THE STUDENT-ATHLETE-EMPLOYEE: FORGING AN EQUITABLE PATH TOWARD A NEW NCAA

*Halle R. Fiedler**

In 2021, the landscape of National Collegiate Athletic Association (NCAA) sports as we knew it shifted dramatically as the U.S. Supreme Court held that student-athletes could now receive compensation based on their names, images, and likenesses (NIL). For the first time in the history of college sports, student-athletes may now receive a share of the billions of dollars that they have been generating for their universities and the NCAA for decades. Since this ruling, however, there have been several questions as to how to best regulate student-athletes in this new universe, and whether the NCAA's long-standing amateurism model is durable enough to withstand these drastic changes. Not only must these concerns be addressed, but they must also be considered against the backdrop of gender equality to avoid further widening the gap between men's and women's athletics and conflicting with the mandates of Title IX.

Along with questions of regulation, there is the emerging issue of whether student-athletes should be considered employees of the universities that they attend. Courts have been apprehensive to afford employee status to this class of students because of the tensions that would arise between federal labor laws and current NCAA bylaws. However, the U.S. Court of Appeals for the Third Circuit recently held that all college athletes are not barred from bringing a Fair Labor Standards Act (FLSA) claim simply due to their "amateur-status."

This Note argues that courts answering the question of whether student-athletes may plausibly be employees under the FLSA should utilize a student-athlete specific test, in order to address the particularities of the context at hand. Further, this test must reflect factors that the Supreme Court has previously deemed relevant to this inquiry to avoid a disparate impact among female and male student-athletes. Lastly, if the "student-athlete-employee" is established, benefits, such as NIL compensation, should function under Title IX's substantially equal standard,

* J.D. Candidate, 2025, Fordham University School of Law; B.A., 2021, University of Wisconsin-Madison. Thank you to Professor James J. Brudney for his invaluable knowledge and guidance throughout this process; Max Kaufman, and the *Fordham Law Review* for their careful editing and feedback; Adjunct Professor Samantha Springer for her inspiration; and my family and friends for their unwavering love and support. This Note is dedicated to my former teammates in the University of Wisconsin Women's Soccer program.

and Title VII's affirmative defense of the market excuse should not be made available to universities defending against claims of discrimination based on gender.

INTRODUCTION

"It's just 37 words, 37 plain and grammatically clunky words hiding inside a large education bill, 37 words that didn't seem to be a big deal at the time, 37 words that would change everything."[1] Over fifty years ago, on June 23, 1972, President Richard M. Nixon signed Title IX of the Education

1. Steve Wulf, *Title IX: 37 Words That Changed Everything*, ESPN (Mar. 22, 2012, 1:19 PM), https://www.espn.com/espnw/title-ix/story/_/id/7722632/37-words-changed-everything [https://perma.cc/TH85-DKWZ] ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." (quoting Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688)).

Amendments of 1972[2] into law.[3] Title IX has since become the touchstone of equal opportunity in collegiate athletics.[4] Enacted with a remedial purpose, Title IX mandates that universities may not provide unequal participation opportunities for men compared to women in sports and that a certain sport may not receive better treatment than another.[5] Further, regulated institutions may not "maintain that there are revenue productions or other considerations to justify an unequal dispersion of benefits."[6] But even after fifty-plus years of Title IX, these thirty-seven words still fail to adequately reflect the reality of the collegiate sports landscape.[7]

"Title IX applies to all educational institutions, both public and private, that receive federal funds."[8] The National Collegiate Athletic Association (NCAA) has been able to operate "above the law for decades" as the organization does not fit definitionally within Title IX's reach.[9] As a result, student-athletes[10] see significant gendered disparities while participating in NCAA-sponsored events, specifically their championship tournaments.[11] However, the NCAA does function as a "controlling authority" or regulator over the educational institutions that are covered by Title IX, and thus, the organization is indirectly liable for activities with a disparate impact based on gender.[12] Therefore, although the NCAA may be free from direct liability in court, there are existing incentives for the organization to comply with

2. Pub. L. No. 92-318, § 901, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688).

3. *See Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html [https://perma.cc/8KPS-8GU8] (Aug. 1, 2024); Wulf, *supra* note 1.

4. *See* Wulf, *supra* note 1; Leigh Ernst Friestedt, *Title IX vs. NCAA: A Gameplan for Championship Equity*, 25 VAND. J. ENT. & TECH. L. 307, 310 (2023).

5. *See Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx#who [https://perma.cc/6VGW-UQUC] (last visited Oct. 12, 2024).

6. *Id.*

7. *See* Andrew J. Haile, *Equity Implications of Paying College Athletes: A Title IX Analysis*, 64 B.C. L. REV. 1449, 1455 (2023).

8. *Title IX Frequently Asked Questions*, *supra* note 5.

9. *See* Friestedt, *supra* note 4, at 360; *see also* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 469–70 (1999) (holding that the NCAA is not an institution covered by Title IX).

10. *See* Liz Clarke, *The NCAA Coined the Term 'Student-Athlete' in the 1950s. Its Time Might Be Up*, WASH. POST (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/ [https://perma.cc/8KUJ-FMNW] ("The term was coined by the NCAA in the 1950s to counter any claim that college athletes were employees and entitled to workers' benefits . . . . Over the decades since, the term has become embedded in the public consciousness—widely used without awareness of its origin.").

11. *See* Friestedt, *supra* note 4, at 313–17. In 2021, Congress indicated that the NCAA should be required to comply with Title IX after issuing two bills and reintroducing the College Athletes Bill of Rights. *See id.* at 359. The College Athletes Bill of Rights "includes a Title IX section that mandates intercollegiate athletic associates shall not discriminate based on sex." *Id.*; *see also* KAPLAN, HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW 1 (2021), https://kaplanhecker.app.box.com/s/6fpd51gxk9ki78f8vbhqcqh0b0o95oxq [https://perma.cc/D8HA-F6Y9].

12. *See* Friestedt, *supra* note 4, at 311–12.

antidiscriminative policies, as well as arising initiatives to extend the scope of Title IX.[13] This Note explores the existing gendered differences in collegiate athletics under the assumption that the universities are liable for violations of Title IX, and that the NCAA is the regulatory body that guides these institutions' compliance with the law.[14]

Although Title IX mandates equal treatment among student-athletes, in 2021, a video shared on TikTok brought to light the stark differences between the men's and women's NCAA Basketball Championship March Madness facilities.[15] Due to COVID-19 precautions, that year's tournament was structured as a "bubble," in which the players were prohibited from leaving the facilities for up to three weeks as the competition continued.[16] As the men's teams were flooded with gear, extensive meals, and an Olympic-grade weight room, the women's teams were provided an incomplete set of dumbbells and a few sanitized yoga mats.[17]

After the NCAA received backlash following the viral social media posts of women's basketball players participating in the 2021 March Madness tournament,[18] journalists began looking into the 2021 College World Series to compare the treatment between the men's baseball players and the women's softball players.[19] The Women's College World Series is an eight-team softball tournament held every year in Oklahoma City, which generates substantial television views and sells out stadiums.[20] However, in

13. *See id.* at 334 (explaining that the scope of Title IX may include the NCAA through reinterpretation of the federal law, the passing of a new congressional statute, or voluntary compliance); *see also Smith*, 525 U.S. at 462 (leaving open the question of Title IX's application to the NCAA).

14. *See Behavior Policies for College Athletes & Potential Legal Challenges*, JUSTIA, https://www.justia.com/sports-law/behavior-policies-for-college-athletes/ [https://perma.cc/E9AP-DCHA] (July 2024) (explaining that common issues about the NCAA governing student-athlete behavior include policies on "academic standing, dress codes and grooming, drug and alcohol use," and how the athlete must behave in games or practices). Violations of NCAA policies may lead to discipline, such as suspension or even dismissal from a team. *See id.*

15. *See* Sedona Prince (@sedonerrr), TIKTOK (Mar. 18, 2021), https://www.tiktok.com/@sedonerrr/video/6941180880127888646?is_copy_url=1&is_from_webapp=v3&lang=en [https://perma.cc/6BEB-H63H].

16. *See* Bill Chappell, *NCAA Says 2021 Men's March Madness Will Take Place in a Bubble in Indiana*, NPR (Jan. 4, 2021, 1:35 PM), https://www.npr.org/sections/coronavirus-live-updates/2021/01/04/953261708/ncaa-says-2021-march-madness-will-take-place-in-a-bubble-in-indiana [https://perma.cc/WLQ4-XT2V].

17. *See* Emine Yücel, *Men's and Women's NCAA March Madness Facilities, Separate and Unequal, Spark Uproar*, NPR (Mar. 19, 2021, 9:15 PM), https://www.npr.org/2021/03/19/979395795/mens-and-womens-ncaa-march-madness-facilities-separate-and-unequal-spark-uproar [https://perma.cc/Q3UC-5YW7].

18. *See* Prince, *supra* note 15; *see also* Billy Witz, *Her Video Spurred Changes in Women's Basketball. Did They Go Far Enough?*, N.Y. TIMES (Mar. 15, 2022), https://www.nytimes.com/2022/03/15/sports/ncaabasketball/womens-march-madness-sedona-prince.html [https://perma.cc/5AM4-3K6W].

19. *See* David Leonhardt, *Massages for Men, Doubleheaders for Women*, N.Y. TIMES (June 4, 2021), https://www.nytimes.com/2021/06/04/briefing/college-sports-gender-inequality.html [https://perma.cc/8M4E-ZXB8].

20. *See* Dan Rorabaugh, *What Is the Women's College World Series?: A Guide to the NCAA Softball Championship*, TALLAHASSEE DEMOCRAT (May 29, 2023, 4:48 PM),

comparison to the men's baseball tournament, where the players received "off days . . . a golf outing, a free massage day and a celebratory dinner," the NCAA preferred a "condensed schedule" for the women to "hold down hotel and meal costs."[21] The USA Softball Hall of Fame Complex in Oklahoma City, now known as Devon Park, is a softball stadium that often sells out quickly, but only has a capacity of about 13,000 fans—a recent expansion from a capacity of 9,000.[22] In comparison, the men's baseball stadium is prepared to hold a maximum of 24,000 fans.[23] Although many softball teams believe they could easily reach the same amount of spectator interest as the baseball games, they are simply not provided that opportunity.[24]

Following the 2021 March Madness and College World Series tournaments, the NCAA then received harsh criticism after cancelling one of its regional women's golf tournaments due to "inclement weather."[25] In response, the NCAA hired a law firm to investigate the disparities between their men's and women's programs, particularly in championship tournaments.[26] The NCAA External Gender Equity Review concluded that "the disparities in the NCAA championships stem from the structure and culture of the NCAA itself."[27] The report stated "[t]hat there are gender inequities at NCAA championships other than basketball is, while disappointing, not a surprise."[28] As the report further noted:

> [W]oven into the fabric of the NCAA is a pressure to increase revenue to maximize funding distributions to the membership, which relies heavily on the NCAA's support. This pressure led the NCAA to prioritize Division I men's basketball over women's basketball in ways that create, normalize, and perpetuate gender inequities.[29]

Both the "head start" toward opportunities at the men's collegiate level,[30] and the fact that the NCAA has failed to "put in place systems to identify,

---

https://www.tallahassee.com/story/sports/college/fsu/2023/05/29/how-women-college-world-series-works-ncaa-softball/70264166007/ [https://perma.cc/8TY7-ZGLQ].

21. Leonhardt, *supra* note 19.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See* Gabriel Fernandez, *NCAA Cancels Women's Golf Regional Due to Course Not Being Playable 'at a Championship Level'*, CBS (May 13, 2021, 10:28 AM), https://www.cbssports.com/golf/news/ncaa-cancels-womens-golf-regional-due-to-course-not-being-playable-at-a-championship-level/ [https://perma.cc/8PN4-YTYJ] ("Miami junior Kristyna Frydlova . . . noted that, even though the women were not allowed to practice on the course as a decision on whether the competition would move forward was made, a group that appeared to be LSU men's team was practicing on that very course.").

26. *See* Jaclyn Diaz, *The NCAA's Focus on Profits Means Far More Gets Spent on Men's Championships*, NPR (Oct. 27, 2021, 9:25 AM), https://www.npr.org/2021/10/27/1049530975/ncaa-spends-more-on-mens-sports-report-reveals [https://perma.cc/N8HR-P4X5].

27. KAPLAN, HECKER & FINK LLP, *supra* note 11, at 2.

28. *Id.*

29. *Id.*

30. *See History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx [https://perma.cc/CFB7-DUW3] (last visited Oct. 12, 2024). The NCAA is the regulatory body overseeing college sports, but it was not until the enactment of Title IX that the NCAA enacted

prevent, and address gender inequities," have led to deeply ingrained gendered differences in collegiate athletics as a whole.[31] These gendered differences in sports are greatly influenced by market values and revenue production.[32]

In combination with the history of gender inequity in college sports, an additional factor has begun to widen this already-existing gap: the existence of Name, Image, and Likeness (NIL) compensation. Following the unanimous U.S. Supreme Court decision in *National Collegiate Athletic Ass'n v. Alston*,[33] the NCAA "adopted the most progressive reform" since its inception in allowing student-athletes "to monetize their names, images and likenesses" through compensation and other benefits, such as sponsorships and brand marketing deals.[34] Athletes are now able to work with "collectives,"[35] and most of the NCAA's Division I schools have established these organizations to finance endorsement opportunities for their athletes.[36] A gray area has subsequently developed because the NCAA bylaws' amateurism model clearly bars direct pay-for-play schemes,[37] but student-athletes are now essentially receiving compensation due to their recognition as collegiate athletes.[38]

In addition to the erosion of the NCAA's amateurism model,[39] the newly-developed NIL compensation scheme provided by these collectives has facilitated increased gender discrimination.[40] Data shows that close to 75 percent of all NIL compensation has gone to football players alone, and more than half has gone to only male athletes.[41] Similar to the NCAA,

---

a governance plan to include women's athletics within the NCAA structure in 1980. *See id.*; *infra* notes 33–43 and accompanying text.

31. KAPLAN, HECKER & FINK LLP, *supra* note 11, at 2.

32. *See* Diaz, *supra* note 26; Haile, *supra* note 7, at 1455–56.

