Clock-Out or Time-Out: *Alston*'s Game-Changing Impact on Student-Athletes' Employment Status

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> "No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession . . . ."[1]

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1. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 223 (2006) (citing THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED

> "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an *avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises."[2]

STATES, PROCEEDING OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES 34 (1906)); NCAA v. Alston, 141 S. Ct. 2141, 2148 (2021). Intercollegiate Athletic Association of the United States, established in 1906 as a rule-making body by President Theodore Roosevelt, is the immediate predecessor to the National College Athletic Association. NCAA, *History*, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Feb. 1, 2023).

2. NCAA, *2021–22 NCAA*, DIVISION I MANUAL, art. II, § 2.09, https://www.ncaapublications.com/productdownloads/D122.pdf (titled "The Principle of Amateurism").

I. INTRODUCTION

To be or not to be an employee—that is a question that has plagued the athletic industry since the National Collegiate Athletic Association ("NCAA") coined the term "student-athlete" in the 1950s.[3] The uniquely American intercollegiate athletics model[4] has left players without access to those benefits that come with the employee status such as minimum wage, unionization, and access to workers' compensation.[5] While denied these employee-specific benefits, student-athletes were also previously prevented by the NCAA from using their name, image, and likeness ("NIL") to profit from endless hours they had spent cultivating a profitable name for themselves.[6]

In an attempt to access these benefits, a group of grant-in-aid[7] student-athletes from Northwestern's football team attempted to

3. *See* NCAA, *supra* note 1 (discussing the origins of the NCAA from college athletics' desire to evolve from the reputation of brutality within football in the early 20th century as well as the implementation of the amateurism principles through the "Sanity Code").

4. Andrew Miller, *In Europe, You Don't Play High School or College Sports. Some Think U.S. Should Follow Suit.*, POST & COURIER (Dec. 14, 2020), https://www.postandcourier.com/sports/in-europe-you-dont-play-high-school-or-college-sports-some-think-u-s-should/article_92ad84ba-a5c8-11e8-86ae-df88215ac3a1.html ("In Europe, Canada, and Central and South America, the notion of playing for your local high school or even a university is, well, foreign. The United States is one of the few countries in the world where athletes play for their respective schools with the hope of earning college scholarships or even professional contracts.").

5. *Compare* Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983) (reversing and denying workers' compensation coverage for a student-athlete who became a quadriplegic after being injured at a spring football practice), *with* Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126 (Mo. Ct. App. 2007) (granting a professional hockey player access to workers' compensation under Missouri law after an accidental injury during a professional hockey game).

6. *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2165 (2021) ("The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary.").

7. "Grant-in-aid," used interchangeably with scholarship within this Note, is defined as "a financial subsidy given to an individual or institution for research, educational, or cultural purposes." *Grant-in-aid*, DICTIONARY.COM, https://www.dictionary.com/browse/grant-in-aid (last visited Feb. 5, 2023).

unionize in 2014 and received a determination from the National Labor Relations Board's ("NLRB") Regional Director of Region 13 declaring that the grant-in-aid student-athletes were in fact employees of the university under the National Labor Relations Act ("NLRA").[8] However, upon granting Northwestern University's request for review of the Regional Director's decision, the NLRB refused to provide greater clarity in its *Northwestern University* decisions, instead declining to exert jurisdiction.[9] This landscape of uncertainty became magnified when the United States Supreme Court (the "Court") granted certiorari to review what became *NCAA v. Alston*: a petition by the NCAA to the Court regarding an unfavorable ruling by the Ninth Circuit which found that the NCAA's restrictions in the name of amateurism violated antitrust laws.[10] Though the main focus of that review was on the NCAA's antitrust violations, the Court's holding ultimately blocked some of the NCAA's restrictive rules and opened

> College athletes do not technically receive a "scholarship" (financial aid provided on the basis of academic merit) in return for performing athletic-related services for a university. Rather, they receive a "grant-in-aid" (GIA). The NCAA Division I Manual defines a full GIA as "financial aid that consists of tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance."

Richard T. Karcher, *Big-Time College Athletes' Status As Employees*, 33 ABA J. LAB. & EMP. L. 31, 31 n.5 (2017) (citing NCAA, *2017–2018 NCCA*, DIVISION I MANUAL, art. XV, § 15.02.5, http://www.ncaapublications.com/productdownloads/D118.pdf).

8. Nw. Univ., No. 13-RC-121359 (2014), http://apps.nlrb.gov/link/document.aspx/09031d4581667b6f; *see* Joe Nocera & Ben Strauss, *Fate of the Union: How Northwestern Football Union Nearly Came to Be*, SPORTS ILLUSTRATED (Feb. 24, 2016), https://www.si.com/college/2016/02/24/northwestern-union-case-book-indentured. *Cf.* 29 U.S.C. § 203(d)–(e) (defining "employer" and "employee" for purposes of the Fair Labor Standards Act).

9. Nw. Univ., 362 N.L.R.B. 1350, 1356 (2015).

10. *Alston*, 141 S. Ct. at 2165.

the door for not only the mainstream NIL movement[11] but also recalibrated the employment status debate.[12]

Looking anew at the question of the employment status of student-athletes has generated both proposed legislation as well as new litigation.[13] The recent reinvigoration of the employee status question has resulted in a memorandum from the NLRB's newest General Counsel in support of the status change for student-athletes to statutory employees.[14] With this constantly changing environment, student-athletes and universities need to work together to ensure retention of the positive aspects of college student athletics and avoid the potential pitfalls and unintended consequences of an employee classification. Jennifer A. Abruzzo ("Abruzzo"), the General Counsel to the NLRB, has stated that granting student-athletes the ability to perform concerted activity as employees under the NLRA is not an "automatic" finding that student-athletes will be designated as employees in other legal contexts.[15] However, a finding of employee status under the NLRA does give further weight to the argument for similar findings in favor of their employee status in those other contexts such as workers'

11. *See* Andrew H. King, *Name, Image, and Likeness in US College Athletics: One Year Later*, 12 NAT. L. REV. 192 (2022) (drawing a direct link from the Court's remarks in *NCAA v. Alston* to the abandonment of the NCAA's NIL restrictions on student-athletes); NCAA v. Alston, 141 S. Ct. 2141 (2021).

12. *Alston*, 141 S. Ct. 2141; *see, e.g.*, Memorandum from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd. at 1 (Sept. 29, 2021) (on file with author).

13. *See* S. 1929, 117th Cong. (as referred to the S. Comm. on Health, Educ., Lab., and Pensions on May 27, 2021) (proposing the expansion of the National Labor Relation Act to "include public institutions as employers within the context of intercollegiate sports"); S. 4724, 117th Cong. (as refereed to S. Comm. on the Judiciary, August 2, 2022) (commonly known as the College Athletes Bill of Rights which proposes grant-in-aid guarantees such as necessities and reimbursement of expenses associated with participation as well as limited scholarship revocation rights for universities). *See, e.g.*, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021) (denying the NCAA's motion to dismiss the claims of student-athletes at various universities and colleges under the Fair Labor Standards Act based on an argument of amateurism principles).

14. Abruzzo, *supra* note 12, at 1.

15. SportsWise: A Podcast About Sports and the Law, *Episode 20: College Athletes as Employees? Jennifer Abruzzo, General Counsel of the NLRB, Explains* (Oct. 10, 2021), https://podcasts.apple.com/us/podcast/episode-20-college-athletes-as-employees-jennifer-abruzzo/id1525109223?i=1000538167783.

compensation, taxation, and the Fair Labor Standards Act ("FLSA"), making this memorandum potentially imperative.[16]

This Note will discuss the classification of student-athletes as "statutory employees" by looking at a few of the broad implications[17] and potential consequences for applying employee status to student-athletes throughout the legal landscape.[18] This Note proposes that it is necessary for Congress to regulate this area through binding federal legislation in order to resolve the student-athlete employee status debate and provide guidance for student-athletes and universities and colleges alike. Part II of this Note discusses the context in which the issue of student-athletes' employee status arose. Part III looks at the implications that the change of a student athlete's status to an employee would have on players and their universities, ultimately asserting that the employee status does more harm from both a legal and policy

16. *See infra* Part III (analyzing these broader implications).

17. *See infra* Part III (addressing the implications employee status has on student-athletes in multiple contexts including economic autonomy through NIL, workers' compensation claims, and receiving minimum wage). This Note does not attempt nor intend to address all of the subject matter that this topic could address and therefore, only discusses a very narrow scope of topics. *See. e.g*, Sophia Laurenzi, *The Second Job Nobody Asked For*, MEDIUM (Oct. 28, 2021), https://medium.com/on_second_thought/the-second-job-nobody-asked-for-4deb76679eaf (examining unpaid labor issues in America and comparing the treatment of student-athletes and domestic laborers) ("Without employee status, athletes can make hundreds of thousands of dollars in NIL deals without the security of workplace protections and benefits such as health insurance."). *See generally* Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving,'* CNN (Apr. 8, 2014), https://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html (exploring Shabazz Napier's story of starving as a student-athlete due to being unable to afford food despite having a scholarship); FOX Sports, *Shabazz Napier: "Some Nights I Go to Bed Starving,"* YOUTUBE (Mar. 27, 2014), https://www.youtube.com/watch?v=fFdRk2DYolM (showing Shabazz Napier discussing why he believes student-athletes should be paid).

18. As the NLRA has more explicit exceptions than many other acts, such as the Fair Labor Standards Act, a finding of a group as "employees" under the NLRA would greatly enhance the argument for those persons to be classified as employees under other legal definitions. Thus, for purposes of this Note the author will be analyzing the broad implication of employee status, recognizing, but not separating the distinct differences between such status under each discussed act or statute unless directly cited. Additionally, this Note in no way attempts to discuss all the implications brought on by the employee status designation, limiting its analysis to four broad fiscally related topics.

standpoint. Part IV proposes that the only reliable means for both addressing the broad implications of employee status for student-athletes and creating uniformity of labor relations remains the implementation of federal legislation. Part V briefly concludes.

II. THE HISTORY & REVITALIZATION OF THE "EMPLOYEE" QUESTION

The potential employee status of student-athletes has a multi-layered and complex history through every area of employment law. The current landscape of the employee status question is no less complex: with newfound economic autonomy through NIL deals being impacted by the disparities of NIL statutory language between states, as well as the push for student-athletes to be paid to play through a variety of proposed structures,[19] student-athletes begin to look more like professionals with each passing day.[20] Therefore, understanding the trajectory of the employment status question within multiple contexts requires a review of the NCAA's history, including its tumultuous efforts in administrative forums and the courts to prevent a finding of the "employee" status for student-athletes.[21] Additionally, acknowledging the governing principles of amateurism and their purpose grants greater understanding into the difficulties of transitioning student-athletes into employees that can arise from entirely abandoning the NCAA's reliance on those principles.[22]

A. The Origin of the NCAA and Amateurism Principles

The Court in *O'Bannon v. NCAA* eloquently laid out an origin story for American intercollegiate sports, and thus intercollegiate student-athletes, stating that: "American colleges and universities have been competing in sports for nearly 150 years: the era of intercollegiate

19. *See, e.g.*, David A. Grenardo, *Preparing for the Inevitable—Compensating College Athletes For Playing—By Comparing Two Pay-For-Play Methods: The Duke Model Versus the Free Market Model*, 53 U. MEM. L. REV. 963 (2023).

