not have the time for academic obligations. For example, 80 percent of PAC-12 student athletes reported missing at least one class due to athletic

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

commitments during the 2014–15 school year. **Despite the sacrifices that most student athletes make, their time commitment rarely results in a professional sports career—less than 2 percent of NCAA student athletes go on to play professionally. Notwithstanding the statistics, many student athletes believe that they will play at the next level and thus do not sufficiently plan for a different career, resulting in scores of student athletes leaving school with little-to-no financial benefit from their time in college.**

Diversion: The current system, rewards profiting off of student athletes— the money that would have gone to athlete salaries is instead diverted into other aspects of the program, such as coaches salaries and facility upgrades.

McLaughlin & Rotthof 16 - [McLaughlin, Patrick. Rotthoff, Kurt. “College Football Players, Not Coaches, Deserve to Be Paid” Mercatus Center. January 7, 2016.<https://www.mercatus.org/economic-insights/expert-commentary/college-football-players-not-coaches-deserve-be-paid>.] Elene.

[Dr. Patrick A. McLaughlin is the Director of Policy Analytics and a Senior Research Fellow at the Mercatus Center at George Mason University. His research focuses primarily on regulations and the regulatory process. Prior to joining Mercatus, Dr. McLaughlin served as a Senior Economist at the Federal Railroad Administration in the United States Department of Transportation and as a Visiting Scholar at the Regulatory Studies Center at George Washington University. He holds a Ph.D. in economics from Clemson University.

Kurt Rotthoff earned his Ph.D. from Clemson University in 2007. His research interests include applied microeconomics, financial economics, and industrial organization, with a focus on the application of economics and finance to the sports industry and the economics of education.]

A long-standing debate recurs every time a college football player suffers a career-threatening injury: **Should college athletes be paid? After all, in a violent sport, players risk suffering a career-ending injury.**

In a normal labor market, employees who take on risks are compensated for it. But the list of NCAA football players who suffer debilitating injuries keeps growing.

It’s obvious to many that college players should be paid for the risks they take and the value they create. But there’s another consequence of the system that’s often overlooked. **Because college players can’t be paid, the money that would go to them in a normal labor market shifts to other parts of the program — like coaches.**

Ohio State University’s football coach, Urban Meyer, recently said that collegiate coaches are overpaid. The reason college coaches are overpaid is because the salaries of their employees — the players — aren’t determined by market forces.

The salaries that would be paid to the players is instead paid to the coach.

If schools feel that student-athletes shouldn’t be paid while they’re in school, the funds could be held until after college — maybe even paying a bonus for those who graduate.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Black Markets: there are black markets in college sports, where some star athletes receive under-the-table payments or off-the-books compensation, often arranged by boosters or athletic directors.

Young 22 - [Young, Ryan. "The Case for Paying College Athletes | AIER." Www.aier.org. American Institute for Economic Research. April 9, 2022. <https://www.aier.org/article/the-case-for-paying-college-athletes/>.] Elene.

[Ryan Young is a Senior Fellow at the Competitive Enterprise Institute (CEI). His research focuses on regulatory reform, trade policy, antitrust regulation, and other issues. He holds an M.A. in economics from George Mason University in Fairfax, Virginia, and a B.A. in history from Lawrence University in Appleton, Wisconsin.]

College players are **unpaid laborers who generate millions of dollars for others.**

Big-time college sports are, in fact, a business. There is nothing amateur about the NCAA's \$1.15 billion in revenue, its marketing deals, college coaches' and athletic directors' salaries, or the amount of time many athletes put in to compete at a high level.

The third reason is practical: **Black markets exist. Some star college players will always be paid, no matter what the NCAA says. It should be above the table so schools and the NCAA can keep a better eye on it.** As of last year, some college athletes may now make money from their name, image and likeness (NIL), which were previously the NCAA's property. The new interim NIL policy means that some players can now make money from endorsements, sell T-shirts and other branded merchandise, and make paid public appearances. The NIL rule also applies to teams. Georgia Tech, for example, made a deal to promote TiVo on its sports teams' social media accounts. Some players received a prepaid debit card for \$404 to match Atlanta's 404 area code, plus some merchandise.

College sports are big business, amateur or not. **College athletes receive almost none of the revenue they generate, beyond scholarships.** By contrast, the major professional leagues pay players between 50 percent and 60 percent of revenue. **That is no problem for the few college athletes who go on to NBA or NFL careers, but for most athletes, whose sporting careers end when college does, it is unfair.**

Paying athletes would also finally acknowledge an open secret: Some college athletes will always get paid, no matter the rules. Boosters have long paid star athletes under the table. **Off-the-books compensation is a routine part of the recruiting process, though not all of it is paid in money.** Once a recruit is on campus, athletic directors sometimes arrange no-show jobs. College athletes aren't allowed to have agents, but that happens anyway. Colleges might as well acknowledge the inevitable and bring these activities above ground to help prevent abuses.

College sports can be thrilling to watch, whether it is this year's Cinderella busting everyone's bracket, seeing new stars shine for the first time, or cheering for your alma mater. But off the playing field, things are a lot less thrilling for the players.

The NCAA is a cartel, and acts like one. The new NIL rules are the start of something fairer and more honest. But it isn't enough. Players should be paid for the value they create, same as everyone else.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Racism

Racial Optics: most high-profit-generating sports players are black

Higgins 22— [Higgins, Laine. 2022. “Should College Athletes Be Paid? A Once-Radical Idea Gains Momentum.” Wall Street Journal, July 24, sec. Life. <https://www.wsj.com/articles/college-athlete-pay-ncaa-employees-11658502884>.] Joel.

[Laine Higgins is a sports reporter for The Wall Street Journal, primarily covering college sports in New York. Her coverage centers on the NCAA, both the results on the field and the ways the association is navigating this period of dramatic transformation. She grew up in Minneapolis and graduated from the University of Pennsylvania, where she was captain of the varsity women's swim team.]

The National Collegiate Athletic Association has for decades fought to protect its founding principle of amateurism, defined in its constitution as competition for athletes who “have not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport.” In the 1950s, NCAA President Walter Byers coined the term “student-athlete” to differentiate college athletes from professionals.

It’s a fight that has become harder and harder for the NCAA to justify as college sports turned into a billion-dollar business in the 21st century. With money flooding into athletic departments from lucrative television contracts, schools spent lavishly on facilities, stadium upgrades and ever-higher salaries for coaches.

Money flowed to practically everyone except the athletes on the field. It created uncomfortable optics given that the majority of participants in the highest grossing sports—football and men’s basketball—are Black. Mr. Byers, the NCAA president, later characterized college sports as having a “neo-plantation mentality” where “the coach owns the athlete’s feet, the college owns the athlete’s body,” and wrote in his memoir that he regretted creating the “student-athlete” term.

Advocates of college athletes being paid argue that they should be treated no differently than any other student employed by the school in the library or cafeteria, for example.

Over half: Black students make up more than 50% of the highest-earning sports, despite making up less than 6% of the total student body

Kalman-Lamb et al. 21—[Kalman-Lamb, Nathan, Derek Silva, and Johanna Mellis. 2021. “‘I Signed My Life to Rich White Guys’: Athletes on the Racial Dynamics of College Sports.” The Guardian. The Guardian. March 17. <https://www.theguardian.com/sport/2021/mar/17/college-sports-racial-dynamics>.]

[Nathan Kalman-Lamb is Assistant Professor of Sociology at the University of New Brunswick. His teaching and research focus on social theory, labor, and sport

Derek Silva is Associate Professor of Sociology and Criminology at King’s University College. His work focuses on culture, sport, racism, and crime and punishment

Johanna Mellis is Assistant Professor of History at Ursinus College outside of Philadelphia. She teaches about and researches European and world/international history, sport, the Cold War, imperialism, and nationalism and memory]

Based on the NCAA’s own figures, at the predominantly white institutions (PWIs) that comprise the Power Five, as of the 2019-2020 season, Black students comprise only 5.7% of the population. Yet, in the Power Five, Black athletes make up 55.9% of men’s basketball players, 55.7% of men’s football, and 48.1% of women’s basketball. At some schools, the numbers are particularly startling. Texas A&M, the second-highest athletic revenue earning institution in US college sports, has only 3.1% Black students in the general student body. Yet, its college football team is 75% Black, and its women’s basketball team 92.9%. It is hard to deny from these numbers that Black athletes are admitted into institutions that usually ignore them specifically to have their labor exploited for the universities’ gain.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

These numbers are all the more galling given recent events. When Texas Longhorns football players did not remain on the field during the singing of The Eyes of Texas this fall because of what they called the song's "racial undertones," wealthy alumni threatened to pull donations and spammed the university with racist vitriol. One particularly troubling email sent by donor Larry Wilkinson read "less than 6% of our current study body is black...the tail cannot be allowed to wag the dog....and the dog must instead stand up for what is right. Nothing forces those students to attend UT Austin. Encourage them to select an alternate school...NOW!" As a consequence of these letters, players were told that if they did not participate, they could lose access to job opportunities after graduating.

Impact: Black athletes are deprived of up to \$1.4 billion / year by the failure to get paid for their services

Shults 23—[Shults, Jennifer. 2023 "If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for 'Employee' Status." <https://jlsplaw.columbia.edu/files/2023/04/Vol56-3-Shults.pdf>.] Joel.

[Jennifer Shults is Executive Managing Editor, Colum. J.L. & Soc. Probs., 2022–23. J.D. Candidate 2023, Columbia Law School. She's a former women's volleyball player for Harvard]

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. Yet, roughly eighty-five percent of these athletes live below the poverty threshold. 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.

Amateurism policies have had a glaringly disparate impact on Black athletes, depriving Black football and basketball players at the Power Five level, where "college sports are most commercialized and lucrative," of approximately \$1.2 to \$1.4 billion per year. They have also harmed women's programs by, among other things, indirectly capping their funding.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Service Providers

Student-athletes perform services for their college or university, similar to other students employed in athletic events such as ticket takers and concession workers. They fulfill roles that contribute to the institution's operations and therefore should be classified as employees entitled to the same rights and benefits.

LaPorta 23 - [LaPorta S, Sean. "Student-Athletes or Student Employees." McLane Middleton. October 16, 2023. <https://www.mclane.com/insights/student-athletes-or-student-employees/>] Elene.

[Sean is an associate in the Education Law Practice Group, and has focused his practice on serving the needs of both students and educational institutions as they navigate legal and practical issues. He has extensive experience working closely with small to large educational institutions, where he provides advice and analysis on a wide variety of issues, including employment and board of trustee policies. Sean provides services regarding employment contracts, waivers, severance agreements, compliance, risk analysis, and navigating state and federal laws.]

While an employee/employer relationship may seem clear-cut in our day-to-day lives, in practice, it is not. Under the Fair Labor Standards Act ("FLSA"), **an employee is defined as "any individual employed by an employer."** Such a definition provides little guidance as to what an employee/employer relationship may look like—especially when the parties do not agree as to whether such a relationship exists. As such, the determination of whether or not a student-athlete is an employee of their college or university is left to the courts.

Student-athletes have long argued that they should be considered employees. Student-athletes point out that other students involved in athletic events may be employees of their college or university. **Traditionally, students employed in work-study programs hold positions such as ticket takers, seating attendants and food concession workers at various sporting events. In these student-athletes' opinion, their position as employees of their college or university is no different from those other students working at these events.**

However, there will always be some nuance to this employer/employee analysis as an employee classification can depend on the state law of where the college or university is located. For example, under Massachusetts law an individual that performs services for an employer is presumed to be an employee so long as that person provides services that are part of the employer's business and the employer exerts control and direction in fulfillment of those services.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

College athletes function as the labor force for college sports, investing significant time and effort into their athletic pursuits, resembling employees in many aspects.

McCann 23—[McCann, Michael. “College Athletes as Employees: Answering 25 Key Questions.” Sportico.com, December 19, 2023. <https://www.sportico.com/feature/college-athletes-employees-complete-primer-1234758491/>.] Elene.

[Michael McCann is a Legal Analyst and Senior Sports Legal Reporter at Sportico. He is also a Professor of Law at the University of New Hampshire Franklin Pierce School of Law, where he is Founding Director of the Sports and Entertainment Law Institute. McCann is a Visiting Professor of Law at Harvard Law School in the 2023-24 academic year. He is an attorney with more than 20 years of practice.]

The rights of college athletes to earn money have undergone massive changes in the 2020s.