33. 141 S. Ct. 2141 (2021); *see infra* notes 67–72 and accompanying text.

34. *See* Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1112 (2023).

35. *See Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS, https://businessofcollegesports.com/tracker-university-specific-nil-collectives/#:~:text=A%20collective%20is%20an%20organization,student%20athletes%20of%20that%20institution [https://perma.cc/GV4X-YMDB] (July 24, 2024). A collective is typically formed by alumni of a particular university, focused on assisting student-athletes with their NIL opportunities and brand deals. *See id.*

36. *See* Chase Garrett, *What Are NIL Collectives and What Do They Do?*, ICON SOURCE, https://iconsource.com/blog/nil-collectives/#:~:text=Today%2C%20more%20than%20120%20known,has%20at%20least%20one%20organization [https://perma.cc/Q4UA-KF4S] (last visited Oct. 12, 2024) ("[M]ore than 120 known collectives have formed or are currently in the process of being formed. These are not numbers to sneeze at, as 92% of Power 5 schools now have at least one collective or are in the process of forming one . . . . [E]very school in the SEC has at least one organization.").

37. *See infra* Part I.A.1.

38. *See* Leonard Armato, *Pay for Play Is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022, 11:08 PM), https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=2ccd2d6e638e [https://perma.cc/HTJ2-EGBL].

39. *See infra* Part I.A.1.

40. *See* Boston, *supra* note 34, at 1130.

41. *See id.* at 1112–13; *see also* Lev Akabas, *Football and Social Media Dominate Rapidly Growing Market: Data Viz*, YAHOO FIN. (July 5, 2022), https://financ

although Title IX does not directly regulate these collective bodies,[42] NIL's impact on college sports has important implications. Not only has NIL compensation exacerbated the negative and disparate treatment of benefits that women's versus men's student-athletes receive, but it has also raised significant questions as to the durability of the NCAA's amateurism model.[43] This has prompted commentators and athletes themselves to consider whether student-athletes should be classified as employees so as to afford them the benefits and protections that the typical employee receives in other industries.[44]

This Note will examine the state of the NCAA and collegiate athletics following the 2021 Supreme Court decision in *Alston*, which allowed compensation to athletes based on their NIL,[45] as well as the circuit split over whether collegiate athletes may be deemed employees of their universities.[46] This Note argues that courts must determine whether student-athletes are "employees" under the Fair Labor Standards Act[47] (FLSA) using a test that accounts for the particularities of the context and that avoids an unintended but discriminatory impact among student-athletes.[48] Further, assuming certain student-athletes may achieve this status, this Note presents the difficulties that universities will face in squaring their existing Title IX requirements with additional regulations as employers under Title VII of the Civil Rights Act of 1964.[49]

I. THE LAW SURROUNDING THE STUDENT-ATHLETE-EMPLOYEE

The decision as to whether student-athletes may be deemed employees of their universities will have a far-reaching effect, not only on the student-athletes and their universities but also on the current state of the NCAA. If employee classification is achieved, there will be a resulting tension between a university's requirements as a provider of "substantially equal athletic opportunity" under Title IX and its new obligations as an employer under Title VII.[50] Part I.A focuses on the history of the NCAA, the development of their amateurism model, and the NCAA's future challenges due to NIL compensation. Part I.B then provides background on employment classification under federal labor laws and how courts have

e.yahoo.com/news/football-social-media-dominate-rapidly-164819134.html [https://perma.cc/H8G5-8BDC]. "A lot of NIL compensation just mirrors the revenue sources for the athletic department for which the student athletes play." *Id.* (quoting Opendorse cofounder and CEO Blake Lawrence).

42. *See* Friestedt, *supra* note 4, at 311.

43. *See* Kristi L. Schoepfer, Comment, *Title VII: An Alternative Remedy for Gender Inequity in Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 107, 111–16 (2000).

44. *See id.* at 107–08.

45. *See generally* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

46. *See infra* Part II.

47. 29 U.S.C. §§ 201–219.

48. *See infra* Part III.A.

49. 29 U.S.C. §§ 151–169; *see infra* Part III.B.

50. *See infra* Part I.C.3.

determined the meaning of "employee" under the FLSA in the educational setting. Part I.C explains the history of gender discrimination in both the employment and collegiate athletic settings and the future tensions between Title IX and Title VII that a university may face if student-athletes gain employee status.

A. The NCAA and NIL

This part will examine the NCAA's current regulations against direct compensation and how this has been altered by the Supreme Court's decision in *Alston*. Part I.A.1 explains the background of the NCAA and its amateurism model and the changes collegiate sports have undergone since *Alston*. Part I.A.2 then explores recent student-athletes' challenges and proposals from both the National Labor Relations Board (NLRB) and the NCAA to address the aforementioned concerns.

1. The Amateurism Model

The NCAA is a "member-led organization" comprised of more than 500,000 college athletes that attend about 1,100 member schools in the United States.[51] The NCAA organizes ninety championships in twenty-four sports each year.[52] The organization operates under the guidelines of their manual containing numerous bylaws.[53] Under Article 12 of the NCAA bylaws, student-athletes must fit the definition of an "amateur" to compete in intercollegiate athletics.[54] Although "amateur" is not directly defined in the bylaws, the regulations detail how an individual will lose their "amateur-status," and their subsequent eligibility to compete in their sport.[55] If an athlete (1) is paid, directly or indirectly, for use of their "athletics skill"; (2) "[a]ccepts a promise of pay even if such pay is to be received following completion of . . . athletics participation"; (3) receives "any other form of financial assistance from a professional sports organization"; or (4) "[c]ompetes on any professional athletics team," that athlete is no longer considered an "amateur".[56] Since its inception, the NCAA has regulated participating student-athletes under a strict amateurism model, vaguely defined as prohibiting pay-for-play.[57] Thus, a student-athlete's failure to adhere to the NCAA's amateurism standards will result in loss of eligibility

51. *See Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx [https://perma.cc/ME6A-3WT2] (last visited Oct. 12, 2024).

52. *See id.*

53. *See* Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the* NCAA Student-Athlete Name & Likeness Licensing Litigation *Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1022 (2014).

54. *See* NCAA, DIVISION I 2024-25 MANUAL 33 (2024), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/DL8Z-YYVR].

55. *Id.*

56. *Id.*

57. *See* Armato, *supra* note 38.

and can have severe repercussions, including disqualification from competition or loss of their scholarship.[58]

Under this amateurism model, a paradox developed as the NCAA attempted to maximize revenue from college sports, while at the same time, prevented the student-athletes from receiving any form of payment.[59] According to the NCAA, Division I athletics produced 15.8 billion dollars in revenue in 2019.[60] But of that 15.8 billion dollars, "only $2.9 billion—18.2 percent—was returned to athletes in the form of athletics scholarships," and merely 1 percent went toward medical treatment and insurance protections for athletes.[61] On the other hand, "35 percent was spent on administrative and coach compensation."[62]

Prior to 2021, collegiate athletes had no legal avenue to earn any financial benefits beyond a scholarship for their education.[63] Although university staff and coaches earned millions of dollars in salaries and were awarded a cut of their winnings if they were successful,[64] the players actually lacing up their cleats or stepping onto the courts were limited to receiving the cost of university attendance as compensation.[65] For most student-athletes, this included "tuition and fees, room and board, books, and other educational-related expenses."[66]

However, this shifted dramatically in 2021, when the Supreme Court held that the NCAA's rules limiting education-related benefits and NIL compensation violated the Sherman Act.[67] This ruling opened the doors to allow student-athletes to permissively receive compensation for the use of

58. *See* NCAA, *supra* note 54, at 66–67; Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. J.L. & SOC. PROBS. 451, 454, 487 (2023) ("[R]oughly eighty-five percent of these athletes live below the poverty threshold," and "[e]ven though less than two percent of college athletes go on to become professionals in their sport, college athletes are routinely asked to put their athletic commitments over their career goals." (footnote omitted)).

59. *See* Edelman, *supra* note 53, at 1030; *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

60. *See* Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS NEWS HOUR (Mar. 18, 2023, 7:14 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://perma.cc/C338-FAE9].

61. *Id.*

62. *Id.*

63. *See* Bruce Schoenfeld, *Student. Athlete. Mogul?*, N.Y. TIMES MAG. (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html [https://perma.cc/D6PG-AE3C].

64. *See* Tom Schad & Steve Berkowitz, *Why College Football Is King in Coaching Pay – Even at Blue Blood Basketball Schools*, USA TODAY (Jan. 31, 2024, 4:59 PM), https://www.usatoday.com/story/sports/ncaaf/2023/10/03/college-football-coach-pay-is-soaring-even-at-basketball-schools/70924373007/ [https://perma.cc/VLL6-A6B2].

65. *See* Comment, NCAA v. Alston, 135 HARV. L. REV. 471, 471–72 (2021).

66. *Id.* at 471 (internal citation omitted); NCAA, *supra* note 54, at 37.

67. 15 U.S.C. § 1. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2145 (2021). "Courts have interpreted the Sherman Act to proscribe only agreements among competitors that 'unreasonably' restrain trade." Shults, *supra* note 58, at 462 (internal citation omitted).

their "name, image, and likenesses" without the loss of amateur-status.[68] Although the *Alston* decision does not allow for the athletes to directly receive a cut of the NCAA's profits, which totaled "$1.14 billion in revenue across the 2021-'22 collegiate seasons,"[69] collegiate athletes may now legally endorse products for money.[70] This has led to several questions among the NCAA, universities, and athletes themselves as to what compensation is legal and whether this compensation will affect a student-athlete's amateurism status or eligibility.[71] Further, the question remains as to whether the NCAA's centuries-old amateurism model will withstand these substantial challenges.[72]

One form of an NIL scheme raises particular questions about the future of the NCAA's amateurism model. The collective compensation model, or NIL opportunities facilitated through "specialized booster organizations,"[73] has essentially "circumvent[ed] the N.C.A.A.'s still-in-force ban on paying players to play,"[74] and found work-arounds to pay athletes without causing

68. *See* Shults, *supra* note 58, at 454, 474–76; NCAA, *supra* note 54.

69. *See* Matt Johnson, *NCAA Revenue Topped $1.1 Billion in 2022*, SPORTSNAUT, https://sportsnaut.com/ncaa-revenue-2022/ [https://perma.cc/63V7-B6BQ] (Jan. 29, 2023); *see also* Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 3:36 PM), https://www.businessinsider.com/college-sports-football-revenue-2017-10 [https://perma.cc/WF29-LZTN] (providing data on the profits generated for Division I schools from their athletics programs). In 2017, the NCAA's revenue by sport was as follows: (1) Football: $31,924,154; (2) Men's Basketball: $8,193,344; (3) Men's Ice Hockey: $2,861,394; (4) Women's Basketball: $1,812,159; (5) Baseball: $1,399,338; (6) Track & Field: $1,274,032; (7) Men's Lacrosse: $1,005,477; (8) Equestrian: $972,970; (9) Women's Ice Hockey: $960,466; (10) Rowing: $932,646; (11) Swimming & Diving: $858,029; (12) Women's Volleyball: $803,713; (13) Women's Soccer: $784,817; (14) Women's Lacrosse: $709,286; (15) Softball: $697,386. *Id; see also* Joe Drape & Allison McCann, *In College Sports' Big Money Era, Here's Where the Dollars Go*, N.Y. TIMES (Aug. 31, 2024), https://www.nytimes.com/interactive/2024/08/31/business/nil-money-ncaa.html [https://perma.cc/DB4V-RDW8] (explaining the NIL market in 2024).

70. *See* Boston, *supra* note 34, at 1120; *see also* David A. Fahrenthold & Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, N.Y. TIMES (Oct. 22, 2023), https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html?searchResultPosition=3 [https://perma.cc/T9YA-3RFS]. According to the New York Times, every university that participates in a Power 5 football Conference has at least one collective. *See id.* As such, the "average starter at a big-time football program now takes in about $103,000 a year." *Id.* (quoting figures from Opendorse, a company that helps to facilitate NIL deals). Opendorse expected "to process over $100 million in payments for athletes" in 2023, "with about 80 percent coming through collectives." *Id.*

71. *See* Armato, *supra* note 38; *see also Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring) ("The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes.").

72. *See* Fahrenthold & Witz, *supra* note 70 (explaining the upheaval of the economics of college sports since NIL compensation was approved).

73. *See* Boston, *supra* note 34, at 1128.

74. *See* Fahrenthold & Witz, *supra* note 70 ("While in theory they operate independently of athletic programs, collectives have become deeply embedded in the economics of college sports, offering vast supplements to the scholarships that schools provide.").

them to lose their amateur status or eligibility.[75] In response, the NCAA has formed a subcommittee to discuss how their current guidelines may accommodate the athletes' ability to profit off of their NIL.[76] Currently, the argument that the athletes are not being "paid to play" is that the NIL compensation is provided by third parties and for purposes other than their athletic achievements, such as product endorsements.[77] However, proposed changes to the NCAA's existing bylaws would potentially allow universities to assist athletes with marketing deals and managing their finances.[78] Implementation of this proposal may further call into question whether the athletes are receiving permitted education-related benefits from collectives or if they are essentially being paid to play by both the collectives and their universities.[79] In that case, universities may no longer argue that NIL compensation is strictly provided by third parties, unrelated to the benefits provided by the school.[80] Increasing school involvement in NIL deals could mark a step away from the NCAA's amateurism model.[81]

The questions raised as to NIL's effect on the NCAA and the current college sports model have garnered calls to Congress to regulate collegiate athletics in a new way.[82] Several sports leaders, including former and current athletes, coaches, and NCAA officials, have lobbied Congress in favor of federal legislation to regulate the rapidly transforming industry.[83] At the tenth congressional hearing on college sports since 2020, NCAA president Charlie Baker proclaimed that federal legislation should first focus on the employment question, rather than regulating NIL compensation.[84] Baker stated, "To enable enhanced benefits while protecting programs from

75. *See* Boston, *supra* note 34, at 1134–35 ("Just as accomplices, accessories, aiders and abettors can be held accountable for their indirect involvement in crimes, so too can schools be held accountable for their involvement in Title IX violations.").