20. *See Tracker: Name, Image and Likeness Legislation by State*, BUS. COLL. SPORTS, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ (last updated July 28, 2023) (charting the status of NIL legislation as it is introduced on both a state and federal level); Grenardo, *supra* note 20 (looking at two possible "pay-for-play" structures for student-athletes).

21. *See infra* Part III.

22. *See infra* Part II.A.

athletics began, by most accounts, on November 6, 1869, when Rutgers and Princeton met in the first college football game in American history."[23] This story evolved as the Intercollegiate Athletic Association of the United States ("IAAUS"), which served as the precursor to the NCAA, came into existence under President Theodore Roosevelt as a response to a moment of crisis in collegiate football.[24] As the competitive nature of sports developed, universities faced a secondary crisis, a crisis in many ways still facing intercollegiate athletics today, which directly opposed the concepts of amateurism ingrained across sports at the time.[25] This crisis involved universities contemplated employment-like arrangements for some "college" athletes, including compensating both non-students to play on school teams as ringers[26] and the traveling athlete, one who moved on to whichever school paid better from game to game.[27]

The IAAUS changed its name to the NCAA in 1910, expanding to later encompass the wide array of sports regulated by the organization today.[28] Though the NCAA may have begun with a well-intentioned origin story in its pursuit to ensure fairness throughout intercollegiate athletics, Walter Buyers, the first full-time executive director of the NCAA, acknowledged that in the 1950s an injury crisis

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23. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

24. Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY (July 21, 2019), https://www.history.com/news/how-teddy-roosevelt-saved-football. The injury crisis which arose during this time included "wrenched spinal cords, crushed skulls and broken ribs that pierced [] hearts. . . . [I]n 1904 alone, . . . 18 football [player's] d[ied] and [there were] 159 serious injuries . . . ." *Id.*

25. *Id.*

26. A ringer within the sports context is recognized as "one that enters a competition under false representations." *Ringer*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ringer (last visited Mar. 8, 2023). A ringer is typically recognized as someone who gives a group or team a competitive advantage, for example, Thomas Carney, who "regularly golfed 18 holes," was referred to as a ringer in the New York Times as "[s]ome of his most faithful customers were businessmen who relied on him as a ringer in golf tournaments." Alex Traub, *Thomas Carney, Crusty Bartender at Elaine's, Dies at 82*, N.Y. TIMES (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/nyregion/thomas-carney-dead.html.

27. Jason Kirk, *The Endless Argument at the Center of College Football*, BANNER SOC'Y (Oct. 4, 2019, 9:31 AM), https://www.bannersociety.Com/2019/10/4/18716003/College-Football-Amateurism-History.

28. *Id.*; *see* NCAA, *supra* note 1.

within college football caused the coining of the term "student-athlete" as propaganda for use by the NCAA to prevent "the consequences of worker compensation cases" of said athletes, later disavowing the term himself.[29] Even from its beginning, the NCAA has questioned where "student-athletes" fall within the spectrum of amateur to professional.

The term "student-athlete" is based on the principles of amateurism—the definition of which has evolved on the whims of popularity and the NCAA's monopolistic discretion.[30] Amateurism is treated as "an exalted ideal with a long, proud tradition, and if fans felt the tradition was destroyed, the high moral value of college sports would be lost and no one would watch."[31] Amateurism, however, was not a concept concocted solely by the NCAA.[32] The idea of

29. Ellen J. Staurowsky, *An Analysis of Northwestern University's Denial of Rights to and Recognition of College Football Labor*, J. INTERCOLLEGIATE SPORT 134, 135 (2014); Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete ("With linguistic sleight of hand, the NCAA public relations machine forced the term *student-athlete* into common usage. As students, athletes could not be employees, and therefore, were limited in the compensation they could receive outside of their athletic aid. The term is particularly embedded in athletes' rights issues and court cases that seek to keep athletes from receiving additional financial support from an athletics enterprise that generates billions.").

30. Samir H. Durrani, *What is a Student-Athlete?*, HARV. CRIMSON (Feb. 12, 2014), https://www.thecrimson.com/article/2014/2/12/student-athlete/.

31. Timothy Winkler, *The End of An Error: Reforming The NCAA Through Legislation*, 90 UMKC L. REV. 219, 222 (2021). George Kliavoff, the Pac-12 Conference Commissioner, expressed his views on the purpose and tradition of amateurism asserting that student-athletes "are students first and athletes second." Ross Dellenger, *NCPA Takes Next Step Toward College Athletes Being Classified as Employees*, SPORTS ILLUSTRATED (Feb. 8, 2022), https://www.si.com/college/2022/02/08/ncaa-student-athletes-vs-employees-debate-big-step. Kliavoff goes on to express his opposition to the employee status because of the implosion it would cause to the structure of intercollegiate athletics stating "[w]e get to a place where we talk about professional athletes and it blows up the whole model. Let's take it to the natural conclusion. Talking about professional athletes, then we have a draft. You're telling a kid where to go to college. If they are an employee, do I get the right to fire them?" *Id.*

32. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1054 n.2 (9th Cir. 2015) (discussing the correlating development and dissolution of the requirement of amateur status within the International Olympic Committee and the Amateur Athletic Union compared to the NCAA's current requirement of amateurism).

amateurism in sports percolated even the highest of competitive endeavors: the Olympics.[33] The principles of amateurism still permeate the NCAA's guidelines preventing student-athletes from accepting any type of "pay-for-play."[34]

The goals and ideals of amateurism are the focus of many individuals who espouse the position that student-athletes are not employees. However, in many ways, amateurism has lost its luster due to the commercialization of major college athletics transitioning the amateurism model into a business model.[35] The economics associated with major college athletics has resulted in litigation that has dragged the ideals of amateurism through the mud. Interconnected with the commercialization of college athletics is the implantation of betting within intercollegiate athletics.[36] Betting has cultivated the feeling that money drives the outcomes—or at least that money overshadows the development of student-athletes as individuals in favor of developing

33. Ross Andrews, *Push to Allow Professional Athletes Took Hold in 1986 Olympic Games*, GLOBAL SPORT MATTERS (Oct. 15, 2018), https://globalsportmatters.com/1968-mexico-city-olympics/2018/10/15/professional-athletes-1968-olympic-games/.

34. Robert Litan, *The NCAA's "Amateurism Rules": What's In a Name?*, MILKEN INST. REV. (Oct. 28, 2019), https://www.milkenreview.org/articles/the-ncaas-amateurism-rules. The NCAA's bylaws prevent paying Division I student-athletes directly for their participation in the sports, whether it be prior to or during their participation at the intercollegiate level. *NCAA Rules*, GUILFORD COLL., https://sites.google.com/a/guilford.edu/pay-for-play/ncaa-rules (last visited Feb. 5, 2023). The idea that student-athletes should receive direct compensation other than scholarships for their contributions to their university's sports endeavors is known as "pay-for-play." *Id.*

35. KEN REED, HOW WE CAN SAVE SPORTS: A GAME PLAN 5 (2015) ("Despite how many sports executives behave, sport isn't just an industry, it's a sociocultural institution. Therefore, due to sociocultural reasons, sport as business is different than any other business, and needs to be treated as such.").

36. Paul Solman & Ryan Connelly Holmes, *College Partnerships Are Bringing Sports Betting to Campus. Are Students Safe?*, PBS (Feb. 27, 2023, 6:35 PM), https://www.pbs.org/newshour/show/rise-of-sports-betting-brings-concerns-some-colleges-are-too-involved-in-its-promotion. "National surveys between 2018 and 2021 show a roughly 30 percent increase in risk for gambling problems nationwide." *Id.* This problem trickles down even to minors as currently "4% to 6% of high schoolers are considered addicted to gambling." Marsha Mercer, *As Sports Betting Grows, States Tackle Teenage Problem Gambling*, MARYLAND MATTERS: STATELINE (July 13, 2022), https://www.marylandmatters.org/2022/07/13/as-sports-betting-grows-states-tackle-teenage-problem-gambling/.

the statistics which they represent.[37] Continued exposure to monetary scandals in the collegiate realm has made many lose faith in the ability of the principles of amateurism to withstand the pressures of greed and the win-at-all-cost attitude.[38] Thus, when discussing these concepts, a distinction must be made between the actual principles and purpose of amateurism and the ineffective application of these principles in some spheres of major college athletics.

B. Employee Defined

Though the NCAA argues that amateurism is what drives the commercial value of intercollegiate sports, courts have found student-athletes to be employees in limited circumstances.[39] One result of these findings was the use of the term student-athlete to avoid the employee designation.[40] "Employee" itself is a complicated term with a

37. Solman & Holmes, *supra* note 36.

38. REED, *supra* note 35 (citing throughout the book the concept of a "WAC" or "win-at-all-costs" structure which has warped sport at all levels including intercollegiate athletics). *Id.* at 69 (quoting Ralph Nader, founder of The League of Fans) ("Big-time college sport is filled with hypocrisy. Many NCAA administrators, college and university presidents, athletic directors, and coaches constantly talk about their educational values and the importance of 'student-athletes' getting an education. But their actions speak louder than their words. Every decision they make seems to be driven by revenue-at-all-costs and *win-at-all-costs* motives, not educational ethos. That has to change.") (emphasis added).

39. *See, e.g.*, Univ. of Denver v. Nemeth, 257 P.2d 423, 430 (Colo. 1953) (finding that the student-athlete was an employee under workers' compensation law because he was hired by the University "to perform work on the campus, and as an incident of this work to . . . engage in football" and his injury arose as a result of that work).

40. *See* Staurowsky, *supra* note 29 (discussing the societal purposes behind having the term "student-athlete" as "a mandated substitute for such words as players and athletes").

multitude of definitions,[41] the scope of which has often been litigated.[42] The National Labor Relations Act defines "employee" as:

> any *employee* . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.[43]

Despite the exceptions within this definition, the broad nature of the definition has caused copious amounts of controversy to determine who is statutorily included.[44] The distinction between an employee and

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41. *Compare Employee*, DICTIONARY.COM, https://www.dictionary.com/browse/employee ("a person working for another person or a business firm for pay."), *with* LAW.COM, https://dictionary.law.com/Default.aspx?selected=621 ("[A] person who is hired for a wage, salary, fee or payment to perform work for an employer. In agency law the employee is called an agent and the employer is called the principal. This is important to determine if one is acting as employee when injured (for worker's compensation) or when he/she causes damage to another, thereby making the employer liable for damages to the injured party.").

42. *See, e.g.*, Nw Univ., 362 N.L.R.B. 1350, 1350 (2015) (litigating whether student-athletes fall within the definition of "employee" under the NLRA); Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440 (2003) (litigating "employee" for purposes of the Americans with Disabilities Act of 1990).

43. 29 U.S.C. § 152(3) (emphasis added).

44. *See* Michael Pego, *The Delusion of Amateurism in College Sports: Why Scholarship Student Athletes Are Destined to be Considered "Employees" Under the NLRA*, 13 FIU L. REV. 277, 285 n.42 (2018) ("FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 496 (D.C. Cir. 2009) (asserting that the notion that a 'bright line test' can determine who is an employee is 'a long recognized rub'); Smith v. Castaways Family Diner, 453 F.3d 971, 975 (7th Cir. 2006) (stating that the question of who can be

an independent contractor under the NLRA is dependent on factors[45] based on the common law principles of the Restatement of Agency. Reliance on the Restatement's factor-based standard is supported by the Court in *Community for Creative Non-Violence v. Reid*.[46] One of these factors[47] is the element of control over the manner and means from which the desired result emanates.[48] The definitions of employee, or more precisely the lack of clarity within these definitions, exacerbates the need for discussion concerning the employment status of student-athletes.[49]

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considered an employee under the NLRA is 'a recurring question'); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1330–31 (D.C. Cir. 1992) (finding that 'employees' under the NLRA can include paid union organizers); NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 30 (2d Cir. 1979).").

