LIFE AFTER EMPLOYEE-STATUS IN COLLEGE SPORTS

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The U.S. Court of Appeals for the Third Circuit's decision in Johnson v. National Collegiate Athletic Ass'n *is the latest in a series of legislative and judicial actions that raise the likelihood that at least some college athletes will be considered employees within the next decade. Despite what seems to be a near-certain legal outcome, those who oppose reforming college sports suggest that doing so will lead to a new era of chaos. We disagree. This Symposium Article examines some of the questions pertaining to what college sports might look like in the future with certain athletes as employees, and it explains why we believe labor reform will bring stability to intercollegiate sports. The questions we explore include how employment status would enable athletes to collectively bargain, and what benefits athletes might be able to secure from this opportunity. This Symposium Article also addresses why not all college athletes might be employees, how Title IX may affect college-athlete employees, and what new responsibilities athletes and colleges may have in light of the change in the legal status of certain athletes.*

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INTRODUCTION

For the better part of the past hundred years, the National Collegiate Athletic Association (NCAA) has insisted that *amateurism*, which is coded language for athletes not being paid, was essential to the product that is college sports.[1] In 2021, the NCAA's century-long policy that athletes do not receive compensation beyond scholarships, room and board, and some other minor allowances began to unravel.[2]

Virtually none of the NCAA's policy changes have come voluntarily; in fact, nearly all of the organization's recent position changes can be traced

1. The NCAA was successful in its charade of claiming that athletes not being compensated was an essential feature of college athletics. The organization's lobbying efforts around the phrase *amateurism* were so successful that Justice John Paul Stephens once referred to the policy as "a revered tradition." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

2. *See* John T. Holden, Marc Edelman & Michael A. McCann, *(Still) Anticompetitive College Sports*, 66 B.C. L. REV. (forthcoming 2025) (describing the recent evolution of the NCAA's position on athletes receiving compensation beyond cost of attendance).

directly to legislative efforts[3] or litigation.[4] Despite attempts to settle various antitrust lawsuits, including those that would allow schools to compensate athletes directly, the NCAA has continued to maintain that college athletes must not be classified as employees, going so far as to lobby Congress for a legislative declaration of such.[5] After spending nearly $3 million lobbying for favorable legislation, congressional action on NCAA objectives seems unlikely,[6] even despite Republicans winning control of Congress,[7] and the NCAA potentially settling three private class-action lawsuits pertaining to college athlete compensation.[8]

This Symposium Article explores the myths and realities about the nearly inevitable future of employee status in college sports. This Symposium Article is less focused on whether at least some college athletes are employees—a question that has already been examined extensively[9]—and is

3. *See generally* Dan Wetzel, *California Could Lead Another Charge in College Athlete Pay with Its Latest Proposed Bill*, YAHOO! SPORTS (Jan. 19, 2023), https://sports.yahoo.com/california-could-lead-another-charge-in-college-athlete-pay-with-its-latest-proposed-bill-010553341.html [https://perma.cc/HB33-H2KX] (noting that legislation in California was a driving force behind the NCAA's change of stance with regards to athletes being compensated for the use of their name, image, and likeness).

4. *See* Michelle Brutlag Hosick, *Settlement Documents Filed in College Athletics Class-Action Lawsuits*, NAT'L COLLEGIATE ATHLETIC ASS'N (July 26, 2024), https://www.ncaa.org/news/2024/7/25/media-center-settlement-documents-filed-in-college-athletics-class-action-lawsuits [https://perma.cc/D8XA-BK2Y]; *see also* Joint Motion of Plaintiff States and Defendant National Collegiate Athletic Association for Entry of Consent Judgment and Permanent Injunction, Ohio v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-00100 (N.D. W. Va. 2024) (Exhibit A).

5. Michael McCann, *Congress to Consider Bill Declaring College Athletes Are Not Employees*, SPORTICO (June 12, 2024), https://www.sportico.com/law/analysis/2024/ncaa-antitrust-settlement-congress-athletes-employee-debate-1234783946/ [https://perma.cc/7TWJ-L6M9].

6. *See* Ben Nuckols, *NCAA President Says Congress Must Act to Preserve Sports at Colleges That Can't Pay Athletes*, ASSOCIATED PRESS (Feb. 23, 2024), https://apnews.com/article/ncaa-charlie-baker-congress-lobbying-f5dfbcc5e8aba387d533b392f78c8be7 [https://perma.cc/M5TW-J9S9].

7. *See* Riley Beggin, *Trump's Dream Scenario: Republicans Win Control of House and Senate in Congress Sweep*, USA TODAY (Nov. 13, 2024), https://www.usatoday.com/story/news/politics/elections/2024/11/13/republicans-win-house-senate-2024/75734400007 [https://perma.cc/4KRY-U3PP] (discussing Republicans winning control of the House and Senate in the November 2024 election). *But see generally* Ben Nuckols, *College Sports Reform Could Advance in GOP-Controlled Congress, with Sen. Cruz as NCAA Ally*, ASSOCIATED PRESS (Nov. 29, 2024), https://apnews.com/article/ncaa-congress-ted-cruz-nil-0a047afaee0087817f64802216109792 [https://perma.cc/59BJ-P8TN] (suggesting that Senator Ted Cruz (R-TX) has made passing a bill favorable to NCAA interests a top priority under the now Republican-controlled Congress).

8. *See* Holden et al., *supra* note 2 (discussing the proposed *House* antitrust settlement and its implications).

9. *See, e.g.*, Marc Edelman, Michael A. McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2024 ILL. L. REV. 1, 47–50; Robert T. Zielinski, *College Athletes as Employees*, 41 J. COLL. & U. L. 71, 71–72 (2015); Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look Into the Alt-Labor Future*, 95 CHI.-KENT L. REV. 187, 215–16 (2020); John Wolohan, *A Reexamination of College Athletes: Are Athletes Students or Employees*, 53 U. MEM. L. REV. 835, 890–91 (2022); Robert A. McCormick & Amy Christian McCormick, *Myth of the Student-Athlete: The College Athlete*

more forward-looking, exploring what a world with certain college athletes as employees would look like. Part I provides an abridged overview of how college sports went from nearly one hundred years of opposition to athletes being compensated to the precipice of athletes as employees on college campuses. Part II explores employee status, including what areas of college sports might be subject to collective bargaining. Part III seeks to clarify many of the most pervasive questions about athletes having employee status. Finally, Part IV analyzes why employment status may bring the stability to college sports that many critics of athletes being compensated claim is needed.

I. MODERN COLLEGE SPORTS: PROFESSIONAL AMATEURS

Contemporary college sports are big business.[10] College sports administrators have publicly articulated a fear of *commercialization* of college sports during much of the last century[11] while at the same time embracing the benefits that have come with commercialism.[12] Despite the long-held opposition to the so-called commercialization of college sports, college sports have survived every existential threat they have faced.[13] In

as Employee, 81 WASH. L. REV. 71, 155–57 (2006); Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 53 (2017).

10. In 2019, Division I athletic programs collectively generated $15.8 billion in revenue. *See* Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS (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/9WEB-LCKE]. This is roughly in line with $16 billion that the National Football League generated in 2019. *See Report: NFL Revenue Dropped by $4 Billion in 2020*, REUTERS (Mar. 11, 2021, 5:08 PM), https://www.reuters.com/lifestyle/sports/report-nfl-revenue-dropped-by-4-billion-2020-2021-03-11/ [https://perma.cc/8E8A-ZQFB]. However, the NCAA's revenue figure exceeded the Major League Baseball's 2019 figure by close to 50 percent. *See* Josh Sim, *MLB Beats Revenue Record with More than US$10.8bn*, SPORTSPRO (Jan. 11, 2023), https://www.sportspromedia.com/news/mlb-2022-season-revenue-record-sponsorship-broadcast-rights [https://perma.cc/3PPK-DSM3].

11. *See* David L. Westby & Allen Sack, *The Commercialization and Functional Rationalization of College Football: Its Origins*, 47 J. HIGHER EDUC. 625, 644 (1976) (noting that Walter Camp, the so-called "father of American football," mused in his writings "against the evils of professionalism in sport" but "regarded with great satisfaction the growth of football, not merely as a game, but as a spectacle.").

12. The average Power Five conference athletic director from 2017 to 2018 (a period before athletes could receive compensation beyond total cost of attendance) earned total compensation exceeding $900,000. Robert Lattinville & Roger Denny, *2017-2018 DBS Athletics Directors' Compensation Survey*, ATHLETICDIRECTORU, https://athleticdirectoru.com/articles/17-18-fbs-ad-compensation/ [https://perma.cc/HH67-8WBR] (last visited Mar. 7, 2025).

13. Indeed, in just the last forty years, college sports have managed to survive despite having to allow television companies to broadcast multiple college football games a week, which, contrary to NCAA arguments, did not cannibalize ticket sales. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984). Similarly, college athletics survived the inability to artificially cap basketball assistant coaches' salaries. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1014 (10th Cir. 1998). As did college sports survive athletes being able to receive compensation for the total cost of attendance at college. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2164 (2021). College

fact, college sports have flourished, drawing millions of viewers for marquee events.[14] Indeed, the long-held fears of athletes receiving compensation have been unfounded even as the top college athletes, in a few cases, are receiving more than a million dollars in compensation.[15]

This part briefly examines how college sports have evolved over the last hundred years to the position that the NCAA is currently in and also looks at a future with college athletes as employees. Part I.A begins with a short discussion of college sports before the landmark events that took place in June 2021. Part I.B discusses the evolution of college sports following June 2021, including the continued litigation surrounding anticompetitive conduct, before transitioning to discussion about recent efforts to have athletes gain status as employees.