In 2021, the NCAA permitted athletes to use a right they already had, the right of publicity, to sign endorsement, sponsorship, influencing and other name, image and likeness deals without running afoul of amateurism rules. It only did so after states passed NIL statutes that made it illegal for the NCAA and its members to block NIL.

The next major change will be the recognition of college athletes as employees of their schools, and possibly also their conference and the NCAA. There are several ways this recognition could occur. **Once college athletes are deemed employees, some will form unions that negotiate collective bargaining agreements. It will be a new era in college sports.**

College athletes function **as the labor force for college sports, a multibillion-dollar industry.** For some college athletes, their recruitment, their enrollment and how they spend their time in school are primarily centered on advancing an athletics program.

Many of these athletes say **they spend more than 40 hours per week focused on their sport, despite NCAA and conference limits. Some are also nudged if not effectively forced to take courses that comply with their responsibilities as athletes.**

These factors vary by school and sport; for example, football and basketball players at Power Five schools more closely resemble employees, while other athletes lead a more average “student” life. Still, under applicable labor and employment law tests, some college athletes resemble employees.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Support

Student Athletes: 62% of NCAA competitors want to unionize to bargain for more rights

Niedzwiadek 23—[“College Athletes Open to Unionization’s Potential.” 2023. POLITICO. December 18. <https://www.politico.com/newsletters/weekly-shift/2023/12/18/college-athletes-open-to-unionizations-potential-00132224>.] Joel.

[Nick Niedzwiadek is a labor reporter for POLITICO. He is a graduate of the University of North Carolina at Chapel Hill and has previously written for the Times Union and the Wall Street Journal.] Joel.

THE NEXT DOMINO: The NCAA’s decision in 2021 to abruptly drop their opposition to college athletes profiting off their names, images and likenesses has led to a patchwork of unequal and unregulated marketplaces — and has done nothing to deter advocates from pushing for a greater share of revenues for athletes.

Some 62 percent of top-flight NCAA competitors support the idea of unionization to bargain for more rights and protections, according to a survey of 500 college athletes from The Generation Lab on behalf of The Athlete’s Bureau newsletter, shared exclusively with POLITICO. A nearly identical share stated that a politician’s position on NIL or revenue sharing would influence their willingness to vote for that candidate.

That pro-union sentiment is on par with recent polling of Americans overall and Gen Z in particular, though the picture can get a bit murkier when the question moves from unions conceptually to actually joining one.

“We want politicians to know **that athletes are paying attention, athletes are informed, and they have an opportunity to position themselves on the right side of history**,” Chase Griffin, the founder of the Athlete’s Bureau and a senior quarterback on UCLA’s football team, told POLITICO.

The issue remains a live ball, and one that Congress has largely kept to the sidelines of as several outstanding lawsuits are heaping pressure on the NCAA and lawmakers to find a path forward for a system that increasingly feels on the brink.

Members of the Dartmouth men’s basketball team this year petitioned the National Labor Relations Board for a union election, reviving unsettled labor-rights questions previously raised by Northwestern University’s football team, with big stakes for athletes at private institutions. The NLRB’s regional director in Boston is evaluating whether to order an election. (Public colleges are another matter, given differences in state laws.)

And on Monday, an NLRB judge will resume oral arguments in a case involving athletes at the University of Southern California that’s also roped in the (beleaguered) Pac-12 Conference and NCAA.

NLRB attorneys have said that the trio are misclassifying athletes as non-employees, and that the USC athletic department’s social media conduct policies infringe on free speech and other activity protected under federal labor law. — Nick Niedzwiadek and Adam Peck

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Public: Nearly 70% of US adults believe student-athletes should receive compensation, and 64% believe they should be classified as employees

Kraft 23 –[Kraft, Nicole. 2023. “Why the Public Strongly Supports Paying College Athletes.” Forbes, August 22. <https://www.forbes.com/sites/nicolekraft/2023/08/21/why-the-public-strongly-supports-paying-college-athletes/?sh=77be675f1b08>] Joel.

[Nicole Kraft is an associate professor of journalism practice at The Ohio State University, teaching sports journalism and sports media relations, and also director of Ohio State’s Sports & Society Initiative. She is a member of the Ohio State Athletics Council, chairing the Committee on Facilities and Fees, and serve also as teaching chair of the Sports Communication Interest Group of the Association for Educators in Journalism and Mass Communication. She holds a doctorate in educational leadership from Lamar University.]

When student-athletes in 2021 were finally provided the chance to earn money from their name, image and likeness, some feared it would be the end of college sports as we knew it.

Fast forward two years, and **the majority of Americans seem ready to let them bank even more bucks. Nearly 70% of U.S. adults said college athletes should be able to receive direct compensation from their school** when asked in a survey conducted this summer by Sportico and The Harris Poll.

“It’s about time,” sports attorney Luke Fedlam, founder of Advance NIL, said. **“We have seen over the last 20 years the explosion in the commercialization of college sports. Look at the NCAA [March Madness] tournament. So much money is being made on student-athletes’ abilities. The idea that people are still coming around to is understanding and believing college athletes should receive compensation just makes sense.”**

The poll, which surveyed 2,018 people nationally from Aug. 11–13, **found 67% agreed college athletes should receive direct compensation from their universities, while 74% of respondents supported athletes’ ability to profit from NIL.**

“I think it’s good that athletes are getting their share,” Ohio University sports business professor B. David Ridpath said. “People are starting to come to the realization that not only is it inevitable, it’s really the right thing to do.”

NIL became part of the sports landscape in June 2021 when the NCAA Board of Directors lifted NCAA restrictions on athlete payments for everything from sponsorships to personal appearances.

That same month, the Supreme Court voted unanimously that the NCAA can no longer limit education-related benefits that colleges offer athletes beyond tuition, including computers and internships. As part of what’s known as the Alston ruling, schools are now allowed to annually provide athletes with as much as \$5,980 in education-related compensation.

Fedlam said **the amount of money being poured into and flowing from collegiate sports has made it clear they are no longer purely about amateurism and love of competition. That means the move toward paying college athletes is an inevitability, not a debate.**

“If college sports were solely about education and the benefits that could come from that, college sports would look entirely different,” Fedlam said. “Do we ruin college sports when we pay tens of millions to schools for broadcast rights, when March Madness makes \$1 billion, when schools on the West Coast are aligning with Midwest and East Coast conferences to earn more compensation? That’s where sports have come.”

The survey also revealed 64% of respondents think college athletes should become university employees, an idea NCAA president Charlie Baker shot down at the April LEAD1 Association’s annual spring meeting, proclaiming, “I think student-athletes want to be student-athletes, and it’s up to us to figure out how to make that work for them in a variety of environments and in circumstances that are different.”

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Democrats were much more in favor of direct compensation for college athletes than Republicans (78%-56%), while **people who follow college sports favored the change at 78%, compared to 56% for those who do not follow sports closely.**

More than 80% of respondents ages 18-41 supported athlete payments, while people over age 58 were just 48% in favor.

Ridpath said it sounds good in theory to allow athletes to be paid while in college, but to older fans more set in their ways, it is clearly far less accepted.

“The younger demographics are much more savvy than we were because they have access to more information,” he said. “This is the reality now.”

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Unionization Good

Unions: College student-athletes should be allowed to unionize – this would afford them benefits like financial compensation and recompense for injuries, which often surface only later in life

FindLaw 23— [Findlaw Team. 2023. “Can College Athletes Unionize?” Findlaw. April 4. <https://www.findlaw.com/education/higher-education/can-college-athletes-unionize.html>.] Joel.

[FindLaw.com is a legally-reviewed source of legal information and resources on the web.]

People who think college athletes should be able to form a union say it's about fairness. These athletes bring in a lot of money for academic institutions and athletic conferences, but often get little in return or don't get paid at all. A union would use collective bargaining to help athletes get better conditions, like health care or a share of the revenue. The National College Players Association supports this view and fights for athletes' rights.

Those who argue for unionization for college athletes claim it would provide them with several benefits. These benefits include:

- **Procedural protections, including notice and a hearing before punishment**
- **Increased freedom to voice their opinions on social media without college interference**
- **New financial rights**
- **Health care benefits**
- **Pension plans**

Advocates argue that school athletes meet the common law definition of employee. They use the federal labor law definition of employee to prove this. They state they perform services for another under a contract of hire and also point out they are subject to the other's control or right of control.

Catastrophic injuries and long-term health risks are points of concern for athletes. Football, in particular, has come under scrutiny for its potential issues. It has been linked to cognitive issues and depression. There are also other significant health conditions that can result from football.

At present, it can be very difficult to recover when a student-athlete is injured. The medical world continues to unravel the connections between injuries and student-athletes. These injuries can even persist or surface later in life. **Unionization may provide protection and treatment for these injuries.** It can also provide compensation for the suffering that can arise from participating in college sports.

Advocates also point out that college athletes don't share in the multi-billion dollar revenue received from their athletic participation. This revenue is generated from college sports. The enforced amateurism of college athletics prevents schools from adequately compensating athletes. This resulted in poverty and a lack of health or disability benefits for many college athletes.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Impact: College players could be paid up to \$2.4 million each season if they negotiate the same profit share as NFL & NBA players

Shults 23—[Shults, Jennifer. 2023 “If at First You Don’t Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for ‘Employee’ Status.” <https://jlsplaw.columbia.edu/files/2023/04/Vol56-3-Shults.pdf>.] Joel.

[Jennifer Shults is Executive Managing Editor, Colum. J.L. & Soc. Probs., 2022–23. J.D. Candidate 2023, Columbia Law School. She’s a former women’s volleyball player for Harvard]

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. The last few years have seen increased support for the idea of paying college athletes and the advent of new professional basketball leagues intended to offer an alternative to playing college ball. As these alternative professional leagues gain traction, and as support for college athletes continues to grow, the NCAA’s resolve may falter. As one commentator has noted, collective bargaining could provide an “ironic solution” to the NCAA’s “antitrust woes.” 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 antitrust review. 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].”

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. 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.” 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. 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. Because of the need to spread football and basketball revenues across nonrevenue-generating sports in order to keep those other sports alive, and colleges’ need to comply with Title IX, 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. 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.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Aff Blocks

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Amateurism

Argument: The NCAA's is a traditionally amateur league—a league where the players aren't paid. This is a traditional part of college sports culture, that gives it a unique flavor and gives more options to sports fans.

Saying that schools can't pay students because they're amateur leagues is “circular and unpersuasive”

Ford 23— [Ford, Matt. 2023. “The One Thing the Supreme Court Got Right: Blowing up College Sports.” The New Republic. August 25. <https://newrepublic.com/article/175193/supreme-court-alston-college-sports>.] Joel.

[John R. Padova is a senior United States district judge of the United States District Court for the Eastern District of Pennsylvania.]

Padova's ruling opened the door for student-athletes to be paid the federal minimum wage, to receive other workplace compensation and benefits, and even to potentially organize in a labor union. The NCAA had argued that a Labor Department interpretation of the FLSA had foreclosed this possibility. But the judge ruled that it was unpersuasive, citing various labor-law precedents—as well as the Supreme Court's ruling in *Alston*.

“As Justice Kavanaugh noted in his concurring opinion in *Alston*, the argument ‘that colleges may decline to pay student athletes because the defining feature of college sports ... is that the student athletes are not paid ... is circular and unpersuasive.’” Padova wrote. **“Accordingly, we reject the [schools'] argument that Plaintiffs are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between [the athletes] and the [schools].”**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Education

Argument: The main purpose of university is education—classifying student-athletes as employees would take away from that purpose

The NCAA doesn't actually care about Education of student-athletes—players spend 3 times as many hours per week on athletics as they do on academics

Sugrue 23—[Sugrue, Liam. n.d. “THE COLLEGIATE SPORTS REVOLUTION: THE EXPECTED and UNEXPECTED EFFECTS of the SUPREME COURT’S LATEST RULING on PAYING COLLEGE ATHLETES.” <https://www.hofstrajbl.org/wp-content/uploads/2023/04/22-1-sugrue.pdf>.] Joel.

[Liam Sugrue is Editor in Chief of Hofstra International Business and Law Journal, and graduated from Maurice A. Deane School of Law at Hofstra University]

With all this said, a possible glaring issue becomes apparent: the NCAA generates billions in revenue, yet operates under the guise of a nonprofit organization. Prior to Alston, the NCAA, “[was] designed around the notion that providing access to an education [was] sufficient compensation to players for their participation in a multibillion-dollar industry.” However, this sentiment still remains and the NCAA will continue to operate as a nonprofit, following their mission of “equipping student-athletes to succeed on the playing field, in the classroom and throughout life.”