45. *See* NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (excluding those who are independent contractors from the definition of "employee" under the NLRA); *see also* Pego, *supra* note 44, at 284–87 (discussing the employee status and its close relationship to agency law).

46. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1976).

47. The thirteen factors for establishing an agency relationship as determined by the Supreme Court are:

> [1] the hiring party's *right to control* the manner and means by which the product is accomplished. . . . [;] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment; [9] the hired party's role in hiring and paying assistants; [10] whether the work is part of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.

Id. (emphasis added) (footnotes omitted).

48. *See, e.g.*, *Total and Partial Unemployment TPU 415.4*, EMP. DEV. DEP'T STATE OF CAL., https://edd.ca.gov/en/uibdg/Total_and_Partial_Unemployment_TPU_4154 (stating that, in California, whether a professional athlete is an employee or an independent contractor determined by the control factor).

49. In NLRB v. Town & Country, the Court discusses the common law test of control stating that "one can be a servant of one person for some acts and the servant of another person for other acts, even when done at the same time." 516 U.S. 85, 95

C. Region 13 and the Northwestern Disappointment

The question of control regarding student-athletes arose in *Northwestern University and College Athletes Players Association*.[50] In 2014, a group of grant-in-aid[51] student-athletes from Northwestern University's football team attempted to unionize under the NLRA.[52] Matters regarding the NLRA come before the NLRB.[53] The NLRB, established in 1935,[54] ensures that the rights to collectively bargain and seek better working conditions are protected from private actors and unfair labor practices.[55] The NLRB may delegate this power to regional boards while retaining the power to review those holdings.[56] The Northwestern matter was assigned to the Region 13 board ("Region 13") where Region 13 classified the Northwestern student-athletes as statutory employees.[57]

(1995) (quoting Professor W. Seavey, HANDBOOK OF LAW OF AGENCY § 85, 146 (1964)). This emphasis on control is what spurs on the argument that the NCAA is a joint employer alongside the universities they represent. *See* Katherine B. Brezinski & James Verdi, *College Athletes Closer to Being 'Joint Employees': NLRB Moves Case Against USC, the Pac-12, and NCAA*, NAT'L L. REV. (Dec. 20, 2022), https://www.natlawreview.com/article/college-athletes-closer-to-being-joint-employees-nlrb-moves-case-against-usc-pac-12 (discussing the National College Players Association filing of an unfair labor practice charge with the (NLRB) against University of Southern California, the PAC-12 Conference, and the NCAA, characterizing it as "the first time the General Counsel has formally argued that not only is USC an employer, but also, the Pac-12 and the NCAA should be considered 'joint employers'"). When comparing student-athletes to professional athletes, control is also an important aspect in making the distinction between independent contractors and employees, noting that the manner and means of accomplishing the result over which the principal has control determines in many ways this distinction. *See Total and Partial Unemployment TPU 415.4*, *supra* note 48.

50. Nw. Univ., 362 N.L.R.B. 1350, 1350 (2015).

51. *See supra* note 7 (defining "grant-in-aid").

52. *Northwestern*, 362 N.L.R.B. at 1350.

53. *See Who We Are*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are (last visited Jan. 1, 2023).

54. 29 U.S.C. § 153(a).

55. *Who We Are*, *supra* note 53.

56. 29 U.S.C. § 153(b).

57. Nw. Univ., No. 13-RC-121359 (2014), http://apps.nlrb.gov/link/document.aspx/09031d4581667b6f, petition dismissed, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

Northwestern argued that the principles of amateurism prevented the establishment of an employer-employee relationship due to "[t]he predominantly academic relationship between student-athletes and universities."[58] However, Region 13 ruled in the players' favor due to the players generating tens of millions of dollars in profit for the university and providing an immeasurably positive impact on the university's reputation, receiving significant compensation in the form of scholarships, and the NCAA's significant control over the players' terms and conditions of employment.[59] In its ruling, Region 13 defined "employee" as one "who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment."[60]

In its decision, Region 13 declared that the players had shown the control element necessary for this employee relationship in several ways including hour-by-hour itineraries as well as restrictions on attire and what cars could be driven on campus.[61] The transfer of "tender," which the university coined as the term for the student-athletes' scholarships,[62] between parties also establishes the existence of a contract between the student-athlete and the school on which the student-athlete relied for the basic necessities of food and shelter as they were prohibited from profiting based on athletic ability or reputation.[63] Thus, Region 13 ultimately classified the Northwestern

58. Brief to the Regional Director on Behalf of Northwestern University at 47, *Northwestern*, (No. 13-RC-121359), http://i.usatoday.net/sports/college/2014-03-17-NU-Brief-to-RD.PDF.

59. *Northwestern*, No. 13-RC-121359 at 14–17.

60. *Id.* at 13.

61. *Id.* at 16.

62. "Northwestern provides its student-athletes with four-year scholarship offers (also known as 'tenders')." Brief to the Regional Director on Behalf of Northwestern University at 8, *Northwestern*, (No. 13-RC-121359), http://i.usatoday.net/sports/college/2014-03-17-NU-Brief-to-RD.PDF. Region 13 found that "it [was] clear that the scholarships that players receive are in exchange for the athletic services being performed." Decision and Northwestern, No. 13-RC-121359 at 15. Therefore, though the contract itself was called a tender, it also served as "legal tender" which is defined as "[t]he money (bills and coins) approved in a country for the payment of debts, the purchase of goods, and *other exchanges for value*." *Legal Tender*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

63. *Northwestern*, No. 13-RC-121359 at 14.

student-athletes as statutory employees.[64] This finding could have resulted in a major transition in college athletics.

Upon appeal by Northwestern, the student-athletes' unionization was halted and the NLRB reviewed Region 13's decision regarding whether grant-in-aid student-athletes should be deemed statutory employees under the NLRA.[65] Holding that it "would not serve to promote stability in labor relations," the NLRB refused to assert jurisdiction based on the lack of an analytical framework or relevant precedent on which to base its analysis.[66] The NLRB also pointed to the unique nature of the academic institution's relationship to grant-in-aid football players, stating that the scholarships granted to student-athletes are for participating in something that historically has been recognized as an extracurricular activity.[67] The NLRB did, however, state that "subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today."[68] The question this Note addresses is what the impact would be on employment law if the events that have occurred since this finding changed the legal landscape to cause the NLRB to exercise jurisdiction today.[69]

D. The Aftermath: Argument, Alston, and Abruzzo, Oh My!

Despite the disappointing holding from the NLRB, the Northwestern student-athletes' attempt at unionization did succeed in causing reform in many ways including "expanded scholarship

64. *Id.* at 17. *See* 29 U.S.C. § 152(3) (defining "employee" for purposes of the National Labor Relations Act). *See also* 29 U.S.C. § 203(d)–(e) (defining "employer" and "employee" for purposes of the Fair Labor Standards Act).

65. Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015).

66. *Id.* ("There has never been a petition for representation before the Board in a unit of a single college team or, for that matter, a group of college teams. And the scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes.").

67. *Id.* at 1353.

68. *Id.* at 1355.

69. *See infra* Part III (analyzing this question in depth). *See also* Jimmy Golen, *Dartmouth tells NLRB that basketball players are students - for real - not employees*, INDEP. (Oct. 5, 2023, 9:59 PM), https://www.independent.co.uk/news/dartmouth-ap-ivy-league-ncaa-boston-b2424982.html (discussing the 15 members of the Dartmouth men's basketball team who are attempting to unionize).

guarantees, more money to cover food and other living expenses, and improved medical care."[70] Additionally, the NLRB's ending sentiment of "subsequent changes" encouraged those who believe in the employee status of student-athletes.

1. The Argument In-Between: Post-Northwestern, Prior to Alston

An important contextual element of the employment status question is the contentious political discourse that occurred post-*Northwestern*. Robert F. Griffin, Jr. ("Griffin") was nominated by President Barack Obama to become the General Counsel of the NLRB, serving from 2013–2017.[71] Griffin wrote a memorandum discussing this topic in 2017 known as GC 17-01.[72] Griffin's memorandum clarified that *Northwestern*'s holding did not preclude the General Counsel from stepping in where the NLRB punted on the important employee status question.[73] Following in concert with Region 13's opinion, Griffin laid out the opinion of the General Counsel that the Northwestern grant-in-aid football players were employees under the NLRA stating: ". . . scholarship football players should be protected by Section 7 [of the NLRA] when they act concertedly to speak out about aspects of their terms and conditions of employment. . . . regardless of whether the Board ultimately certifies the bargaining unit."[74]

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70. Michael Wasser, *Post-Game Analysis: What Really Happened in the Northwestern Football Case?*, JOBS WITH JUST. (Aug. 26, 2015), https://www.jwj.org/post-game-analysis-what-really-happened-in-the-northwestern-football-union-case.

71. *Richard F. Griffin, Jr. Sworn in as NLRB General Counsel*, NAT'L LAB. RELS. BD. (Nov. 4, 2013), https://www.nlrb.gov/news-outreach/news-story/richard-f-griffin-jr-sworn-in-as-nlrb-general-counsel.

72. Memorandum from Richard F. Griffin Jr., Gen. Couns., Nat'l Lab. Rels. Bd. 16 (Jan. 31, 2017) (on file with author).

73. *Id.*

74. *See id.* "Section 7" refers to 29 U.S.C.S. § 157 (LexisNexis), which grants the collective bargaining rights the NLRA is known for, stating that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

Griffin's memo fell directly in line with the Regional Director's prior holding in the *Northwestern* line of cases, yet GC 17-01 caused a stir among lawmakers.[75] Two chairmen of labor related committees jointly wrote a letter requesting either the rescission of GC 17-01 or the resignation of Griffin.[76] Neither occurred. Instead, Peter B. Robb became the new General Counsel of the NLRB, upon the appointment by President Donald J. Trump in 2017.[77] Only under this new General Counsel was GC 17-01 ultimately rescinded.[78] This recission, and thus the political seesaw of nonbinding guidance, led to even less clarity in an already unclear area of the law regarding student-athletes employee status under the NLRA.

2. Arriving at Alston

Although the NLRB avoided discussing the student-athlete employee status conundrum and the haphazard manner in which the

> mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id.

75. Marjorie C. Soto et al., *Federal Legislators Tell NLRB GC Griffin to Rescind His Education Report or Step Aside*, SEYFARTH (Feb. 3, 2017), https://www.employerlaborrelations.com/2017/02/03/federal-legislators-tell-nlrb-gc-griffin-to-rescind-his-education-report-or-step-aside/?utm_source=Seyfarth+Shaw+-+Employer+Labor+Relations+Blog&utm_campaign=584d20349d-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_287228f319-584d20349d-71423401.

76. *Id.*

77. *Peter B. Robb Sworn in as NLRB General Counsel*, NAT'L LAB. RELS. BD. (Nov. 17, 2017), https://www.nlrb.gov/news-outreach/news-story/peter-b-robb-sworn-in-as-nlrb-general-counsel.