A. The College Sports Business Prior to the Summer of 2021

The NCAA was initially founded for the stated purpose of protecting the health and safety of college athletes, namely college football players.[16] By 1905, college football had become so violent, even deadly,[17] that President Theodore Roosevelt stepped in, calling collegiate leaders to the White House and tasking them with creating a body to oversee college sports.[18] That body, founded the following year, by 1911 had become known as the NCAA.[19]

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sports have also continued to exist in spite of athletes being able to monetize their own name, image, and likeness, something the NCAA argued would threaten the organization's business model. *See generally* Alicia Jessop, Thomas A. Baker III, Joanna Wall Tweedie & John T. Holden, *Charting a New Path: Regulating College Athlete Name, Image and Likeness After* NCAA v. Alston *Through Collective Bargaining*, 37 J. SPORT MGMT. 307, 308–09 (2023) (describing the NCAA's history of opposition to athletes being able to receive compensation for the use of their image rights). Indeed, not only has the NCAA's claim about the dire nature of compensation changes been incorrect, so too have its fears about other threats, including its opposition to legalized sports gambling. *See* John T. Holden, *North American Sports Leagues and Gambling Policy: A Comparative Analysis*, 14 INT'L SPORTS L.J. 242, 250–51 (2014) (describing the NCAA's opposition to legalization of sports wagering in both the United States and Canada).

14. *See* Michael Brauner, *2024 Rose Bowl Was the Most-Watched College Football Semifinal Game of All Time*, YELLOWHAMMER NEWS (Jan. 3, 2024), https://yellowhammernews.com/2024-rose-bowl-was-the-most-watched-college-football-semifinal-game-of-all-time/ [https://perma.cc/42NE-DWKV]; Steve McCaskill, *NCAA Women's March Madness Final Secures Record 18.7m Viewers*, SPORTSPRO (Apr. 9, 2024), https://www.sportspromedia.com/news/march-madness-south-carolina-iowa-basketball-caitlin-clark/ [https://perma.cc/L44J-QPCA].

15. Barry Werner, *Top NIL Earners in NCAA*, YAHOO! SPORTS (Feb. 20, 2024), https://sports.yahoo.com/top-nil-earners-ncaa-153252893.html [https://perma.cc/5FEY-C7SD].

16. *See* John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After* Alston, 74 FLA. L. REV. 427, 431 (2022).

17. *See Nineteen Killed on Gridiron*, S.F. CALL, Nov. 27, 1905, at 1, https://chroniclingamerica.loc.gov/lccn/sn85066387/1905-11-27/ed-1/seq-1/ [https://perma.cc/48LE-4FHZ]; *Columbia Bars Football*, N.-Y. TRIB., Nov. 29, 1905, at 1, https://chroniclingamerica.loc.gov/lccn/sn83030214/1905-11-29/ed-1/seq-1 [https://perma.cc/W4BV-V74T].

18. Holden et al., *supra* note 16, at 431–32.

19. Palmer E. Pierce, *The National Collegiate Athletic Association*, 17 AM. PHYSICAL EDUC. REV. 146, 146–47 (1912) (explaining that the Intercollegiate Athletic Association of

By the mid-1920s, college sports administrators at NCAA member colleges were already wrestling with issues about "commercialization" and "professional spirit" and athletics' place on a college campus.[20] These concerns about commercialization came to a head in 1935 when University of North Carolina at Chapel Hill president Frank P. Graham announced what would come to be known as the "Graham Plan."[21] In a plan that would come to light six days after a disappointing loss on the football field to the University of North Carolina's chief rival, Duke University, President Graham "launched a public crusade to purify intercollegiate athletics of what he regarded as widespread and rampant professionalism."[22] Under the Graham Plan,[23] students were not to receive compensation as a result of their athletic abilities.[24] In addition, freshmen and those students whose academic performance placed them on probation were ineligible to participate in a sport.[25] The Graham Plan passed narrowly, but by December 1937, the rule had been rescinded, and athletic scholarships were back in place as the norm.[26]

Despite the failure of the Graham Plan, roughly a decade later, in 1948, the NCAA made its next attempt at commercial and educational reform when it passed the "purity code," which came to be known as the "Sanity Code."[27] The Sanity Code led to the implementation of various principles; chief among them was the "Principle of Amateurism"[28] (the "Principle"). This Principle stated:

> An amateur sportsman is one who engages in sports for the physical, mental or social benefits he derives therefrom, and to whom the sport is an avocation. Any College athlete who takes or is promised pay in any form for participation in athletics does not meet this definition of amateur.[29]

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the United States was formed in 1906, with thirty-nine member institutions, a number that would continue to grow to ninety-five members in 1911, the first year that the organization would become known as the National Collegiate Athletic Association).

20. CHARLES W. KENNEDY, COLLEGE ATHLETICS 31–32 (1925).

21. Holden et al., *supra* note 16, at 432.

22. Richard Stone, *The Graham Plan of 1935: An Aborted Crusade to De-emphasize College Athletics*, 64 N.C. HIST. REV. 274, 275–77 (1987) (explaining that Graham was far from alone in his concerns about the commercialization, or prioritization, of athletics on college campuses, as the Carnegie Foundation had also authored critical studies of college sports in both 1929 and 1931).

23. President Frank P. Graham would later go on to be a U.S. Senator. Fans of obscure sports trivia may also be interested to know he was also the brother of Archibald "Moonlight" Graham. Moonlight Graham was later immortalized in the 1989 film *Field of Dreams*, as a baseball player who appeared in a single Major League Baseball game in his entire career playing two innings on June 29, 1905. Jimmy Keenan, *Moonlight Graham*, SOC'Y AM. BASEBALL RES. (Aug. 13, 2022), https://sabr.org/bioproj/person/Moonlight-Graham/ [https://perma.cc/5J67-LQHC].

24. *See* Stone, *supra* note 22, at 279.

25. *See id.* at 279.

26. *See id.* at 280.

27. George Van Bibber, *The N.C.A.A.'s Sanity Code and Its Effect on Intercollegiate Athletics*, 13 PHYSICAL EDUCATOR 138, 139 (1956).

28. *Id.*

29. *Id.*

The Sanity Code would also require institutional control over athletics, maintenance of "Sound Academic Standards," standards for awarding financial aid, and bans on promising financial aid to recruits.[30] However, the Sanity Code's only penalty (expelling nonconforming schools from the NCAA) caused its demise because the prospect of expelling seven member schools became too much for a two-thirds majority of the NCAA's Executive Committee to execute.[31] So, much like the Graham Plan, the Sanity Code fell by the wayside.

The NCAA and its member institutions, in time, would continue repeating the same tropes built around the mythical concept of amateurism[32]—seeking to ensure that college athletes would not be paid, even as many NCAA member schools continued to operate their sports programs as revenue centers, and their football and basketball athlete labor as cash cows for their schools.[33]

Although college sports have arguably always been commercialized, since the 1980s, the growth of college sports' revenue has truly skyrocketed. As of 2023, at least twenty-five collegiate athletic departments produced revenues exceeding $145 million annually.[34] Meanwhile, according to data produced by *USA Today*, one university, Ohio State University, brought in more than $250 million,[35] which is more revenue than all but five National Hockey League teams earned in the same year.[36] The colossal revenues derived from certain modern-day college sports have trickled down to those heading up top programs, with twenty-five college football coaches earning

30. *Id.*

31. Brian Ewart, *History: The Sinful Seven*, VU HOOPS (Aug. 22, 2011), https://www.vuhoops.com/2011/08/22/history-the-sinful-seven [https://perma.cc/V2X3-9TB8].

32. *See generally* Jayson Jenks, *The NCAA and the Myth of Amateurism*, THE ATHLETIC (Feb. 8, 2021), https://www.nytimes.com/athletic/2316801/2021/02/08/ncaa-amateurism-supreme-court/ [https://perma.cc/9SUG-9EJX] (highlighting that the idea of amateurism has almost never matched the reality of what was taking place).

33. Indeed, one of the great ironies of the NCAA's quests to control the commercialization of college sports came in 1984, after the organization was sued over efforts to limit the number of college football games being broadcast based on the argument that in-person attendance would suffer. The NCAA would lose its antitrust case at the Supreme Court; the result would be perhaps the greatest influx of money into college sports ever seen with television broadcasting contracts reaching billions of dollars in value. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984); *see also* Drew Thornley & John T. Holden, *Rethinking College Football Grant of Rights Agreements*, 34 MARQ. SPORTS L. REV. 319, 338–41 (2024) (describing the growth in value of college athletics' broadcast contracts in the years after *Board of Regents*).

34. *See* Grant Hughes, *College Athletics' 25 Powerhouses Who Produce the Most Revenue Entering 2024*, 247SPORTS (June 28, 2024, 12:30 AM), https://247sports.com/longformarticle/college-athletics-25-powerhouses-who-produce-the-most-revenue-entering-2024-233312519/ [https://perma.cc/U2B8-TBEH].

35. *See NCAA Finances: Revenue and Expenses by School*, USA TODAY, https://sportsdata.usatoday.com/ncaa/finances [https://perma.cc/75HJ-PDPU] (last visited Mar. 7, 2025).

36. *See The NHL's Most Valuable Teams 2024*, FORBES (Dec. 20, 2024, 3:53 PM), https://www.forbes.com/nhl-valuations/list/ [https://perma.cc/5349-49DV].

more than $6.2 million in 2024,[37] at least twenty-five men's basketball coaches earning more than $3.5 million per year,[38] and at least eighteen women's basketball coaches earning more than $1 million per year.[39] Yet, despite all of this revenue being generated, NCAA member schools have consistently voted to maintain bylaws that have allowed college athletes to be compensated only de minimis amounts—reforming these bylaws only as state legislation and court rulings have required them to do so.[40]

B. College Sports Since Legally Mandated Reforms

In the summer of 2021, two of the pillars upon which the NCAA was built were, alas, demolished, not by NCAA member schools willingly enacting reform, but by state legislators, U.S. Supreme Court justices, and others stepping into the matter.[41] Perhaps most significantly, the Supreme Court's June 21, 2021, ruling in *National Collegiate Athletic Ass'n v. Alston*[42] signaled, both literally and figuratively, imminent change to the way in which the college sports industry has long operated.[43] With a single strike of the pen, the *Alston* decision ended the NCAA's ability to restrict academically related aid to athletes.[44] The decision also, and almost immediately, led schools to implement so-called *Alston* payments, which were cash payments of up to $5,980 annually that the NCAA member schools finally could allow athletes to spend in any way they chose.[45]

The *Alston* decision was monumental to reforming college sports, but what followed brought arguably the biggest change to the NCAA in more than 100

37. Amanda Christovich, Doug Greenberg & Rodney Reeves, *Who Is Highest-Paid Coach in College Football?*, FRONT OFF. SPORTS (July 26, 2024), https://frontofficesports.com/who-are-highest-paid-college-football-coaches/ [https://perma.cc/FU2D-J64V].