Other than a non-profit generating billions of dollars in profit, **the proposition that education plays an important role in their mission is hypocritical. While academics may be promoted on paper, education is ancillary for the NCAA.** In 2017, the NCAA ruled that the University of North Carolina (“UNC”) did not commit an academic violation after the school fabricated academic records for athletes to maintain NCAA eligibility. **“An independent report commissioned by North Carolina found that of the 3,100 students that took fake classes over 18 years, 47.4 percent were athletes.”** It is naïve to think that this kind of fake class setup only exists at UNC. Professor Jasmine Harris of the University of Texas of San Antonio stated, **“data from my ongoing research on the academic experiences of black Division I football and men’s basketball players shows that they spend three times as many hours per week on athletics as they do on academics.”**

While some claim “education and athletics are inherently at odds, the issue may actually stem from the impotence of the NCAA enforcement model **“The NCAA enforcement model ‘creates no legal duty to prevent NCAA members from violating NCAA rules.’”** Far from deterring future violations, **this model may incentivize cheating**, or at the very least, perpetuate a tightrope “gamesmanship” amongst universities where schools encroach the boundaries of the NCAA rules until faced with real consequences.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: NIL

Argument: NCAA v Alston ruled that athletes can receive compensation through NIL programs—classification as employees is no longer needed

No Impact: Most student athletes won't make any money from NIL programs

Murry 22— [Murry, Tyler J. 2022. “The Path to Employee Status for College Athletes Post-Alston.” Scholarship@Vanderbilt Law. <https://cdn.vanderbilt.edu/vu-URL/wp-content/uploads/sites/356/2022/06/20025358/4.-Murry-Note.pdf>] Joel

[Tyler Murry is an Attorney, a Capital Markets/Securities Associate at Haynes and Boone, LLP. He graduated from Vanderbilt University Law School with a JD, and from University of Missouri with a journalism major.]

Despite Alston's holding, it is unlikely that many student athletes will benefit from their NIL because the sports that they play are not profitable at the college level, and many students do not have “brand names. Indeed, the large amounts of money in college athletics that “flow to seemingly everyone except the student athletes” was a conundrum that Justice Kavanaugh wrestled with in his Alston concurrence. Under previous NCAA rules, to maintain eligibility to play collegiate sports, student athletes were prohibited from accepting any form of payment. The Alston decision does not require schools to pay student athletes; it only permits schools to offer “academic achievement awards.” Some athletes now may receive upwards of \$5,980 per year through these awards, and some schools give athletes relatively small monetary academic achievement awards. While student athletes now can receive some form of compensation for their labor, the Justices in Alston questioned, albeit in dicta, if student athletes still required “fuller relief.”

Turn: NCAA v Alston is the strongest argument yet to classify students as employees. Under the ruling, student-athletes are still being exploited while their programs rake in billions of dollars.

Murry 22— [Murry, Tyler J. 2022. “The Path to Employee Status for College Athletes Post-Alston.” Scholarship@Vanderbilt Law. <https://scholarship.law.vanderbilt.edu/jetlaw/vol24/iss4/4/>.] Joel

[Tyler Murry is an Attorney, a Capital Markets/Securities Associate at Haynes and Boone, LLP. He graduated from Vanderbilt University Law School with a JD, and from University of Missouri with a journalism major.]

College athletics are in a state of flux following the Supreme Court's decision in NCAA v. Alston. **While student athletes can now earn money from their name image and likeness (NIL) through endorsement deals, the NCAA and its member schools can still exploit college athletes to earn billions of dollars. To remedy this injustice, courts should classify student athletes as employees under the Federal Labor Standards Act (FLSA) to compensate these students for their work.** Whether student athletes should be eligible for minimum wage and employment benefits has been a hot-button topic in the legal community for many years. Fortunately, **the Alston decision and subsequent NIL policy changes give student athletes their strongest argument to be classified as an employee to date.**

Because of Alston's effects on the legal status of NIL, courts should classify student athletes as employees—not independent contractors—under the various employment tests, and thus grant student athletes FLSA protections. Employee classification for student athletes would require NCAA member schools to alter their business models in order to compensate student athletes for the labor they provide; the NCAA has no other option but to subsidize schools that cannot meet this new expense. If the NCAA fails to do so, other amateur sports organizations may soon take its place.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Professional Track

Argument: Classifying student-athletes as employees is unnecessary—they'll make big money when they reach professional leagues like the NFL or NBA, and NCAA play simply prepares them for these larger careers

Only 2% of NCAA student athletes go on to play professionally – yet many more believe they'll 'make it' in the big leagues

Murry 22— [Murry, Tyler J. 2022. "The Path to Employee Status for College Athletes Post-Alston." Scholarship@Vanderbilt Law. <https://cdn.vanderbilt.edu/vu-URL/wp-content/uploads/sites/356/2022/06/20025358/4.-Murry-Note.pdf>] Joel

[Tyler Murry is an Attorney, a Capital Markets/Securities Associate at Haynes and Boone, LLP. He graduated from Vanderbilt University Law School with a JD, and from University of Missouri with a journalism major.]

Student athletes can only benefit from these profits through scholarships, meals, or living stipends, and on average are no better off financially than the average American at their age. Depending on the sport, student athletes typically spend upwards of fifty hours per week on athletic activities. The amount of time spent on athletics causes many student athletes to feel as though they do not have the time for academic obligations. For example, 80 percent of PAC-12 student athletes reported missing at least one class due to athletic commitments during the 2014–15 school year. **Despite the sacrifices that most student athletes make, their time commitment rarely results in a professional sports career—less than 2 percent of NCAA student athletes go on to play professionally. Notwithstanding the statistics, many student athletes believe that they will play at the next level and thus do not sufficiently plan for a different career,** resulting in scores of student athletes leaving school with little-to-no financial benefit from their time in college.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Sports Cuts

Argument: Classifying student-athletes as employees means that universities won't have enough money to pay for non-revenue-generating sports, leading to cuts in programs, and especially in Women's Sports and Olympic Sports

Olympic Sports & Women's Sports won't be cut if student-athletes are classified as employees

Prisbell 21— [Prisbell, Eric. 2023. "Experts Say There's 'No Stopping' Employment Train with NCAA Sports." On3. April 26. <https://www.on3.com/os/news/experts-say-theres-no-stopping-employment-train-with-ncaa-sports/>] Joel

[Eric Prisbell is the national college sports business writer at On3. Over most of the past two decades, Prisbell has covered virtually every angle of college sports for outlets including The Washington Post and USA Today. His work has been honored seven times in the Associated Press Sports Editors' national contests. Four of his stories received honorable mention recognition in the Best of American Sports Writing anthologies.]

[Quoted: **Sarah Wake** advises universities on athletic compliance issues in her role as an attorney at McGuireWoods]

Wake does not believe that an employee model would doom Olympic sports, forcing them to be eliminated or reduced to the club level. Additionally, she noted that designating someone an employee does not mean that they all needed to be treated the same. It warrants creative thinking, she added, such as perhaps rethinking how scholarships are handed out. Instead of awarding scholarships, would schools give athletes money that equates to the amount of a scholarship?

"I don't like the doomsday of 'This is going to make all of our Olympic sports go away, [or] all the women's sports are going to go away,'" Wake said. "That's when I hear a lot of fear-mongering about Title IX and it sends me into a stratosphere of rage."

When asked during the panel about Title IX concerns if athletes are deemed employees, Wake said, "I'm 100% positive – like, I'd bet my shoe collection on it, right – Title IX applies to employees. Period. Full stop. End of story ... You just can't eradicate women's sports and have that like not be a problem."

But there are other concerns related to Title IX, the federal law that bars discrimination on the basis of sex for any educational program or activity receiving federal financial assistance.

"Do we have to pay the men the same as the women? If you're a school that receives federal financial assistance ...," Wake said, "then, yeah, you're going to have to be a little bit careful to treat the men and the women differently under Title IX."

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Neg

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Alternative Incomes

NIL Collectives: college sports fans pay money to athletes for various levels of access, letting student athletes earn up to millions of dollars

Wanna & Bloomberg 22— [Wanna, Carly, and Bloomberg. 2022. “NCAA Athletes Are Receiving Millions of Dollars from Collectives Created by Rich College Sports Fans.” Fortune. Fortune. May 16. <https://fortune.com/2022/05/16/ncaa-athletes-millions-compensation-funds-wealthy-college-sports-fans/>.] Joel.

[Carly Wanna is a research analyst and journalist. She graduated with a History degree from Yale, and has worked as a Bloomberg reported since 2023.]

Wealthy college sports fans across the U.S. are racing to set up organizations that can channel money to student athletes in the wake of a Supreme Court ruling last year letting amateur players receive compensation.

Supporters of Penn State University, including the son of famed coach Joe Paterno, have set up multiple funds, known as collectives. Donors paying as little as a few dollars a month get varying degrees of access to athletes, from online get-togethers to private events, with most of the proceeds going to players.

“If a school does not have a collective with a mission to benefit that school, it’s behind,” said Darren Heitner, a sports attorney in Fort Lauderdale, Florida.

The collectives are part of a wave of change sweeping college athletics since the high court ruling. In all, more than 60 such groups have formed in the past year, according to a tally by the Business of College Sports, **and that’s raising concerns at the National Collegiate Athletic Association, which announced new rules last week to limit their activities.**

Athletic departments have long courted prospects with top-of-the-line gyms and athletic centers. But **so-called NIL collectives** (standing for name, image and likeness) **pay athletes directly in cash for services, like signing autographs, an unprecedented change for college sports. Offensive linemen on scholarship at the University of Texas at Austin stand to earn as much as \$50,000 a year** through Horns with Heart, one of that school’s funds. That’s a big lure for an 18-year-old choosing his or her college.

Eager boosters all over the country are forming groups. **One collective at the University of Florida has raised over \$5 million. Another at the University of Tennessee aims to generate \$25 million each year,** according to the Athletic. The website reported in March **that one student clinched an \$8 million deal.**

The race has been on since last June, when the Supreme Court made its decision and the NCAA rescinded century-old prohibitions on athletes signing marketing deals. From the outset, the association’s new NIL policy banned using such deals as “inducements” for students to enroll at a particular school. It also required that students perform a service, such as a social media post, in return for pay.

Yet the collectives are already testing the limits with offers to top recruits and transfers, and raising the possibility that donors will get their schools in legal trouble, as so many have in the past through interference in recruiting. In a bid to rein in the collectives, the NCAA issued new guidance to member schools last week, explicitly barring boosters from talking with recruits and requiring that NIL deals be based on an “independent” analysis of their value.

The statement was “just more of a reminder to everyone of the current NCAA rules that exist regarding booster involvement in the recruiting process,” said Mit Winter, an attorney in Kansas City, Missouri, who specializes in NIL law.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Alternative Solutions

NOTE: *don't run this as a counterplan. However, you can use it to demonstrate to judges that we can get the benefits of paying student-athletes without the drastic measure of classifying them as employees.*

CAPA: The College Athlete Protection Act would compensate college athletes by requiring schools participating in major college sports to pay athletes up to \$25,000 annually, plus additional benefits—such a law wouldn't require formally classifying student-athletes as employees

Harris & Russo 23 - [Harris, Beth. Russo, Ralph D. "Calif. Bill Calls for Revenue Sharing with College Athletes." AP NEWS. January 19, 2023. <https://apnews.com/article/politics-sports-california-state-government-chris-holden-san-diego-699825d02972aeb2a2b0ab854b5b843f>.] Elene.

[Ralph Russo has been the national college football writer for The Associated Press since 2004, covering conference realignment, the creation of the College Football Playoff and every national championship game over the last 14 years. He has spent almost all of his 25-year career in with the AP, covering sports. He has spent almost all of his 25-year career with the AP, covering sports.

Beth Harris is a journalist for The Associated Press, covering sports and entertainment]

A California lawmaker introduced a bill Thursday that would require schools that play major college sports to pay some athletes as much as \$25,000 annually, along with covering the cost of six-year guaranteed athletic scholarships and post-college medical expenses.

The College Athlete Protection Act is sponsored by **Assemblymember Chris Holden, who is a former San Diego State basketball player**, and is the type of state-level legislation that the NCAA is looking to federal lawmakers to preempt.

"I know how close you can come to an injury taking away not only the game you love to play but also your opportunity to finish college," Holden said at a news conference outside the historic Rose Bowl stadium.

California was the first state to pass a law that gave college athletes the right to be compensated for name, image and likeness back in 2019. That triggered similar action by state legislatures around the country.

Holden is eager for the state to be at the forefront again.