78. This was not the only issue brought into question by Peter Robb upon his appointment. Natalie C. Groot, *The NLRB's General Counsel Rescinds, Revokes, and Questions*, MINTZ (Dec. 21, 2017), https://www.mintz.com/insights-center/viewpoints/2226/2017-12-21-nlrbs-general-counsel-rescinds-revokes-and-questions. In fact, "Robb made quite clear that his agenda would not support many of the Obama-era initiatives. . . . call[ing] into question fifteen significant legal issues that will now be subject to 'alternative analysis' . . . , rescind[ing] seven memoranda, and revok[ing] five initiatives." *Id.*

General Counsel's office addressed the issues, the Court could not avoid discussing issues involving the NCAA. In *National Collegiate Athletic Association v. Alston*, the Court addressed whether the NCAA's anti-compensation rules violated a section of the Sherman Act, an antitrust law which prohibits the undue restraint of trade.[79] The Court found that the NCAA's arguments of amateurism lacked real persuasive elements stating "that the NCAA 'nowhere define[s] the nature of the amateurism they claim consumers insist upon.' . . . [and thus] struggle[s] to ascertain for itself 'any coherent definition' of the term."[80] However, the majority made clear that under current law, the NCAA could restrict those forms of compensation not related to education.[81]

Even if unintended, the majority's opinion in *Alston* was a blow to the NCAA's foundational argument for amateurism and against the employee status of student-athletes as any chance of an antitrust exception disappeared.[82] However, Justice Kavanaugh's concurrence sparked the most debate.[83] Justice Kavanaugh not only strongly

79. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (citing 15 U.S.C.A. § 1 (the Sherman Act section violated by the NCAA)).

80. *Alston*, 141 S. Ct. at 2152 (internal citations omitted).

81. *Id.* at 2165 ("Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a 'no Lamborghini' rule.").

82. *Id.* at 2159. Since *Alston*, minor league baseball players have challenged the judicially crafted antitrust exemption created for baseball. *See Continued Antitrust Focus on the Labor Market in the Wake of NCAA v. Alston*, BAKER HOSTETLER (Apr. 25, 2022), https://www.bakerlaw.com/insights/continued-antitrust-focus-on-the-labor-market-in-the-wake-of-ncaa-v-alston/ (examining Alston's widespread impact including regarding the baseball exemption).

83. *See Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring). The interest in Justice Kavanaugh's concurrence continues through today. *See, e.g.*, Josh Blackman, *Why Does Justice Kavanaugh Write Concurrences?*, REASON (Jan. 1, 2023, 1:29 AM), https://reason.com/volokh/2023/01/27/why-does-justice-kavanaugh-write-concurrences/ (discussing an interview of Justice Kavanaugh as well as the *Alston* concurrence's significance in the framework of student-athletics) ("I'm not so sure that Kavanaugh's opinion will actually help the overwhelming majority of student athletes. . . . Now, boosters, who would otherwise donate money to schools, will give the money directly to the bluechip players through NIL deals. As a result, athletic departments will receive less money. And athletes on virtually all other sports will lose funding."); Chuck Burton, *The NIL Mess Part One: How Brett Kavanaugh Set The Wheels In Motion With*

suggested that the NCAA's remaining compensation rules violate antitrust laws, but also questioned "whether the NCAA and its member colleges can [continue to] justify not paying student athletes a fair share" of the billions of dollars in revenue that they generate.[84] Moreover, Justice Kavanaugh explicitly suggested that one mechanism by which colleges and students could resolve these difficult questions regarding compensation is by "*engag[ing] in collective bargaining*"—the exact rights established by the NLRA and undefined in *Northwestern*.[85] Although simply dicta, the language of Justice Kavanaugh's opinion illuminated an area in which certainty is desperately needed: the student-athletes' employment status.

3. Starting Anew: Abruzzo's Memo

After *Alston*, the world shook—or at least, the sports world had been shaken up. The NCAA's cartel-like reign over college sports was no longer able to continue in the protective shadows of amnesty by amateurism.[86] *Alston* is not a case directly discussing the NIL discourse, but the Court's ruling caused the NCAA to almost immediately rescind its prior stance on NIL and put out a new policy which permitted student-athletes to receive payment for the use of their

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One Concurring Opinion, COLL. SPORTS J. (May 5, 2022), https://www.college-sports-journal.com/the-nil-mess-part-one-how-brett-kavanaugh-set-the-wheels-in-motion-with-one-concurring-opinion/ ("Folks moan and groan and try to blame the NCAA for the current landscape. . . . But the NCAA didn't create this mess. Brett Kavanaugh did."); Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh's Concurrence*, TIME (June 21, 2021, 6:24 PM), https://time.com/6074583/ncaa-supreme-court-ruling/ (summarizing the *Alston* opinion from the perspective of Justice Kavanaugh's concurrence and its relationship to the majority opinion) ("Those words, from a Supreme Court justice no less, serve as a useful rallying cry, sure to be quoted by lawyers representing college athletes, and college athletes themselves, for years to come.").

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

85. *Id.* at 2167 (Kavanaugh, J., concurring) (emphasis added).

86. The NCAA has been analogized to and defined as a cartel in multiple instances even by the Supreme Court in both *Alston* and in *NCAA v. Board of Regents of University of Oklahoma*, where the Court cited a district court's finding that the NCAA was itself a "classic cartel." 468 U.S. 85, 96 (1984),

name, image, or likeness.[87] Student-athletes began signing NIL deals, which have gained traction nationwide, increasing exponentially over the last two years the amount of platforms and money available to athletes.[88] Though the holding in *Northwestern* was a disappointment for the Northwestern athletes and their supporters, *Alston*'s clear rejection and reduction of the binding restrictions from the NCAA gave both the "employment" and "direct payment of student-athletes" debates new chances at solid footing.[89]

In light of *Alston*, the NIL movement, and the election of a new pro-union President,[90] the scales again tipped toward employee status for student-athletes. In 2021, President Joseph R. Biden appointed Jennifer A. Abruzzo, a former Deputy General Counsel at the NLRB, as the General Counsel for the NLRB.[91] Post-*Alston*, Abruzzo gave her *non-binding guidance* on student-athletes' employee status through GC 21-08, a memorandum titled the "Statutory Rights of Players at Academic Institutions."[92] GC 21-08 provided "updated guidance regarding [Abruzzo's] prosecutorial position" and "reinstate[d] GC 17-

87. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

88. *Id.*; *see also* Zach Braziller, *Year 2 NIL Money Pouring in Even Greater Despite Cautionary Tales*, N.Y. POST (Sept. 1, 2022, 10:44 PM), https://nypost.com/2022/09/01/nil-money-pouring-in-even-greater-despite-cautionary-tales/ (discussing the direct correlation which exists between between social media following and selection for NIL deals instead of player performance and the profitability of NIL deals).

89. *See Sherman Act—Antitrust Law—College Athletics—NCAA v. Alston*, 135 HARV. L. REV. 471, 471 (2021) ("The Alston decision . . . lays the groundwork for a successful future challenge to the NCAA's restrictions on compensation unrelated to education.").

90. *See, e.g.*, Ahiza García-Hodges, *Biden's Vow to Be 'Most Pro-Union President' Tested in First Year*, NBC NEWS (Jan. 20, 2022, 5:15 PM), https://www.nbcnews.com/business/economy/bidens-vow-union-president-tested-first-year-rcna12791 (quoting President Joseph R. Biden's vow to be the "Most Pro-Union President").

91. *The NLRB Welcomes Jennifer Abruzzo as General Counsel*, NAT'L LAB. RELS. BD. (July 22, 2021), https://www.nlrb.gov/news-outreach/news-story/the-nlrb-welcomes-jennifer-abruzzo-as-general-counsel.

92. Abruzzo, *supra* note 12, at 1.

01, to the extent it [was] consistent with [Abruzzo's] memo."[93] Within this memo, Abruzzo asserts that *Alston* is a precursor for additional change within intercollegiate sports, citing commentators who claim that "as courts 'continue to chip away at NCAA restrictions on benefits to student-athletes, more compensation that is untethered to academics brings student-athletes more fully within "employee status" under the law.'"[94] According to Abruzzo, student-athletes are employees under the NLRA, but, to limit the coverage of this status, she clarifies that it applies only to those who receive "grant-in-aid."[95]

In addition to addressing the "grant-in-aid" distinction between student-athletes and statutory employees, Abruzzo asserts that NIL deals themselves make student-athletes fall even further into the category of employee, stating that, in the future, she may pursue joint employer theories of liability.[96] Drawing a line in the sand, Abruzzo states that the misclassifying of employees as "student-athletes" is actionable under the NLRA and insinuates that the NCAA is a potential target through joint employer liability due to the NCAA's strict regulation of student-athletes' conduct both on and off the field.[97] Abruzzo's actions and statements make clear that the federal government plans to be active in this arena which could effectuate a new direction for student-athlete litigation.

III. THE FIELD OF FISCAL IMPLICATION: THE IMPACTS OF EMPLOYEE STATUS

In a post-*Alston* world, the opportunity for the NLRB to follow the guidance of Abruzzo and find grant-in-aid student-athletes to be employees under the NLRA looms closer each day.[98] Despite the

93. *Id.*

94. *Id.* at 5.

95. *Id.* at 2 (effectively narrowing the scope of its discussion to the grant-in-aid scholarship athletes discussed in *Northwestern*).

96. *Id.* at 6, 9 n.34.

97. *Id.* at 9. This possibility of holding the NCAA as a joint employer has become increasingly more plausible as the Court in *Johnson v. NCAA* found that the plaintiffs in the case provided enough evidence of such a status to withstand a motion to dismiss filed by the NCAA. *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

98. Abruzzo, *supra* note 12.

NLRA's broad definition of "employee" having existed since the statute's inception, public opinion now favors a greater level of fairness for student-athletes which provides additional support for Abruzzo's definitional guidance. However, student-athletes' issues are not simply solved by Abruzzo's valiant efforts to lead the fight for student-athletes to become employees.

For example, student-athletes will not just be fighting for employee status rights under the NLRA, but also under the Fair Labor Standards Act. The FLSA, established in 1938, governs minimum wage and overtime pay in the private sector as well as in federal, state, and local governments.[99] If the NLRB does find that student-athletes are employees under the NLRA, the argument that student-athletes would be employees in other contexts, including the requirement for minimum wage and workers' compensation under the FLSA, is strengthened.[100] Further, the definition of "employee" under the NLRA is more restrictive than the definitions of "employee" used in these other contexts, including under the FLSA, indirectly granting weight to the NLRB's potential classification of student-athletes as employees for these other areas of law.[101]

Additionally, in a post-primetime-pandemic world, people generally are taking on secondary employment, with 5% of Americans holding two full-time positions.[102] With newfound employee status, a student-athlete's employer could legally restrict their ability to hold a second job when that job interferes or competes with business: the

99. Fair Labor Standards Act (FLSA), 29 U.S.C. § 206. All covered nonexempt workers, which would likely include student-athletes, are entitled to the minimum wage under Federal law. *Id.*; *Wages and the Fair Labor Standards Act*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/flsa (last visited Jan. 1, 2023).

100. *See generally*, SportsWise: A Podcast About Sports and the Law, *supra* note 15.

101. *Compare* 29 CFR § 1620.8, *with* Fair Labor Standards Act (FLSA), 29 U.S.C. § 206.