76. *See* Dan Murphy, *NCAA to Discuss NIL Changes Allowing More School Involvement*, ESPN (Oct. 9, 2023, 1:17 PM), https://www.espn.com/college-sports/story/_/id/38615589/ncaa-discuss-nil-changes-allowing-more-school-involvement [https://perma.cc/8664-KRDL].

77. *See id.*

78. *See id.*

79. *See* Armato, *supra* note 38.

80. *See* Colleen Murphy, *College Athletics Programs Face Likely 'Collision' Between NIL Deals and Title IX*, LAW.COM (Oct. 17, 2023, 2:16 PM), https://www.law.com/2023/10/17/college-athletics-programs-face-likely-collision-between-nil-deals-and-title-ix/ [https://perma.cc/BF3W-MM28].

81. *See* Dan Whateley & Margaret Fleming, *How NIL Deals and Brand Sponsorships Are Helping College Athletes Make Money*, BUS. INSIDER, https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals [https://perma.cc/9X7Y-HKPA] (Apr. 2, 2024, 1:24 PM).

82. *See* Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced in Congress*, FORBES (July 29, 2023, 9:31 AM), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=42c005034d46 [https://perma.cc/K55F-HZZD].

83. *See id.*; Associated Press, *NCAA Focused on Employment Status of Athletes at Senate Hearing*, ESPN (Oct. 17, 2023, 11:27 AM), https://www.espn.com/college-sports/story/_/id/38678809/ncaa-focused-employment-status-athletes-senate-hearing [https://perma.cc/P6EA-8PQ4]. "Although nearly a dozen bills have been introduced at the federal level over the past few years, none have ever made it out of committee." Dosh, *supra* note 82.

84. *See* Associated Press, *supra* note 83.

one-size-fits-all actions in the courts, we support codifying current regulatory guidance into law by granting student-athletes special status that would affirm they are not employees."[85] Baker contended that the NCAA has since introduced reforms such as longer-term health insurance and degree-completion funds for their athletes, thus employee status for collegiate athletes has become both unnecessary and unwanted.[86] This proposed legislation is sought as a way to calm the "chaos" that the collegiate sports landscape is currently experiencing.[87] Specifically, advocates are seeking an avenue for the NCAA to avoid pending legal battles, while at the same time providing student-athletes increased benefits by relaxing the bylaws under which they are regulated.[88]

Along with NIL-related regulatory issues, the NCAA is also facing legal battles where student-athletes are requesting a share of the NCAA's revenue as employees under federal labor laws.[89] Student-athletes have pursued two prominent avenues in these challenges, through the FLSA, or the National Labor Relations Act (NLRA) of 1935.[90] The next part of this Note explores the recent complaints that student-athletes have filed with the NLRB, alleging their universities have misclassified them as student-athletes, and in turn, "amateurs," thus failing to treat them as employees protected under the NLRA.[91]

2. Student-Athlete Challenges and Proposed Solutions

Title VII of the Civil Rights Act "protects employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin."[92] Under Title VII, the term "employee" is simply defined as "an individual employed by an employer."[93] Title VII and its preceding federal workplace statutes, the FLSA and the NLRA, were purposefully crafted in broad terms so that courts may adapt and apply them to newly occurring circumstances.[94] Both generally, and in the educational setting,

85. *Id.*
86. *See id.*
87. *See id.*; Dosh, *supra* note 82.
88. *See* Associated Press, *supra* note 83.
89. *See* Dosh, *supra* note 82.
90. 29 U.S.C. §§ 151–169.
91. Although this Note primarily focuses on exploration and interpretation of the FLSA, student-athlete claims under the NLRA provide an example of the depth of challenges against the NCAA's amateurism model since the emergence of NIL.
92. *Protections Against Discrimination and Other Prohibited Practices*, FED. TRADE COMM'N, https://www.ftc.gov/policy-notices/no-fear-act/protections-against-discrimination [https://perma.cc/R54G-BRTP] (last visited Oct. 12, 2024). "Title VII protection covers the full spectrum of employment decisions, including recruitment, selections, terminations, and other decisions concerning terms and conditions of employment." *Id.*
93. 42 U.S.C. § 2000e(f); *see* Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 AM. BAR ASS'N J. LAB. & EMP. L. 53, 58 (2015).
94. *See* James J. Brudney, *Square Pegs and Round Holes: Shrinking Protections for Unpaid Interns Under the Fair Labor Standards Act*, *in* INTERNSHIPS, EMPLOYABILITY, AND THE SEARCH FOR DECENT WORK EXPERIENCE 163, 163–64 (Andrew Stewart, Rosemary

tests have developed to evaluate whether an entity is an "employee," warranting the protections under the FLSA or NLRA.[95]

Prior to the enactment of the FLSA, Congress passed the NLRA, and President Franklin D. Roosevelt signed it into law on July 5, 1935.[96] Establishing the NLRB, the NLRA addresses relations between unions and employers and gives workers the ability to bargain for higher wages or better working conditions.[97] The NLRB interprets whether an entity is an employee under the NLRA on a case-by-case basis.[98]

In 2015, Northwestern University football players asked the NLRB to find that scholarship athletes "were employees within the meaning of Section 2(3) of the NLRA."[99] The NLRB's regional director agreed and directed an election.[100] However, the NLRB ultimately refused to assert jurisdiction over the case.[101] Although the NLRB avoided ruling on the merits of the case, they did conduct a detailed analysis regarding the relationship between the alleged employee and their university and considered reasons as to why the football players' long hours and revenue generation may give rise to employee classification under the NLRA.[102] *Northwestern University* involved "novel and unique circumstances" for the NLRB, as the NLRB had "never been asked to assert jurisdiction" in a case involving college athletes and they could not apply the analytical frameworks previously utilized in cases involving "other types of students or athletes."[103] The NLRB noted, however, that although student-athletes are prohibited from acting as a professional may in various respects, Division I Football Bowl Subdivision

Owens, Niall O'Higgins & Anne Hewitt eds., 2021) ("Yet the FLSA offers the broadest definition of 'employ' in all federal law . . . .").

95. *See id.* at 164.

96. *See* National Labor Relations Act (1935), NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act [https://perma.cc/EJ4L-73G4] (last visited Oct. 12, 2024).

97. *See* 29 U.S.C. §§ 151–169.

98. *Cases and Decisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/cases-decisions/decisions#:~:text=After%20a%20Regional%20Director%20issues,to%20the%20Board%20in%20Washington [https://perma.cc/TDV6-X8EE] (last visited Oct. 12, 2024). "After a [NLRB] Regional Director issues a complaint in an unfair labor practice case, an NLRB Administrative Law Judge hears the case and issues a decision and recommended order, which can then be appealed to the Board in Washington." *Id.* However, if the complaining party is not in fact an "employee," covered by the Act, the NLRB will not exercise jurisdiction over the case. *See* Nw. Univ., 362 N.L.R.B. 1350, 1350, 1355 (2015).

99. *Nw. Univ.*, 362 N.L.R.B. at 1350, 1362 ("Section 2(3) of the Act provides in relevant part that the 'term "employee" shall include any employee . . . 'The U.S. Supreme Court has held that in applying this broad definition of 'employee' it is necessary to consider the common law definition of 'employee.'") (internal citation omitted); *see also* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html [https://perma.cc/6SLT-8AUT].

100. *See Nw. Univ.*, 362 N.L.R.B. at 1350.

101. *See id.*

102. *See* Strauss, *supra* note 99.

103. *Nw. Univ.*, 362 N.L.R.B. at 1351–52.

(FBS)[104] participants do actually resemble professionals in a number of ways.[105] Although this analysis was eventually stalled as the NLRB refused to assert jurisdiction over this case,[106] it foreshadows where future analyses may lead.

Following *Northwestern University* and *Alston*, the general counsel of the NLRB, Jennifer A. Abruzzo, released a memo arguing that the NLRA "fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated [student-athletes] are employees under the NLRA."[107] Although this is the opinion of the NLRB's general counsel, and not the official statement of the NLRB, Abruzzo made clear that she will pursue violations where an employer misclassifies student-athletes as nonemployees.[108]

Abruzzo argued that certain "Players at Academic Institutions" are employees under the NLRA, and that misleading student-athletes to believe they lack statutory protections is an unfair labor practice.[109] Although the NLRB in the *Northwestern University* decision declined to exercise jurisdiction over the case,[110] Abruzzo noted that "nothing in that decision precludes the finding that scholarship football players at private colleges and universities, or other similarly situated Players at Academic Institutions, are employees under the Act."[111] Abruzzo argued that common-law agency rules and the NLRA's language and purpose fully support a finding that Division I scholarship athletes are employees under the NLRA.[112] This is because the athletes perform a service for the university that generates substantial profit, the athletes already receive significant compensation, and the athletes are significantly controlled in their daily lives by the NCAA and their universities to ensure compliance and eligibility.[113]

Most recently, Dartmouth College men's basketball players made their case that they are employees during an NLRB pre-election hearing.[114] Citing

104. *See id.* There are four levels of college football in the NCAA, but the most popular is the FBS. *See* Brandon Lilly, *College Football Explained*, THE GUARDIAN (Oct. 10, 2012, 9:00 AM), https://www.theguardian.com/sport/blog/2012/oct/10/college-football-explained-ncaa [https://perma.cc/L5RE-XQBQ]. "There are 124 teams in the FBS, divided into 11 conferences." *Id.* "[T]he other three levels are the Football Championship Subdivision (FCS), Division II, and Division III." *Id.*

105. *Nw. Univ.*, 362 N.L.R.B. at 1353.

106. *See id.* at 1355 (concluding that asserting jurisdiction in this case would not "effectuate the policies of the [NLRA]" because it would not "promote stability in labor relations," and reforms of collegiate athletics are already underway).

107. Memorandum from Jennifer Abruzzo, Gen. Counsel, NLRB, to All Reg'l Dirs., Officers-in-Charge & Resident Officers, Nat'l Lab. Rels. Bd. (Sept. 29, 2021). Although the memo is narrowly focused to certain, and not all, student-athletes, it is instructive for the purposes of this Note as to how the NLRB analyzes the employee question.

108. *See id.* at 1.

109. *See id.*; s*ee also* 29 U.S.C. § 158.

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

111. *See* Memorandum from Jennifer Abruzzo, *supra* note 107, at 2.

112. *See id.* at 3.

113. *See id.* at 2; *see also Nw. Univ.*, 362 N.L.R.B. at 1351.

114. *See* Trs. of Dartmouth Coll., No. 01-RC-325633 (N.L.R.B. 2023); Michael McCann, *Dartmouth Men's Basketball Makes Employment Case at NLRB*, SPORTICO (Oct. 5, 2023, 5:45

Northwestern University, Dartmouth College argued that the players are not employees because they are not receiving any form of compensation, even in the form of scholarships, and they are actually "los[ing] money for the school."[115] Dartmouth maintained that the players are "students first," and that while Dartmouth does provides their athletes with unique benefits, this does not amount to "compensation" within the meaning of the NLRA.[116] To the contrary, the players argued that they are used to fundraise and called into question why the student manager may be paid as an employee, whereas athletes may not.[117] The NLRB's regional office in Boston issued a decision on February 5, 2024, holding that these student-athletes are "employees" for the purposes of the NLRA and that they are eligible to vote in a union election.[118] Ultimately, the regional office held in favor of "student-athlete-employee" status due to the amount of control the college has over the players, and because they are performing "work in exchange for compensation" within the meaning of the Act.[119] This decision is subject to review by the NLRB.

Additionally, Abruzzo filed a complaint against the University of Southern California (USC), the Pac-12 Conference (the "Pac-12"), and the NCAA, alleging they were joint employers of the football players, and men's and women's basketball players, and that they have violated the NLRA by misclassifying them as nonemployees.[120] The regional office's decision in *Trustees of Dartmouth College*, or a subsequent NLRB review may be decisive in this case as well. However, if the NCAA's proposal for special legislation explicitly declaring that student-athletes are not employees[121] applies to both the NLRA and FLSA and passes, these student-athlete challenges would be moot. Although the White House has remained silent on this issue and has not addressed any proposed bills, President Biden's administration recently announced an event to bring together former NCAA

PM), https://www.sportico.com/law/analysis/2023/dartmouth-mens-basketball-employees-nlrb-1234741295/ [https://perma.cc/6KMF-6A2M].

115. McCann, *supra* note 114; *see* Trs. of Dartmouth Coll., *supra* note 114.

116. McCann, *supra* note 114; *see* Trs. of Dartmouth Coll., *supra* note 114.

117. *See* Trs. of Dartmouth Coll., *supra* note 114; McCann, *supra* note 114.

118. *See* Trs. of Dartmouth Coll., No. 01-RC-325633 (N.L.R.B. 2024) (decision and direction of election); Steve Berkowitz, *NLRB Official Rules Dartmouth Men's Basketball Team Are Employees, Orders Union Vote*, USA TODAY (Feb. 5, 2024, 9:24 PM), https://www.usatoday.com/story/sports/ncaab/ivy/2024/02/05/dartmouth-mens-basketball-nlrb-employees-union-vote/72486223007/ [https://perma.cc/NW3M-38A2].

119. Trs. of Dartmouth Coll., *supra* note 118 ("It is true that they do not receive the athletic scholarships enjoyed by the football players at issue in *Northwestern University* . . . . However, the Employer cites no case, and I can find none, which stands for the proposition that employee status is tied to the size of one individual's salary in relation to that of his colleagues. The players' compensation is of a non-traditional form because NCAA regulations have historically prohibited a traditional form of compensation.").

120. *See* Univ. of S. Cal.; Pac-12 Conf.; Nat'l Collegiate Athletics Ass'n, No. 31-CA-290326 (N.L.R.B. 2023) (complaint and notice of hearing); Michael McCann, *NLRB Rejects USC 'Student-Athlete' Motion to Dismiss After Late Filing*, YAHOO! SPORTS (Oct. 23, 2023), https://sports.yahoo.com/usc-defends-student-athlete-media-140000233.html [https://perma.cc/47NP-24HV].