"It's a bill that will end the blatant exploitation of California's college athletes," said Ramogi Huma, executive director of the National College Players Association. **"The NCAA's economic model is illegal and based on racial injustice. The NCAA uses amateurism as cover to systemically strip generational wealth from predominantly Black athletes from lower income households to pay for lavish salaries of predominantly white coaches, athletic directors, commissioners and NCAA administrators."**

Money paid toward scholarships would be included in the 50% that goes toward the players. The rest would go into a fund that would pay out yearly. **Individual payments would be determined based on what schools bring in and could not exceed \$25,000 per year for any one athlete.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Amateurism

College Experience: Paying college athletes could ruin the essence of amateur sports. Focusing on paying high-profile athletes could shift resources away from supporting non-revenue-producing sports and scholarship athletes, ultimately diminishing the overall college experience.

Abbott 22 - [Abbott, Alden. "The Case against Paying College Athletes | AIER." www.air.org. April 10, 2022. <https://www.aier.org/article/the-case-against-paying-college-athletes/>] Elene.

[Alden Abbott is a Senior Research Fellow with the Mercatus Center at George Mason University. He formerly served as the Federal Trade Commission's general counsel. Mr. Abbot has a J.D. from Harvard Law School and an M.A. in economics from Georgetown University.]

As March Madness comes to a close, once again we hear that college student athletes are being unfairly "exploited" by being denied salaries for playing sports.

This notion, while seemingly sensible at first glance, is badly misguided. **If colleges were required to pay athletes salaries, the entire fabric of amateur college sports could unravel, harming the interests of fans, colleges and — most important — players themselves.** Let's see why.

The National Collegiate Athletics Association is a nonprofit organization that regulates student athletes and organizes the athletic programs of its member colleges and universities in the United States and Canada.

In its 1984 *NCAA v. Board of Regents* decision, the court emphasized that certain other NCAA restrictions on athletes — including salary bans — were key to the preservation of the college football "product":

"In order to preserve the character and quality of the (NCAA) 'product,' athletes must not be paid, must be required to attend class, and the like. ... Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable."

The court believed that **loss of amateur status will cause a popular alternative to big-time pro sports to lose its luster.** But there are lots of other bad things that will happen if the NCAA drops restrictions on paying salaries to athletes.

Eliminating "no salary" rules will favor large, well-funded athletic programs over others, likely undermining already tenuous competitive balance among schools.

It will also incentivize the shifting of large college athletic departments' funds **to bidding for big-name high school basketball and football superstars**, whose presence will attract future lucrative contributor donations, endorsements and television deals. In addition **to reducing team cohesion between stars and other players, this could eventually transform college football and basketball into little more than ugly minor leagues for their pro counterparts.**

The biggest losers will be the myriad scholarship athletes — young men and women alike — who compete in non-revenue producing sports such as swimming, wrestling, gymnastics, volleyball, and track and field, just to name a few. These athletes cannot realistically expect significant salaries.

Even worse, **they can expect reduced funding and fewer scholarships due to the increased focus on paying big-revenue sports superstars.** As such, a key quality of their college experience will be diminished as amateurism is swept aside.

The conclusion is clear. The NCAA has its reasons for keeping its rules against paying college athletes. These should remain, for the good of fans and college athletes.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Student-athletes should not be paid as they are classified as amateurs, emphasizing their commitment to sports as part of their educational experience rather than as a profession.

LaPorta 23 - [LaPorta S, Sean. "Student-Athletes or Student Employees." McLane Middleton. October 16, 2023. <https://www.mclane.com/insights/student-athletes-or-student-employees/>] Elene.

[Sean is an associate in the Education Law Practice Group, and has focused his practice on serving the needs of both students and educational institutions as they navigate legal and practical issues. He has extensive experience working closely with small to large educational institutions, where he provides advice and analysis on a wide variety of issues, including employment and board of trustee policies. Sean provides services regarding employment contracts, waivers, severance agreements, compliance, risk analysis, and navigating state and federal laws.]

Hot topics pertaining to student-athlete issues have recently dominated the sports law space, from Name, Image, and Likeness ("NIL") regulation, to class action lawsuits against the NCAA, and NCAA conference realignment.

In the words of Taylor Branch:

The term "student-athlete" was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies. ("The Shame of College Sports," The Atlantic, Oct. 2011).

Common arguments against student athletes as employees have included assertions that: (1) students athletes are amateurs; (2) the Department of Labor has stated that students who participate in extracurricular activities are not considered to be employees; (3) participation in collegiate sports is in furtherance of the student's education; and (4) student-athletes may receive a scholarship for their college or university. These very arguments are currently before the Third Circuit of Appeals in the case of *Johnson v. NCAA*. Specifically, student-athletes in *Johnson* are seeking to be classified as employees and therefore fall under the FLSA. **The NCAA and member schools moved to dismiss the case, following a similar argument as described above.** The motion was denied and subsequently appealed. In February of 2023, the Third District Court of Appeals heard oral argument on the matter.

As mentioned above, the debate as to whether student-athletes are employees of their college or university is long running. However, there are some current factors that could potentially sway the outcome of this analysis: first, there is the *Johnson v. NCAA* case before the Third Circuit of Appeals; second, we are in the beginning of the NIL rights era for collegiate and other amateur sports, and we are beginning to see litigation come as a result of this; third, the United States Congress is proposing various forms of legislation to alter the collegiate sports landscape; and fourth, collegiate sports just underwent the largest conference realignment in decades. Each of these events could have the ability to alter the analysis as to whether student-athletes are employees of their college or university

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

[Tim Tebow quotes on Amateurism in Collegiate Sports]

Bumbaca 19 – [Bumbaca, Chris. "Tim Tebow Doesn't Want College Athletes to Get Paid: 'It's about Your Team.'" USA TODAY. 2019. <https://eu.usatoday.com/story/sports/college/2019/09/13/college-athletes-tim-tebow-speaks-out-against-paying-players/2312200001/>.] Elene.

[Chris Bumbaca is a journalist at USA Today]

Tim Tebow is not one to suppress his passion for college athletics. **As a two-time national champion and Heisman winner at the University of Florida, he often fondly looks back on his time as a college athlete.**

So it should come as little surprise Tebow has taken a hard stance against a California bill passed by the state's government this week that would allow college athletes to more easily make money off their name, image and likeness, beginning Jan. 1, 2023.

"**I feel like I have a little credibility and knowledge about this,**" Tebow begins during a Friday interview on ESPN's "First Take."

"Because when I was at the University of Florida, I think my jersey was one of the top jerseys around the world ... and I didn't make a dollar from it, but nor did I want to. Because I knew, going into college, what it was all about."

For Tebow, that meant being part of a team and working toward unified goals.

"Now we're changing it from 'us' from 'we' from 'my university,' being an alumni where I care, which makes college sports special, to 'OK, it's not about us, it's not about we, it's about me,'" Tebow said. "And yes, I know we live in a selfish culture, where it's all about us, but we're just adding and piling it on to that. Where it changes what's special about college football.

"It's about your team. It's about your university. It's about where my family wanted to go. It's about where my grandfather had my dream of having Florida win an SEC championship. **And you're taking that away so young kids can earn a dollar. And I feel like that's just not where college football needs to go.**"

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Arms Race

Rich-Poor Gap: Allowing universities to pay athletes means that richer programs will be able to recruit from around the country at will, widening the gap between rich and poor athletic programs

Totenberg 21— [“The Supreme Court Sides with NCAA Athletes in a Narrow Ruling.” 2021. NPR. June 21. <https://www.npr.org/2021/06/21/1000310043/the-supreme-court-sides-with-ncaa-athletes-in-a-narrow-ruling>.] Joel.

[Nina Totenberg is NPR's award-winning legal affairs correspondent. Her reports air regularly on NPR's critically acclaimed newsmagazines *All Things Considered*, *Morning Edition*, and *Weekend Edition*. Totenberg's coverage of the Supreme Court and legal affairs has won her widespread recognition. Totenberg has been honored seven times by the American Bar Association for continued excellence in legal reporting and has received more than two dozen honorary degrees.]

He thinks that the rules for what can and cannot be offered are likely to be institutional. "If you're a star gymnast and you're 17 years old and choosing between three different schools, those schools theoretically could offer you all sorts of academically related benefits," said Luck. "A year abroad, internships. They could pay for your law school or medical school if you decided to."

But other **sports law experts think that the individual Division I conferences might take over the job of making the rules for what benefits recruiters can offer. The super-rich Power Five conferences, for instance, could continue to spend hundreds of millions of dollars annually, leaving the more modestly funded conferences to compete at a lower level.**

Amy Perko, CEO of the independent Knight Commission on Intercollegiate Athletics, notes that **having the conferences each establish their own limits on educational compensation would mean that there would be competition among the conferences**, and an athlete who doesn't like the benefits that are offered in one conference might sign up with a school in a different conference.

But **Len Elmore, a former NBA and college basketball star, and a lawyer who teaches sports law at Columbia University, worries about an arms race in college recruitment that would defeat the quid-pro-quo that inspired athletic scholarships** — namely, that the athletes get a free education they could not otherwise afford, graduating without debt.

Elmore, co-chair of the independent Knight Commission, would like to see the rules for collegiate athletics more broadly changed, with TV revenue being much more widely disbursed. Noting that the Knight Commission just released a report on racial equity, he said if the commission's recommendations were put into effect, "we would balance the experience of Black athletes upon whose backs the revenue generating sports are balanced."

Walter Harrison — a former chairman of the NCAA board of governors, **former president of Hartford University** and also a member of the Knight Commission — **worries about an arms race in recruiting too. He is especially worried about the big-time football teams that are eligible for the playoffs.**

"Big-time football ought to be something unto itself," Harrison said. "They ought to be separated entirely from the rest of the NCAA because the money flowing into that sport is just different."

That would allow the other conferences to do their own thing, he says, though there would certainly be problems that would have to be worked out — for instance, in basketball, accommodation would have to be made for schools like Villanova and Georgetown that are often contenders in big tournaments, but don't play football at the top level.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Ruins Athletic Competition: Paying college athletes could worsen disparities between wealthy and less affluent universities, potentially harming athletic competition nationwide – paying these athletes would make them professionals and ruin the purity of amateur sports

Drozdowski 23 - [Drozdowski, Mark. "Should College Athletes Be Paid?" BestColleges.com. March 10, 2023. <https://www.bestcolleges.com/news/analysis/2021/09/07/should-college-athletes-be-paid/>] Elene.

[Mark J. Drozdowski, Ed.D., is a senior writer and higher education analyst with BestColleges. He has 30 years of experience in higher education as a university administrator and faculty member and teaches writing at Johns Hopkins University. Mark holds a bachelor's degree in American history from the University of Pennsylvania and a master's degree and doctorate in higher education from Harvard University.]

Assuming a free-market system, the chasm between the haves and have-nots would widen even further.

Universities best positioned to pay athletes top dollar would win bidding wars and recruiting battles against institutions with limited budgets. Athletic competition nationwide would suffer as a result. Might this exacerbate booster interference and create a black market for top talent funded surreptitiously?

Paying student-athletes turns them into professionals and sullies the purity of amateur athletic competition. Student-athletes are students first and foremost, attending college primarily to receive an education and secondarily to compete in their sport. College students should participate in sports for the love of the game, not for financial gain, following the long-forgotten credo held dear by Olympic athletes.

Title IX stipulates that colleges must provide equal opportunities for male and female athletes. Does this rule apply to payment structures, too, though? **Would a university have to pay female athletes in aggregate the same amount as their male counterparts?** Not necessarily — but a school would be required to ensure that female athletes receive proportionate opportunities for scholarships.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Culture

Treating student athletes as employees will significantly alter the culture around American collegiate sports, including the student-coach athlete of mentorship

Perez & Niedzwiadek 24— [“College Sports Giants Struggle to Get Rescued by Congress.” 2024. POLITICO. January 26. <https://www.politico.com/news/2024/01/26/college-sports-ncaa-athletes-employees-congress-00137829>.] Joel.

[Juan Perez, Jr., is the education reporter for Politico, based in Washington D.C. He is a 2009 graduate of the UNL College of Journalism & Mass Communications where he majored in Journalism.]

Nick Niedzwiadek is a labor reporter for POLITICO. He is a graduate of the University of North Carolina at Chapel Hill and has previously written for the Times Union and the Wall Street Journal.]

Pro-labor advocates argue that schools’ “student-athlete” designation is a legal term of art originally designed to shield institutions from player workers’ compensation claims. It deprives competitors of fair compensation for their talents or influence over the system that governs much of their day-to-day college experience, they note.