38. *See Men's Basketball Head Coach Salaries*, USA TODAY (Mar. 13, 2024, 2:25 PM), https://sportsdata.usatoday.com/ncaa/salaries/mens-basketball/coach [https://perma.cc/K2F8-B2P7].

39. *Women's Basketball Head Coach Salaries*, USA TODAY (Mar. 13, 2024), https://sportsdata.usatoday.com/ncaa/salaries/womens-basketball/coach [https://perma.cc/VAG5-J3FZ].

40. *See generally* Alan Blinder, *College Athletes May Earn Money from Their Fame, N.C.A.A. Rules*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/06/30/sports/ncaabasketball/ncaa-nil-rules.html [https://perma.cc/5KNQ-7SS7] (describing the NCAA policy changes that allowed athletes to receive compensation for the commercial use of their publicity rights).

41. Tom Wright-Piersanti, *Change Comes to the N.C.A.A.*, N.Y. TIMES (June 22, 2021), https://www.nytimes.com/2021/06/22/briefing/ncaa-scotus-ruling.html [https://perma.cc/RM2X-GY73]; Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx [https://perma.cc/37VN-VKQP].

42. 141 S. Ct. 2141 (2021).

43. *See id.* at 2169 (Kavanaugh, J., concurring) ("The NCAA is not above the law.").

44. *See id.* at 2166.

45. Although the money is provided to athletes, each individual school chooses how much and how athletes receive the money. For instance, the University of Colorado conditioned a portion of the *Alston* payment on athletes "attending programming events." Andy Wittry, *The On3 Guide to Alston Awards—Education-Related Compensation*, ON3 (Sept. 20, 2022), https://www.on3.com/college/wisconsin-badgers/news/alston-awards-ncaa-v-alston-supreme-court-of-the-united-states-brett-kavanaugh/ [https://perma.cc/FVC8-A6WK].

years.[46] On June 30, 2021, just nine days after the Supreme Court's decision in *Alston* was released to the public, the NCAA addressed another question that many college sports fans had been wondering since the California state legislature passed a law nearly two years earlier to allow college athletes to monetize their own likenesses, effective as of July 1.[47] How would the NCAA respond?

With the *Alston* decision calling into doubt whether the NCAA could legally ban a member college for not complying with its concerted restraints against athlete compensation,[48] the NCAA simply "announced the suspension of name, image and likeness rules," providing minimal guidance to colleges on the allowance on name, image, and likeness (NIL) deals,[49] and shifting the burden of governance largely to individual schools or member conferences.

Although the NCAA has evolved, even if involuntarily, with respect to allowing athletes to receive outside money as compensation for endorsements,[50] the NCAA has continued to maintain opposition to NIL payments being used as inducements for athletes to attend particular schools. Despite the NCAA's stated opposition, NIL payments were quite clearly used as inducements for athletes to attend schools. But the words of Justice Kavanaugh, in his concurring opinion in *Alston*, have continued to loom large, as reverberations from the NCAA about potential enforcement of NIL restrictions were met with litigation from various state attorneys general.[51] In early 2024, a federal district court issued an injunction stopping the NCAA from enforcing its NIL restrictions, even where the payments came from collectives, including school boosters.[52]

Most recently, the NCAA has also faced a tripartite of private antitrust litigations related to the association's concerted restraints on college athlete compensation in terms of third-party endorsement deals and direct payments from colleges to athletes.[53] These lawsuits—*House v. National Collegiate*

46. *See* Brutlag Hossick, *supra* note 41.

47. S.B. 206, 2019-2020 Leg., Reg. Sess. (Cal. 2019).

48. *See Alston*, 141 S. Ct. at 2156 ("Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions."); *see also* Holden et al., *supra* note 16, at 463 ("The *Alston* decision represented one of the NCAA's most significant defeats since the Association's founding, and it caused fear that more court-ordered antitrust reform could be coming to college sports if the NCAA did not change its ways.").

49. *See generally* Memorandum from Jennifer Abruzzo, Gen. Counsel, Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, & Resident Officers, Nat'l Lab. Rels. Bd. 6 (Sept. 29, 2021).

50. *See* Brutlag Hossick, *supra* note 41.

51. *See generally* Complaint, Tennessee v. Nat'l Collegiate Athletic Ass'n, No. 24-cv-33 (E.D. Tenn. Jan. 31, 2024).

52. *See generally* Tennessee v. Nat'l Collegiate Athletic Ass'n, 718 F. Supp. 3d 756 (E.D. Tenn. 2024).

53. Dan Murphy, *Court Filing Reveals Terms of NCAA Antitrust Lawsuits Settlement*, ESPN (July 26, 2024), https://www.espn.com/college-sports/story/_/id/40649389/ncaa-antitrust-lawsuits-settlement-filed-federal-court [https://perma.cc/2Q2A-A2FF].

Athletic Ass'n,[54] *Hubbard v. National Collegiate Athletic Ass'n*,[55] and *Carter v. National Collegiate Athletic Ass'n*[56]—place the NCAA member schools at risk of colossal economic liability and emphasize the need to make meaningful changes to how their industry operates. Collectively, they are subject to a proposed settlement that, in October 2024, the U.S. District Court for the Northern District of California court granted preliminary approval for, subject to final review by the court on April 7, 2025.[57]

C. A Whole World Beyond Antitrust

The ongoing antitrust lawsuits the NCAA faces do not represent the only challenges confronting intercollegiate sports.[58] Even as years of antitrust litigation involving the college sports industry may be heading toward a slowing point, legal disputes related to the employee status of college athletes and their potential rights as such are still very much proceeding. Although the NCAA has attempted to resolve many lingering antitrust cases,[59] the organization and its member institutions have maintained steadfast opposition to the threat from labor law: the possible recognition of athletes as employees.[60]

The NCAA has long spent efforts marketing a delineation between college athletes and employees.[61] The NCAA's nearly hundred-year effort to push back on the notion that athletes on college campuses are not employees,

54. No. 20-cv-03919 (N.D. Cal. June 15, 2020).

55. No. 23-cv-01593 (N.D. Cal. Apr. 4, 2023).

56. No. 23-cv-06325 (N.D. Cal. Dec. 7, 2023).

57. *See* Complaint, House v. Nat'l Collegiate Athletic Ass'n, No. 20-cv-03919 (N.D. Cal. June 15, 2020); Complaint ¶¶ 11, 119, Hubbard v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-01593 (N.D. Cal. Apr. 4, 2023); Complaint, Carter v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-06325 (N.D. Cal. Dec. 7, 2023); *see also* Justin Williams, *House v. NCAA Settlement Granted Preliminary Approval, Bringing New Financial Model Closer*, THE ATHLETIC (Oct. 7, 2024), https://www.nytimes.com/athletic/5826004/2024/10/07/house-ncaa-settlement-approval-claudia-wilken/ [https://perma.cc/T8MS-WDM6] (final approval hearing for settlement tentatively scheduled for April 7, 2025); *see also* Marc Edelman & Michael A. Carrier, *Of Labor, Antitrust and Why the Proposed* House *Settlement Will Not Solve the NCAA's Problem*, 93 FORDHAM L. REV. 1573 (2025) (providing a very detailed analysis and critique of the proposed *House* class action settlement).

58. *See* Jessica Blake, *Appeals Court Rules Some NCAA Athletes Qualify as Employees*, INSIDE HIGHER ED (July 16, 2024), https://www.insidehighered.com/news/quick-takes/2024/07/16/appeals-court-rules-ncaa-athletes-may-qualify-employees [https://perma.cc/6GTU-SBH5].

59. The NCAA appears to be playing something akin to antitrust litigation whack-a-mole. As the organization attempts to settle claims, new challenges to other NCAA regulations or past conduct appear. *See, e.g.*, Michael McCann, *CHL Player, ASU Pressure NCAA to Drop Junior Hockey Boycott*, SPORTICO (Sept. 13, 2024), https://www.sportico.com/law/analysis/2024/chl-asu-pressure-ncaa-over-boycott-1234797264/ [https://perma.cc/R3TG-P39G] (observing a recent challenge to NCAA regulations that prohibited players who played in the Canadian Hockey League from playing NCAA hockey).

60. *See generally* Edelman et al., *supra* note 9, at 5–14.

61. *See* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [https://perma.cc/34KK-7UD4] (describing efforts to stop college athletes from gaining access to worker's compensation).

despite being responsible for generating tens of millions or more in annual revenue for institutions, appears to be facing increased pressure.[62] Indeed, the NCAA faces at least three challenges to the status of athletes on campuses, two centering on athlete status under the National Labor Relations Act[63] (NLRA) and one under the Fair Labor Standards Act[64] (FLSA).