121. *See* Associated Press, *supra* note 83.

athletes and advocates amid the "mounting legal challenges" following *Alston*.[122]

Although the NLRA challenges and proposals for legislation annotate the relevance and importance of this issue as the NCAA continues to face challenges to their current model, an additional avenue exists for student-athletes to challenge their employment status: the FLSA.[123] The next section of this Note describes the legal standards that have developed to determine whether an entity is an employee under the FLSA, specifically in the educational setting.

B. "Employees" Under the FLSA

The FLSA, enacted in 1938, established the right to a minimum wage and overtime pay.[124] The statute's definition of "employee" is "any individual employed by an employer," where to "employ" means to "suffer or permit to work."[125] Labor laws in the United States "generally define 'employee' in a circular fashion—as someone employed by the employer—leaving it to the courts . . . to determine whether a worker is an employee eligible for protection or an ineligible independent contractor."[126] Thus, courts are presented with the ultimate task of determining the limits of the employer-employee relationship.[127] Legal standards under the FLSA were articulated through early Supreme Court interpretations and subsequent guidance from the Department of Labor (DOL).[128] In recent decades, however, different interpretative approaches have emerged.[129]

The Supreme Court established that the test of employment under the FLSA is one of "economic reality."[130] The economic reality test "examines

122. *See* Seth Emerson, *Biden Administration to Wade into Debate About College Athletes' Economic Rights*, THE ATHLETIC (Nov. 8, 2023), https://theathletic.com/5042380/2023/11/08/white-house-college-athletes-rights/?redirected=1&source=googlesearch&access_token=14463872 [https://perma.cc/G4B3-K5LP].

123. *See infra* Part II.

124. *See* 29 U.S.C. §§ 201–219; Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32–37.

125. *See* 29 U.S.C. § 203(e)(1)–(g).

126. Sprague, *supra* note 93, at 58.

127. *See id.* at 59–60.

128. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); *see also* Brudney, *supra* note 94, at 164–65; Anthony J. Tucci, Note, *Worthy Exemption?: Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1365 (2012) (explaining the DOL's Wage and Hour Division's guidance as to the circumstances where one can have an unpaid internship and still comply with the law). The DOL's Wage and Hour Division's guidance in the intern context is relevant because many cases in the university setting that courts have previously explored rely on FLSA interpretations in the internship context. DOL Wage and Hour Division guidance can come in the form of fact sheets, bulletins, or the Field Operations Handbook (FOH), all of which provide relevant interpretations, procedures, and guidance for investigations. *See* Field Operations Handbook, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/field-operations-handbook [https://perma.cc/L7Y6-EX8Z] (Aug. 31, 2017).

129. *See* Brudney, *supra* note 94, at 163–64.

130. *See* Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) (internal citations omitted); *Portland Terminal Co.*, 330 U.S. at 152; *see, e.g.*, Mclaughlin v. Ensley,

the balance of power" in an alleged employment relationship, and whether an alleged employee, "as a matter of economic reality [is] dependent upon the business to which they render service."[131] The common law has developed several factors that are relevant to this inquiry including "the alleged employee's expectation of compensation,[132] the alleged employer's power to hire and fire,[133] and evidence that an arrangement was conceived or carried out to evade the law."[134] Courts have subsequently applied different iterations of the economic reality inquiry in both the educational and trainee settings, which provides relevant context in considering the application to student-athletes.[135]

In *Walling v. Portland Terminal Co.*,[136] the Court was tasked with determining whether brakemen trainees were employees of their railroad, or if they were exempt from the protections of the FLSA.[137] Although the Court acknowledged the broad statutory definitions of "employer" and "employee," the Court held that the brakemen were not employees under the FLSA because the "railroads received no 'immediate advantage' from any of the work done by the trainees."[138]

In the decades following, the DOL received numerous inquiries from universities concerning how the FLSA should be interpreted with respect to their students and interns.[139] In response, the DOL administrator issued opinion letters that developed the use of a six-part test derived from *Portland Terminal*.[140] Under the DOL's *Portland Terminal* test, trainees or interns are *not* employees *only if* all six of the following criteria apply:

> (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) the training is for the benefit of the trainees or students; (3) the trainees

877 F.2d 1207, 1209 (4th Cir. 1989); Donovan v. Am. Airlines, 686 F.2d 267, 272 (5th Cir. 1982); Marshall v. Baptist Hosp., 473 F. Supp. 465, 476 (M.D. Tenn. 1979); *see also* Brudney, *supra* note 94, at 171–74 (explaining that lower courts articulated more of an economic reality approach when applying *Portland Terminal*'s six criteria by assessing which party received the bulk of the benefit).

131. Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 165 (2007) (internal quotation omitted).

132. *See Portland Terminal Co.*, 330 U.S. at 152.

133. *See* Goldberg v. Whitaker House Co-op., Inc., 366 U.S. 28, 33 (1961).

134. *See Portland Terminal Co.*, 330 U.S. at 153.

135. Although beyond the scope of this Note, there is also an existing question as to whether the NCAA and the universities may be joint employers of the student-athletes, because the student-athletes engage in athletic "work" that is supervised by university staff but also integral to the NCAA's business. *See* Complaint at 5, 66–79, Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-cv-05230, 2019 WL 5847321 (E.D. Pa. Nov. 6, 2019), ECF No. 1. However, universities likely must be deemed employers of the student-athletes before the joint employer question may be answered, and this is outside the scope of this Note. *See generally* Hailey Reed, *Cleating Up and Clocking In: A Joint-Employer Approach to Student-Athlete Employee Status*, 72 U. KAN. L. REV. 99 (2023).

136. 330 U.S. 148 (1947).

137. *See id.* at 149–51.

138. *Id.* at 152–53.

139. *See* Brudney, *supra* note 94, at 168–70.

140. *See id.* The DOL's six-part test is referred to as the *Portland Terminal* test.

> or students do not displace regular employees, but work under their close supervision; (4) the employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded; (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.[141]

The *Portland Terminal* test allows courts to discern whether a student or trainee is an employee because they are "part of a prescribed educational or training course that offered close employer supervision of the educational experience, with no displacement of regular employees and no immediate employer advantage derived from intern performance."[142] Thus, for example, if a student does not displace regular employees, or the university does not obtain an immediate advantage from their services, a court should conclude the student is not an employee as defined by the FLSA.

From the 1970s to the early 1990s, lower federal courts began reworking the *Portland Terminal* factors to assess which party was receiving the "bulk of the benefit."[143] From the 2000s on, some circuit courts have persisted with the use of the *Portland Terminal* test, but others have openly rejected the long-standing approach that emphasizes certain detailed requirements that must be met by employers.[144] Instead, these circuit courts have opted for a balancing test, often referred to as the "primary beneficiary test."[145] For example, the U.S. Court of Appeals for the Second Circuit, in *Glatt v. Searchlight Pictures, Inc.*,[146] was tasked with determining whether Fox Searchlight and Fox Entertainment Group violated the FLSA by failing to pay their interns as employees.[147] The court invoked the use of seven nonexhaustive factors to assess who the "primary beneficiary" of the arrangement was.[148] These seven factors are similar to the *Portland*

141. *See id.* at 169.
142. *Id.* at 164.
143. *See id.* at 171–74.
144. *See id.* at 176–79.
145. *See id.* at 173–74.
146. 811 F.3d 528 (2d Cir. 2016).
147. *See id.* at 531–33.
148. *See id.* at 536. The seven factors identified in *Glatt* are as follows:

> (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation; (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions; (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; (7) The extent to which the intern and

Terminal factors in that they analyze whether the alleged employee is receiving educational training, whether paid employees have been displaced, and whether there is an expectation of compensation.[149] However, the *Glatt* primary beneficiary test differs from *Portland Terminal* and the DOL's long-standing approach in that it seeks to identify whether the "work" is in actuality an extension of academic coursework.[150] Further, the *Glatt* test removes the "no immediate advantage" factor.[151] Additionally, the *Portland Terminal* test is an exhaustive list, where the student may be deemed an employee *only if* all six criteria are applicable, whereas the *Glatt* test is a more flexible balancing inquiry.[152] The circuit courts that have opted for the *Glatt* test have argued that the primary beneficiary considerations were sought to modernize the *Portland Terminal* factors.[153] However, the removal of the "immediate advantage" factor allows courts to overlook employment relationships that do not directly fit the mold, but where "employers" are still failing to compensate workers for the benefits they are providing.[154] In 2018, the DOL, under President Donald J. Trump's administration, endorsed this approach and moved away from the *Portland Terminal* factors.[155]

Under the assumption that student-athletes do receive some compensation, whether in the form of education-related scholarships or benefits and NIL endorsements,[156] cases outside of the educational setting where courts have considered compensation in the FLSA question are also instructive. In *Tony and Susan Alamo Foundation v. Secretary of Labor*,[157] the Court explored whether unpaid individuals volunteering at a religious foundation were employees under the FLSA.[158] The Court explained that *Portland Terminal* expressly stated that "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit,' is outside the sweep of the Act."[159] However, Justice Byron R. White, writing for the majority, emphasized that the individuals who worked in the

---

> the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Id. at 536–37; *see also* Brudney, *supra* note 94, at 173, 176–77.

149. *See* Brudney, *supra* note 94, at 176–82.

150. *See id.*

151. *See id.*

152. *See id.* (arguing that "the new balancing test is in tension with the text, legislative history and long-standing agency application of the [FLSA]"). "The prevalence of the new primary beneficiary approach has made it considerably easier for for-profit employers to establish and maintain unpaid internships." *Id.* at 164.

153. *See* Brudney, *supra* note 94, at 174.

154. *See id.*

155. *See id.*; U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD ASSISTANCE BULLETIN 2018-2 (2018), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2018-2 [https://perma.cc/CHJ5-EA7H].

156. *See* Armato, *supra* note 38.

157. 471 U.S. 290 (1985).

158. *See id.* at 306; Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

159. *See Tony & Susan Alamo Found.*, 471 U.S. at 295 (quoting *Portland Terminal Co.*, 330 U.S. at 152).

businesses of the foundation were employees within the meaning of the FLSA largely because the benefits the foundation provided them in the form of food, shelter, clothing, transportation, and medical benefits, constituted wages in another form.[160] Thus, unlike *Portland Terminal*, where the Court found the railroad trainees expected no compensation for their labor, the individuals here were "entirely dependent upon the Foundation for long periods, in some cases several years."[161] The Court held that the economic reality test was satisfied as there was an implied expectation of compensation, and that compensation need not only be in the form of cash.[162]

Additionally, the U.S. Court of Appeals for the Third Circuit in *Donovan v. DialAmerica Marketing, Inc.*[163] adopted a revised version of the economic reality test when considering whether home researchers of a telephone marketing firm that already received monetary compensation may be deemed independent contractors rather than employees under the FLSA.[164] The circuit court here adopted a test to deal with this question that considers the following six factors:

> (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.[165]

Lastly, some scholars have argued that the student-athlete context is too unique to fit under any common-law test previously used in the educational setting.[166] One proposal argues that the application of the traditional definition of "employee," as well as the common-law tests that courts have typically applied, may lead to a singular outcome for student-athletes "where not all college athletes are similarly situated in economic reality."[167] Because of the imbalance in revenue that certain sports contribute to their schools in comparison to others,[168] the proposal suggests that courts and

160. *See id.* at 292–93, 301.
161. *See id.* at 301 (internal citation omitted).
162. *See id.* at 306.
163. 757 F.2d 1376 (3d Cir. 1985).
164. *See id.* at 1379.
165. *See id.* at 1382–83 (internal citation omitted).
166. *See* Marc Edelman, Michael A. McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2024 U. ILL. L. REV. 1, 16–17.
167. *Id.* at 39.
168. *See* Shults, *supra* note 58, at 483 (explaining that before *Alston*, many only considered FBS football players and Division I basketball players as having the potential to amount to "employees," based on the economic nature of their sports, but "[n]ow that the NCAA can no longer lean on amateurism as a defense, all Division I athletes now have a fighting chance of becoming employees—not just the ones who are money-making machines for their schools"); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984) (explaining that survival of college sports rests on the preservation of the unpaid, amateur student-athlete). This Note argues that the development of the amateur creates a

labor boards "ascertain[] the dividing point between employee-athletes and true student-athletes" on a team-by-team basis and consider three specific factors:

> (1) whether the team provides meaningful revenues to their school; (2) whether the athletes' athletic participation substantially enhances their colleges' goodwill in a manner beyond team-specific, quantifiable revenues; and (3) whether the proceeds derived from a college sports team are passed along to their team's coaches and administrators in the form of above-market salaries.[169]

The proposed factors seem to revert back to *Portland Terminal*'s criteria to explore the depth and shape of benefits that an alleged employer is receiving from an individual's services.[170] However, the proposed test also draws from a primary beneficiary test-like analysis as it disregards employee-focused factors such as who controls the number of hours and conditions in which students perform their services.[171] Although a team-by-team basis seems sensible, the disparate impact that such a test may have on male versus female student-athletes could be significant if the test focuses more on the advantages to the employer, rather than the conditions of the employees' work environment. The next section of this Note discusses the already existing disparate impact based on sex in the employment setting as a whole, as well as in the student-athlete setting in particular.

C. Gender Discrimination in Employment and Athletics

Assuming certain student-athletes are deemed employees of their universities, the university would then be bound as employers under Title VII. An "employer" for the purposes of Title VII is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees."[172] An employer may violate Title VII for discriminating against one of their employees "because of" their sex.[173] This part provides background on gender discrimination in both the employment and collegiate athletics settings. Part I.C.1 discusses the history of discrimination in employment, governed by Title VII, specifically focused on wage

---

unique circumstance for student-athletes, which does not fit under the typical internship or a previously explored university employment inquiry.

169. *See* Edelman et al., *supra* note 166, at 39.

170. *See supra* notes 134–55 and accompanying text.

171. *See id.*

172. 42 U.S.C. § 2000e(b).

173. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that the plaintiff established that sexual stereotyping and her gender played a part in evaluating the plaintiff's employment candidacy); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that sexual harassment in the workplace may constitute sex discrimination under Title VII). Since the enactment of the Equal Pay Act of 1963, courts have seen thousands of lawsuits for discriminatory treatment in the employment setting, many of which are claims for compensation discrimination. *See* Simon Goodley, *29,000 Claims a Year Despite 50 Years Since Equal Pay Act*, THE GUARDIAN (May 24, 2020, 7:01 PM), https://www.theguardian.com/inequality/2020/may/25/29000-annual-claims-50-years-equal-pay-act [https://perma.cc/4A22-YA5P].

discrimination. Part I.C.2 explores the history of discrimination in collegiate athletics, governed by Title IX. Part I.C.3 compares the standards under Title VII and under Title IX.

1. Title VII and Employment Discrimination

Despite the remedial purpose of Title VII to avoid gendered treatment in the employment setting, significant disparities between genders persist. For example, the Equal Pay Act[174] (the "Act"), enacted in 1963, sought to prevent gender-based wage differences in the workplace.[175] Under the Act, it is illegal to pay men and women in the same workplace unequally for similar work.[176] However, the Act is only violated if it can be shown that the employee's jobs require "equal skill, effort, and responsibility," and "are performed under similar working conditions."[177]

Additionally, under the Bennett Amendment,[178] a provision of Title VII meant to limit sex discrimination claims, an employer is permitted to differentiate pay upon the basis of sex, so long as the differentiation is authorized by the Equal Pay Act.[179] Thus, a wage disparity may be justified by one of four affirmative defenses: "(1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex."[180]

The fourth defense, "any other factor other than sex," has been interpreted broadly by many courts, despite the Equal Pay Act's "sweeping remedial purpose."[181] A common justification under this affirmative defense is that the pay disparity reflects "market forces."[182] This has become known as the "market excuse."[183] The Supreme Court previously rejected this argument

174. 29 U.S.C. § 206(d).

175. *See Equal Pay Act of 1963*, NAT'L PARK SERV., https://www.nps.gov/articles/equal-pay-act.htm#:~:text=The%20Equal%20Pay%20Act%2C%20signed,different%20salaries%20for%20similar%20work [https://perma.cc/9SSK-QQ8Y] (Apr. 1, 2016).

176. *Id.*

177. Corning Glass Works v. Brennan, 417 U.S. 188, 188, 195 (1974) (internal citation omitted); NAT'L WOMEN'S L. CTR., CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE IN THE EQUAL PAY ACT 1 (2011), https://nwlc.org/wp-content/uploads/2015/08/4.11.11_factor_other_than_sex_fact_sheet_update.pdf [https://perma.cc/UB8K-X48E].

178. 42 U.S.C. § 2000e-2(h).

179. *See id.*; James B. Ropp, *The Bennett Amendment: A Loophole in the Prohibition Against Sex Discrimination in Compensation Under Title VII?*, 85 DICK. L. REV. 67, 68 n.7 (1980) ("The Bennett Amendment, which is contained in the last sentence of 42 U.S.C. § 2000e-2(h), provides, '[i]t shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is *authorized* by the provisions of section 4(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d)).'" (quoting 42 U.S.C. § 2000e-2(h))).

180. NAT'L WOMEN'S L. CTR., *supra* note 177, at 1 (internal citation omitted).

181. *See id.* at 1–3.

182. *See id.* at 2.

183. *See id.*; Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 581 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)).

in *Corning Glass Works v. Brennan*,[184] where male inspection workers had a higher wage base than the female inspection employees.[185] The Court held that the market excuse defense was an invalid justification to pay women less than men for the same work, and their practices constituted a violation of Title VII.[186] However, despite this holding, courts continue to accept the market excuse as a satisfactory "factor other than sex" affirmative defense.[187] As a result, plaintiffs often have little chance of winning a wage discrimination claim as they have "the formidable burden of proving that the employer intentionally depressed the pay scale in their jobs because of the sex of the majority of the incumbents in the jobs."[188] Ninety percent of "pure 'comparable worth'" cases are dismissed after an employer claims their pay gap is not discrimination based on sex, but rather they are "following the market."[189]

Although the concept of equal pay for equal work is ingrained in Title VII and the Equal Pay Act, the United States does not recognize the idea of "pay equity."[190] "Instead of 'equal pay for equal work,' supporters of the pay equity model call for 'equal pay for work of equal value.'"[191] This model allows for pay scales for women-dominated professions to be "determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort."[192]

In 1951, the General Conference of the International Labor Organization's Equal Remuneration Convention concerning "equal remuneration of men and women workers for work of equal value" adopted the proposal of "pay equity," or "equal remuneration."[193] The proposal has been ratified by 173 member countries, *excluding* the United States.[194] Taking it a step further, the U.S. Court of Appeals for the Ninth Circuit outright rejected the "pay equity" model in *American Federation of State, County & Municipal Employees v. Washington*.[195] There, the court found no Title VII violation where Washington state was paying employees in female-dominated positions at lower rates than male-dominated positions, even though the jobs

184. 417 U.S. 188 (1974).

185. *See id.* at 195.

186. *See id.* at 204–05 ("That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.").

187. *See* NAT'L WOMEN'S L. CTR, *supra* note 177, at 2–3.

188. Chamallas, *supra* note 183, at 582.

189. *Id.*

190. *See* Anna Louie Sussman, Opinion, *"Women's Work" Can No Longer Be Taken for Granted*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/opinion/sunday/women-pay-gender-gap.html [https://perma.cc/DH5Q-ELTP].

191. *Id.*

192. *Id.*

193. *See* International Labour Organization [ILO], *Convention Concerning Equal Remuneration for Men and Women Workers of Equal Value* (June 29, 1951), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C100 [https://perma.cc/U5GT-M7VU].

194. *See* Sussman, *supra* note 190.

195. 770 F.2d 1401 (9th Cir. 1985).

were identified to be of "comparable worth."[196] Reflecting the market excuse rationale, the court held that the state's compensation system was permissibly responding to supply and demand and this was an insufficient claim of gendered pay discrimination.[197]

Although the pay equity model is designed to dismantle historical social beliefs that are inevitably ingrained in our employment system,[198] the United States opts for a more "economic" approach to these lawsuits. "The market defense is so well entrenched that it is almost unthinkable that courts will reverse course and adopt a view of the market as inherently gender-biased and tainted."[199] However, progress has been made both internationally and in some domestic state legislation.[200]

The United States's approach to equal pay is an example of how the financial market and economics impact the way both employers and courts hearing complaints under Title VII think about gender discrimination. The next section details how analogous discrimination persists in the collegiate athletics setting. Then, Part I.B.3 explains the difficulties that may arise if these two settings were combined, following a ruling that student-athletes may plausibly be employees of their universities.

2. Title IX and Discrimination in Athletics

Although Title IX was enacted with the remedial purpose of prohibiting sex discrimination in education, what constitutes a violation of Title IX remains unclear.[201] The federal civil rights law prohibits disparate treatment based on sex in university programs or activities.[202] Title IX requires schools to provide equal opportunities to men and women in all athletic programs,

196. *See id.* at 1403.

197. *Id.* at 1406.

198. *See* Sussman, *supra* note 190.

199. Chamallas, *supra* note 183, at 599.

200. *See, e.g.*, Employment Equity Act 55 of 1998 (S. Afr.); Sussman, *supra* note 190 (explaining New Zealand legislation supportive of pay equity and eliminating pay discrimination against women); Case C-127/92, Enderby v. Frenchay Health Authority, 1994 All ER 495 (adopting the principal of pay equity and holding that sex discrimination occurs where there is a significant pay difference between two jobs of equal value, when one position is held by almost exclusively women and the other by predominately men); WASH. REV. CODE § 41.06.155 (1993) (implementing changes to achieve comparable worth); MINN. STAT. §§ 471.991–.992 (2023).

201. *See* Alvin Powell, *How Title IX Transformed Colleges, Universities over Past 50 Years*, HARV. GAZETTE (June 22, 2022), https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/#:~:text=Title%20VII%20of%20the%20Civil,address%20sex%20discrimination%20in%20education [https://perma.cc/G9FH-QKG9].

202. *See* U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., TITLE IX AND ATHLETIC OPPORTUNITIES IN COLLEGES AND UNIVERSITIES 2 (2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf [https://perma.cc/4GEF-Q3MP].

including benefits,[203] scholarships and financial assistance,[204] and meeting athletic interests and abilities.[205] According to the NCAA, Title IX applies to athletics in that "women and men [must] be provided equitable opportunities to participate in sports," must "receive athletics scholarship dollars proportional to their participation," and must be provided substantially equal benefits along with their participation in their sport.[206]

The NCAA has consistently resisted the changes that Title IX threatened to bring to the college sports landscape.[207] After years of lobbying efforts and legal challenges, Congress passed the Javits Amendment[208] in 1974, "which remains in effect today."[209] The Javits Amendment "permit[s] discrepancies in spending based on the 'nature of particular sports.'"[210] The Amendment enables universities to provide larger budgets and disperse additional benefits for men's sports programs, on the premise that certain teams require additional resources.[211] Thus, so long as the institution complies with the factors stipulated under "equal athletic opportunity,"[212] the Javits Amendment allows for the continuation of the long-standing gendered differentials in college sports that have persisted beyond the passing of Title IX.[213] Although the Javits Amendment allows for larger budgets to be allocated to a male sport for a nondiscriminatory need for additional resources, a disparity in resources for no particular reason would not fall

203. *See id.* at 3–6. Benefits include equipment and supplies, scheduling games and practice times, travel and daily allowance, coaching, academic tutors, medical and training facilities and services, housing and dining services, publicity, and recruitment. *Id.* at 3–5.

204. *See id.* at 2. The second factor is measured by "whether the total amount of scholarship aid a school makes available to men and women is in proportion to their participation rates." *Id.* at 6.

205. *See id.* at 8–12. Schools may choose from three ways to demonstrate that it is "fulfilling its legal duty to meet the athletic interests and abilities of men and women in its student body": (1) "the percentage of women and men participants on athletic teams are . . . 'substantially proportionate' to . . . the percentage of women and men enrolled full-time as undergraduates," (2) a showing of a "history and continuing practice" of expansion of opportunities for women, or (3) a showing that "despite the disproportionality . . . the interests and abilities" of women are otherwise being met. *Id.*

206. *Title IX Frequently Asked Questions*, *supra* note 5 ("Title IX requires the equal treatment of female and male student-athletes in the provisions of: (a) equipment and supplies; (b) scheduling of games and practice times; (c) travel and daily allowance/per diem; (d) access to tutoring; (e) coaching; (f) locker rooms, practice and competitive facilities; (g) medical and training facilities and services; (h) housing and dining facilities and services; (i) publicity and promotions; (j) support services and (k) recruitment of student-athletes.").

207. *See* Friestedt, *supra* note 4, at 320–29.

208. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612.

209. *See* Friestedt, *supra* note 4, at 323.

210. *Id.* (quoting Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 144 MARQ. SPORTS L. REV. 11, 40 (2003)).

211. *See* Friestedt, *supra* note 4, at 323–24 ("For example, men's lacrosse is a contact sport that requires student-athletes to wear protective equipment . . . women's lacrosse is a non-contact sport, and female student-athletes are not required to wear the same protective equipment. Therefore, a larger budget for men's lacrosse to accommodate the more expensive protective equipment would be permissible under the Javits Amendment.").

212. *See supra* notes 203–07 and accompanying text.

213. *See* Friestedt, *supra* note 4, at 320–29.

under the exception.[214] Therefore, the mandate for gender equity under Title IX cannot be excused as easily as wage discrimination may under Title VII due to the Bennett Amendment's market excuse.[215]

Additionally, NIL compensation has further widened the disparities in benefits between men's and women's college sports programs.[216] Although Title IX only applies to NCAA-member institutions and not third-party collectives, there is inevitable overlap.[217] Scholars have argued that NIL compensation may fit under Title IX because courts have broken up Title IX regulations to require "equal opportunities for women, equal athletic financial aid, and equal treatment,"[218] or because NIL compensation constitutes a benefit that is facilitated by the schools, either directly or indirectly.[219] There is an existing issue as to whether universities may face liability for violating their Title IX obligations because, for example, if the school is allowing their male student-athletes six million dollars' worth of endorsements, they are not in turn balancing this out with giving the women six million dollars of something else.[220] However, if schools were to become more involved in the athletes' NIL deals,[221] the link between the third-party collectives and the universities would thicken,[222] and Title IX lawsuits may arise. Increased university involvement in NIL deals may lead to Title IX coverage over NIL compensation flowing to student-athletes.[223] In that case, however, it is unclear whether disparities in NIL resources fall within the scope of the Javits Amendment.[224]

3. Title VII Versus Title IX

Similar to the questions that arise from a university providing unequal opportunities in NIL deals, it is also unclear how disparate benefits and opportunities provided to a student-athlete-employee will be governed. This section compares the different standards under Title IX and Title VII to underscore the tension that may arise in differing liability if a university were to become a student-athlete's employer.

---

214. *See id.* at 323–24.
215. *See id.*; *supra* notes 178–89 and accompanying text.
216. *See supra* notes 33–43 and accompanying text; Boston, *supra* note 34, at 1112–13.
217. *See* Murphy, *supra* note 80.
218. *Id.*; *see also* Fahrenthold & Witz, *supra* note 70 ("Michael LeRoy, a University of Illinois professor who has studied collectives and found that one school paid 89 percent of its money to football and men's basketball players" has said that "[j]ust inside the door, Title IX applies. But outside the door, it doesn't apply. It's a sham.").
219. *See* Boston, *supra* note 34, at 1131–37.
220. *See* Murphy, *supra* note 80 (quoting Arthur H. Bryant who "was lead trial counsel in the first Title IX case tried against a university for discriminating against its women athletes"); Fahrenthold & Witz, *supra* note 70 ("Because they are not operated by the schools, collectives ignore Title IX . . . . At top schools, the average men's basketball player with a collective contract is paid $37,000, and the average women's player $9,000, according to Opendorse.").
221. *See supra* notes 35–43 and accompanying text.
222. *See id.*; Boston, *supra* note 34, at 1131–37.
223. *See* Murphy, *supra* note 76.
224. *See supra* notes 208–15 and accompanying text.