But **some school leaders fear employee rights will upend the culture around a unique American enterprise.**

“If student-athletes become employees, it completely changes the relationship between a coach and a student-athlete,” Baylor University President Linda Livingstone, who also serves as the chair of the NCAA’s top governing board, said in an interview. **“They really move from being a mentor and a coach and a teacher, to being a boss and a supervisor.”**

And in recent months, the NCAA and its allies have refocused their attention on sweeping requests from Washington: A legal ban on players from being classified as school employees and broad protections from the country’s antitrust laws.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Education

The primary purpose of college is to provide education and prepare students for their future careers—the focus, therefore, should remain on supporting student-athletes academically rather than introducing financial incentives that may distract from their educational goals.

Jenkins 21 - [Jenkins I, John. "Opinion | at Notre Dame, We Believe 'Student' Should Come First in 'Student-Athlete.'" *The New York Times*, July 1, 2021. <https://www.nytimes.com/2021/07/01/opinion/college-athletes-pay-NCAA-Notre-Dame.html>] Elene.

[John I. Jenkins is the president of the University of Notre Dame. He earned undergraduate and advanced degrees from Notre Dame, a doctorate of philosophy from Oxford University, and a master of divinity and licentiate in sacred theology from the Jesuit School of Theology at Berkeley. He is the author of *Knowledge and Faith in Thomas Aquinas*, and scholarly articles published in *The Journal of Philosophy*, *Medieval Philosophy and Theology*, and the *Journal of Religious Ethics*. Jenkins is a member of the American Academy of Arts and Sciences. He has served on the Independent Commission on College Basketball led by Dr. Condoleezza Rice and on the Association of Catholic Colleges and Universities board of directors.]

The Supreme Court recently issued a ruling against N.C.A.A. regulations limiting education-related funds a school can provide to its student-athletes. Such developments will undoubtedly, in the short term at least, create disruption and uncertainty for college sports.

As we consider the shape of such reform, I propose the following as a guiding principle: **Any changes adopted should support and strengthen the educational purpose central to our institutions, and enhance the educational outcomes for our student-athletes.**

In an interview with The Times six years ago, **I expressed support for relaxing prohibitions against student-athletes profiting from use of their own names, images and likenesses for one simple reason — other students are allowed to do so. For example, a student writing a popular fashion blog may earn money by endorsing a product. We should allow our student-athletes similar opportunities.**

A disturbing disparity exists in the graduation rates from sport to sport, and too often the sports with lower graduation rates are those, such as football and basketball, with a high number of Black student-athletes. The most regrettable exploitation occurs when a student plays her or his sport for the full extent of eligibility and then leaves the institution without a college degree. **We must take all reasonable steps to ensure that student-athletes, at the end of their college career, leave with a degree.**

Additionally, a national policy should be established to **limit the number of days during any academic term in which an institution may require its students to be away from campus for athletic purposes. In-person engagement with faculty members and fellow students on a regular basis is an essential part of the college experience.**

Of course, talented athletes who want to play professionally should not be forced to go to college to develop their talents in their sport. **Every professional sport should create a minor or development league open to athletes with high potential.** Professional baseball, hockey, basketball and many Olympic sports have systems in place that allow athletes to become professional while forgoing the opportunity to participate in intercollegiate athletics. Perhaps it is time for football to develop one as well. **Young athletes would then have a choice: They could either sign up with a development league, or they could attend college and pursue a degree, while playing the sport they love.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

FLSA

The Department of Labor's position suggests that university or college students engaged in activities like interscholastic athletics are generally not considered employees under the Fair Labor Standards Act (FLSA)

Wood 23 – [Wood, Christopher. "Student-Athletes as Employees." Tax & Accounting Blog Posts by Thomson Reuters. August 18, 2023. [https://tax.thomsonreuters.com/blog/attorney-explains-legal-legislative-landscape-surrounding-classifying-student-athletes-as-employees.](https://tax.thomsonreuters.com/blog/attorney-explains-legal-legislative-landscape-surrounding-classifying-student-athletes-as-employees)] Elene.

[Christopher Wood is an author/editor at Thomson Reuters Checkpoint for payroll related content since June 2006. He has a B.A. in Communications from Richard Stockton University in New Jersey and achieved his Certified Payroll Professional (CPP) from the American Payroll Association (APA) in 2016.]

The U.S. Department of Labor (DOL) looks at the “economic realities” of the working relationship between the employer and employee when determining a worker’s status under the FLSA, explains Andrew Henson, an associate with the national law firm Troutman Pepper.

The tests developed by federal courts regarding worker classification under the FLSA typically focus on analyzing if an employer-employee relationship exists by determining whether the worker is economically dependent on the employer for work (employee) or is in business for themselves (independent contractor).

Generally, the following factors are considered when making a worker classification determination: (1) the degree of the employer’s right to control the manner in which the work is to be performed; (2) the worker’s opportunity for profit or loss depending upon their managerial skill; (3) the worker’s investment in equipment or materials required for their task, or their employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer’s business.

However, Henson points out that **“it has been less common for litigation to raise a question of whether an employment relationship exists where an individual is engaged in an ostensibly recreational, educational, or other non-commercial purpose.”**

Regarding the DOL’s current position on how student-athletes are to be classified under the FLSA, Henson says that “there is no explicit carveout for student-athletes” but notes that the DOL published a field operations manual “in which it opined that students are generally not deemed employees under the FLSA when they engage in ‘extracurricular activities’ and ‘interscholastic athletics.’”

Section b24 of Chapter 10 in the DOL’s Field Operations Handbook confirms university or **college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the FLSA.** It adds that an employment relationship will generally exist regarding students whose duties are not part of an overall educational program and who receive some compensation.

Also, Section 10b03(e) says that **activities of students in programs, including interscholastic athletics, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, do not result in an employer-employee relationship between the student and the school or institution for FLSA purposes.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Funding

Logistics: Most questions around how funding student-athlete-employees don't have answers. Implementing a payment system faces logistical challenges, and the financial viability of compensating all athletes may be impossible, especially considering that only a few collegiate sports programs, like football and basketball, generate profits.

Patterson 23 - [Patterson, Tiffany. "Should College Athletes Be Paid?" SmartAsset. September 8, 2023. <https://smartasset.com/retirement/should-student-athletes-be-paid>] Elene.

[Tiffany Patterson has a BA in Political Science from Temple University and an MBA from La Salle University Business School with a concentration in Finance. She is an expert on topics including home buying, life insurance and credit cards.]

While not all student-athletes are on scholarship, many are. **In addition to free tuition and room and board, these college athletes also often receive stipends to help towards books and other basic needs.** Most other students are not receiving these benefits. They'll come out of school with a great deal of student loan debt like most of their classmates. **Thus, in comparison, student-athletes already have it easier, financially, than most of the students at their school.**

The logistics governing any sort of pay structure for college athletes is unavoidably complicated. Questions about the details are plentiful, and answers are scarce. **Should only college athletes in the most popular and profitable sports (football and basketball) be paid? If not, what money should be used to pay the baseball players, soccer players and fencers? Is it the responsibility of the school or the NCAA? How much should students-athletes earn? How often would they get a check?**

According to economist Jeffrey Dorfman, **only a few collegiate sports actually bring in money for their schools. College football, as well as men's and women's basketball, are big money makers, but most other programs actually lose money.** Many athletic departments across the country use some of the proceeds from the football and basketball programs to subsidize the other athletics programs on campus. If the schools also had to pay their athletes, it's unclear whether institutions beyond the top athletics programs in the country could actually foot the bill.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

HBCU: Historically Black Colleges don't have the funds to hire students to play sports – and therefore, most sports wouldn't be funded

McWilliams et al. 24— [The Four Historically Black Athletic Conferences (4HBAC). 2024. *Message to Congressional Energy & Congress Committee*. https://d1dth6e84htgma.cloudfront.net/HBCU_Letter_Committee_Leadership_41_f520aa8193.pdf.] Joel.

[The Four Historically Black Athletic Conferences (4HBAC) represent America's Historically Black Colleges & Universities (HBCUs) college sports programs, and are members of the National Collegiate Athletic Association (NCAA) representing Division I and Division II institutions.]

[Commissioner Jacqie McWilliams Central Intercollegiate Athletic Conference. Commissioner Anthony Holloman Southern Intercollegiate Athletic Conference. Commissioner Sonja Stills Mid-Eastern Athletic Conference. Commissioner Charles McClelland Southwestern Athletic Conference]

Our schools provide developmental, intellectual, and social experiences as well as stability for our students, which in turn leads to academic, athletic and ultimately post-graduate success. In most cases, HBCU student athletes are first generation college students, and it is through their participation in sports and competition that we celebrate and recognize that 4HBAC student-athletes graduate at a higher rate than their non-athlete peers and they traditionally lead in federal graduation rates for both student body and student-athletes. Increasingly, HBCU and college sports fans across the country are excited about what's happening on our campuses and on our athletic fields and, in several cases, we are outpacing our predominantly white institution peers in attendance and viewership. As a result, there is a recent rise in corporate sponsorships, destination contests offers and most importantly prominent media prospects.

With the ever-changing climate of intercollegiate athletics, these increased opportunities for our predominantly Black students are at risk. Pending regulatory decisions and plaintiffs' attorneys threaten to change the face of college sports without our voices, and more importantly without the voices of the student athletes being considered. Additionally, there is a growing patchwork of state laws impacting college sports and creating disparities and confusion among our student-athletes. **The laws have made it difficult for the 4HBAC to manage and support member institutions and student-athletes.** In other cases, it has also become a challenge to retain our HBCU student-athlete population due to the differences in laws instituted from state to state.

Like the majority of our Division II and mid-major peers, most HBCUs do not generate significant revenue and rely heavily on school appropriated funds and donations. Therefore, classifying student-athletes as employees would have a staggering impact on our athletic programs and schools.

There is no question college sports have been too slow to change, but thanks in part to the voices of many HBCU leaders, college sports are transforming. The NCAA now funds sports injury health coverage for all college athletes, extending up to two years after graduation, and all DI schools must offer health and wellbeing benefits as well as scholarship protections - long after graduation. We enthusiastically support our student-athletes profiting from their name, image and likeness (NIL).

To protect all that we have accomplished on our HBCU campuses, we ask for your support in passing laws that, when necessary, pre-empt state law, to create clear and fair playing fields for HBCU student-athletes. Such legislation will allow for consistent and nimble national governance with consumer protections. Most importantly, we seek special status for student-athletes to ensure they are not designated as employees of their institutions.

We look forward to partnering with each of you and serving as a resource on this important issue. Do not hesitate to contact us directly.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Private Schools: Treating college athletes as employees could burden private colleges with financial and administrative challenges, while also diminishing their competitive edge in student recruitment.

Edel 21 - [Edel D, Martin. "Are Student-Athletes Employees or Students? The NLRB General Counsel Issues Non-Binding Guidance," The National Law Review, October 6, 2023. <https://www.natlawreview.com/article/are-student-athletes-employees-or-students-nlr-general-counsel-issues-non-binding>] Elene.

[Martin Edel is Chair of Goulston & Storrs Sports Law Practice. In Marty's litigation and advisory practice, Marty advises and represents leagues, teams, media companies and individuals in licensing matters and disputes, intellectual property matters, employment, antitrust and other complex contractual disputes. His principal focus has been in the sports, media and financial institutions industries.

Marty is an Adjunct Instructor at Law at Columbia Law School, where he teaches Sports and The Law. In addition, for over 20 years, Marty has been an Adjunct Law Professor at the Brooklyn Law School, where he teaches classes in Sports Law and in Antitrust.]

On September 29, 2021, the National Labor Relations Board's (NLRB) new General Counsel issued a memorandum that student-athletes at private colleges and universities should be considered employees under the National Labor Relations Act (NLRA).

The memo, if adopted by the NLRB, will have far-reaching consequences for private educational institutions including **that students will have the right to unionize, have a representative negotiate their wages, hours and other terms and conditions of employment, be entitled to an array of costly benefits, including health insurance, vacation and other days off, and engage in strikes or other work stoppages sanctions under the NLRA.**

The NLRA reflects the country's commitment to unionization and collective bargaining as means to avoid labor strife and level the playing field for employees. It provides for employees of private employers to unionize, bargain collectively for the wages, hours and terms and conditions of employment and engage in work stoppages, including strikes, as a means to advance their collective goals.