There have long been questions about whether the NCAA could continue to defend the illusion that athletes on college campuses are not employees of the institutions they represent, a question that became even more poignant as college sports' revenues and coaches' salaries continued to grow.[65] *Johnson v. National Collegiate Athletic Ass'n*[66] has cast a shadow over the NCAA since the complaint was filed in 2019.[67] This involves, broadly, the prospect of the NCAA owing at least minimum wage under the FLSA to thousands of collegiate athletes.[68] The U.S. Court of Appeals for the Third Circuit concluded in July 2024 that "[t]he '[f]rayed [t]radition' of [a]mateurism is [n]o [s]hield to FLSA [c]laims."[69] Although the NCAA attempted to rely on past judicial victories the organization had achieved—as well a court decision justifying the nonpayment of prison labor (a repugnant analogy, to say the least)—to support its claims that college athletes not be paid, the Third Circuit noted its "refus[al] to equate a prisoner's involuntary servitude, as authorized by the Thirteenth Amendment, to 'the long-standing tradition' of amateurism in college athletics."[70] The Third Circuit ultimately rejected the NCAA's efforts to overturn the district court's denial of the organization's motion to dismiss but did suggest in closing that there may be differences between collegiate athletes engaged in nonrevenue generating sports and those who participate in football and basketball.[71]

Johnson is also joined by several challenges to gain employee status for college athletes under the NLRA. In March 2024, the Dartmouth College ("Dartmouth" or the "College") men's basketball team voted 13-2 to

62. It is worth noting that many college sports do not generate millions, or in some cases, any revenue at all, but those sports that do, principally football and men's basketball, are meaningful contributions to university balance sheets. *See* George Malone, *Which College Sports Make the Most Money?*, YAHOO! FINANCE (Mar. 21, 2022), https://finance.yahoo.com/news/college-sports-most-money-130012417.html [https://perma.cc/5CZ8-V6FP].

63. 29 U.S.C. §§ 151–169.

64. *Id.* § 203; *see* Decision and Direction of Election, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024); Joe Reedy, *Testimony in USC Case Before Labor Relations Board Administrative Judge Could Be Wrapping Up*, ASSOCIATED PRESS (Apr. 15, 2024), https://apnews.com/article/usc-ncaa-nlrb-b261dd0164b4bd17e00e4c7da5ca3f98 [https://perma.cc/Z8LH-RYLS].

65. *See NCAA Finances*, *supra* note 35.

66. 108 F.4th 163 (3d Cir. 2024).

67. *See* Complaint, Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-cv-05230 (E.D. Pa. Nov. 6, 2019).

68. *Johnson*, 108 F.4th at 167.

69. *Id.* at 181–82.

70. *Id.* at 182.

71. *See id.*

unionize.[72] The College appealed the decision to unionize to the National Labor Relations Board (NLRB or the "Board") and was later joined by the NCAA in support of Dartmouth's opposition.[73] In August of 2024, the union representing the men's basketball players filed an unfair labor practices complaint against Dartmouth over the College's refusal to bargain with the athletes.[74] Across the country in California, testimony wrapped up in April 2024 over the allegations that the University of Southern California (USC) engaged in unfair labor practices by misclassifying football and basketball players as amateur athletes as opposed to employees.[75] The outcome of the 2024 presidential election, however, led the backers of the NLRB petitions for the recognition of Dartmouth and USC to become employees to withdraw the petitions.[76] It is expected that similar efforts involving the recognition of public university athletes as employees could emerge.[77] Although the NCAA may manage a small reprieve, if it is able to settle the tripartite of antitrust litigation under the *House*, *Hubbard*, and *Carter* captions, the organization continues to face pressure to recognize at least some athletes as employees.[78]

D. The Inevitable Future

It is inevitable that at some point in the future, the NCAA will be tasked with paying the debts it has accrued for a century of classifying athletes as amateurs, in the name of depriving them of earnings. The future of the NCAA, or its successor as the governing body of collegiate sports, will at some point include athletes who share in the revenue that they generate.[79] It

72. Amanda Christovich, *NCAA Backs Dartmouth Against Unionizing Men's Basketball Players*, FRONT OFF. SPORTS (June 21, 2024), https://frontofficesports.com/ncaa-dartmouth-amicus-brief-mens-basketball-union/ [https://perma.cc/23EP-S86Z].

73. *See id.*

74. Jimmy Golen, *Dartmouth Basketball Players Union Accuses School of Unfair Labor Practices over Refusal to Bargain*, ASSOCIATED PRESS (Aug. 21, 2024), https://apnews.com/article/dartmouth-union-basketball-ncaa-759258a2b8e5e942de341c11853ba7d9 [https://perma.cc/BSA6-P8Y9].

75. *See* Amanda Christovich, *Hearings Have Concluded in the Pivotal USC Athlete Employment Case. What's Next?*, FRONT OFF. SPORTS (Apr. 19, 2024, 4:10 PM), https://frontofficesports.com/hearings-have-concluded-in-the-pivotal-usc-athlete-employment-case-whats-next/ [https://perma.cc/T8RE-NC3N].

76. *See* Michael McCann, *Fight to Recognize College Athletes as Employees Lives On*, SPORTICO (Jan. 13, 2025, 5:55 AM), https://www.sportico.com/law/analysis/2025/college-athlete-employee-legal-fight-1234823597/ [https://perma.cc/M7JP-P38Z].

77. *Id.*

78. It is worthwhile to note that in a previous article we articulated that it likely makes sense to identify which athletes may be employees by examining three factors: whether the team in question generates "meaningful revenues"; whether the university uses the image of a particular team to generate specific goodwill for the institution; and, by examining windfall coaching salaries, where certain coaches earn outsized salaries in comparison to other faculty and employees on campus. *See* Edelman et al., *supra* note 9, at 47–50.

79. The *House* settlement already provides for revenue sharing. *See* Steve Berkowitz, *Multiple Parties File Legal Oppositions to NCAA Revenue Settlement Case*, USA TODAY (Aug. 9, 2024, 10:20 PM), https://www.usatoday.com/story/sports/college/2024/08/09/ncaa-revenue-sharing-settlement-legal-opposition/74745351007/ [https://perma.cc/MD4F-22PV].

has become impossible to ignore the role that major college sports play in the marketing of institutions of higher education.[80] As Tulane University Law School sports law professor Gabe Feldman observed, the NCAA is much like a game of Jenga.[81] The organization is slowly having block after block removed, as regulation after regulation is defeated in court; the question is how long can the NCAA continue to fight what is inevitable.[82] There is near universal agreement among experts that at some point in the future at least some athletes on college campuses will be employees of those institutions.[83] The remainder of this Symposium Article examines what that relationship will likely look like.

II. LEGAL UNDERPINNINGS OF EMPLOYMENT STATUS AND ITS VIRTUES

Accepting the near certainty that some college athletes in the future will be declared to be employees,[84] the precise nature of this future employment relationship remains far from settled. Important questions remain about which college athletes meet the legal definition of "employees," as well as whether the mere fact that certain college athletes may constitute employees would per se entitle them to the right to unionize.

Moreover, even if it is determined that certain collegiate employee-athletes have the legal right to form a union, there are further questions about the appropriate bargaining unit for college athletes to negotiate over their terms of employment. This part looks broadly at some of these important questions. Part II.A begins by addressing the legal question of who is, and who is not, an employee. Part II.B explores the broad topics of unionization and collective bargaining. Finally, Part II.C delves into the challenge of determining appropriate bargaining units for collective bargaining purposes and, specifically, how the assessment of an appropriate unit is likely to relate directly to the opportunity set of college athletes.

A. What Is an Employee?

Employment status represents a distinct legal relationship between people who perform work and the individuals or entities that benefit economically

80. *See* Ted Mitchell, *Higher Education Must Clean Out Its 'Front Porch'*, WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/04/25/higher-education-must-clean-out-its-front-porch/ [https://perma.cc/F7AV-JSJC] (noting that "major revenue-producing sports of football and basketball[] ha[ve] often been called an institution's 'front porch'").

81. *See* Nicole Auerbach, *College Athletes Are Getting Closer to Becoming Employees. What Would Happen Next?*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/athletic/5313992/2024/03/04/college-athletes-employees-dartmouth/ [https://perma.cc/QM5N-VKE8].

82. *See id.*

83. *See id.*

84. *See, e.g.*, John Henry Vansant, Essay, *Standing Shoulder Pad to Shoulder Pad: Collective Bargaining in College Athletes*, 110 VA. L. REV. ONLINE 89, 99 (2024) (explaining that "[b]ased on recently established case law for [college athletes,] the current [NLRB] will likely determine that the college athletes involved in the USC and Dartmouth cases statutorily qualify as 'employees'").

from this work. Distinct from volunteers, interns, and independent contractors, "employees," under at least one legal definition, include specifically those individuals who perform work for another, subject to the other's control.[85] In this vein, one may reasonably construe the employer-employee relationship as a special type of agency relationship.[86]

Before the nineteenth century, few workers in the United States would have met today's legal definition of "employees," as most people who performed work for others during that era were enslaved people, indentured servants, or individuals who completed tasks on fields or in small shops under either a guild model or an apprenticeship.[87] It was only in the nineteenth century, with the advent of mass manufacturing and entity organization, when a modern system featuring large conglomerates that mass hire workers under a hierarchical system of pay emerged.[88]

Since then, changing times and evolving forms of work have honed the set of individuals who perform work for others that receive the "employee" classification. Some of the types of workers that highlight the expansive definition of "employees" that the NLRB has adopted include orchestra performers who receive compensation in the form of honoraria and complimentary tickets,[89] college students who work as teaching and graduate

85. *See* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from* Northwestern University *and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1637 (2017); *see also* Decision and Direction of Election at 13, Northwestern Univ., 362 N.L.R.B. No. 167 (Mar. 26, 2014) (defining the term "employee," pertaining to the question of employment status of college athletes, as including any person "who performs services for another under a contract of hire, subject to the other's control or right of control, in return for payment"). The NLRA, meanwhile, provides what we have described in a previous article as "a particularly unhelpful definition." Edelman et al., *supra* note 9, at 16. Under the NLRA:

> The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Act . . . as amended from time to time, or by any other person who is not an employer as herein defined.
>
> 29 U.S.C. § 152(3) (2018).

86. *See generally* Memorandum from Jennifer Abruzzo, *supra* note 49, at 3 (explaining that "common-law agency rules" may be adopted for assessing the presence of an employer-employee relationship).

87. *See* MICHAEL D. YATES, WHY UNIONS MATTER 13–14 (2d ed. 1998).