Beginning with Title IX, in response to an NCAA survey in 1991 that revealed that "men constituted 69.5% of the participants in intercollegiate athletics," the NCAA appointed a Gender Equity Task Force (the "Task Force").[225] This Task Force identified the ultimate goal of gender equity in athletics as achieving substantially proportionate numbers of male and female athletes as compared to the proportions of the institution's undergraduate population.[226] In determining whether an institution is compliant with their Title IX requirements, judges often look to the requirements cited in the Office of Civil Rights (OCR) Manual.[227] The OCR Manual's regulations require institutions to provide accommodations in order to effectuate equal opportunity among men and women in both selection of sports and levels of competition.[228] To evaluate compliance with this standard, the OCR considers whether participation opportunities are substantially proportionate in relation to enrollment, whether one sex has been historically underrepresented in a particular sport, and whether an institution can show that members of an underrepresented gender group have been fully and effectively accommodated.[229]

In contrast, although Title VII was enacted with a similar remedial purpose as Title IX, albeit in different contexts,[230] disparities between genders persist in the United States, as evidenced by the pay equity versus equal pay models.[231] Despite Title VII and the Equal Pay Act's broad language and purpose, the standard for compliance of employers has been greatly undercut by the way courts have interpreted and "constrained the law."[232] As discussed previously, some courts have interpreted the Bennett Amendment's "factor other than sex" defense to justify the payment of discriminatory wages in many circumstances.[233] Although Title IX has its own enforcement issues because of similar "market force" defenses,[234] Title VII lacks the "substantially equal" language found in Title IX.[235]

The comparison of university athletic scholarships to employee wages provides a clear delineation of the different standards. For example, under Title IX, if the total amount of scholarship funding available for twenty male athletes is 2,000 dollars, then the university must provide a total amount of 1,000 dollars in scholarship funding for ten female athletes.[236] In this scenario, to comply with federal law, the amount of scholarship funding per

225. *See* Walter Block, Roy Whitehead & Lu Hardin, *Gender Equity in Athletics: Should We Adopt a Non-discriminatory Model?*, 30 U. TOLEDO L. REV. 223, 224–25 (1999).
226. *See id.* at 226.
227. *See id.* at 228.
228. *See id.*
229. *See id.* For the purposes of this Note, Title IX and the OCR's interpretation generally function under the "substantially equal" standard.
230. *See* NAT'L WOMEN'S L. CTR., *supra* note 177, at 1.
231. *See supra* notes 190–200 and accompanying text.
232. *See* NAT'L WOMEN'S L. CTR., *supra* note 177, at 1.
233. *See id.*; *see also supra* notes 178–89 and accompanying text.
234. *See supra* notes 208–15 and accompanying text.
235. *See supra* notes 233–34 and accompanying text.
236. *See* Boston, *supra* note 34, at 1117.

athlete, both male and female, must be "proportionately equal at $100 each."[237] However, in the Title VII employment arena, the Ninth Circuit held in *American Federation* that a wage disparity of about 20 percent, between jobs held mostly by women and jobs of comparable worth held mostly by men, did not violate Title VII because the "compensation system was the result of a complex of market forces."[238] Thus, the substantially equal standard under Title IX differs from the standard under Title VII, as evidenced by the United States's model for wage dispersion.[239]

Assuming student-athletes are deemed employees of their universities, the difference in standards between Title IX and Title VII becomes increasingly relevant.[240] Universities would transform into not only a provider of athletic opportunity, but also the employer of their student-athletes. In turn, the university's existing obligations under Title IX to provide substantially equal athletic opportunity would then be coupled with Title VII's prohibition on discrimination on the basis of gender.[241] On their face, these obligations do not seem all that different. However, because there are no existing "equity" requirements under Title VII, as demonstrated by the models governing wage discrimination, but rather requirements of "equality," this stands in tension with Title IX's seemingly "equitable" standard.[242] In other words, an activity that creates a disparate impact between different gendered athletes may be permissible and defensible under Title VII, but may be a violation under Title IX.[243] If, for example, an entire team of football players are "employees," receive the minimum wage, insurance benefits, worker's compensation for injuries, protection from discrimination or harassment, or any other privileges that come with employment under Title VII, must the university then provide an equal amount of female student-athlete-employees the same benefits and opportunities? Could the market excuse defense to Title VII violations now seemingly transfer to Title IX violations?[244]

The next section explores the existing circuit split as to whether student-athletes may be deemed "employees" under the FLSA. As this question is answered in the positive, the aforementioned tension between the standards under Title IX and Title VII will inevitably arise.

---

237. *Id.* at 1117.

238. *See* Am. Fed'n of State, Cnty., and Mun. Emps. v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985).

239. *See id.*

240. *See generally* Oral Argument, Johnson v. Nat'l Collegiate Athletic Ass'n 108 F.4th 163 (3d Cir. 2023) (No. 22-1223), https://www2.ca3.uscourts.gov/oralargument/audio/22-1223RalphTreyJohnson;etalv.NationalCollegiateAthleticAssociation;etal.mp3 [https://perma.cc/E8UN-F3LS].

241. *See supra* Part I.C.3.

242. *See generally* Oral Argument, *supra* note 240.

243. *See id.*

244. *See* Haile, *supra* note 7, at 1454.

II. THE CIRCUIT SPLIT

The question as to whether student-athletes are "employees" of the NCAA, their universities, or both, for the purposes of the FLSA, has arisen in three instances. In Parts II.A and II.B, this Note describes cases before the U.S. Courts of Appeals for the Seventh and Ninth Circuits on this issue. These parts discuss the tests both parties have argued for and the tests the courts opted to use in their analyses. Part II.C then considers the Third Circuit's circuit-splitting decision as to the employment status of student-athletes. The decisions of this circuit split help to portray the complex issue of student-athlete employment status and the ramifications of courts' decisions.

A. The Seventh Circuit: Berger v. National Collegiate Athletic Association

In 2015, former University of Pennsylvania women's track athletes brought a class action against the NCAA and NCAA-member universities alleging they were employees under the FLSA and entitled to a minimum wage.[245] In comparing student-athletes to student participants in work-study programs,[246] the plaintiffs argued that they too should gain employee status because they similarly participate in school-supervised, nonacademic activities that they do not receive credit for, and that the school is deriving "immediate and meaningful" advantages from.[247] Further, the plaintiffs argued that the universities maintain daily timesheets for both groups of students, "recording up to 20 hours per week of performance."[248] The plaintiffs argued that NCAA student-athletes are even more strictly supervised than work-study participants due to the greater need to comply with regulations to maintain eligibility.[249] Thus, the plaintiffs alleged that student-athletes qualify as employees under both the DOL fact sheet for determining whether certain internships qualify as employment under the FLSA,[250] and the *Glatt* test.[251] However, the U.S. District Court for the

245. *See* Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016).

246. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike at 1, Lauren Anderson v. Nat'l Collegiate Athletic Ass'n, 2015 WL 13091755 (S.D. Ind. June 11, 2015), ECF No. 212. The DOL's FOH section 10b24(a) exempts university or college students as nonemployees if they are participating in extracurricular activities. *See Field Operations Handbook – Chapter 10*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-10#B10b24 [https://perma.cc/2T6C-4ASW] (Mar. 31, 2016). However, section 10b24(b) states that "an employment relationship will generally exist with regard to students whose duties are not part of an overall education program and who receive some compensation," which includes students who work at food service counters or as ushers at athletic events. *Id.*

247. Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike, *supra* note 246, at 1–2.

248. *See id.* at 2.

249. *See id.*

250. *See id.* at 4; *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/fact-sheets/71-flsa-internships [https://perma.cc/977C-RL96] (Jan. 2018).

251. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike, *supra* note 246, at 2–3; *supra* notes 146–55 and accompanying text.

Southern District of Indiana refused to apply the fact sheet's factors or the *Glatt* test.[252] The court granted the NCAA's motion to dismiss, and held that the student-athletes were not employees under the FLSA.[253]

On appeal, the Seventh Circuit affirmed the district court's grant of the defendants' motions to dismiss.[254] Appellant student-athletes urged the Seventh Circuit to utilize the *Glatt* test and argued that the student-athletes are analogous to the interns evaluated by the Second Circuit in *Glatt*.[255] In opposition, the NCAA argued that the court should decline to follow the *Glatt* test, similar to other Seventh Circuit cases where the court opted for a more flexible "common-sense" inquiry, rather than a multifactor test.[256] The Seventh Circuit agreed with the NCAA, and rejected application of the *Glatt* test because the factors "fail to capture the nature of the relationship between the Plaintiffs, as student athletes, and Penn."[257] Rather, the court reasoned that the "revered tradition of amateurism in college sports" defined the economic reality of the relationship between student-athletes and their universities and that student-athletic "play" is not "work" within the meaning of the FLSA.[258]

B. The Ninth Circuit: Dawson v. National Collegiate Athletic Association

In 2017, former football players at USC brought a class action against the NCAA and the Pac-12 asserting that they were entitled to wages under California labor law and the FLSA.[259] A notable difference between this case and *Berger*[260] is that the plaintiffs did not allege that they were employees of their universities, but rather of the NCAA and the Pac-12.[261] Attempting to distinguish the case at hand from *Berger*,[262] the plaintiffs

252. *See* Berger v. Nat'l Collegiate Athletic Ass'n, 162 F. Supp. 3d 845, 853 (S.D. Ind.), *aff'd*, 843 F.3d 285 (7th Cir. 2016).

253. *See id.* at 857.

254. Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285, 294 (7th Cir. 2016).

255. *See id.* at 291; *supra* notes 146–55 and accompanying text.

256. *See Berger*, 843 F.3d at 291. *See also* Vanskike v. Peters, 974 F.2d 806, 806–08 (7th Cir. 1992) (rejecting application of a *DialAmerica*-like test because the question before the court was not whether a prisoner was an employee or an independent contractor, but whether an employment relationship existed at all); Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (establishing that the determination of a joint-employer relationship must be "based on 'a consideration of the total employment situation and the economic realities of the work relationship,'" and in particular, courts must consider "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of their payment, and (4) maintained employment records").

257. *See Berger*, 843 F.3d at 291.

258. *See id.* at 293 (internal citation omitted); *see also supra* Part I.A. Because this case predated *Alston* and NIL, the economic reality of collegiate athletics likely has changed due to the questionable viability of the amateurism model as a whole.

259. *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 250 F. Supp. 3d 401, 403 (N.D. Cal. 2017).

260. *See supra* Part II.A.

261. *See Dawson*, 250 F. Supp. 3d at 403.

262. *See supra* Part II.A.

argued that the student-athletes here were football players belonging to a massively lucrative, Division I FBS program, as compared to nonrevenue producing athletes at an Ivy League university.[263] Further, the plaintiffs argued that *Berger* was not controlling law, especially because the Seventh Circuit expressly declined to apply the Ninth Circuit's method of employment inquiry.[264] However, although the district court conceded that *Berger* was not controlling as out-of-circuit authority, it concluded that the NCAA's reasoning, as in *Berger*, was persuasive and granted their motion to dismiss.[265]

On appeal, the appellants urged the court to utilize the *Glatt* primary beneficiary test,[266] previously used in other Ninth Circuit cases.[267] However, because of the factual nature of the complaint,[268] the circuit court stated that "the pure question of employment is not before us, and we need not consider whether [Dawson] had employment status as a football player, nor whether USC was an employer. That question is left, if at all, for another day."[269] Thus, the Ninth Circuit did not grapple with any of the important issues raised, including which test is most applicable for the inquiry. The court ultimately held that because the NCAA and the Pac-12 were regulatory bodies, the student-athletes could not be found to be their employees within the meaning of the FLSA, regardless of whether the court considered the *Portland Terminal* factors or the *Glatt* primary beneficiary test.[270]

C. The Third Circuit: Livers v. National Collegiate Athletic Association *and* Johnson v. National Collegiate Athletic Association

In 2018, a former football player at Villanova University brought a class action against the NCAA, his university, and dozens of other NCAA-member schools alleging the defendants jointly "violated his right to be paid as an employee" under the FLSA.[271] However, the U.S. District Court for the Eastern District of Pennsylvania dismissed the case for failure to state a

263. *See* Opposition to Defendants' Motion to Dismiss at 2, Dawson v. Nat'l Collegiate Athletic Ass'n, 250 F. Supp. 3d 401 (N.D. Cal. 2017) (No. 16-cv-05487), 2017 WL 2492227, ECF No. 43 ("Defendants structure and conduct their billion-dollar FBS operations like a major commercial business enterprise, and not one dollar of that enormous revenue would exist were it not for the on-the-field efforts of the football players themselves.").

264. *See id.* at 8–9 (explaining that the Seventh Circuit refused to apply the considerations the Ninth Circuit laid out in *Bonnette*); Bonnette v. Cal. Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

265. *See Dawson*, 250 F. Supp. 3d at 403.

266. *See supra* notes 146–55 and accompanying text.

267. *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905, 911 (9th Cir. 2019); Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017) (evaluating whether cosmetology school students were "employees" under the FLSA for the work they performed in the school's salon clinics).

268. *See supra* notes 260–63 (discussing claims against an athlete's university as compared to the NCAA and their conference).

269. *Dawson*, 932 F.3d at 907.

270. *See id.* at 910–11.