One key to the NLRB's jurisdiction is that there must be an "employee" over which the NLRB may assert jurisdiction. Under the NLRB's rules, the NLRA applies to an employee "**who perform[s] services for another and is subject to the other's control or right to control.**" **To date, the NLRB has declined jurisdiction over student-athletes.**

Private colleges and universities need to examine their practices and prepare for what appears to be the NLRB's inevitable decision to challenge the schools' failure to classifying student-athletes as employees under the NLRA. Sitting back is not an option. For example, taking no position might invite the NLRB to act without the benefit of opposing views, including holding colleges and universities in violation of the NLRA for failing to classify student-athletes as employees. This is a high-stakes situation. **Think of the adverse possibilities for your school of finding student-athletes to be employees:**

- **This would allow student-athletes to retain a bargaining representative to negotiate with the school;**
- **This would allow student-athletes to negotiate collectively over their wages, hours and working conditions, which could include paying student-athletes more than the school can afford, agreeing to let student-athletes have "holidays" as vacation time which could impact playing schedules and paying them health and other benefits that are not budgeted;**
- **This could impact your competitive advantages in recruiting students who otherwise might attend public colleges or universities, which are not subject to the same requirements.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Impact: Tuition increases. Paying student athletes will require even more funding from tuition to cover increased athletic expenses.

Krupnick 14 - [Krupnick, Matt. 2014. "Would Your Tuition Bills Go up If College Athletes Got Paid?" Money. Money. November 28. <https://money.com/college-athletes-sports-costs-students/>] Joel.

[Matt Krupnick (he/him) is a Chicago-based freelance reporter and editor specializing in inequity/inequality, education, investigative work, data journalism and the environment]

According to the Knight Commission, **growth in athletics funding at Division I schools outpaced academic spending from 2005 to 2012. Students at some schools pay \$1,000 in athletics fees alone.**

Changes to how student-athletes are paid could lead some schools, stuck with nowhere else to turn, to raise other students' fees. Universities and colleges could also scale back their athletics programs to cut costs.

That "would be the rational approach," Kirwan said. "But when it comes to college athletics, rationality doesn't often prevail," he said. "There are so many societal pressures."

Research shows that some students don't even know their fees are already paying for athletics. At Ohio University, for instance, 41% of revenue from the general fee of \$531 per quarter for full-time students in 2010 went to intercollegiate athletics, but 54% of students didn't know it, according to a survey by the nonprofit Center for College Affordability and Productivity, a Washington, D.C. think tank.

Dividing the \$765 per year they paid for athletics through the fee by the number of games the average Ohio University student attended, the center calculated that students were paying the equivalent of more than \$130 per athletic event they actually watched in person.

Eighty-one percent said they opposed raising the amount of their fees that went to the athletics program, or wanted it reduced.

If the Kessler lawsuit succeeds, "The institutions that rely primarily on student fees are going to have to make a decision about whether they're going to try to keep up," says Amy Perko, executive director of the Knight Commission. "When you have schools with \$5 million for their entire athletic budget trying to compete with schools that have \$5 million coaches, it's going to strain at some point."

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Sports Bad

NOTE: *this argument may be unpopular with many judges. Run with care.*

Collegiate sports should be dismantled – they take away from occupational education and social engagement, leave athletes in a poor position to compete on the job market, are a huge drain on financial resources, and promote a culture where college athletes often get away with sexual abuse
Classifying students as employees would entrench a bad institution, which moves us in the wrong direction

DiMaggio 14— [DiMaggio, Anthony. 2014. “Why Higher Education Should Rid Itself of College Athletics.” CounterPunch.org. CounterPunch. April 22. <https://www.counterpunch.org/2014/04/22/why-higher-education-should-rid-itself-of-college-athletics/>.] Joel.

[Anthony DiMaggio is Associate Professor of Political Science at Lehigh University. He is the author of *Rising Fascism in America: It Can Happen Here* (Routledge, 2022), in addition to *Rebellion in America* (Routledge, 2020), and *Unequal America* (Routledge, 2021). Anthony DiMaggio holds a Ph.D. in Political Science from the University of Illinois, Chicago.]

Advocates of college sports will claim that these activities are vital for building school pride and that many bring in needed revenues for schools. The revenues claim is largely false for all but the most successful sporting programs, as these activities usually cost non-elite schools (and even elite ones) significantly more than their monetary turns. On the school pride point, I would respond with a question: what good is civic pride if the rest of the university or college is collapsing under its own weight? In the era of declining tenure, the adjunctification of higher ed, massive budget cuts, and skyrocketing tuition rates, spending millions on college athletics seems like an unnecessary indulgence and a misappropriation of valuable funds.

College athletics are not essential (and often antithetical) to the primary missions of higher education: promoting critical thought and the developing of occupational skills. The groupthink and diversion from studying and on-campus political engagement that often comes with sports boosterism and sports-related partying (“tailgating”) works at the expense of student achievement within the classroom and regarding social activism. **When the college experience is about sports and partying, little time is left for real world social engagement.** Furthermore, on the most instrumental level, **these sports having nothing to do with the primary reason students attend college: pursuit of an occupational skill-set.** Students at University of Illinois may enjoy rooting for the “Illini,” but **the dismantlement of college sports will have nothing to do with their pursuit of a degree in medicine or engineering.**

The largest problem I have with college sports is not instrumental, but pedagogical. As a teacher at a major state university in Illinois for years, I had many experiences with student athletes. These experiences were typical, by what I’ve heard from other professors. **Student athletes were almost never the highest achieving in my classes. Most did just enough to “get by.”** They often registered for the earliest classes possible (8 AM being very common), **seldom contributed anything of interest or relevance to class discussions, and received mediocre to poor grades compared to their classmates.** The reason why was obvious – **as a student on a partial or full scholarship, they felt obligated** (usually pressured by coaches and teammates) **to put all their time into their “real” occupation – sports.** They usually walled themselves off in special sports-related student housing, spent much (if not most of their day) on sports-related activities, and did little to develop critical thought by participating in student groups or by excelling in coursework. In other words, most of them were students in name only. The problems are much worse at more elite schools. In those settings, student athletes often do not even attend class, and benefit from an army of tutors hired to assist them in passing their classes. Professors are often intimidated or pressured into giving them decent enough grades to pass without going on academic probation. I think most directly of my experiences with an immediate family member and former student athlete (on a sports scholarship). He excelled at skipping class, only to plead with professors at semester’s end for a passing grade that he didn’t deserve. As a soccer player, he thought sports was his life, but like **the vast majority**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

of college athletes, never made it into professional sports and was forced to enter the job market like other college graduates. Without having developed much by way of professional skills (he majored in “communication” as a default), his occupational prospects were limited.

The fixation on sports among so many students is quite sad in light of the likely outcome. Most-all student athletes will never become professionals, but instead will have to fall back on their college degrees to find employment once they graduate. With little time spent on developing critical thinking and occupational skillsets, these students are in a poor position to succeed once they leave higher ed. Consider some of the recent statistics: **just 1.7 percent of college football players play professionally (and those that do play only average of a couple years professionally playing time,** typically earning league minimum salaries that will require them to find a new career once they wash out). Only 11.6 percent of college baseball athletes enter Major League Baseball; **just 1.3 percent of hockey players make it into the NHL; and only 1.2 percent of basketball players enter the NBA.** Rather than skating through on partial or full scholarships, many of students would be far better off earning a vocational degree at a low-cost community college, or using that community college as a spring-board into a more affordable four-year degree, to be paid for with a combination of student loans and (ideally) parental tuition assistance.

College sports are also a tremendous drain on financial resources. A large majority of college sports programs – 90 percent – lose money for their schools and require additional funds beyond what is earned through ticket, apparel, and other revenues. The cost of such sports only increased in recent years, by 25 percent on average from 2008 to 2012. A recent USA Today study found that just 23 of 228 NCAA athletic departments earned enough revenues to pay for their expenses in 2012. Recent research from the Delta Cost Project found that college sports cost \$6 billion annually and that schools on average spent three to six times more on student athletes than non-athletes. A recent report from the American Association of University Professors highlights that nationally professors’ salaries grew quite meagerly in recent years, while administrative and athletic coach salaries and spending skyrocketed. **In the modern era, sports appear to be more and more important to collegiate priorities, while pedagogy and teaching are receding into the background.** In light of the significant and growing cost of these athletic programs – often millions for a single school per year – and the meager academic returns, such funds would be better spent elsewhere.

The above problems with college sports are bad enough, but the situation worsens when one considers the impunity with which college athletes are allowed to conduct themselves. The immunity of college athletes and coaches from basic ethical standards was made infamous with the Joe Paterno-Jerry Sandusky child sex-abuse scandal at Penn State University. The incident demonstrated the dangers involved when college athletes and coaches are elevated to the status of semi-divine, and when administrators turn a blind eye to child rape committed on campus and enabled by university employees. The student rebellion – manifesting itself in the riots following the firing of Joe Paterno – suggested that an entitled, thuggish groupthink mentality has taken hold among many college athletes and fans.

Sadly, **this type of groupthink manifests itself in many ways, particularly in the reluctance to prosecute college athletes for alleged sex crimes.** Recent research finds that the problem is most acute in the insulated walls of college sports. For example, **college athletes are 30 percentage points less likely to serve jail or prison time for sex-related crimes than are professional athletes.** Countless stories and studies have emerged in recent years exposing the delayed reaction and punishment of college administrators to sexual abuse allegedly committed by student athletes. In such situations, **male athletes in Basketball and Football programs (among others) are often treated with “kids gloves” under a “boys will be boys” mentality. Scholarly studies have concluded that this isn’t because they are “better citizens” than non-athlete students.** The reality is the opposite, **statistically, athletes are more likely to have engaged in sexual harassment or assault than non-athletes, and more likely to have engaged in non-consensual sex and gang rape.” This is not to suggest that most athletes engage in such abhorrent behavior (they most likely don’t), but that such behavior is a relatively greater problem in athletic programs than elsewhere on college campuses.** The reasons for this problem, studies suggest, relate to phenomena such as the development of entitlement among male athletes, the

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

hubris that comes along with their “celebrity” status, and the lack of institutional regulation of, or concern with their bad behavior.

I’m not naïve enough to think that the momentum is going to change anytime soon against college sports. Nonetheless, the dire financial straits in higher ed, and the lack of worthwhile academic returns of college sports mean that eventually the problem of college athletics has to be addressed. I propose the closure of most NCAA-affiliated athletic programs, and the institution of a far less expensive, voluntary intramural system that is typically practiced at the community college level. This system will bring the cost of higher ed sports more into line with the limited academic returns of such endeavors. College campuses need to be a place where learning and critical thought are prioritized, rather than a second thought. If student athletes at “Big 10” schools cannot make the grade without being coddled through the system by extra tutors and grade inflation, then these programs should be dismantled in the name of maintaining academic rigor. The revenues earned by these top-level sports programs mean they are unlikely to ever be eliminated. If that is the case, it is time to start asking what contributions these programs are making to the pedagogical and fiscal health of their parent institutions.

The macho, larger-than-life culture associated with college sports, and celebrity athletes and coaches needs to be demolished in favor of a pedagogical system that values student civic engagement, critical thought, and commitment to academic excellence. College sports often get in the way of these achievements. Professional sports (especially those posting record profits such as the NFL and MLB) should bear the responsibility of recruiting and preparing prospective professional athletes. **This can be done through private athletic associations, clubs, and recruiting, rather than at the expense of student tuition or taxpayers. The private gains of these professional sports should no longer be enhanced by public subsidies that will be better spent elsewhere.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Sports Cuts

Forcing universities to pay student athletes might require cuts to programs that don't make money – namely, Olympic Sports like gymnastics or soccer

Higgins 22— [Higgins, Laine. 2022. “Should College Athletes Be Paid? A Once-Radical Idea Gains Momentum.” Wall Street Journal, July 24, sec. Life. <https://www.wsj.com/articles/college-athlete-pay-ncaa-employees-11658502884>.] Joel.

[Laine Higgins is a sports reporter for The Wall Street Journal, primarily covering college sports in New York. Her coverage centers on the NCAA, both the results on the field and the ways the association is navigating this period of dramatic transformation. She grew up in Minneapolis and graduated from the University of Pennsylvania, where she was captain of the varsity women's swim team.]

One possibility would be to classify all college athletes as salaried employees, no matter how much revenue their sports generate. But **even the most strident advocates for college athletes worry that turning on the employment spigot for all athletes at once would create a financial crunch for universities, possibly prompting them to cut certain sports, with men's Olympic sports like gymnastics or soccer facing the greatest risk of elimination.**

“The challenge has been to try to avoid unintended and collateral consequences that most people would find unfortunate,” says Purdue University President Mitch Daniels, who has publicly opposed imposing a pay-for-play model in college athletics.