88. *See id.*

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

assistants,[90] and, according to a growing amount of case law, at least certain college athletes.[91]

Obtaining the legal classification of "employee" carries with it a number of benefits: employees are paid wages and, depending on the nature of their employment, receive health care, workers' compensation insurance, vacation time, paid time off, childcare assistance, pension contributions, and support services.[92] Employees are also eligible for legal protections afforded by civil rights and other laws. For example, Title VII of the Civil Rights Act of 1964[93] prohibits discrimination of employees on the basis of race, sex, national origin, religion, and color, but does not protect independent contractors.[94] Similarly, state employment law protections are typically predicated on employment status.[95] Finally, although being an employee does not guarantee one the right to unionize under the NLRA, the absence of employee status would prevent one from enjoying this right.[96]

B. Employee Unionization and Collective Bargaining

Under the NLRA, private, nonmanagerial employees further enjoy yet one more important right: the right to join together to form unions that legally may pursue "concerted activities, for the purpose of collective bargaining or other mutual aid or protection."[97]

Although there is evidence of workers banding together to form organizations, guilds, or so-called unions in the United States that dates back to the colonial period,[98] the idea of the government providing special legal

90. *See* Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. 1080, 1081 (2016) (holding that it may be appropriate under the NLRB to extend coverage to students working as employees at a college).

91. *See, e.g.*, Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 180 (3d Cir. 2024) ("We therefore hold 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.'" (internal citations omitted)).

92. *See* Stephen Kim Park & Norman D. Bishara, *Climate Change and a Just Transition to the Future of Work*, 60 AM. BUS. L.J. 701, 741 (2023).

93. 42 U.S.C. §§ 2000e to 2000e-17.

94. *See* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 908 (2017).

95. Samantha M. Adams, *"Influencing" The Legislature: The Need for Legislation Targeting Online Sexual Harassment of Social Media Influencers*, 99 WASH. U. L. REV. 695, 712 (2020).

96. The NLRA refers specifically to employees. *See* National Labor Relations Act, ch. 372, § 2, 49 Stat. 449, 450–51 (1935) (codified as amended at 29 U.S.C. § 152).

97. National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452–53 (1935) (codified as amended at 29 U.S.C. § 157); *see also* Roberto L. Corrada, *College Athlete Unionization*, 11 TEX. A&M L. REV. 829, 845 (2024) (explaining that "[t]he NLRB has jurisdiction over most unionization and collective bargaining in United States commerce . . . [h]owever, its jurisdiction is largely confined to the private sector").

98. *See* YATES, *supra* note 87, at 14 (citing various such examples in the United States prior to the creation of statutory rights protecting union members and granting certain legal rights to unions); *see also* Edelman et al., *supra* note 9, at 37 ("While there is evidence of organized strikes by artisan traders as far back as the American colonial period, the first known

and statutory rights to certain groups of organized labor did not emerge until more than one century later. The idea of giving workers, as members of legally recognized unions, the right to replace their free-market labor negotiations with collective negotiations over their hours, wages, and working conditions emerged, in a meaningful part, out of legal changes to employment relations in Western Europe in the 1890s.[99] During that decade, financial trauma led union membership to skyrocket, as Social Democrats pushed for alternatives to traditional capitalist means for negotiating employment agreements.[100] According to Norwegian history Professor Odd Arne Westad in his seminal book *The Cold War: A World History*, Denmark, in 1899, became the first country in the world to institute a modern collective bargaining system when "the central board of trade unions . . . agreed to a system of annual negotiations over wages and working conditions with the employers' union."[101] The goal of the Danish system, as well other forms of collective bargaining that followed, was to help level the playing field between powerful employer groups and less powerful individual employees.[102] Denmark's system of collective bargaining thereafter provided the legal rudiments for the systems of collective bargaining that eventually spread throughout much of Western Europe and into the United States in the decades that followed.[103]

In the United States, the right for private, nonmanagerial employees to unionize and collectively bargain first took root in the NLRA (also known as the Wagner Act), which was passed by Congress in 1935.[104] Congress has since amended the Wagner Act with the Labor Management Relations Act of 1947[105] (also known as the Taft-Hartley Act) and through additional amendments in 1959 and 1972—all of which combine to form what is known today as the NLRA.[106] The NLRA, as interpreted today, allows private employees "the right to self-organize and engage in concerted activities"[107] without running the risk of being found in violation of federal antitrust law with respect to their internal, concerted, labor-related activities.[108]

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organized trade union was the Federal Society of Journeymen Cordwainers, which was formed by a collection of Philadelphia shoemakers in 1794.").

99. ODD ARNE WESTAD, THE COLD WAR 12–13 (2017). *See generally* Edelman, *supra* note 85, at 1630 (discussing the bargaining rights arising under U.S. federal labor law).

100. *See id.* at 13.

101. *Id.*

102. *Cf.* Edelman, *supra* note 85, at 1629 (explaining that the goal of the NLRA, which was later passed in the United States, was to give laborers the opportunity to deal on equal footing with their employer).

103. *See* WESTAD, *supra* note 99, at 13.

104. *See* Corrada, *supra* note 97, at 832.

105. 29 U.S.C. §§ 141–197.

106. *See* Corrada, *supra* note 97, at 832.

107. Edelman, *supra* note 85, at 1629 (internal citations and quotations omitted).

108. *See* Brady v. Nat'l Football League, 644 F.3d 661, 670 (8th Cir. 2011) (explaining that federal law disallows injunctions from being issued against labor disputes, even where the underlying conduct relates to agreements among employees in the context of union activity); *see also* USS-Posco Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, 31 F.3d 800, 805 (9th Cir. 1994) (explaining that "the Supreme Court examined the 'interlacing' Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a

Under the NLRA, the NLRB is the federal administrative agency that has jurisdiction over "private employers in the United States who meet a minimum threshold of commercial activity."[109] The NLRB consists of five members, including "a mix of Republicans and Democrats, appointed to staggered terms."[110] When a president is elected to office, their party gains majority control over the Board.[111] Consequently, NLRB policy is often heavily influenced by the views of the sitting president.[112]

Pursuant to the NLRA, the Board determines whether to grant jurisdiction over particular units of workers who seek to form unions.[113] Typically, "[s]ubstantial effect on commerce [serves as] the touchstone of labor board jurisdiction . . . ."[114] Where such jurisdiction is granted, employers garner "the affirmative duty to bargain collectively with their workers over the mandatory terms and conditions of bargaining—hours, wages, and working conditions."[115] In addition, where there exists an NLRB-recognized collective bargaining relationship, employers must bargain over disciplinary procedures, including the right to institute discipline.[116]

These principles, no doubt, represent a departure from the traditional free market principles that underlie much of the U.S. economic system; however, at the same time, they are consistent with other values that are well embedded in American jurisprudence. For example, one of the authors to this Symposium Article explained in an earlier work that "the values advanced by U.S. labor laws conflate with the broader values of the U.S. Civil Rights movement—equality, equity, and procedural fairness."[117] As such, it is perhaps not surprising that "[l]abor unions gained their greatest strength [in the United States] in the 1960s during the presidencies of John F. Kennedy and Lyndon B. Johnson,"[118] which was the exact same time period when the civil rights movement was undergoing its most formative stages of development.[119]

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statutory exemption to the antitrust laws . . . [s]o long as a union *acts in its self-interest and does not combine with non-labor groups*" (internal citations and quotations omitted)).

109. Corrada, *supra* note 97, at 832–33.

110. *Id.* at 833.

111. *See id.*

112. *See id.* (explaining that because the party of the elected president controls the majority of the seats on the NLRB, "[s]ince the early 1970s, the Board has spent some substantial amount of time reversing the precedents of the prior administration if that administration was of the opposite political persuasion").

113. *See* NLRB v. Action Automotive Inc., 469 U.S. 490, 494 (1985) (explaining that this authority is granted to the Board under Section 9(b) of the Act).

114. Corrada, *supra* note 97, at 838.

115. Edelman, *supra* note 85, at 1630.

116. *Id.*

117. *Id.*

118. Edelman et al., *supra* note 9, at 38.

119. Kyle K. Moore, *Labor Rights and Civil Rights*, ECON. POL'Y INST. (June 1, 2021, 12:57 PM), https://www.epi.org/blog/labor-rights-and-civil-rights-one-intertwined-struggle-for-all-workers/ [https://perma.cc/5ER2-DTEK].

C. Proper Bargaining Units

Under the NLRA, there are various types of bargaining units that employees may choose for purposes of pursuing collective bargaining.[120] These different types of units include single-employer bargaining units, multiemployer bargaining units, and joint-employer bargaining units.[121] Presuming that there is a "community of interest" among members of the proposed bargaining unit, employees typically have broad discretion in determining their preferred type of bargaining unit.[122] Indeed, "[t]he NLRB only requires that representation be sought in an 'appropriate' bargaining unit," and not necessarily in the most appropriate potential bargaining unit.[123] Thus, a general principle of employee choice pervades the federal labor bargaining system.

1. Single-Employer Bargaining Units

Single-employer bargaining units, which include a single company as the employer bargaining against that single company's employees, represent a common form of bargaining in the United States.[124] One reason for popularity of single-employer bargaining units is that the smaller size of these bargaining units typically necessitates less coordination among employees for initial organization.[125] Nevertheless, the tradeoff of needing to organize a smaller group is that, once organized, the employee unit often has fewer resources to devote to their cause.[126]

Historically, it has been rare to find single-employer bargaining units in industries involving workers that compete in team sports.[127] This is because although each professional sports team typically has a separate ownership group, there is a distinctly close business relationship between all of the teams in a sports league.[128] As early as 1978, the NLRB issued an opinion

120. SWACCA COLLECTIVE BARGAINING GUIDEBOOK 2–3 (2019), https://www.wwcca.org/files/Collective%20Bargaining%20Guidebook%20(2019)%20April%207%20Rev(2).pdf [https://perma.cc/D3M5-BUXR]. *See generally* E. R. Livernash, *The Relation of Power to the Structure and Process of Collective Bargaining*, 6 J.L. & ECON. 10, 10–13 (1963) (describing single-employer and multiemployer as the two predominant forms of bargaining units).

121. *See id.*

122. NLRB v. Action Auto. Inc., 469 U.S. 490, 494 (1985) (explaining that the Board's role in ensuring that a proposed bargaining unit is cohesive and relatively free from conflicts of interest).

123. *See* Corrada, *supra* note 97, at 853.