102. *Multiple Jobholders, Primary and Secondary Jobs Both Full Time*, FRED ECON. DATA, https://fred.stlouisfed.org/series/LNU02026631 (last visited Dec. 2022). *See also* Megan Cerullo, *More American Workers Are Taking on Second Jobs as Inflation Rages*, CBS NEWS (July 21, 2022, 11:43 AM), https://www.cbsnews.com/news/inflation-american-workers-are-taking-on-second-jobs/ (discussing the rise of inflation and depletion of pandemic savings as reasons for the increase in second jobs).

university and its preexisting or future endeavors.[103] This could greatly impact student-athletes' ability to access the benefits of NIL that Justice Kavanaugh's concurrence in *Alston* brought to light. Thus, Part III of this Note analyzes whether the principles of amateurism currently serve any purpose in application by looking at a few of the fiscally related legal issues in this broad field of employment law and the ripple effects an employee status change may have on student-athletes and universities alike.[104]

A. Wages Under the FLSA

Assuming that athletes are deemed to be employees by the NLRB, a potential issue becomes whether those employees will also be deemed employees under the FLSA and therefore be entitled to payment for their athletic endeavors on behalf of the colleges and universities. Though in *Berger v. National Collegiate Athletic Association*, the Seventh Circuit stated that "student-athletic 'play' is not 'work,' at least as the term is used in the FLSA," that may not be true for much longer.[105] Specifically, football and basketball players at Division I institutions who generate significant revenue from their football and basketball programs would understandably want access to some of the billions of dollars of revenue they generate for the universities and colleges they represent.[106] However, other student-

103. *Can Employees Be Restricted From Working a Second Job*, ROCKET LAW. (last updated Sept. 2, 2022), https://www.rocketlawyer.com/business-and-contracts/employers-and-hr/company-policies/legal-guide/can-employees-be-restricted-from-working-a-second-job. Variations between states exist on when and what may be restricted by employers. *Id.*

104. *See infra* Part IV (discussing the purpose of the amateurism model's modern applications after concluding analysis of these implications in Part III).

105. Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) ("Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—*without any real expectation of earning an income*. Simply put, student-athletic "play" is not "work," at least as the term is used in the FLSA. We therefore hold, as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA.") (emphasis added).

106. Tommy Beer, *NCAA Athletes Could Make $2 Million a Year If Paid Equitably, Study Suggests*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/?sh=21838a5f5499.

athletes from non-revenue generating sports—or from sports programs that generate small amounts of revenue—must be considered as well.[107] Considering the scope of monetary needs of student-athletes beyond that of just tuition is reasonable when issues such as food insecurity and homelessness threaten even those student-athletes at Division I schools, who are also expected to attend hours of practice and maintain academic eligibility.[108]

If a student-athlete is deemed an employee under the NLRA, there is a strong likelihood that a student-athlete will also be deemed an employee under the FLSA. The FLSA defines employee as "any individual employed by an employer" and employ is defined as including "to suffer or permit to work."[109] This FLSA's definition is

107. Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, SPORT J. https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/ (last visited Mar. 31, 2023).

108. "Food Insecurity," defined by the United States Department of Agriculture as "a household-level economic and social condition of limited or uncertain access to adequate food," is more common than one may think among student-athletes with twenty-four percent of Division I athletes reporting that they have experienced food insecurity. *Definitions of Food Security*, U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/definitions-of-food-security/ (last visited Jan. 4, 2023). A study published in April 2020 showed that "[n]early 14% of student-athletes at Division I schools experienced homelessness in the previous year and 24% were food insecure in the prior 30 days" with both rates "higher among student-athletes at Division II schools and two-year colleges." Sara Goldrick-Rab, Brianna Richardson & Christine Baker-Smith, *Hungry to Win: A First Look at Food and Housing Insecurity Among Student-Athletes*, HOPE CENTER at 2 (Apr. 2020), https://www.luminafoundation.org/wp-content/uploads/2020/04/hungry-to-win.pdf; Chloe McKenzie, *Yes, Some College Athletes Face Food Insecurity. Colleges Can Change That.*, GLOB. SPORT MATTERS (Mar. 22, 2022), https://globalsportmatters.com/health/2022/03/22/colleges-can-prevent-athlete-food-insecurity/ ("According to a national survey, however, nearly a quarter of Division I athletes experience food insecurity. And more than one in ten experience homelessness.").

109. 29 CFR § 1620.8.

similar to the NLRA's[110] in some respects, but is generally broader.[111] Thus, the employee designation by the NLRB strongly implicates the "pay-for-play" scenario and a starting point for that payment is the minimum wage requirement built into the FLSA.[112]

Under the FLSA, employers are required to keep employee time and pay records.[113] Employees are also entitled to be paid for the number of hours worked for the employer, which ordinarily includes all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.[114] The current federally mandated minimum wage is $7.25 per hour.[115] Many states also have minimum wage laws.[116] If an employee lives in a state where there is a state minimum wage law, the employee is entitled to

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110. As stated previously, the National Labor Relations Act defines "employee" as:

> any *employee* . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C.S. § 152(3) (emphasis added).

111. *See supra* Part II.B.

112. *See supra* note 34 (defining "pay-for-play). This Note is not directly discussing pay-for-play models and is instead focusing on the impact of paying students on the relationship between student-athletes and the universities with which they represent. Thus, though typical "pay-for-play" models are in many ways propositioned as third-party funded, this Note looks at the idea of the university as the sole funding source for this model.

113. *Wages and the Fair Labor Standards Act*, *supra* note 99.

114. *Id.*

115. Fair Labor Standards Act (FLSA), 29 U.S.C. § 206; *Wages and the Fair Labor Standards Act*, *supra* note 99.

116. *Wages and the Fair Labor Standards Act*, *supra* note 99.

the higher of the state or federal minimum wage.[117] Therefore, each university or college would potentially be required to keep up with and pay each player an amount equal to $7.25 per hour for the hours they are deemed to be working.

What constitutes work may be difficult to ascertain for student-athletes. A range of activities from practices, game performance, warmups, travel time, and team meetings are more likely to be considered "work related" because they are sport related. However, student-athletes may also be required to attend class or keep a certain grade-point average to retain their scholarship or remain enrolled at the university. The term "student-athlete" does encompass a certain amount of academic requirement on the athlete, but the term "employee" does not inherently do the same. Therefore, changing one's designation from "student-athlete" to "employee" blurs the lines even further between what may be considered payable work and a requirement of employment. If a student-athlete works forty hours per week at $7.25 per hour for forty weeks of the year, that student-athlete would be entitled to at least $11,600 per year.[118] Whether that work would include attending classes, however, requires greater clarification.

Additionally, the FLSA does not set any limits on the number of hours that employees sixteen years or older may work in any work week.[119] This brings to the forefront the question of overtime pay. Under the FLSA, overtime pay is required after forty hours of work in

117. *Id.*

118. Although forty hours per week is commonly known as a "typical" work week, student-athletes are barred from participating in athletic activities for more than twenty hours per week and no more than four hours per day. *CARA*, SPRY, https://spry.so/term/cara/ (last visited Mar. 5, 2023). The allegedly restricted hours spent on athletics, also known as Countable Athletically Related Activities ("CARA") hours, include "any mandated activity with an athletics purpose involving student-athletes and at the direction of, or supervis[ion] by one or more of the institution's coaching staff." *Id.* This distinction is an important one as this regulation is intended to protect student-athletes from being unduly encumbered by the obligations associated with their participation in intercollegiate athletics. However, as employees, it is unlikely that the CARA hours would continue to stay in existence, and therefore, this protection would likely go away. Thus, this Note uses the typical forty-hour work week paradigm as opposed to the current CARA twenty-hour student-athlete week paradigm to show this distinction due to the change in classification.

119. *Wages and the Fair Labor Standards Act*, *supra* note 99.

a work week.[120] The rate that must be paid is a rate not less than one and one-half times (1.5) the regular rate of pay.[121] Though limited exceptions exists for overtime pay,[122] student-athletes are unlikely to qualify for any of these exemptions solely based on the fact that they are student-athletes.[123] The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.[124]

In addition to the fiscal burden of paying student-athletes, regardless of whether their pay is standard or overtime, defining and recording what constitutes work and how many hours a student-athlete is *actually working* will be a significant administrative burden for colleges and universities. The reality is that when so many collegiate sports programs are already operating at extreme deficits, the interconnected issues to consider when determining the next steps forward regarding student-athlete wages are beyond complex.[125]

B. Taxation

Though the issues arising from including student-athletes on the payroll are burdensome on universities and colleges, a potential financial burden that could affect both the school and the student looms large: taxation. Grant-in-aid student-athletes, like many other

120. *Id.*

121. *Id.*

122. 29 U.S.C. § 213.

123. The question of overtime for athletes is an increasingly complex topic even within the professional athletics space, where those players are already deemed employees or independent contractors clearly and by law. *See, e.g.*, Jeff Passan, *MLB To Pay $185 Million in Settlement with Minor League Players Over Minimum-Wage and Overtime Allegations*, ESPN (July 15, 2022, 7:02 PM), https://www.espn.com/mlb/story/_/id/34249632/mlb-pay-185-million-settlement-minor-league-players-minimum-wage-allegations (discussing the $185 million settlement and the monumental step toward a fair wage for minor league baseball players after claiming that the league had violated federal and state minimum-wage and overtime laws).

124. *Wages and the Fair Labor Standards Act*, *supra* note 99.

125. The "abstract and unrealistic calls for college athletes to be compensated according to vague formulas and 'lockbox mechanisms' . . . [fail to] recognize that a significant majority of athletic programs at major institutions are operating at deficits and cutting back on spending . . . ." Michael N. Widener, *Compensating Collegiate Athletes in "Store Credit,"* 47 U. MEM. L. REV. 431, 438 (2016).

students, are exempt under the Federal Tax Code from paying taxes on their scholarships as if it were part of their gross income they receive for their education.[126] A "qualified scholarship" provides students, and thus student-athletes, this exemption when it is:

> any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and related expenses. [Qualified tuition and related expenses would include] (A) tuition and fees required for the enrollment or attendance of a student at an educational organization described in section 170(b)(1)(A)(ii) [26 USCS § 170(b)(1)(A)(ii)], and (B) fees, books, supplies, and equipment required for courses of instruction at such an educational organization.[127]

If student-athletes are deemed employees, colleges and universities may want to treat these scholarships as compensation for purposes of meeting the FLSA requirements regarding minimum wage.[128] This could significantly affect the treatment of those scholarship funds for income tax purposes.[129] As a result, these

126. I.R.C. § 117.

127. *Id.*

128. Fair Labor Standards Act (FLSA), 29 U.S.C. § 206.

129. One significant change could be the use of scholarship funds for determining child support and alimony payments. *See, e.g.*, E.A. Gjelten, *Child Support: How Judges Decide the Amount*, DIVORCENET https://www.divorcenet.com/resources/child-support/child-support-basics/child-support-how-judges-deci (last visited Mar. 8, 2023) (discussing how all child support structures in the United States are based on parental income); E.A. Gjelten, *How Judges Decide Alimony Amounts*, DIVORCENET https://www.divorcenet.com/resources/divorce-judge/how-judge-decides-alimony-amount.htm (last visited Mar. 8, 2023) (discussing how income and "imputed" income are used to calculate alimony). Statistics show that "a reasonable estimate for pregnancy rates for female student-athletes and partners of male student-athletes for an athletics department is between 10% to 15%." *Pregnancy and Parenting Student-Athletes*, NCAA at 7, http://s3.amazonaws.com/ncaa.org/documents/2021/1/18/PregnancyToolkit.pdf (last visited Mar. 8, 2023).

exemptions will likely be eliminated, and student-athletes' tax-free scholarships could be converted into employment-based wages subject to gross-income tax.[130]

Beyond the potential income tax effects, the payment of student-athletes will also result in additional employment tax liabilities for the students as well as the colleges and universities. Pursuant to the Federal Insurance Contribution Act ("FICA"),[131] the Federal Unemployment Tax Act,[132] and state unemployment tax acts, employers are required to pay certain taxes for wages paid to employees.[133] Under FICA, both the employee and the employer pay a tax amount equal to 7.65% of the amount of wages paid to an employee.[134] For the student-athlete that was paid $11,600 for his forty hour workweek, that equates to $887.40 paid by both the student and the employer. That amount may not seem significant but a large university with over 400 student-athletes could be required to contribute a significant amount of funds to paying the taxes associated with employing student-athletes. Student-life, access to academic resources, collegiate athletics, and the institutions themselves are run by funding and this amount diverted to taxes alone could have a greater impact than many are willing to consider.