Michael Hsu, a former University of Minnesota regent who is independently pushing to pay student athletes, acknowledges that **paying a football team a minimum wage, let alone hundreds more athletes in other sports, would require a substantial sum.** For instance, **salaries for a football team of about 124 players at the federal minimum wage of \$7.25 per hour for the officially allowed 20 hours of weekly practice over 22 weeks in the fall would come to roughly \$395,000.** But he points to coaching contracts of as much as **\$10 million per year** as evidence that there is plenty of money sloshing around the system that could be redirected.

Athletic Directors: over 90% of surveyed athletic directors agreed that that college athletes employment status would affect non-revenue sports funding.

LEAD1 Association 21 - [LEAD1 Association “LEAD1 Survey Reveals Strong Majority of FBS Athletics Directors Believe Employment Status of College Athletes Would Impact Funding of Non-Revenue Sports.” Lead1 Association. November 16, 2021. <https://lead1association.com/lead1-survey-reveals-nearly-all-fbs-athletics-directors-believe-employment-status-of-college-athletes-would-impact-funding-of-non-revenue-sports/>.] Elene.

[LEAD1 represents the athletics directors of the 130 member universities of the Football Bowl Subdivision (FBS). Key to the LEAD1 mission are influencing how the rules of college sports are enacted and implemented, advocating for the future of college athletics, and providing various services to our member schools.]

The LEAD1 Association (“LEAD1”), which represents the athletics directors of the 130-member schools of the Football Bowl Subdivision (“FBS”), recently surveyed approximately 100 of its FBS athletics directors on whether the employment status of college athletes would impact funding of non-revenue sports.

Of the LEAD1 athletics directors surveyed, more than 90 percent disagreed with a recent comment made in a podcast interview by National Labor Relations Board (NLRB) General Counsel, Jennifer Abruzzo, that the employment status of college athletes would not significantly impact non-revenue sports, including these sports being cut.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

In addition, approximately 85 percent of the LEAD1 athletics directors surveyed answered that they are **highly concerned about college athletes being classified as employees whether via legislative, administrative, or judicial means with possible corresponding benefits and protections such as the rights to organize, strike, overtime pay, minimum wage, health and safety protections, and more.**

In recent months, particularly following Abruzzo’s memorandum providing updated guidance that certain college athletes are employees under the National Labor Relations Act (NLRA), LEAD1 has continued to educate its members, as well as other college sports stakeholders, about the ramifications of college athletes being classified as employees.

“Our recent survey demonstrates that nearly **all of the leading practitioners in athletics departments across FBS college sports believe that employment rights will impact broad-based opportunities for college athletes,**” said President and CEO of LEAD1, Tom McMillen. “In fact, the financial model in college sports is unique given that football and basketball subsidize all of the other sports in our athletic departments. **If more resources were directed towards football and basketball because college athletes have been classified as employees, other sports will inevitably suffer.** If these other sports are cut, our U.S. Olympic effort will be damaged as the majority of U.S. Olympians were sourced from our colleges and universities. In the 2020 Summer Games, 75% of the U.S. national team competed in college before participating in the Olympic Games.”

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Student Disadvantages

Lost Benefits: Student-athletes already receive substantial benefits such as room and board, scholarships and academic support, and classifying them as employees would put all these benefits at jeopardy.

Vukmirovich 23—[Vukmirovich, John. “No, Colleges Should Not Pay Student-Athletes.” Chicago Sun-Times, March 25, 2023. <https://chicago.suntimes.com/2023/3/25/23653920/student-athletes-payment-labor-issue-college-costs-john-vukmirovich-op-ed>.] Elene.

[John Vukmirovich is a writer and book reviewer at The Chicago Sun-Times and Chicago Tribune, both one of the major daily newspapers published in Chicago, Illinois. John Vukmirovich is also a topic expert and a former college instructor]

With March Madness upon us, perhaps it’s a good time to examine the ambiguous and contentious label of student-athlete. Are they first and foremost students, or are they athletes? Or worse, are they to become paid employees of their respective institutions?

As it stands, here is what the average student-athlete commonly earns. **He or she is awarded a scholarship that invariably includes free tuition and housing. In addition, they have access to special academic advisers and tutoring services. Further, as of the summer of 2021, student-athletes can benefit financially from the use of their names, images, and likenesses, per revised NCAA guidelines.**

That’s quite a haul, but apparently, that’s not enough for some folks. While the National Labor Relations Board seems to favor the argument that student-athletes should be considered paid employees, the issue has yet to be decisively resolved on the national level by the courts.

As a former college instructor, I just don’t buy it, and here’s why.

If they are to be paid employees, drop the pretense of them being students. No classes, no grades, no degrees. They can come to work — practices, team meetings, games — and then leave campus. If they are to be paid employees, and not students, there is also no reason for them to be provided with room and board. They can find housing and pay their way like any other worker in any other job. Those dormitory rooms would be available for other students. There is often a waiting list.

Finally, if they are to be paid employees, they should be able to be fired if they fail to fulfill their assigned duties. But they will have contracts, you say! I’ve dealt with several labor contracts, and a non-performance clause is common, covering absenteeism, dereliction of duties, insubordination and criminal activity. All can result in termination. Why should a former student-athlete be treated differently than any other employee?

Student-athletes should remain so — that’s it. They should take full advantage of all they are offered, dedicate themselves to their studies as much as they do to their sport, and by doing so, earn that much-needed degree.

What are they to do if they don’t accept the terms that I’ve just presented? **As workers, they can walk and try their luck in the labor market, like any other worker.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Management: Paying student-athletes could lead to legal classification as employees, allowing them to unionize, negotiate contracts, and manage professional conflicts

Miller 17 - [Miller, Keith. "6 Advantages and Disadvantages of Paying College Athletes." FutureofWorking.com. January 14, 2017. <https://futureofworking.com/6-advantages-and-disadvantages-of-paying-college-athletes/>.] Elene.

[Keith Miller has over 25 years of experience as a CEO and serial entrepreneur. As an entrepreneur, he has founded several multi-million dollar companies. As a writer, Keith's work has been mentioned in CIO Magazine, Workable, BizTech, and The Charlotte Observer.]

If colleges and universities began to pay student-athletes for their services on the field, pitch, or court, then that action would likely be seen legally as an employment contract. That classification would give the athletes in the program an opportunity to unionize throughout most of the United States. That means teens and their families would need to manage the same conflicts that professional franchises and their professional athletes handle regularly. There might even be contract negotiations to manage in this situation. The logical outcome from this disadvantage is that the best student-athletes would receive agent representation to maximize the potential of their value. Instead of playing for the joy of the game, there would be an elite group in each division working toward the best possible contract instead.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Title XI

Spending Gap: Classifying student-athletes as employees would widen the spending gap between men's and women's sports

Haile 23 – [Haile, Andrew J. 2023. “Equity Implications of Paying College Athletes: A Title IX Analysis.” Ssrn.com. February 2. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345946.] Joel.

[Professor Haile is an assistant teaching professor in the Legal Skills in Social Context program. Prior to joining Northeastern, Professor Haile was an assistant attorney general in the constitutional and administrative law division of the Office of Massachusetts Attorney General Maura Healey '98. In that capacity, he litigated appeals in state and federal court on behalf of Massachusetts state agencies in a variety of subject areas.]

After fifty years of Title IX, the gap in participation rates between men and women in college athletics has closed significantly. In 1982, women comprised only 28% of all NCAA college athletes. In 2020, they made up 44%. Despite the progress in participation rates, a substantial gap in resources allocated to men's and women's sports continues to exist. **On average, NCAA colleges spend more than twice as much on men's sports as they do on women's.** This gap is even greater at schools in the Football Bowl Subdivision, the most elite level of college athletics. **The median FBS institution spends almost three times more on men's athletics than on women's. This situation may get even worse if colleges are allowed to start paying their athletes, which appears a realistic possibility in the not-too-distant future.** Justice Kavanaugh's concurrence in the 2021 Supreme Court decision *NCAA v. Alston* sent a strong signal that prohibitions on paying college athletes most likely violate federal antitrust law. More recently, **some states have introduced legislation that would require colleges to compensate athletes in sports that generate positive net income for their schools.** While this could rectify the serious inequity of colleges making tens of millions of dollars from their athletes' labor without those athletes being allowed to share in the financial benefits they create, it could also widen the gap in resources colleges invest in men's and women's sports. With very rare exception, football and men's basketball are the only college sports that produce more revenue than expenses. Consequently, **unless Title IX requires otherwise, the difference in the amount of money colleges invest in men's and women's sports could grow significantly if those colleges are allowed to compensate male athletes without compensating female athletes.** This Article provides a detailed analysis of whether the current Title IX regulations require equal payments to male and female athletes. **It concludes that they do not.** Of course, the controlling Title IX regulations were drafted at a time when paying college athletes was not even contemplated, and therefore this result does not comport with the purpose or spirit of Title IX. Consequently, **the Article goes on to argue that the regulations should be amended to treat payments to college athletes the same as scholarships. This would require that male and female athletes receive proportionately equal payments for their athletic services.** Making this change to ensure equitable treatment of all athletes will advance the purposes of Title IX and will help to combat the “marketplace bias” that hampers the economic growth of women's sports.

Equal pay: Title IX would require equal pay for all athletes, potentially increasing program expenses, fees, or reducing individual pay.

Miller 17 – [Miller, Keith. “6 Advantages and Disadvantages of Paying College Athletes.” FutureofWorking.com. January 14, 2017. <https://futureofworking.com/6-advantages-and-disadvantages-of-paying-college-athletes/>.] Elene.

[Keith Miller has over 25 years of experience as a CEO and serial entrepreneur. As an entrepreneur, he has founded several multi-million dollar companies. As a writer, Keith's work has been mentioned in CIO Magazine, Workable, BizTech, and The Charlotte Observer.]

Another problem that proponents of paying student-athletes would need to address in the United States is the **equality requirements of Title IX. This issue would make it all but impossible to pay student-athletes in only the revenue sports since women make up about 15% of the student population in that category.** That means paying one athlete would likely mean paying everyone. **That outcome will either increase the total expenses of the program, add more fees to it, or lower the amount of pay that each athlete could earn while attending the institution.**

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Unionization Bad

College student-athletes shouldn't be allowed to unionize – it could cause issues in D1 sports, and form a relationship inappropriate to the school-student relationship, which should be about education rather than profit

FindLaw 23— [Findlaw Team. 2023. "Can College Athletes Unionize?" Findlaw. April 4. <https://www.findlaw.com/education/higher-education/can-college-athletes-unionize.html>.] Joel.

[FindLaw.com is a legally-reviewed source of legal information and resources on the web.]

Others disagree. They say that **college athletes are students first and not employees. They get scholarships and other perks that regular employees don't. Also, if athletes can unionize, it might cause issues in Division I sports. Schools would have to figure out how to treat these athletes as part of a bargaining unit, and that could be complicated.**

Opponents of student-athletes unionization argue there is not an employer-employee relationship. They argue out that the business of higher education is the exchange of tuition money for education. They recognize that some student sports may generate large amounts of money, but also point out that many student sports tend not to generate profits.

Allowing athletes who play profitable sports to unionize would logically permit others to join or create their own. These colleges would be forced to pay salaries and provide insurance for every sport equally. This result could be financially disastrous. Negotiating with multiple unions would also drain administrative resources.

Opponents say universities can handle this by addressing instances of clear unfairness and supporting student-athletes with grants and loans. Some argue that the students participating in the most profitable sports should be better represented. This can be accomplished by changing school rules to permit a special class of athletes. These athletes would be considered professional athletes. This employee status would be used rather than creating unions.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

Neg Blocks

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Anti-Trust Laws

Argument: The NCAA's rules don't allow for fair competition amongst athletes, teams, and leagues – it's a monopoly on college sports—and that violates US anti-trust laws. Classifying student-athletes as employees would chip away at these anti-trust violations.

Major sports leagues like the MLB all have some degree of anti-trust exceptions—the NCAA should be no exception

Ford 23— [Ford, Matt. 2023. “The One Thing the Supreme Court Got Right: Blowing up College Sports.” The New Republic. August 25. <https://newrepublic.com/article/175193/supreme-court-alston-college-sports>.] Joel.

[Matt Ford is a staff writer at The New Republic and former Associate Editor at The Atlantic.]