124. *Cf.* Brown v. Pro Football, Inc., 518 U.S. 231, 240 (1996) (noting that multiemployer bargaining units account for "more than 40% of major collective-bargaining agreements" in the United States).

125. Corrada, *supra* note 97, at 853.

126. *See id.*

127. *See generally* Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1664 (1997) (explaining that "[a]ll major professional team sports clubs have joined with other league clubs to bargain in multiemployer units with unions representing the athletes that they employ").

128. *See* Gabriel Feldman, *Antitrust Law Versus Labor Law in Professional Sports: Balancing the Scales after* Brady v. NFL *and* Anthony v. NBA, 45 U.C. DAVIS L. REV. 1221,

that various different types of bargaining units may be appropriate in the professional sports setting.[129] In the context of intercollegiate sports, single-employer bargaining units may include units in which athlete-workers at one college seek to bargain specifically with their college over hours, wages, and other generalized working conditions.[130] Such bargaining units would be properly defined as *single-employer bargaining units* irrespective of whether the unionizing athletes come from one sports team, or multiple sports teams, within the same college.

In 2015, the Northwestern University football team became the first college sports team to attempt to form a union when they proposed a single-employer bargaining unit to negotiate collectively against Northwestern University over their hours, wages, and working conditions.[131] Although a regional director of the NLRB concluded that the grant-in-aid college football players at Northwestern University constituted employees and thus were permitted to vote to form a union for collective bargaining purposes, on appeal, the five members of the NLRB unanimously reversed and declined to assert jurisdiction over the proposed bargaining unit.[132] Using opaque reasoning,[133] the NLRB held that asserting jurisdiction over the Northwestern University football players "would not promote stability in labor relations."[134] Further, using veiled language and several unfortunate platitudes, the members of the Board described the Northwestern University football players' effort to unionize as a single-employer bargaining unit as "novel and unique," even though the Board had previously recognized and asserted jurisdiction over single-employer bargaining units consisting of university graduate assistants and teaching assistants.[135]

To many, the Board's decision in *Northwestern University* was puzzling, as it called into doubt single-employer bargaining units in the college sports

1233–34 (2012) (explaining that "[p]rofessional sports teams form such coordinated [multiemployer bargaining] units because of the long-recognized interdependence of teams and the need for these teams to reach agreements for the league to exist").

129. *See* N. Am. Soccer League, 236 N.L.R.B. 1317, 1321 (1978), *enforced sub nom.* N. Am. Soccer League v. NLRB, 613 F.2d 1379 (5th Cir. 1980) (explaining that although the provided facts "might support a finding that single-club units may be appropriate, [the facts] do not establish that such units are alone appropriate or that the petitioned-for overall unit is inappropriate").

130. For two examples of such proposed bargaining units, see Decision and Direction of Election, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024) (proposed bargaining unit of men's college basketball players at Dartmouth College seeking to bargain against their college); Northwestern Univ., 362 N.L.R.B. 167 (2015) (proposed bargaining unit of Northwestern University grant-in-aid football players seeking to bargain against Northwestern University).

131. *See* Darren Heitner, *Northwestern Football Union Vote Is a Winner, Even If It Fails*, FORBES (Apr. 24, 2014), https://www.forbes.com/sites/darrenheitner/2014/04/24/northwestern-football-union-vote-is-a-winner-even-if-it-fails/ [https://perma.cc/N5GM-EATC].

132. Northwestern Univ., 362 N.L.R.B. 167, 1355–56 (2015).

133. *See* Corrada, *supra* note 97, at 838 (stating that the NLRB board members, in *Northwestern*, failed to explain "exactly why" they believed asserting jurisdiction would destabilize the bargaining unit).

134. *Northwestern*, 362 N.L.R.B. at 1352.

135. *Id.*

context. According to at least one commentator who had previously worked at the NLRB, it seemed as if the Board, in rendering its *Northwestern* decision, "blinked under some very bright lights."[136] Meanwhile, Professor Roberto Corrada, one of the nation's leading scholars in labor law, called the decision "surprising," especially in terms of it being unanimous.[137] He also questioned how, given the finding of a substantial effect on commerce, the Board even had discretion over the matter.[138] Thus, one can strongly argue that this decision marked a nadir for the NLRB under former President Barack Obama.

Nevertheless, "the [*Northwestern*] decision not to assert jurisdiction in that one case [did] not preclude reconsideration of the issue in a future case."[139] More recently, the prevailing view toward the permissibility of single-employer bargaining units in college sports seems to be softening. Notably, this past year, the Dartmouth College men's varsity basketball team proposed their recognition as a single-employer bargaining unit for purposes of engaging collective bargaining.[140] The school has a tradition of negotiating as a single-employer bargaining unit with unionized employees who are undergraduate students. For example, Dartmouth undergraduates who work in Dartmouth dining services have unionized, and they bargain terms of employment, including wages, with the school.[141] One of the basketball players, Cade Haskins, is a member of the dining services' union and is separately paid to work at another single-employer, the alumni front desk for Dartmouth.[142]

On February 5, 2024, Region 1 of the NLRB issued an opinion asserting jurisdiction over a bargaining unit consisting of the Dartmouth College men's basketball team and directing an election in the petitioned-for unit.[143] Laura A. Sacks, the Regional Director of Region 1 of the NLRB, explained that

136. Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis [https://perma.cc/FL7T-49V4].

137. *See* Corrada, *supra* note 97, at 838 (noting that three members of the Board were Democratic appointees and seeming to imply the belief these members would have voted favorably).

138. *See id.*

139. Memorandum from Jennifer Abruzzo, *supra* note 49, at 4 n.11 (citing *Northwestern*, 362 N.L.R.B. at 1355 n.28); *see also id.* at 21 (explaining that the ruling in *Northwestern* is not binding precedent on Dartmouth College); *see also* Edelman et al., *supra* note 9, at 50.

140. *See* Decision and Direction of Election at 1, Trs. of Dartmouth Coll., 362 N.L.R.B. No. 167 (Feb. 5, 2024) ("Service Employees International Union, Local 560 (the Petitioner or the Union) seeks to represent a bargaining unit comprised of the approximately fifteen students enrolled at Dartmouth who comprise the men's varsity basketball team.").

141. *See* Michael McCann, *Dartmouth Dining Hall Losses Reheat Basketball Union Push*, SPORTICO (Feb. 20, 2024), https://www.sportico.com/law/analysis/2024/dartmouth-dining-services-basketball-employees-1234767391/ [https://perma.cc/CN94-5ZC8].

142. Michael McCann, *Dartmouth Men's Basketball Players Certified as Union*, SPORTICO (Mar. 14, 2024, 2:03 PM), https://www.sportico.com/law/analysis/2024/dartmouth-mens-basketball-union-certified-1234770843/ [https://perma.cc/WS84-2LKJ].

143. *See* Decision and Direction of Election at 2, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024).

because she found "Dartmouth has the right to control the work performed by the men's varsity baseball team, and because the players perform that work in exchange for compensation, the petitioned-for basketball players are employees within the meaning of the [NLRA]."[144] She further explained, in contrast to the conclusion of the Board in *Northwestern*, that "asserting jurisdiction [over a single-employer bargaining unit of college athletes] would not create instability in labor relations."[145] She reached this conclusion, at least in part, because Dartmouth College competed in intercollegiate sports in the Ivy League, which, "unlike the Big Ten Conference, consists only of private universities," and thus, asserting jurisdiction over the men's basketball players at Dartmouth College would not create concerns about "conflicting state labor laws" potentially applying to some schools within the conference if their athletes similarly sought to unionize.[146]

In a 2017 *Cardozo Law Review* article, one of us suggested three benefits of college athletes pursuing recognition as single-employer bargaining units.[147] These benefits included: (1) college athlete organizers' experience in attempting to unionize athletes at individual colleges; (2) the need for less coordination as compared to attempting to unionize a broader bargaining unit; and (3) the opportunity to unionize, at least arguably, without implicating or limiting the antitrust rights of the unionized college athletes.[148] Nevertheless, the NLRB's failure to assert jurisdiction over Northwestern University as a single-employer bargaining unit leaves some doubt as to whether the Board would approve of single-employer bargaining in college sports.[149] In addition, there also may be certain unique advantages related to pursuing bargaining through multiemployer or joint-employer units, rather than single-employer bargaining units.

2. Multiemployer Bargaining Units

By contrast to single-employer bargaining units, multiemployer bargaining units include more than one entity as the employer bargaining in a single unit against more than one of the entity's employees.[150] Additionally, "[n]o employee in a unit described as multiemployer shares an employer in common with all employees."[151]

144. *Id.*
145. *Id.*
146. *Id.* at 22.
147. *See* Edelman, *supra* note 85, at 1643.
148. *See id.*
149. *Id.*
150. *See* Robert W. Tollen, *When Is a Multiemployer Bargaining Unit a "Multiemployer Bargaining Unit"?*, 17 LAB. LAW. 183, 185–86 (2001) (describing multiemployer bargaining units).
151. *Id.* at 191.

Although somewhat less popular than single-employer bargaining units,[152] multiemployer units are most desirable to workers who work in industries "characterized by numerous employers of small work forces," and in industries "characterized by workers who changed employers from day-to-day or week-to-week."[153] For example, multiemployer bargaining units are regularly "used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate."[154] They are also the dominant form of bargaining unit in commercial sports—including Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League.[155]

Unlike single-employer bargaining units, multiemployer bargaining units are "consensual in nature," meaning that multiemployer bargaining "can take place only with the consent of all the participating employers and of the union."[156] In a 1983 law review article written by two attorneys in the Pittsburgh, Pennsylvania, office of Reed Smith LLP, it is noted nonetheless that multiemployer bargaining units can still "receive[] official recognition only backhandedly, through the NLRB's refusal to permit employers or unions to withdraw from an established multi-employer bargaining structure once negotiations have begun."[157]

To the extent that college athletes are legally deemed to be employees with the right to unionize, it would not be surprising to find certain groups of college athletes and their employers consent to a multiemployer bargaining arrangement. For example, in a conference with all private colleges, such as the Ivy League, college athletes may reasonably attempt to propose a bargaining unit in which all of the college athletes in a given sport at that school would bargain collectively against all of their employer colleges. Indeed, given that all colleges in an athletic conference would be part of the underlying bargaining unit, it would seem to immediately alleviate any theoretical concerns about asserting jurisdiction that the Board had raised in *Northwestern*.[158]

3. Joint-Employer Bargaining Units

Finally, joint-employer bargaining units are bargaining units in which multiple different entities collectively control the work of the same

152. *See* Brown v. Pro Football Inc., 518 U.S. 231, 240 (1996) (noting that multiemployer bargaining units account for "more than 40% of major collective-bargaining agreements" in the United States).