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130. *But see* S. 1929, 117th Cong. (as referred to the S. Comm. on Health, Educ., Lab., and Pensions on May 27, 2021) ("Nothing in this Act, or an amendment made by this Act, shall . . . cause any individual to be *treated as an employee*, or cause any amounts received by an individual to be *treated as wages*, for purposes of any provision in the Internal Revenue Code of 1986 relating to employment taxes or the withholding of taxes by an employer if such individual or amounts would not otherwise be so treated.").

131. I.R.C. § 3111.

132. I.R.C. § 3301.

133. It is important to note that student-athletes can already receive unemployment benefits so long as those benefits are unrelated their athletics and therefore those benefits do not impact the current eligibility consideration they receive for playing football for their university. Billie Boschert, *Can NCAA Athletes File for Unemployment?*, SPORTSMANIST, https://sportsmanist.com/can-ncaa-athletes-file-for-unemployment (last visited Jan. 4, 2023).

134. I.R.C. §§ 3111, 3201.

C. Workers' Compensation Claims

While professional athletes are able to file for workers' compensation,[135] student-athletes have unsuccessfully tried for years to access the benefits that come from workers' compensation claims.[136] "Workers' Compensation" benefits those who become injured or ill from their job by "provid[ing] partial medical care and income protection to employees."[137] Though state precedent for student-athletes' employee status for workers' compensation has varied slightly,[138] the majority of the precedent has leaned toward the status

135. Similar to the employment status debate amongst student-athlete, professional athletes must establish that they are employees and not independent contractors to be able to access the benefits of workers' compensation. *Compare* Pagano v. Baer, No. 88A-AU-12, 1989 WL 40961, at *2 (Del. Super. Ct. April 4, 1989) (stating that a jockey was not an employee due to several factors including his payment was a late fee per race, supplied his own equipment, and the owner of the horse essentially only controlled that the jockey be on the horse with an indicated result in mind), *with* Farren v. Baltimore Ravens, Inc., 720 N.E. 590 (Ohio Ct. App. 1998) (stating "reasonable minds may conclude" that a football player injured during a weightlifting session in the off season was still an employee of the team). The ability of professional athletes to file for workers' compensation is also dependent on their state law. For example, FLA. STAT. ANN. § 440.02(20)(c)(3) excludes professional athletes from coverage under workers' compensation, though its coverage can be collectively bargained for. For a broader discussion of the issues facing professional athletes' qualification for workers' compensation, *see* Linda A. Sharp, *Workers' Compensation Benefits for Professional Athletes*, 77 A.L.R.7th 6 (2022).

136. *See supra* cases compared note 5. In *Waldrep v. Texas Emps. Ins. Ass'n*, the Texas appellate court noted that had the plaintiffs football injury happened in 2000, the difference in society and intercollegiate athletics could possibly have changed the outcome of its finding on non-employee status. 21 S.W.3d 692, 707 (Tex. App. 2000) ("In conclusion, we note that we are aware college athletics has changed dramatically over the years since Waldrep's injury. Our decision today is based on facts and circumstances as they existed almost twenty-six years ago. We express no opinion as to whether our decision would be the same in an analogous situation arising today; therefore, our opinion should not be read too broadly.").

137. *What is Workers' Compensation?*, CDC https://www.cdc.gov/niosh/topics/workercomp/cwcs/definition.html (last visited Dec. 31, 2022).

138. *See* Donald Paul Duffala, Annotation, *Workers' Compensation: Student Athlete as "Employee" of College or University Providing Scholarship or Similar Financial Assistance*, 58 A.L.R.4th 1259 (2021) (outlining student-athletes' vital legal battles in the workers' compensation space).

of non-employee.[139] For instance, the Court has cited both the NCAA's strict rules against student-athletes receiving payment and the fact that the institutions are unable to award financial aid conditioned on a student's athletic ability as its reasons for there being a lack of employee-employer relationship.[140] However, these arguments no longer ring entirely true as the NCAA lifted its ban on students receiving payment from NIL.[141]

More recently, the Ninth Circuit again took up the issue of workers' compensation stating that "[i]nstead of extending employment-related protections to student-athletes, . . . the Legislature provided for scholarship compensation[,] the payment of insurance deductibles and medical expenses for injured students, . . . and due process protections for student-athletes involved in disciplinary actions facing loss of athletic scholarship funds."[142] Regardless, a change in the interpretation of the definition of an "employee" by the federal government could impact the manner that states define student-athletes and could result in the availability for intercollegiate athletics-related workers' compensation benefits.[143]

If student-athletes are found to be employees, the financial calculation of workers' compensation costs becomes an important

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139. *See, e.g.*, Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1173 (Ind. 1983); Graczyk v. Workers' Comp. Appeals Bd., 184 Cal. App. 3d 997 (1986); State Comp. Ins. Fund v. Indus. Com., 314 P.2d 288 (Colo. 1957); Coleman v. Western Mich. Univ. 336 N.W. 2d 224 (Mich. Ct. App. 1983).

140. *Rensing*, 444 N.E. 2d at 1173–74.

141. Hosick, *supra* note 87.

142. Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 913 (9th Cir. 2019). Dawson, a Division I college football player, was held not to be an employee of the NCAA or PAC-12 Conference within the meaning of the FLSA. *Id.* at 909–12. The court reasoned that neither the NCAA or PAC-12 were considered regulatory bodies and not employers of student-athletes under the FLSA because the NCAA regulations limiting scholarships did not create any expectation of compensation, neither had the power to fire or hire players, and there was no evidence that NCAA rules were conceived or carried out to evade law. *Id.*

143. In *Radwan v. Manuel*, the court established that a University of Connecticut soccer player's one-year athletic grant-in-aid was a constitutionally protected property interest as it was (1) guaranteed for a fixed term and (2) terminable only for cause and that she "reasonably expected to retain the scholarship's benefits for that set period." 55 F.4th 101, 123, 125 (2d Cir. 2022). This is a newfound constitutional basis for protection of a student-athlete's scholarship. *Id.* at 128.

consideration for colleges and universities. Though calculation and payments of the pay-out that comes from workers' compensation is a concern, the real question is who pays for that benefit.[144] As a state-funded benefit,[145] funding for workers' compensation is supplemented by the colleges and universities, which are required by law to pay into the workers' compensation program.[146] State statutes hold employers strictly liable for employee injuries, and workers' compensation liability insurance increases with the risk of the job: the greater the risk of injury or disability associated with the employment, the higher the liability insurance required to be paid to cover that employee.[147]

However, the employee status for student-athletes would not only require universities to increase the coverage of their liability insurance for having an increased number of employees while also maintaining insurance for the non-employee status players, but would also require universities to pay into the workers' compensation program at a higher premium due to the risky nature of the job that is being added.[148] This increase of cost is not likely to deter the classification of student-athletes as employees. The addition of workers' compensation benefits may create increased dispute as to what insurance is primary while also risking the ability of schools to be able to provide comprehensive athletic programs.[149] Regardless of the

144. *But see* Harry, *supra* note 29 ("The term ['student-athlete'] is particularly embedded in athletes' rights issues and court cases that seek to keep athletes from receiving additional financial support from an athletics enterprise that generates billions.").

145. Duffala, *supra* note 138.

146. Julia Kagan, *Workers' Compensation*, INVESTOPEDIA (updated Jan. 24, 2023), https://www.investopedia.com/terms/w/workers-compensation.asp. In the case of student-athletes, the employer paying into this program would likely be their university or college. *See, e.g.*, TENN. CODE ANN. § 50-6-402(a) ("[T]he insurer may include allowances of any character made to any employee, only when the allowances are in lieu of wages, and are specified as part of the wage contract.").

147. William O. Kessler, *He Shouldn't Have to Eat Ramen: A Modest Pay-For-Play Proposal for NCAA Student-Athletes Participating in Traditionally Profitable Sports*, 3 WILLAMETTE SPORTS L.J. 56, 71–72 (2011).

148. *How Much Does Workers' Comp Insurance Cost?*, THE HARTFORD (last updated August 14, 2023) https://www.thehartford.com/workers-compensation/how-much-does-workers-compensation-cost.

149. *Survey: Most DI Schools Provide Injury Coverage*, NCAA (May 25, 2016, 3:04 PM), https://www.ncaa.org/news/2016/5/25/survey-most-di-schools-provide-injury-coverage.aspx.

previously discussed complex nature of insurance, with 84% of Division I schools providing the NCAA mandated $90,000 primary insurance for student-athletes injuries, and the NCAA having a catastrophic injury fund providing up to $20 million in benefits to those student-athletes injured during practice or playing, one may ask if a majority of student-athletes would actually benefit from access to workers' compensation.[150]

D. Secondary Employment

Student-athletes jumping the hurdle to being classified as employees of the university for purposes of the sport they play may have an additional complication of secondary employment in a variety of ways including the everchanging world of NIL.[151] Consider a "ripped from the headlines" hypothetical:[152] a junior in high school

150. *Id.*

151. It is important to note that aside from the secondary employment context, many NIL laws currently allow for schools to make distinctions between the ability for student athletes to participate in NIL deals, which may interfere with the institutional values or restrict student-athletes' participation in third-party NIL related content during official events. For example, Tennessee's NIL laws state that "an institution may prohibit an intercollegiate athlete's involvement in name, image, and likeness activities that are *reasonably considered to be in conflict with the values of the institution*," however, "[a]n institution may [also] adopt reasonable time, place, and manner restrictions to prevent an intercollegiate athlete's name, image, or likeness activities from interfering with team activities, the institution's operations, or the use of the institution's facilities." TENN. CODE ANN. §§ 49-7-2802(f)–(g)(1) (West 2022) (emphasis added). Similarly, in Kentucky "the governing board of an institution may adopt a policy governing the name, image, and likeness agreements of the institution's student athletes. . . . Reasonable restrictions that an institution may choose to impose include but are not limited to: [p]rohibiting a student athlete from entering into an NIL agreement for products or services that *are reasonably considered to conflict with the mission of the institution*, in the same manner as any other student would be prohibited" and "[r]estricting a student athlete's NIL agreement activities during official team activities." KY. REV. STAT. ANN. § 164.6947(1)(a), (1)(d) (West 2022) (emphasis added). However, this Note addresses the secondary employment context separately from the NIL laws that are already in place. The employment status question for student-athletes could provide grounds for a university to strike down NIL deals potentially preemptively, which may interfere directly with the universities contractual obligations should it so choose to.

152. *See* Logan Newman, *A High School Junior Reportedly Signed an $8 Million NIL Agreement*, USA TODAY HIGH SCH. SPORTS (Mar. 13, 2022, 8:54 PM),

who is a football star signs an $8 million NIL deal with Puma for the exclusive rights to his name, image, and likeness. His contract is deemed not to be pay-for-play and instead strictly an NIL deal as the student may go to whichever NCAA school he chooses.[153] When looking at universities, the student-athlete is looking at the Big-12 specifically and has several prospects. However, 70% of the schools in the Big-12 have a brand partnership with Nike, and none of them have a brand partnership with Puma.[154] As a result, it may not be in the student-athlete's financial interest to attend a Big-12 school because the school may choose to limit the student-athlete's secondary employment opportunities.