The NCAA fought tooth and nail against the lawsuit, arguing that it was effectively exempt from ordinary antitrust laws. “A defining characteristic of NCAA-regulated college sports has been that they are played by amateur student-athletes, i.e., college students who are not paid for their play,” the association said in its brief for the justices in Alston. “As this Court has recognized, amateurism in college sports is procompetitive because it widens choices for consumers by distinguishing college sports from professional sports.”

Three of the nation's four major professional sports leagues have partial antitrust exemptions under federal law, particularly when it comes to selling broadcast rights. The fourth, Major League Baseball, has a much broader exemption to antitrust laws that is rooted in both federal laws and in Supreme Court rulings dating back to 1922 that gave baseball a privileged (and controversial) status in American commerce. The NCAA does not have a statutory exemption to antitrust laws, but it has long considered a 1984 Supreme Court ruling's deference to amateurism as giving it wide latitude when drafting anti-competitive rules.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Minimum Wage

Argument: Collegiate student-athletes should be paid at least minimum wage – something an employee classification would provide

Paying student athletes minimum wage may start a slippery slope, where club members like college debaters may end up demanding minimum wage as well

Shults 23—[Shults, Jennifer. 2023 “If at First You Don’t Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for ‘Employee’ Status.” <https://jlsplaw.columbia.edu/files/2023/04/Vol56-3-Shults.pdf>.] Joel.

[Jennifer Shults is Executive Managing Editor, Colum. J.L. & Soc. Probs., 2022–23. J.D. Candidate 2023, Columbia Law School. She’s a former women’s volleyball player for Harvard]

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. **Non-revenue-generating athletes have often been analogized to students in extracurricular organizations.** In drawing this comparison in Berger, **a concurring 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.**

Fortunately, nonrevenue-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 and by highlighting how much their athletic commitments distract from their educational pursuits.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: NLRB Jurisdiction

Argument: The NLRB has jurisdiction over NCAA players as the NCAA is a ‘joint employer’ of student athletes – thus, national labor rules should apply to student-athletes and they should be classified as employees

The NCAA is not ‘joint employer’ of athletes, and the NLRB has no jurisdiction over the athletes—the NCAA can’t be responsible for minimum wage for 187,000 student athletes under current law

Karcher 23 –[Karcher, Richard T. 2023. “The NCAA as Joint Employer? Let’s Be Real.” The University of Memphis Law Review. https://www.academia.edu/102477623/The_NCAA_as_Joint_Employer_Lets_Be_Real?uc-sb-sw=97746238.] Joel.

[Richard Karcher was appointed as Eastern Michigan University’s Faculty Athletics Representative in February of 2022. His research and scholarship focuses on labor and ethical issues involving athletes and he is a co-author of a leading textbook on sport ethics for sport management professionals. He is frequently retained as a damages expert in cases involving athletes and has also provided expert testimony before Congress. Prior to entering academia, Karcher was a partner at Honigman LLP in Detroit where he practiced corporate law and also represented and counseled athletes in business and litigation matters.]

In determining the NCAA’s status as a joint employer of college athletes, courts and the NLRB should address the key issues/questions that no court has addressed. First, they should answer whether and how the NCAA’s control is direct, indirect, or a contractually reserved right to control. The district court in Johnson seemed to view the NCAA bylaws as an agreement among the member institutions that gives the association joint authority over employment-related decisions. Second, they should consider whether the NCAA’s operating bylaws more resemble indicia of indirect control that bears on “the routine components of a company-to-company contract” as opposed to essential terms and conditions of employment. Third, they should address and explain the NCAA’s governance system of “institutional control” and how that translates to NCAA control. The Ninth Circuit in Dawson merely noted the complaint alleged that “the NCAA functions as a regulator, and that the NCAA member schools, for whom the student-athletes allegedly render services, enforce regulations.” Finally, **they should answer why the NCAA needs to be jointly liable for minimum wages of the 187,000 college athletes who perform services exclusively for their imputed employers that are Division I members and how it would achieve the joint employer rule’s purpose.** To that end, **they should consider whether the NCAA resembles any of the types of business relationships that are typically subject to joint employer analysis.**

In conclusion, **the NCAA is not the real employer.** If the objective is to give the NLRB jurisdiction over all NCAA member institutions, joint employer theory is not the solution. Claiming the NCAA is a joint employer in a FLSA lawsuit or an unfair labor charge so that its public institutional members are covered by the NLRA is sloppy analysis; it’s like claiming an insured defendant in a tort lawsuit is responsible for damage caused by its business partners that are not “insured persons” under the insurance policy. The appropriate avenue is a revision of the NLRA to give it jurisdiction over public universities in the limited context of athlete-university relations pertaining to intercollegiate athletics—which is what the CARO Act does. The CARO Act also places college athletes and their institutional employers into the most appropriate multiemployer bargaining units in the event college athletes want to exercise their right to collectively bargain. The NCAA, sometimes called “the evil empire,” is the least desirable entity on earth that should be deemed an employer of college athletes and not the entity that players should be bargaining with.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: No Revenue

Argument: Most college sports don't generate net revenue – so the athletes shouldn't be paid.

Whether or not students should be treated as employees has nothing to do with how much the colleges benefit—otherwise, any non-profitable business could well argue that it shouldn't pay its employees

Eigen 14 – [Eigen J. Zev. “Why College Athletes Aren't Really Employees - but Should Be.” HuffPost. March 31, 2014. https://www.huffpost.com/entry/why-college-athletes-aren_b_5063073] Elene.

[Zev. J. Eigen is the Global Director of Data Analytics at Littler Mendelson. He is a nationally recognized expert on data analytics as applied in the fields of human resources, labor and employment law, and contracts. His work focuses on developing artificial intelligence solutions to workplace problems. In 2013, Dr. Eigen was named one of forty under 40 “rising legal stars” in Chicago by the National Law Journal.]

Sometimes, there is a difference between how things should be, and how things are. Some college athletes should be employees, but they are not. **Many people seem to think it's unfair that some student athletes spend the majority of their time playing a sport, and the result is that the school profits from this. They should be employees working for an employer. Not students. They should be athletes, playing in a minor league.** That may be how it should be. But that is not how it is.

How much the university benefits or does not benefit has nothing to do with the question of whether the primary relationship is one of employment. That argument has always been a loser. If it were a winning argument, every non-profitable business could successfully argue that its workers are not eligible to form a union. Even so, some still feel like the current NCAA system doesn't seem fair since it appears to allow schools to take advantage of student athletes.

This gets us back from the world of "is" to the world of "should." Student athletes who receive free degrees in exchange for playing a sport are not employees. Should they be? Yes. What should change? Universities should be required to use two "tracks" for admissions. There should be a "student" track, which is the traditional primary exchange of an education for money. "Students" may still try out for athletic teams, but they are students first and foremost. The second track is "Athlete." Athletes are paid employees of the universities. They would play in what is now like a defacto minor league in sports like basketball and football. The minor league would become more of a real thing than what it is now. As part of their compensation, they could be permitted to earn a degree at the university sometime after their employment contract expires, up to a reasonable amount of time, say 20 years.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Professional

Argument: We can't pay college athletes, because it would turn the sport 'professional'

Non-unique: college sports are already professional, for everyone except the athletes

Harriot 23 – [Harriot, Michael. 2017. "Just a Reminder: The NCAA Is a Plantation, and the Players Are the Sharecroppers." The Root. The Root. March 31. <https://www.theroot.com/just-a-reminder-the-ncaa-is-a-plantation-and-the-play-1793877559>] Joel.

[Michael Harriot is a journalist, author and cultural critic who has been hailed as "one of the most eloquent writers in America." Michael earned degrees in mass communications and history from Auburn University and earned a master's degree in macroeconomics and international business from Florida State University. He earned National Association of Black Journalists Awards for digital commentary, television news writing and magazine writing.]

Of course, there are arguments against paying college players. **Some people say that it turns college athletics into professional sports (even though teams, coaches, sponsors, television networks and everyone else involved with college sports make millions; it is *already* professional sports).** Others argue that the players get a free college education (they don't; athletic scholarships are one-year, renewable offers, and are only good as long as you can play) and kids are given a chance to play professional sports (less than 2 percent of players ever play professionally). The greatest argument is that college players basically get a degree for free, but every metric shows that it is the white players, not the black players, who end up with degrees.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Profits

Argument: College sports program turn huge profits, so the athletes responsible for these profits should be paid.

Most college athletic departments run deficits of millions of dollars, leading to increases in tuition and athletic fees

Zimbalist 23 – [Zimbalist, Andrew. “Analysis: Who Is Winning in the High-Revenue World of College Sports?” PBS NewsHour. March 18, 2023. <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports>.] Elene.

[Andrew Zimbalist is a Robert A. Woods professor emeritus of economics at Smith College whose research focuses on sports economics, international development, and comparative economic systems.]

The U.S. hyper-commercialized system of college sports, which does not exist anywhere else in the world, is in a period of overarching transition and deep financial crisis. **A select share of Division I college athletes produce billions of dollars of revenue every year for their schools. Almost all of this revenue comes from football and men’s basketball.**

Due to longstanding rules of amateurism, the athletes themselves do not receive a salary even though some have an estimated market value of several million dollars. But change is coming. Even if it is in uneven fits and starts.

Division I athletics generated \$15.8 billion in revenues in 2019, according to the National Collegiate Athletic Association (NCAA), which regulates student athletics among 1,100 colleges and universities. Men’s basketball and football generate the vast majority of revenues with media rights, bowl revenues, ticket sales, royalties and licensing, donor contributions and other sources accounting for more than half of these revenues.

Even as commercial revenue streams have grown for top-billing football and men’s basketball, **athletic expenditures exceed revenues at the vast majority of schools. Among the 125 schools of the Football Championship Subdivision (FCS) the median program ran a deficit of \$14.3 million, and in DI without football (94 schools) it was of \$14.4 million. Large and persistent athletic department deficits lead schools to increase student athletic fees (many exceed \$1000 per student yearly) and contribute to increases in tuition.**

The highest-grossing college athletes reap only a very small share of the revenues they generate during their college careers. Of the \$15.8 billion in revenues that went to the NCAA’s Division I athletics enterprise in 2019, only \$2.9 billion — 18.2 percent — was returned to athletes in the form of athletics scholarships and 1 percent spent on medical treatment and insurance protections. In contrast, 35 percent was spent on administrative and coach compensation and 18 percent on lavish facilities.

A recent player-level analysis finds that the existing restrictions on paying college athletes effectively transfers resources away from students who are more likely to be black and more likely to come from poor neighborhoods towards students who are more likely to be white and come from higher-income neighborhoods.

March 24: In the United States, collegiate student-athletes should be classified as employees of their educational institution.

AT: Worse Outcomes

Argument: Student-athletes spend a lot of time on sports instead of academics—this can hurt their graduation rates, chances at good employment, and their overall well-being

Former student-athletes have better lives than non-student-athletes, in 4 out of 5 measured domains, and similar outcomes in financial terms

Gallup 20— [“The Gallup-Purdue Index Report Understanding Life Outcomes of Former NCAA Student-Athletes.” n.d. https://ncaaorg.s3.amazonaws.com/research/other/2020/2016RES_GallupNCAASStudentAthleteReport.pdf.] Joel.

[Gallup, Inc. is an American analytics and advisory company based in Washington, D.C.]

Former student-athletes who received a bachelor’s degree between 1970 and 2014 are leading other college graduates in four out of five elements of well-being that Gallup studied. These former student athletes are more likely than non-student-athletes to be thriving in purpose, social, community and physical well-being. In the element of financial well-being, former student-athletes are just as likely to be thriving as their non-student-athlete peers.

Despite the time commitment that participating in college sports requires, former student-athletes do not appear to have missed out on key college experiences. In fact, former student-athletes are more likely to agree that they had a key experience: **having a professor who cared about them as a person.** Former student-athletes also reported actively engaging in their campus communities during college. They participated in clubs and organizations as well as fraternities and sororities at higher rates than their non-student-athlete counterparts.

In terms of campus retention and persistence, former student athletes transferred colleges at a rate that is 17 percentage points lower than their non-student-athlete counterparts, 22% versus 39%, respectively. Additionally, former student-athletes are just as likely to have completed their degree within the “traditional” four-year time frame.

Eighty-two percent of former student-athletes are employed either full time or part time at their desired level, compared with 78% of non-student-athlete graduates. Additionally, the rates of unemployment are similar for both former student athletes and their non-student-athlete counterparts (3%). Seventy-one percent of former student-athletes are employed full time (by an employer or for themselves), which is similar to the 68% of non-student-athletes. An additional 11% of former student-athletes and 10% of non-student-athletes are employed part time, and do not desire full-time employment.