153. Tollen, *supra* note 150, at 185.

154. *Brown*, 518 U.S. at 240.

155. *See id.* (noting the use of multiemployer bargaining "in professional sports").

156. Leonard L. Scheinholtz & Kenneth C. Kettering, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347, 356 (1983); *see also Tollen*, *supra* note 150, at 187 (explaining that "today there is an unchallenged consensus that the NLRB lacks authority to decide that a multiemployer bargaining unit is appropriate, absent the individual employers' consents").

157. Scheinholtz & Kettering, *supra* note 156, at 356.

158. *See* Edelman, *supra* note 85, at 1648.

employees.[159] Although regularly confounded with, and sometimes overlapping with, multiemployer bargaining units, joint-employer bargaining units, as a matter of federal labor law, can be something meaningfully different.[160] Indeed, under federal labor law, an employee who is part of a multiemployer bargaining unit at any given moment may have only one employer, whereas an employee who is part of a joint-employer bargaining unit will always have at least two employers who simultaneously benefit from the employee's work.[161]

Unlike with the recognition of multiemployer bargaining units, employers do not typically have the choice about whether to recognize joint-employer bargaining units. In the world of organized sports, the U.S. Court of Appeals for the Fifth Circuit, several decades ago, had upheld the finding of a joint-employer relationship including both an individual professional soccer club and the collective entity, where the league entity exercised control over aspects of the individual club labor relations pertaining to areas including "selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline."[162] This decision may help to support the conclusion in intercollegiate athletics that an athlete's college, intercollegiate athletic conference, and arguably perhaps even the national oversight body (the NCAA) should all "be at the table in collective bargaining."[163]

As recently as 2017, one of the authors of this Symposium Article had referred to the argument in favor of joint-employer bargaining units of college athletes as being "a novel argument, with little to no precedent directly on point."[164] However, in 2021, the general counsel of the NLRB, in a memorandum about the misclassification of college athletes, included a footnote stating that "it may be appropriate for the Board to assert jurisdiction over the NCAA and an athletic conference and to find joint employer status with certain member institutions, even if some of the member schools are state institutions."[165] This view, which coincided with the Board's broader view of joint-employer status under President Joseph R. Biden Jr.'s administration, gives greater promise to the possibility of the Board ultimately adopting a joint-employer status over college athletes. As such, in our 2023 *Illinois Law Review* article, "The Collegiate Employee-Athlete," we explain that athletes performing services for their schools, be they private

159. *See generally* N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1382 (5th Cir. 1980) (explaining that "[t]he existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other").

160. *See* Tollen, *supra* note 150, at 190 ("A unit of joint employers is not referred to as a multiemployer bargaining unit, although it literally is.").

161. *See* Corrada, *supra* note 97, at 851.

162. *N. Am. Soccer League*, 613 F.2d at 1382.

163. Corrada, *supra* note 97, at 835; *see also id.* at 852 (attempting to justify the inclusion of the NCAA in a joint bargaining relationship based on the control the national trade association collective exercises over college athletes as per the national student-athlete agreement and NCAA manual).

164. Edelman, *supra* note 85, at 1650.

165. Memorandum from Jennifer Abruzzo, *supra* note 49, at 9 n.34.

or public, are subject to the control of their athletic conference and the NCAA, both of which are private entities.[166]

Nevertheless, as authors of this Symposium Article, we acknowledge that the change in political party leadership in the United States that was brought about by the 2024 election may lead to new leadership of the NLRB revisiting, and once again attempting to scale back, the applicable scope of joint employment status.[167] Thus, although a joint-employer bargaining unit would seem to bring a simple and reasonable solution to many of the more good-faith concerns about the organizing of college athletes, only time will tell as to whether this particular approach will avail itself to college athletes and their prospective union organizers.

III. MYTH-BUSTING EMPLOYMENT STATUS

Irrespective of which of these well-established roads to unionization some college athletes choose to pursue (or, even if they pursue no union path at all), there are still many working within the college sports industry that purport the changing legal status of college athletes will amount to doom and gloom for the industry. Indeed, for decades, it has been suggested that if college athletes are deemed employees, it will spell the demise of college sports.[168]

To be clear: employment status, like other changes the NCAA has claimed as existential threats before—including broadcasting multiple football games on Saturdays[169] and allowing athletes to monetize their publicity rights[170]—

166. *See* Edelman et al., *supra* note 9, at 50.

167. Indeed, this situation may mirror prior situations where a change in presidential administration brings changes to the positionality of the NLRB. For example, the Board has waffled over the appropriate means for determining whether a worker is an independent contractor, adopting a standard in 2014, only to adopt a new standard in 2019, only to return to essentially the 2014 standard in 2023. *See Board Modifies Independent Contractor Standard Under National Labor Relations Act*, NLRB (June 13, 2023), https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor [https://perma.cc/8LPK-D6W6]. Of potential relevance to college athletes, the status of graduate teaching assistants under the NLRA has been a subject that the NLRB flipped its position on several times over the years. *See generally*, Leslie Crudele, Note, *Graduate Student Employees or Employee Graduate Students?: The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education*, 10 WM. & MARY BUS. L. REV. 739, 759–65 (2019) (describing the evolution of the Board's position with respect to graduate student teaching assistants).

168. In support of the argument that college athletes should not be deemed employees, is the argument that athletes already receive benefits of value, and they are therefore compensated for their labor. *See, e.g.*, Patrick Ferlise, *College Football: 5 Reasons Why Student-Athletes Should Not Be Paid*, BLEACHER REP. (Dec. 7, 2010), https://bleacherreport.com/articles/499581-college-football-should-student-athletes-be-paid-to-play [https://perma.cc/F8GJ-S7ME].

169. The NCAA argued in the *Board of Regents* case that it restricted the number of games that could be broadcast in order to ensure that physical attendance at games remains high. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 92–93 (1984).

170. Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles that Remain*, ESPN (June 29, 2022, 7:00 AM), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/G9YQ-SQQJ].

is unlikely to spell the end of college athletics.[171] This part examines some of the most commonly cited questions for why recognizing college athletes as employees could be detrimental to college athletics and seeks to explain why these concerns are, in many cases, substantially overstated.

A. Who Is an Employee, and Who Is Not?

One of the major obstacles to recognition of college athletes as employees is that it defies a long-standing perception of those athletes as students who play a sport.[172] Tradition is a powerful force in shaping views. Social psychologists have found people are susceptible to a "status quo bias," where they tend to prefer to maintain a current state of affairs and are resistant to change.[173] The idea of college students who play a sport being employees runs counter to a practice that began nearly two centuries ago, with college students at Harvard University and Yale University competing against one another in a boat race.[174] The NCAA has capitalized on the perception of college athletes as nonemployees by promoting amateurism—the conception that consumers enjoy college sports because the athletes are students who cannot be paid and are thus qualitatively different from professional athletes.[175]

Until recently, amateurism had been embraced by courts, lawmakers, regulators, and other powerful interests as emblematic of a truism: college athletes are not employees because they are students. In *Berger v. National Collegiate Athletic Ass'n*[176] and *Dawson v. National Collegiate Athletic Ass'n*,[177] the U.S. Courts of Appeals for the Seventh and Ninth Circuits, respectively, rejected legal arguments that college players are employees.[178] Judges in both cases stressed the "long tradition of amateurism in college sports," and the "entirely voluntary" status of college athletes as key in concluding the athletes are not employees.[179] Similarly, the U.S. Department of Labor's Field Operations Handbook states that "[u]niversity or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the

171. *See generally* Michael McCann, *College Athletes as Employees: Answering 25 Key Questions*, SPORTICO (Dec. 19, 2023), https://www.sportico.com/feature/college-athletes-employees-complete-primer-1234758491/ [https://perma.cc/Y4AZ-66P7] (answering some of the most common questions about a potential change to the status of college athletes to employees).

172. *See* Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIA. L. REV. 65, 66 (2014).

173. Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1497–98 (2006).

174. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2148 (2021).

175. *See* Michael A. McCann, *New Amateurism*, 11 TEX. A&M L. REV. 869, 870 (2024).

176. 843 F.3d 285 (7th Cir. 2016).

177. 250 F. Supp. 3d 401 (N.D. Cal. 2017), *aff'd*, 932 F.3d 905 (9th Cir. 2019).

178. *See Berger*, 843 F.3d at 292; *Dawson*, 250 F. Supp. at 403, 407–08.

179. Edelman et al., *supra* note 9, at 22–24.

[NLRA]"[180] and that participation in "intramural and interscholastic athletics" should not be understood as "work" in a legal sense.[181] Others worry about line drawing and a purported lack of limiting principle; if college athletes are employees, what about cheerleaders, band members, students in the drama club, and so on.[182]

These apprehensions are misplaced or, worse, veneers for denying legal rights. For starters, colleges have a long history of employing their undergraduate students through work-study programs.[183] Recently, the country has seen many undergraduate student workers unionize and bargain terms of employment with their school/employer.[184] These workers are recognized as employees in library, cafe, and other campus occupations where it is clear they are working in a job rather than performing an academic activity.[185] Some are also employed in occupations where the school loses money, such as Dartmouth College's dining services which has operated at a loss for several years.[186] Keep that in mind when critics of college athletes as employees suggest their schools reporting losses on athletics means the players are not employees when, in reality, the profitability of an employer has no bearing on whether the workers are employees.[187]

The fact that college athletes have historically not been recognized as employees does not mean that history is on the right side of the law. As discussed in this Symposium Article as well as in our other articles, particularly "The Collegiate Employee-Athlete," whether college athletes are employees is a question that weighs whether there is an exchange, level of control, and other factors.[188] It is a legal question, not a policy one. It is also not answered by historical precedent.