By lifting NIL restrictions on self-monetization through one's own likeness without uniform replacement regulation, the NCAA has caused an extreme lack of clarity.[155] The NCAA "creat[ed] ambiguities with respect to such areas as prospective student-athlete participation in university activities, permissible booster endorsements, reporting requirements, and rights of international student-athletes."[156] One may argue that high school student-athletes would be unlikely to receive a brand deal with certain brands for exclusive rights to their name, image, and likeness, but big brands including Puma are already signing

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https://usatodayhss.com/2022/class-2023-signs-8-million-nil-agreement (discussing the $8 million NIL deal that a high school student has accepted, signing over exclusive rights to his name, image, and likeness throughout college); Mark Gillispie, *Marketing Deals Trickle Down from NCAA io High School Sports*, AP NEWS (May 9, 2022, 1:50 AM), https://apnews.com/article/high-school-athlete-endorsement-deals-NIL-690ca4547e8a00bf06fbd20f1dc058d8 ("Basketball phenom Mikey Williams is among the exclusive group of high school athletes who have signed lucrative NIL deals. Williams . . . signed a deal with shoe and athletic apparel maker Puma for an undisclosed amount . . . .").

153. *See supra* note 152.

154. *See* Nick DePaula, *From Nike to Adidas to the Jumpman and Beyond, Taking Stock of Which Sportswear Companies Have the Strongest Grip on FBS College Football*, BOARDROOM (last updated Oct. 28, 2021), https://boardroom.tv/ncaa-football-apparel-brand-partners/ (tracking shoe brand sponsorship deals within NCAA Division I football programs).

155. *See* Hosick, *supra* note 87 (stating the NCAA's new lack of regulation for NIL).

156. Michael Poyfair, *NCAA v. Alston: The Supreme Court Paves the Way for Name, Image, and Likeness Opportunities Among Collegiate Student-Athletes as the NCAA is Forced to Create an Interim Name, Image, and Likeness Policy to Comply With Antitrust Legislation*, 55 CREIGHTON L. REV. 269, 287 (2022).

lucrative deals with these younger superstars.[157] NIL deals such as these will only increase, with more exclusive rights likely being granted in the future. Thirty states and Washington, D.C. now allow high school athletes to monetize their NIL without impacting an athlete's eligibility for college.[158] However, this freedom may be lost if student-athletes become employees. Universities require conflict of interest evaluations in the "hiring" process, especially as the rights included in those deals may extend beyond just a one-time contract.[159] Shifting from high school to college, those restrictions become even more pervasive as the increase of possibilities for brand name deals grows with intercollegiate success.[160]

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157. Gillepsie, *supra* note 152.

158. The states which allow high school athletes to participate in NIL deals without affecting eligibility are: Alaska, California, Colorado, Connecticut, District of Columbia (D.C.), Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, and Washington. *Tracker: High School NIL*, BUS. COLL. SPORTS, https://businessofcollegesports.com/high-school-nil/ (last updated September 6, 2023) (tracking state laws regulating high school student-athletes and NIL deals effect on their eligibility); *Tennessee High School Sports Org Votes to Allow NIL Deals*, AP NEWS (Dec. 9, 2022), https://apnews.com/article/sports-business-education-tennessee-high-school-84d622c7b9e25c01a09f86d2ce041588 ("Students could receive payment as long it is not related to their performance, doesn't suggest the endorsement or sponsorship of their school and doesn't include the student in gear featuring the name or logo of their school."). Though many states have *rules* which effectively prevent high school student-athletes' participation in NIL deals, Texas is currently the only state with an affirmative state *law* against high school student-athletes participating in NIL. TEX. EDUC. CODE ANN. § 51.9246(j) (West 2023) ("No individual, corporate entity, or other organization may: (1) enter into any arrangement with a prospective student athlete relating to the prospective student athlete's name, image, or likeness *prior to their enrollment in an institution of higher education*; or (2) use inducements of future name, image, and likeness compensation arrangement *to recruit* a prospective student athlete to any institution of higher education.") (emphasis added).

159. *See* Newman, *supra* note 152 (discussing the $8 million NIL deal that a high school student has accepted, signing over exclusive rights to his name, image, and likeness throughout college).

160. *See, e.g.*, *15 Female Student-Athletes Sign NIL Agreements with Adidas*, ADIDAS (Sept. 2022), https://www.adidas.com/us/blog/915507-15-female-studentathletes-sign-nil-agreements-with-adidas (announcing a campaign to honor the 50th anniversary of Title IX through NIL deals with fifteen female student-athletes).

When taking into account the power of universities through secondary employment considerations to potentially restrict the type of NIL deals a student-athlete may pursue, the inconsistency amongst states' laws regarding NIL—and whether or not those laws even exist within a student-athlete's state—compounds this already complicated issue for those student-athletes enrolled in college and looking for NIL deals.[161] Adding the complex intertwining of religious and commercial freedoms only enhances the differences when a student-athlete is granted employee status. Disregarding the Title VII exemption from Section 702 of the 1964 Civil Rights Act, which allows religious organizations to exercise religious preferences when making employment decisions,[162] the dynamic of private religious universities having additional considerations for the upkeep of their religious image could continually complicate the arena of student-athletes' secondary employment and their ability to take on other NIL deals.[163]

One author brings up an interesting statutory comparison: the Nebraska Fair Pay to Play Act[164] with that of Wisconsin, essentially comparing the mandated restrictions on Creighton University and the lack of restrictions on Marquette University.[165] Both Creighton University and Marquette University are Division I NCAA schools as Catholic, Jesuit institutions.[166] Creighton University, located in Omaha, Nebraska, would be restricted to the allowances of the Nebraska Fair Pay for Play Act putting the school "at the mercy of student-athletes and their diverse endorsements that may conflict with

161. *See Tracker: Name, Image and Likeness Legislation by State*, *supra* note 20.

162. *See* 42 U.S.C. § 2000e-1(a).

163. *See generally* Poyfair, *supra note* 156, at 290 n.190 (discussing the distinction between a public religious university, Creighton, and a private religious university, Marquette, in the application of NIL law).

164. NEB. REV. STAT. ANN. §§ 48-3601–09 (West 2022). This Act is also known as the Nebraska Student-Athlete Name, Image, or Likeness Rights Act. *Id.*

165. Poyfair, *supra note* 156, at 290 n.190.

166. *Religious Activities Policy*, MARQUETTE UNIV., https://www.marquette.edu/student-development/policies/religious.php (last visited Jan. 4, 2023); *What is a Jesuit Education?*, CREIGHTON UNIV., https://www.creighton.edu/about/why-creighton/what-jesuit-education (last visited Jan. 4, 2023); *Why Creighton*, Creighton Univ., https://www.creighton.edu/about/why-creighton (last visited September 13, 2023).

education or religious values."[167] While one might view this as a bad thing for the school, the expansive variety of monetizable endorsements is the inherent benefit of NIL for students as they are able to pursue those opportunities that fall within the state's statutory guidelines regardless of their school's religious affiliation. However, Wisconsin to date does not have a law regarding NIL for student-athletes,[168] thus allowing an institution like Marquette University to increase restrictions and prevent students from accepting NIL deals which would "reflect adversely on . . . its mission and values as a Catholic, Jesuit university."[169] This distinction between states based on whether they have implemented a NIL law not only confuses student-athletes and universities alike on what is and is not allowed, but may also determinatively change the extremes to which secondary employment restrictions are applicable to NIL deals.

It is important to acknowledge that access to the rights of the NLRA may invalidate this issue, as the very classification that causes the conflict between student-athletes and their universities may potentially be the fix. If student-athletes are able to "bargain" for NIL to be beyond the scope of their employment contract with the university they represent, then players can also undertake the NIL contract with which they have interest without interference from their university employer. These types of considerations scratch the surface of the complex nature of secondary employment restrictions. However, there is unlikely to be broadly applicable incentive to negotiate for secondary

167. Poyfair, *supra note* 156, at 290–91. For an example of the type of NIL deal potentially restricted by Nebraska's Fair Pay for Play Act see WAFB Staff, *Hooters Announces NIL deals with LSU Offensive Linemen*, WAFB (Aug. 22, 2022), https://www.wafb.com/2022/08/22/hooters-announces-nil-deals-with-lsu-offensive-linemen/.

168. *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 20.

169. Marquette Univ., *NIL Policy 2021*, MARQUETTE UNIV. ATHLETIC DEP'T. (June 30, 2021), https://gomarquette.com/documents/2021/9/30/Marquette_NIL_Policy_July_2_2021.pdf ("Marquette student-athletes may not engage in NIL activities involving a commercial product, service or business that reflects adversely on Marquette University or its mission and values as a Catholic, Jesuit university. Those include, but are not limited to, alcohol, tobacco or vaping products, gambling, illegal or recreational drugs, prophylactics, pornographic, sexually explicit or sexually suggestive entertainment or promotions or racist, sexist, hateful or demeaning language.").

employment restrictions outside of the purview of student-athletes' contracts due to the likely request of universities to compensate student-athletes for their name, image, and likeness as part of their newfound employee compensation package.[170]

IV. TIME-OUT FOR THE NLRB AND TIME-IN FOR FEDERAL LEGISLATION

The NLRB and its General Counsel have been at odds on whether student-athletes are "employees" under the NLRA.[171] Rather than repeatedly wrestle with these issues through litigation every year, the United States Congress must step in and decide this issue through federal legislation.[172] Ultimately, the NLRB, the FLSA, employment taxes, and many other related matters come under the purview of the United States Congress. Student-athletes either are employees or are not employees. Only Congress can structure a framework that contemplates the multitude of injuries emanating from the designation while also meeting the reasonable objectives of all parties.[173]

Congress should designate student-athletes as non-employees for the purpose of participating in their sport, setting reasonable and fair ground rules under which colleges and universities may provide

170. "[I]f student athletes were to become university employees, it would only be natural for institutions to request the use of their students' NIL as part of a compensation package." Bill Carter, *Careful What We Wish for: Student Athletes as Employees May Negatively Affect NIL*, SPORTS BUS. J. (May 23, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/05/23-Carter.aspx. "With an employee designation, [Mr. Carter] envision[s] institutions exercising greater control, potentially impeding student athletes' access to brand opportunities. Consequently, this may lead to diminished interest from brands in engaging with student athletes, *further stifling their earning potential*." *Id.* (emphasis added).

171. Abruzzo, *supra* note 12, at 1.

172. The Court in *NCAA v. Alston* seems to allude to the idea that federal legislation is needed, for without it the Court is constrained to apply and enforce the law as it sees it currently. *See* NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021) (stating that "until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act").