271. *See* Livers v. Nat'l Collegiate Athletic Ass'n, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *2–5 (E.D. Pa. May 17, 2018).

claim.[272] The court reasoned that student-athletes are not paid for their participation in athletics because their scholarships do not qualify as "compensation," and as such, they are differently situated than other students that have previously been found to qualify for employee status, such as workers at food concession stands or seating attendants.[273] Although the plaintiffs, alluding to *Tony & Susan Alamo*,[274] contended that the absence of monetary compensation does not preclude a finding of employee status, the court ultimately concluded that the pleaded facts did not amount to the level of employee status under the economic reality standard.[275] Although the *Livers* case did not make it past the pleading stage, the court did provide its opinion on the best vehicle to discern the economic reality between student-athletes and their universities.[276] The court explained that multifactor tests used to evaluate economic reality may not suffice in this particular analysis, as *Berger* and *Dawson* both found.[277] However, the court continued that an appropriate multifactor test could potentially be identified in the future to evaluate whether a student-athlete may be an employee under the FLSA.[278] The court proposed that this "test would likely lean on the factors outlined by the Third Circuit in [*DialAmerica*]."[279]

Following *Livers*, in 2019, student-athletes at five different universities brought a similar class action, contending that Division I student-athletes are employees under the meaning of the FLSA, and as such, deserve to receive wages for their participation.[280] The plaintiffs brought claims against the NCAA, the five universities attended by the plaintiffs (referred to as the "Attended School Defendants" (ASD)), and twenty additional Division I universities (referred to as the "Non-Attended School Defendants" (NASD)).[281] The plaintiffs alleged that the ASD are the employers of participating student-athletes because their participation in sports is unrelated to their academic experience, they are under the strict supervision and control of university-paid coaches, and they are "integral to the billion dollar Big Business of NCAA sports."[282] In comparison to work-study student participants, the plaintiffs argued that student-athletes qualify as employees at least as much, if not more.[283]

The ASD brought a motion to dismiss on the ground that the complaint did not plausibly allege that they employed the plaintiffs, a requirement for

272. *See id.* at *5.
273. *See id.* at *6–9.
274. *See supra* notes 157–62 and accompanying text.
275. *See Livers*, 2018 U.S. Dist. LEXIS 83655, at *44.
276. *See id.* at *48.
277. *Id.* at *49.
278. *Id.*
279. *See id.* at *50; *see also supra* notes 163–65 and accompanying text.
280. *See* Complaint, *supra* note 135, at 1–2.
281. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021); *see also* Complaint, *supra* note 135 and accompanying text. This Note's analysis of *Johnson* will focus on the claims against the ASD.
282. *See Johnson*, 556 F. Supp. 3d at 497–98, 505; Complaint, *supra* note 135, at 1.
283. *See* Complaint, *supra* note 135, at 87.

lawsuits under the FLSA.[284] The ASD asserted that the student-athletes could not plausibly be their employees because they are amateurs by definition,[285] the DOL has previously answered this question in the negative,[286] and the complaint did not sufficiently utilize any common-law multifactor test.[287] The district court disagreed, however, and denied the motion to dismiss.[288]

As to the amateurism argument, the court rejected the ASD's "circular reasoning" that they should not be required to pay student-athletes because they are amateurs, and that amateurs are unpaid due to the NCAA's long history of not paying student-athletes.[289] Second, the court denied the ASD's argument that they relied on the DOL's exemption for work-study participants from employee status[290] in deciding not to pay student-athletes a minimum wage.[291] The court stated that NCAA sports are unlike the other extracurricular activities listed in the DOL's exemption as they are not conducted as part of the students' educational experience.[292] Lastly, the court concluded that the student-athletes were analogous to the plaintiffs in *Tony & Susan Alamo*,[293] as the relationship may amount to employee status regardless of an expectation of compensation.[294] Thus, the court rejected the ASD's contention that the absence of an expectation of compensation sufficiently defined the economic reality of the relationship.[295]

In addition to denying the ASD's motion to dismiss, the court implied that the *Glatt* test is the best vehicle for evaluating the economic reality between student-athletes and their universities.[296] The court explained that through

284. *See Johnson*, 556 F. Supp. 3d at 499. The NCAA also moved to dismiss all claims against them for lack of standing, on the ground that the student-athletes' complaint did not plausibly allege that they were joint employers. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 561 F. Supp. 3d 490, 493 (E.D. Pa. 2021). The court denied the motion to dismiss, but this Note does not address the joint-employment issue. *See id.*

285. *See Johnson*, 556 F. Supp. 3d at 500–01; *see also supra* Part I.A.1.

286. *See Johnson*, 556 F. Supp. 3d at 502–04; *see also* Tucci, *supra* note 128 and accompanying text; Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike, *supra* note 246 and accompanying text.

287. *See Johnson*, 556 F. Supp. 3d at 506–12.

288. *See id.* at 512.

289. *See id.* at 501; *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2165 (2021) (Kavanaugh, J., concurring).

290. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike, *supra* note 246, at 5 (explaining the comparison between student-athletes and work study participants).

291. *See Johnson*, 556 F. Supp. 3d at 502–03. The court explained that the complaint plausibly alleged that NCAA Division I athletics are not "conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend." *Id.* at 506. Further, the court held that the complaint "plausibly alleg[ed] that NCAA DI interscholastic athletics are not part of the educational opportunities provided to the student athletes by the colleges and universities . . . but, rather, interfere . . . with academic opportunities." *See id.*

292. *See id.*

293. *See supra* notes 157–62 and accompanying text.

294. *See Johnson*, 556 F. Supp. 3d at 506–08.

295. *See id.*

296. *See id.* at 508–09 (rejecting both the *DialAmerica* and *Enterprise* tests).

use of the primary beneficiary test, the facts alleged in the complaint would, if proven, support the conclusion that plaintiffs are employees of their universities.[297] In applying the test, the court reasoned that the first factor—the expectation of compensation—and the seventh factor—the expectation of a paid job at the conclusion of the internship—weigh in opposite directions.[298] But, the third, fourth, and sixth factors tip the scale toward a finding of employee classification, because the "work" is not formally part of a student's education, the "work" does not accommodate, but rather interferes with, the student's academic commitments, and the "work" does not displace the work of paid employees.[299]

The ASD then moved to certify interlocutory appeal of the denial of their motion to dismiss because this decision substantially differed from those of *Berger*[300] and *Dawson*.[301] The Third Circuit affirmed in part the district court's decision, but vacated and remanded the decision because it disagreed with the application of the *Glatt* test.[302] The court stated that the question was not "whether the athletes before [them] are actually owed the protections of the Fair Labor Standards Act," but "whether college athletes, by nature of their so-called amateur status, are precluded from ever bringing an FLSA claim."[303] Ultimately, the answer was no.[304] The court found that the history of amateurism defining the economic reality of collegiate athletes is no longer applicable especially following the previous decisions in Division I athletics, including *Alston*, and the positions taken by the NLRB.[305] The court further held that "college athletes may be employees under the FLSA when they (a) perform services for another party, (b) necessarily and primarily for the [other party's] benefit, (c) under that party's control or right of control, and (d) in return for express or implied compensation or in-kind benefits."[306] This proposed test does away with the district court's application of *Glatt* to the collegiate-athlete setting because, as the court stated, the factual circumstances between unpaid internships and student-athletes are not "sufficiently analogous," and there must be a distinction between college athletes whose play is *also* work from those for whom it is not.[307] "In looking to the economic realities of the relationship

297. *See id.* at 509–12.
298. *See id.* at 510, 512; *see also supra* note 148 and accompanying text.
299. *See Johnson*, 556 F. Supp. 3d at 510–12.
300. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-5230, 2021 WL 6125095, at *2 (E.D. Pa. Dec. 28, 2021); *supra* Part II.A.
301. *See Johnson*, 2021 WL 6125095, at *2; *supra* Part II.B. The NCAA also moved to certify an interlocutory appeal, arguing that they merely regulate plaintiffs' participation in sports, and the complaint failed to allege a joint-employment relationship exists. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-5230, 2021 WL 6125453, at *1 (E.D. Pa. Dec. 28, 2021). However, the court denied the appeal as to the NCAA. *See id.*
302. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, No. 22-1223, 2024 WL 3367646, at *1 (3d Cir. July 11, 2024).
303. *Id.*
304. *See id.*
305. *See id.* at *6.
306. *See id.* at *11 (internal citations omitted).
307. *See id.* at *9, *11.

between college athletes and their schools or the NCAA . . . merely playing sports, even at the college level, cannot always be considered commercial *work* integral to the employer's business in the same way that activities performed by independent contractors or interns are assumed to be in previously mentioned multifactor tests."[308] Thus, the court argued that the relevant test must account for this distinction and decipher which student-athletes' economic realities resemble that of professional athletes, rather than merely students.[309] Additionally, the court argued that previously-used tests and decisions in this arena, referring to both *Berger* and *Dawson*, "either improperly assume that the alleged employee engages in compensable work or account for factors not relevant to college athletics."[310] Ultimately, the court remanded the decision back to the district court to apply an economic realities analysis different from the *Glatt* test, but the underlying holding that college athletes are not generally precluded from bringing FLSA claims as to their employee status is central to the argument of this Note.[311] The next part seeks to resolve the disagreement between circuit courts on this issue, as well as the complications over which economic reality test best serves the unique circumstances of collegiate athletics.

III. HOW THE STUDENT-ATHLETE-EMPLOYEE MODEL MAY AVOID UNINTENTIONAL DISCRIMINATION BASED ON GENDER

As discussed in Part II, circuit courts have diverged on whether student-athletes may plausibly be considered "employees" as a matter of law.[312] The answer to this question hinges greatly on the economic reality test that the relevant court chooses to employ.[313] Part III.A proposes a model test that better addresses the particularities of college sports and the

308. *See id.* at *9.

309. *See id.* at *6. "[W]e will not use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools. Instead, we believe that the amateurism that Judge Hamilton calls into question in his 'note of caution' highlights the need for an economic realities framework that distinguishes college athletes who 'play' their sports for predominately recreational or noncommercial reasons from those whose play crosses the legal line into work protected by the FLSA." *Id.* at *13.

310. *Id.*

311. *See id.* at *1.

312. *See supra* Part II.C.

313. *See supra* Part I.B. This part focuses mainly on Division I student-athletes in the Power Four conferences and the conditions and regulations under which they compete. The Power Four Conferences are the four most prominent athletic conferences in the United States: Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, and Southeastern Conference (SEC). *See* Amanda Christovich, *As Conference Realignment Becomes Official, the Power 5 Era is Over*, FRONT OFFICE SPORTS (June 30, 2024, 12:59 AM), https://frontofficesports.com/conference-realignment-end-of-power-5-end/ [https://perma.cc/86J8-C3H6]; Eric Mullin, *What Future Power Five Conferences Look Like as Pac-12 Loses 5 Schools*, NBC 5 DALL. FORT WORTH (Aug. 5, 2023, 12:14 AM), https://www.nbcdfw.com/news/sports/ncaaf/power-five-conferences-big-ten-pac-12-big-12/3310458/ [https://perma.cc/7RL2-JASS] (discussing the trajectory of the Power Five after the departures of universities left the Pac-12 with just four members for the 2024–25 season). The question of Division II, Division III, and smaller Division I universities are outside the scope of this Note.

relationship between student-athletes and their universities, to be administered on a team-by-team basis. Then, assuming the proposed test is satisfied for certain Division I student-athletes, Part III.B discusses an avenue to resolve the resulting tension between the university-employer's obligations under Title IX and Title VII.

A. A Student-Athlete Specific Test

Previous common-law tests that examine the economic reality of alleged employment relationships in the university environment, although insightful, do not apply neatly to collegiate athletics.[314] In no other university environment that has previously been explored, such as work-study participants or students working at concession stands,[315] is there a billion dollar industry or organization like the NCAA overseeing the activities of students.[316] Attempting to apply these common-law tests directly to student-athletes and their relationship with their universities thus presents a challenge for courts. As a result, courts may avoid granting employee status, even if it would make sense definitionally and legally, out of fear of upsetting past models of employment and of college sports. To best examine the relationship between student-athletes and their universities, and whether they may plausibly be considered employees under the FLSA, this part proposes the adoption of a new test to be used in this narrow circumstance.

The proposed test draws from important factors that the Supreme Court has declared as essential to the FLSA employment inquiry overall[317] and avoids a blanket ruling over all student-athletes by calling for administration on a team-by-team basis.[318] Although collegiate sports are a unique environment, it is important for courts to heed the previously used common-law economic reality tests, while ascertaining the factors that are applicable to the student-athletes' circumstances. Utilizing factors from other multifactor tests that have been applied in the university setting allows courts to correctly examine the student-athlete employment question. A test formulated for the issue at hand prevents courts from straying from a multifactor analysis and from inputting any outside opinions or notions so as to avoid upsetting the existing college sports model.

Because all student-athletes have unique circumstances, a team-by-team administration allows for flexibility in declaring which student-athletes satisfy the employee test based upon the economic reality of their

314. *See Johnson*, 2024 WL 3367646, at *9; Nw. Univ., 362 N.L.R.B. 1350, 1352 (2015); *supra* Part I.B.

315. *See* Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *9–10 (E.D. Pa. May 17, 2018); *see also* Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Strike, *supra* note 246 and accompanying text.

316. *See Johnson*, 2024 WL 3367646, at *1 ("Do efforts that provide tangible benefits to identifiable institutions deserve compensation? In most instances, they do. And yet athletes at our most competitive colleges and universities are told that their 'amateur' status renders them ineligible for payment."); *supra* Part I.A.

317. *See supra* Part I.B.

318. *See supra* notes 166–70 and accompanying text.

participation and their relationship with their universities.[319] Further, the proposed test specifically avoids addressing how much revenue a particular team produces for its university.[320] Although the test is meant to address the unique circumstances of student-athletes performing in a billion-dollar industry, each factor is rooted in previously used common-law tests in the university setting, none of which addresses how much revenue the student produces for their university.[321] The avoidance of a factor that considers revenue is essential to circumvent further widening inequality between men's and women's collegiate athletics.[322]

The proposed test consists of seven nonexhaustive factors meant to address the particular elements that the Supreme Court first announced were important to deciphering the economic reality of a relationship: "the expectation of compensation, the power to hire and fire, and evidence that an arrangement was conceived or carried out to evade the law."[323] If, after a balancing inquiry, the seven factors as to a particular team weigh in the affirmative, student-athletes that comprise that team shall be deemed employees of their university. The seven factors are as follows: (1) the extent that the alleged university-employer has the right to control the manner in which the student-athletes' "work" is to be performed;[324] (2) whether the alleged university-employer derives an immediate advantage from the activities of the student-athletes;[325] (3) whether the student-athletes do not displace regular employees;[326] (4) the degree to which student-athletes' participation in their sport interferes with, rather than is integrated with, the students' academic experience;[327] (5) whether the student-athletes' services require a special skill;[328] (6) whether the student-athletes' services are an integral part of the alleged university-employer's business;[329] and (7) whether there is some existing expectation of compensation.[330]

The first factor of the proposed test is aimed at addressing the university's ability to "hire and fire" student-athletes, the regulations which student-athletes must abide by in order to maintain eligibility, and the resources universities supply for student-athletes to facilitate their

319. *See Johnson*, 2024 WL 3367646, at *9 ("[A]thletes in the collegiate context are *sui generis*.").