173. The political back and forth discussed previously underscores the need for greater clarity from Congress. *See infra* Part II (discussing the various memoranda published by the NLRB's General Counsel within the last decade on the question of student-athletes' employee status).

benefits to student-athletes and still maintain this designation.[174] By designating student-athletes as non-employees, Congress can address both the monetary concerns of student-athletes while maintaining the principles of amateurism. Congress should provide that small non-taxable stipends, insurance coverages, and similar benefits to student-athletes are acceptable and will not affect their eligibility status in an effort to ensure their economic well-being while providing essential entertainment. Additionally, a bill of rights for student athletes establishing minimum safeguards, similar to those currently proposed in Congress and other scholarly publications,[175] will help to ensure

174. The broad scope of these issues does not lend itself to a simple or cohesive transition from student-athlete to employee. This Note only begins to scratch the surface of the issues related to the employee status of student-athletes. There are many other legal issues that could be implicated through this change in status including the jeopardized equality among sports and players for purposes of Title IX. *Compare What is Title IX?*, WOMEN'S SPORTS FOUND. (Sept. 10, 2019), https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/ (explaining Title IX, the scope of its application in sports, and the importance of the law and its protections), *with* Evan Gerstmann, *Why Gender Equity in College Sports is Impossible (Unless Colleges Do Something Radical)*, FORBES (Apr. 24, 2019), https://www.forbes.com/sites/evangerstmann/2019/04/24/why-gender-equity-in-college-sports-is-impossible-unless-colleges-do-something-radical/?sh=df86828244e9 (analyzing how college football's inclusion under Title IX's scope prevents gender equality among scholarships for other sports which both men and women participate in as college football usurps those opportunities while still being reserved for a small sector of the population able to play a sport "largely . . . for giants"); *see also* H.R.7336, 117th Cong. (as referred to the H. Comm. on Educ. and Lab. on March 31, 2022). This Note does not discuss any of the nuanced societal issues or a universities' ability to cope with the increase of employees with already depleted human resource departments. *See also Employment Rights for Student-Athletes: Is This the Next Frontier After NIL?,* LEAD1ASSOCIATION, at 27:20 (Sept. 16, 2021), https://www.youtube.com/watch?v=SDeOR4n7KdU&t=990s (commenting on the breadth of issues at stake including ". . . social security and Medicare deductions; federal, state, and unemployment taxes; worker's compensation insurance; inevitably termination rights; and full taxability on income.").

175. *See* S. 4724, 117th Cong. (as refereed to S. Comm. on the Judiciary on August 2, 2022) (commonly known as the College Athletes Bill of Rights, S. 4724 proposes grant-in-aid guarantees such as necessities and reimbursement of expenses associated with participation as well as limited scholarship revocation rights for universities); REED, *supra* note 35 at 78–87 (making recommendations to achieve the following critical goals: "[1] [e]nhanced academic integrity in college athletics [2] [e]conomic and social justice for college athletes[,] [and] [3] [e]thical and safe treatment of college athletes").

athletes' health and safety as well as provide some assurance of fair and equitable treatment.[176]

Providing the legal framework for benefits such as these are within Congress' powers[177] and may be drafted to specifically exclude student-athletes from employee-status. Thus, this framework would still protect universities from complex and essentially unanswerable questions arising while still providing guidance. Anything other than this action by Congress continues the morass that is currently imposed on college athletics and ensures litigation on this issue for the foreseeable future. Whereas a decision by the NLRB would not forego

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176. In looking at evaluating the health of student-athletes,

> some research indicates that football is most dangerous for men and cheerleading most dangerous for women in terms of the risk of catastrophic soft tissue brain injury in college athletics. As of 2013, the risk of catastrophic brain injury among youth appears to be greater among ice hockey players and cheerleaders than football players.

Jennifer A, Brobst, *Why Public Health Policy Should Redefine Consent To Assault and The Intentional Foul in Gladiator Sports*, 29 J.L. & HEALTH 1, 11 (2015). For a deeper discussion of the implications regarding increased injury surrounding "gladiator" sports, see *id.*

177. The regulation of intercollegiate athletics falls under the purview of Congress due to Article I, Section 8, clause 3 of the United States Constitution, also known as the Commerce Clause, as accordingly Congress shall have the power to "regulate commerce . . . among the several states . . . ." U.S. CONST. art. I, § 8, cl. 3. Specifically, in regards to the NCAA,

> [t]he need for uniform national rules compels the NCAA to adopt the least restrictive state NIL law on a national scale, thereby affecting commerce "wholly outside" the state . . . . [O]ne state's NIL law is unlikely to be "least restrictive" in every sense, so changing NCAA bylaws to match one or more state laws cannot truly equalize the playing field. *Only Congress has the power to do that*. Prudent policy, therefore, demands that Congress step up to the plate and legislate a national solution to supplant the state-by-state patchwork of NIL compensation regimes.

M. Ryan Kearney, *When The States Step Out of Bounds: State Regulation of Student-Athlete Compensation and The Dormant Commerce Clause*, 42 LOY. L.A. ENT. L. REV. 221, 229 (2022) (emphasis added).

future litigation and appeals, a statutory designation could provide a clear statement about the status of student-athletes and a framework for meeting the student-athletes' needs while still maintaining a modernized construct of amateurism, which would ultimately "promote stability in labor relations."[178]

This legislation should be enacted after deliberation and with the implications for all student-athletes in mind. The employee status question should not be decided based on the fact that the University of Texas football program generated $156 million in revenue in fiscal year 2018 or that Ball State's football program only generated $5 million in revenue.[179] The astronomical revenue dollars generated by some college football and basketball programs should not be the basis for doing away with the concept of amateurism altogether.[180] These lofty decisions affect all intercollegiate student-athletes[181] and should not be decided based on a small subset of facts involved in a single court case;

178. Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015).

179. *Compare* Zach Barnett, *The Highest-Grossing Football Programs in College Football Are…*, FOOTBALLSCOOP (Mar. 25, 2020), https://footballscoop.com/news/the-highest-grossing-football-programs-in-college-football-are, *with* Jimmy Golen, *Dartmouth Tells NLRB That Basketball Players Are Students - for Real - Not Employees*, INDEPENDENT (Oct. 5, 2023,), https://abcnews.go.com/Business/wireStory/dartmouth-tells-nlrb-basketball-players-students-real-employees-103766365 (stating that "Dartmouth says its basketball program is a money-loser").

180. *See, e.g.*, Eben Novy-Williams, *March Madness Daily: The NCAA's Billion Dollar Cash Cow*, SPORTICO (Mar. 26, 2022), https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/ (examining the hundreds of millions made by the March Madness basketball series).

181. The only significant difference between a college football player and a college volleyball player is the amount of money a university earns from and spends on those different sports' teams. The discussion of the distinction between the value of players depending on the sport they play warrants more depth as the money spent on a team also correlates to the gender of the team. *See* Jaclyn Diaz, *The NCAA's Focus on Profits Means Far More Gets Spent on Men's Championships*, NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1049530975/ncaa-spends-more-on-mens-sports-report-reveals (looking at various factors that perpetuate the potentially unfair treatment of women in sports specifically regarding the spending on their championships).

the risk of omitting the consequences other student-athletes will face by focusing too narrowly on this broad subject is too great of a risk.[182]

Changing student-athletes' employee status to "employee" is not a viable change for intercollegiate athletics because the reality is that this is not about the game—the impact of the employee status change does not just redefine scoring or timekeeping. The direct impact on institutions and student-athletes alike makes the need for student-athletes and the NCAA to have outside guidance imperative. The benefits of some of the broader implications of a finding of employee status such as worker's compensation and minimum wage make the argument for the finding of an employee status more tempting.[183] But the point of intercollegiate sports is not always to be a job or even to serve as a steppingstone to a greater athletic career in organizations like the NBA and NFL. As idealistic as it may sound, many student-athletes simply play for the love of the game, whichever game that may be.[184] In looking for a solution, one

182. Donald L. Swanson, *NCAA's Losing Streak in Court Continues . . . For Now (Johnson v. NCAA)*, LEXOLOGY (Mar. 2, 2023), https://www.lexology.com/library/detail.aspx?g=d6f61d8c-2678-4bc5-9c27-f49d00b64c99 ("If . . . the NCAA and its member schools ultimately lose on the athletes-as-employees issue, the negative financial impact on many schools could be significant.").

183. *See supra* Part III (discussing various benefits and detriments to employee status).

184. The argument of the "walk-on student-athlete," student-athletes who do not receive scholarship funding, is a prevalent one for why student-athletes should be paid instead a minimum wage. William Boor, *College Athletes Do Not Deserve to Be Paid, Now or Ever*, BLEACHER REP. (June 6, 2011), https://bleacherreport.com/articles/725981-college-athletes-do-not-deserve-to-be-paid-now-or-ever; *supra* Part III.A (discussing minimum wage and its potential application in intercollegiate athletics). Walk-on student-athletes are valuable members of every intercollegiate athletic department often putting into the game an equal amount of effort and time as their teammates who receive scholarships, however, as William Boor has stated, "[i]t is unfortunate that they have to put forth all the effort without the reward of a scholarship or the free time to get a part-time job, but when it comes down to it that was their choice." Boor, *supra* note 184. Unlike scholarship athletes, walk-on athletes do not have the same inherent incentive to participate in intercollegiate athletics. However, their safety and rights must be considered when looking at the structure of the NCAA for the very fact that their love of the sport they play is what brought them to the field. *See id.* ("There is no problem with doing something you love to do, but there are consequences for every action. The consequence for a walk-on athlete choosing to walk-on may be that he has no free

cannot discount that the practical application of those same benefits for some may make it logistically impossible for smaller, less athletically focused schools to be able to provide athletics departments for those athletes as well. These universities would be the ones at the highest risk of going bankrupt by taking on increased liability and overwhelming human resources departments with an influx of new "employees."[185] The employee status is not one that is workable in the intercollegiate athletics structure. Without radical restructuring of the NCAA and intercollegiate sports, employee status would simply complicate a multitude of issues.

V. CONCLUSION

The employment status question for student-athletes will not be resolved overnight. Student-athletes are a unique category of potential employee. Intertwined with academic institutions, student-athletes are in the unique position of living as both student and hardworking athlete deserving of protections.[186] This Note serves both to show the issues with the employee designation for student-athletes and as an outline of some of the complex issues that must be tackled to carve out an equitable future for student-athletes if employee status for student-athletes does come to fruition.[187] Employee designation currently does not benefit student-athletes in a way that will be equitable or

time and is unable to find a part-time job. Most people may not like to hear this, but it is no different than a regular student deciding he really likes to play video games and spending his whole day playing games rather than getting a job.").

185. *See* Dan Schwabel, *Why HR Employees are Quitting and How to Retain Them*, LINKEDIN: WORKPLACE INTEL. WKLY. (Aug. 22, 2022) https://www.linkedin.com/pulse/why-hr-employees-quitting-how-retain-them-dan-schawbel/ (discussing the high burnout rates of HR employees and factors that have led to a recently low retention rate).

186. *See* Nw. Univ., 362 N.L.R.B. 1350, 1353 (2015) (acknowledging that "scholarship players are students who are also athletes").

187. *See* Renalia DuBose, *An Unexpected Result of Gender Equality Initiatives in Sports—the Sexualization of Female Athletes*, 48 MITCHELL HAMLINE L. REV. 1139, 1172 (2022) ("[T]he athletic community must develop reliable structures to protect all vulnerable athletes who are eager to participate in the beneficial world of athletics."); McKenzie, *supra* note 108 ("Considering that we have overwhelming pay and wealth gaps across race and gender in American society, our goal should *not be to introduce new compensation structures* that look like existing ones. Instead, we should create an architecture rooted in wealth justice that closes those gaps.") (emphasis added).

sustainable. The implications from this status cause a rolling tide of issues,[188] and though going as far as calling them "volunteers" would belittle their worth on a multitude of levels, the only viable path forward is one of non-employee status, with implementation of other protections to ensure the respect these student-athletes are owed.

188. *See supra* Part III (analyzing the implications of the issues brought by the employee status question).