320. *See supra* notes 166–71 and accompanying text (explaining the negative impact that a primary beneficiary test applied on a team-by-team basis may have).

321. *See id.*; *supra* Part I.B.

322. *See supra* notes 166–71 and accompanying text; *supra* Part I.C.2.

323. *See supra* notes 130–34 and accompanying text.

324. *See supra* notes 163–65 and accompanying text (referencing *DialAmerica* factor (1)).

325. *See supra* notes 136–42 and accompanying text (referencing *Portland Terminal* factor (4)).

326. *See supra* notes 136–42 and accompanying text (referencing *Portland Terminal* factor (3)).

327. *See supra* notes 146–55 and accompanying text (referencing *Glatt* factors (3) and (4)).

328. *See supra* notes 163–65 and accompanying text (referencing *DialAmerica* factor (4)).

329. *See id.* (referencing *DialAmerica* factor (6)).

330. *See supra* notes 146–55 and accompanying text (referencing *Glatt* factor (1)).

participation in their sport.[331] For example, *both* men's and women's basketball players are similarly situated in that their behavior is regulated and monitored in the same way by their universities. For violation of any NCAA bylaw or university regulation, the university has the power to revoke a student's athletic scholarship or terminate participation in their sport, which in many instances could result in the termination of a particular athlete's entire education.[332]

The second factor of the proposed test is aimed at addressing the benefits that the universities gain through student-athletes' participation in their sport, designed similarly to *Portland Terminal*'s "immediate advantage" question.[333] Although this factor references the revenue a men's or women's basketball team produces for its university, the question is not how much, but rather which party is receiving the benefits from the services. Continuing the example of men's and women's basketball teams, the basketball players are the ones performing the service, and although they do receive benefits as student-athletes, such as financial assistance and academic resources, the bulk of the monetary advantages are returned to the universities and the NCAA.[334]

The third factor of the proposed test addresses whether the benefits a university receives are proximately caused or result directly from the student-athletes' participation in their sports. Applied here, the student-athletes are the only entities capable of performing the services that are producing the relevant benefits for the universities. As a result, student-athletes do not displace employees, unlike the arguments for why interns are not true employees under the FLSA.[335]

The fourth factor addresses whether the student-athletes' participation in their sport is simply a benefit of their existence as students, or whether their athletic career is separate and distinct from their academics. Drawn from *Glatt*, this factor deciphers where the bulk of the benefit lies—in the students through their ability to gain an education while playing their sport, or in the universities through the services that the student-athletes provide.[336] As the NLRB concluded in *Northwestern University* and in Abruzzo's memo,[337] the

331. *See Behavior Policies for College Athletes & Potential Legal Challenges*, *supra* note 14.

332. *See supra* note 58 and accompanying text (explaining the repercussions of a student-athlete's loss of eligibility).

333. *See supra* notes 136–42 and accompanying text.

334. *See supra* notes 59–62 and accompanying text.

335. *See supra* notes 149–55 and accompanying text (explaining the differences between the *Glatt* primary beneficiary test and the *Portland Terminal* analysis, notably whether interns are performing "work" or if they are participating in an educational experience).

336. *See supra* notes 149–55 and accompanying text; *see also* Shults, *supra* note 58, at 486–88 ("Such demands hinder college athletes from taking their preferred classes and 'inhibit[] their ability to keep up with the classes they do take.' These demands also impede their ability to major in high-paying fields like science and engineering." (quoting Ben Strauss, *Northwestern Quarterback Makes His Case for Players' Union*, N.Y. TIMES (Feb. 18, 2014), https://www.nytimes.com/2014/02/19/sports/ncaafootball/northwestern-quarterback-makes-his-case-for-players-union.html [https://perma.cc/H7UN-A2F9])).

337. *See supra* notes 97–111 and accompanying text.

time student-athletes dedicate toward their sport does not enhance their education, but rather inhibits their ability to participate in opportunities that are available to typical students, such as pursuing certain majors.[338]

The fifth and sixth factors address whether the universities could gain the same benefits through other students, or if the benefits the university gains from their athletic programs are due to the special skills and talents that the student-athletes may provide.[339]

Lastly, the seventh factor asks whether the student-athletes have any expectation of compensation.[340] Expectation of compensation in the student-athlete context is highly debated due to the nature of the NCAA's amateurism model.[341] Because NCAA bylaws specifically bar pay-for-play schemes,[342] it is important that courts acknowledge the *Tony & Susan Alamo* holding that compensation need not come in the form of wages.[343] Thus, one may conclude that student-athletes are currently compensated, either through their scholarships, or through newly developing university-facilitated NIL deals.[344] This conclusion may destroy the NCAA's current amateurism model barring pay-for-play, but it is important that the circular argument that student-athletes do not expect compensation simply because they have never been paid in the past does not inhibit their ability to gain the protections and resources they deserve.[345] Further, the NCAA bylaws never explicitly define the "amateur," so the possibility that the notion may still exist is not ruled out completely.[346]

The proposed test is meant to draw from leading common-law FLSA tests that have previously been used in the university setting.[347] Although the proposed test is not designed to weigh in a particular direction, the factors focus on the considerations that the Supreme Court has deemed appropriate when ascertaining the economic reality of an alleged employment relationship.[348] As applied, the factors likely result in an employee relationship for certain teams, such as a men's and women's basketball teams at a Power Five Division I university.[349] The next section articulates a solution to the resulting tensions between the university-employer's obligations under Title IX and Title VII, assuming some student-athletes are deemed employees.

---

338. *See supra* notes 146–54 and accompanying text; *see also* Shults, *supra* note 58, at 486–88.

339. *See supra* notes 141–42 and accompanying text.

340. *See supra* notes 216–24 and accompanying text.

341. *See supra* notes 216–24 and accompanying text.

342. *See supra* Part I.A.1.

343. *See supra* notes 157–62 and accompanying text.

344. *See supra* notes 38–45 and accompanying text.

345. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 561 F. Supp. 3d 490, 498–99 (E.D. Pa 2021); *see also* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2165 (2021) (Kavanaugh, J., concurring); Tr. of Dartmouth Coll., *supra* note 114 and accompanying text.

346. *See* Associated Press, *supra* note 83 (discussing the possibility of federal legislation meant to regulate the compensation of student-athletes).

347. *See supra* Part I.B.

348. *See supra* notes 130–31 and accompanying text.

349. *See supra* notes 99–106 and accompanying text.

B. Resolving the Tensions Between Title IX and Title VII

As described in Part I.B.3, the standards under Title IX and Title VII are not identical, and assuming some student-athletes are deemed employees of their universities, the difference in standards may result in confusion for the universities, as well as courts, in determining liability for discrimination or disparate impacts among student-athletes.[350] Because there is no existing "equity" requirement under Title VII, as illustrated by the models governing wage discrimination,[351] a university-employer may have trouble determining how to satisfy its responsibilities under Title IX to provide substantially equal athletic opportunity for male and female student-athlete-employees. Further, an activity that creates a disparate impact between male and female student-athlete-employees may be defensible under Title VII's Bennett Amendment market excuse,[352] but it may simultaneously violate Title IX's obligation to provide substantially equal opportunity.[353] This part proposes a resolution to what "equal treatment" should mean under the two coexisting federal standards.

As equal opportunity under Title IX is measured by (1) benefits, opportunities, and treatment; (2) financial assistance; and (3) meeting interests and abilities,[354] the benefits and resources afforded by the FLSA under Title VII could essentially fit these requirements.[355] For example, the FLSA's minimum wage, workers compensation, and insurance requirements may fit under the second prong, whereas resources and benefits such as protection from harassment or recordkeeping may fit under the first prong. However, it remains unclear as to whether courts will combine the university-employer's obligations under Title VII with their Title IX requirements, or if they will be viewed separately.[356]

In the latter case, because the FLSA's mandated minimum wage is a Title VII benefit, it would likely function under Title VII's standard, rather than Title IX. Thus, as in any other industry in the United States, equal pay rather than pay equity is applicable to the student-athlete-employees.[357] If a female student-athlete-employee were to claim their university-employer was discriminately paying male student-athlete-employees higher wages, the market excuse likely would function as a valid affirmative defense.[358] The university-employer likely would successfully argue that the market values of the male student-athlete-employee's sport are higher than the female student-athlete-employee's sport, because the male sport brings in a much higher proportion of revenue to the school, and therefore justifies the

350. *See supra* Part I.C.3.
351. *See supra* Part I.C.1.
352. *See supra* notes 183–89 and accompanying text.
353. *See supra* notes 205–06 and accompanying text; *see also* Murphy, *supra* note 76.
354. *See supra* notes 203–05 and accompanying text.
355. *See* Boston, *supra* note 34, at 1135–43.
356. *See id.*
357. *See supra* Part I.C.1.
358. *See supra* Part I.C.1.

disparate pay.[359] Because courts continue to accept the market excuse as a "factor other than sex" justification for disparate pay, this likely is a difficult argument for a female student-athlete-employee to win.[360] Further, it is difficult to contend that Title IX's substantially equal standard should apply to the FLSA minimum wage, as the wage is a benefit provided due to employee status, rather than the student's identity as a collegiate athlete.

However, there are circumstances that may fall in a gray area between Title IX and Title VII, as benefits provided to the student-athlete-employee under both their identities as an athlete *and* an employee. In these cases, universities, regardless of the market excuse defense, should evaluate their treatment of student-athlete-employees under Title IX's substantially equal standard. For example, NIL compensation is a benefit that does not clearly fit under Title IX or Title VII.[361] The NIL compensation that a student-athlete-employee receives, when coupled with employee status, may be viewed as "bonus" compensation, on top of the FLSA minimum wage they are now receiving.[362] But, NIL compensation also likely fits within the prongs of Title IX, as a benefit or opportunity, as well as financial assistance if the universities were to become more involved with the collectives.[363] Thus, because it is unclear which federal law governs, and because the standards of Title IX and Title VII are different, universities should be careful to function under the stronger substantially equal standard in facilitating these benefits. In turn, the market excuse cannot exist as a valid defense for universities if they supply greater resources, or NIL compensation itself, to a male student-athlete-employee as compared to a female student-athlete-employee.[364] In a system with student-athlete-employees, it is likely that more circumstances will arise that fit into this gray area, alongside NIL compensation.[365] In these cases, universities should apply Title IX's substantially equal standard, because they cannot as easily fall back on the market excuse to defend against a disparate impact claim.[366]

The application of Title IX's substantially equal standard in these instances will serve the remedial purposes of both of the federal laws as enacted. Further, the standard also provides student-athlete-employees with a way to account for the market excuse when arguing that their university has violated its obligation to provide substantially equal athletic opportunity, or that they are discriminating based on gender in their dispersion of employee-benefits.[367] Although the minimum wage may not fall within this

359. *See supra* Part I.C.1.
360. *See supra* Part I.C.1.
361. *See supra* Part I.C.1.
362. *See supra* notes 76–80 and accompanying text.
363. *See* Boston, *supra* note 34, at 1131–37.
364. *See supra* Part I.C.3.
365. *See* Associated Press, *supra* note 83 (providing examples such as long-term health insurance, degree completion funds, and scholarship protections).
366. *See supra* Part I.C.1.
367. *See supra* Part I.C.1. The United States has already begun to implement measures to account for equality in the employment of professional athletes. *See U.S. Soccer Federation, Women's and Men's National Team Unions Agree to Historic Collective Bargaining*

gray area, allowing for substantially equal treatment in the realm of NIL compensation affords female student-athlete-employees opportunities that they otherwise would not have, due to the long-standing and deeply ingrained history of inequality in collegiate sports. This is a small, but important step toward creating a new, but equal, NCAA for all competitors.

CONCLUSION

The question of whether student-athletes may plausibly be considered employees of their universities as a matter of law under the FLSA is yet to be determined.[368] Student-athletes are currently performing hundreds of hours of services per year for their universities and producing billions of dollars in revenue for their universities and the NCAA.[369] However, the designation of employee status to student-athletes who are currently regulated under an amateurism model barring pay-for-play would uproot how NCAA college sports have always functioned.[370] Thus, there are important considerations that must be contemplated so as to avoid inequitable results among the student-athletes, the NCAA, or universities.

Accordingly, this Note advocates for courts to utilize a test specifically formulated to avoid a blanket ruling on all student-athletes and to follow the considerations that the Supreme Court has previously deemed relevant.[371] Further, if student-athlete-employees were recognized, the tensions between Title IX and Title VII must then be accounted for.[372] Universities must be careful to avoid treating student-athlete-employees disparately based on gender, because the market excuse should not be a valid affirmative defense under Title IX.[373] Thus, benefits afforded to the student-athlete-employee that could be described as a Title IX-regulated benefit or opportunity, such as NIL compensation, should function under the substantially equal standard.[374] These recommendations would provide all student-athletes the benefits and protections they deserve while preventing the inequality gap between men's and women's sports from widening further.

Agreements, U.S. SOCCER (May 18, 2022), https://www.ussoccer.com/stories/2022/05/ussf-womens-and-mens-national-team-unions-agree-to-historic-collective-bargaining-agreements [https://perma.cc/UZ97-3J79]; *see also 2023 US Open to Celebrate 50 Years of Equal Prize Money*, US OPEN (Mar. 14, 2023), https://www.usopen.org/en_US/news/articles/2023-03-14/2023_us_open_to_celebrate_50_years_of_equal_prize_money.html [https://perma.cc/J6ES-XYVC]. Thus, although pay equity is not widely recognized as the standard of employment law generally, the NCAA would not be entering unchartered territory in implementing equity measures in collegiate athletics.

368. *See supra* Part II.
369. *See supra* Part I.A.
370. *See supra* Part I.A.
371. *See supra* Part III.A.
372. *See supra* Part III.B.
373. *See supra* Part III.B.
374. *See supra* Part III.B.