B. Title IX Questions

There has also long been a perception that Title IX of the Education Amendments of 1972[189] ("Title IX") is a barrier to recognizing college

180. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK § 10b24(a) (2024).

181. *Id.* § 10b03(e).

182. *See* Michael P. Cianfichi, *Varsity Blues: Student Athlete Unionization Is the Wrong Way Forward to Reform Collegiate Athletics*, 74 MD. L. REV. 583, 604–05 (2017).

183. Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269, 337 (2006).

184. *See* Cam E. Kettles, *'A Real Shift': New Harvard Student Union Forms amid National Wave of Undergrad Unionization*, HARV. CRIMSON (Oct. 27, 2023), https://www.thecrimson.com/article/2023/10/27/undergrad-workers-unionize-feature/ [https://perma.cc/5EDA-8RLZ].

185. *See id.*

186. McCann, *supra* note 141.

187. *See* Decision and Direction of Election at 18, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024) (The regional director noted "the profitability of any given business does not affect the employee status of the individuals who perform work for that business.").

188. *See generally* Edelman et al., *supra* note 9, at 15–28.

189. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of the U.S. Code); 20 U.S.C. §§ 1681–1688.

athletes as employees, as proponents of this view believe that the economic costs of ensuring equity would effectively render operation of most athletic departments unfeasible.[190] The recognition of college athletes as employees has triggered concerns that employment status would cause schools to violate Title IX, a federal law that guarantees that male and female students are treated equally and fairly.[191] The genesis of the concern is that colleges would be inclined to pay football and men's basketball players higher salaries than other athletes because those two sports tend to generate the most revenue.[192] One recent study found that football and men's basketball generate six times the combined revenue of all other sports.[193] This trend is apparent with college coaches' salaries, which tend to be higher for football and men's basketball than other sports on account of these sports' higher revenue generation and greater publicity.[194] Universities, of course, have a long tradition of paying faculty, staff, and employees at different rates, and even paying student government leaders varying rates.[195]

The potential applicability of Title IX to how colleges pay employees who are athletes is uncertain.[196] Title IX does not explicitly require equal financial terms beyond athletic scholarships.[197] It also has not been interpreted to require equal pay for other employees in athletic departments, such as coaches and staff.[198] Although the athlete-employees would be students—a prerequisite to employment as it is for other student jobs—their pay would presumably reflect their athletic contributions and market value whereas their scholarship would continue to fall under the purview of Title

190. The NCAA has frequently used Title IX as a means to avoid engaging in change. *See generally* Sam C. Ehrlich, *The Inherent Bad Faith of the NCAA's Use of Title IX to Shield Its Illegal Business Practices*, 25 GEO. J. GENDER & L. 39, 61–68 (2023) (describing the NCAA's aggressive historical use of Title IX to resist reform).

191. 20 U.S.C. § 1681(a).

192. Josh Lens, *Terminating College Head Coaches' Employment with Cause for NCAA Rules Infractions*, 67 VILL. L. REV. 35, 46 n.61 (2022).

193. Sachin Waikar, *Big-Time College Athletes Don't Get Paid. Here's How This Amplifies Racial Inequities*, KELLOGGINSIGHT (Feb. 4, 2021), https://insight.kellogg.northwestern.edu/article/college-athletes-dont-get-paid-racial-inequities [https://perma.cc/MVN9-HZGY].

194. Ryan Handel, *Collegiate Coaches of Men's Sports Often Highest Paid*, CONN. HEALTH I-TEAM (Sept. 10, 2016), https://c-hit.org/2016/09/10/collegiate-coaches-of-mens-sports-often-highest-paid/ [https://perma.cc/KH66-Y28Y].

195. *See* Julia Westhoff, *Student Government Salaries Vary Among Universities*, BADGER HERALD (May 8, 2002), https://badgerherald.com/news/2002/05/09/student-government-sa/ [https://perma.cc/4GYD-69FA].

196. *Cf.* Vansant, *supra* note 84, at 106 (stating that arguments purporting conflicts between college athlete unionization and Title IX "fail to recognize that the NLRB does not . . . require parties to agree to specific collective bargaining terms").

197. Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, FORBES (Feb. 4, 2014, 9:30 AM), https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/?sh=71aee53c1bde [https://perma.cc/RC82-NS2T].

198. *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1321–22 (9th Cir. 1994) (holding that a school could pay a men's head basketball coach more than a women's head basketball coach because of different job responsibilities and qualifications).

IX. If the athlete's joint employer is their conference and/or the NCAA, neither would be subject to Title IX since neither receives federal funds.[199]

The Equal Pay Act of 1963[200] (the "Act"), a federal law that prohibits sex discrimination in paying wages for equal work, seems more likely to apply if male and female athletes who play the same sport are paid at considerably different levels.[201] The Act has been amended to recognize affirmative defenses that include merit, seniority, and factors other than sex.[202] A school might argue different pay is permissible given that two teams playing the same sport could have disparate responsibilities and generate varying levels of revenue, attention, and other value metrics for a school-employer.[203]

C. Workers' Compensation Law

Workers' compensation is the legal instrument for ensuring that employees who are injured or who become ill on the job automatically receive partial income replacement and payment of medical expenses.[204] The overarching principle of workers' compensation is that compensation is paid to employees on a no-fault basis, meaning employers must pay the employee when they are injured on the job, regardless of where fault or blame for the injury ought to lay.[205] Employees benefit from this system in that they are paid when they are hurt, whereas employers benefit in that workers' compensation is typically an exclusive remedy.[206] Most states, some of which provide insurance subsidies, obligate employers to carry workers' compensation insurance.[207] Universities are not exempted from these requirements, and courts have found that they must pay workers' compensation for student employees and, in some instances, unpaid student

199. Tan T. Boston, *NIL Data Transparency*, 83 LA. L. REV. 905, 929 n.151 (2023); Claire Kelly, *Title IX and the Evolution of College Athletics with Ann-Marie Guglieri*, YALE SCH. MGMT. (Oct. 15, 2024), https://som.yale.edu/story/2024/title-ix-and-evolution-college-athletics-ann-marie-guglieri [https://perma.cc/AV3H-ETEL].

200. 29 U.S.C. § 206(d).

201. *See id.* § 206(d)(1).

202. *See* 42 U.S.C. § 2000e-2(h); *see also* Sangeeta Shastry Kleinmann, *A New Frontier: Applying Evolving National Pay Equity Trends to Kansas's Statute*, 65 U. KAN. L. REV. 835, 842 (2017) (discussing legislative evolution of the Equal Pay Act).

203. Neal Newman, *Let's Get Serious—the Clear Case for Compensating the Student Athlete—by the Numbers: A University of Michigan Athletic Program Case Study*, 51 N.M. L. REV. 37, 65 (2021).

204. John Dwight Ingram, *The Meaning Of "Arising Out Of" Employment in Illinois Workers' Compensation Law*, 29 J. MARSHALL L. REV. 153, 154 (1995).

205. Daniel Gandert & Esther Kim, *The NFL's Headache: Issues with California Workers' Compensation for Continuous Head Traumas in Former Professional Football Players*, 45 U. TOL. L. REV. 57, 76–77 (2013).

206. *Id.* at 77.

207. Alexia Brunet Marks, *Essential but Ignored: Covid-19 Litigation and the Meatpacking Industry*, 14 NE. U. L. REV. 47, 68 (2022); *see also* Rachel M. Janutis, *The New Industrial Accident Crisis: Compensating Workers for Injuries in the Office*, 42 LOY. L.A. L. REV. 25, 32 (2008) (discussing states providing workers' compensation insurance).

interns.[208] Professional sports teams, including National Football League teams, are generally obligated to comply with workers' compensation requirements found within state laws.[209]

The origin of college athletes as employees began with workers' compensation litigation. In 1950, University of Denver football player Ernest Nemeth sustained an injury during a practice.[210] Afterward, he filed a workers' compensation claim, which the university disputed on the grounds Nemeth was a student, not an employee.[211] In ruling for Nemeth, Justice Francis J. Knauss dismissed the notion that a student cannot simultaneously be an employee whose work is not within the orbit of a college education. "A student employed by the University," Justice Knauss wrote, "to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the [Colorado] Workmen's Compensation Act is concerned."[212]

The NCAA responded to the development by crafting the "student-athlete" moniker, which played a role in convincing courts that the athletes are students and thus ineligible for workers' compensation.[213] This brazen act of internal regulatory recategorization marked one of the first recorded cases of an industry adopting certain verbiage in an effort to secure more favorable legal treatment.[214]

Nevertheless, the myth of the "student-athlete" who is exempted from worker's compensation law, as well as other federal protections, is beginning to be struck down, not only by the increasingly critical eye of law review articles and mainstream media publications,[215] but also by the NLRB itself.[216] Most notably, on September 29, 2021, Jennifer A. Abruzzo, then-general counsel of the NLRB, issued a public memorandum to all regional directors, officers-in-charge, and resident directors of the NLRB, taking the position that "misclassifying [college athletes who constitute employees] as mere student-athletes," and leading them to believe that they

208. *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 252–53 (2012) (discussing court rulings involving unpaid student interns and workers' compensation laws).

209. Gabe Feldman, *Closing the Floodgates: The Battle over Workers' Compensation Rights in California*, 8 FIU L. REV. 107, 109–10 (2012).

210. Michael McCann, *College Athlete Pay Could Trigger Workers' Compensation Coverage*, SPORTICO (June 17, 2024), https://www.sportico.com/law/analysis/2024/college-athlete-pay-workers-compensation-1234784341/ [https://perma.cc/Y8T9-4LA6].

211. *Id.*

212. Univ. of Denver v. Nemeth, 257 P.2d 423, 426 (Colo. 1953).

213. *See* Edelman et al., *supra* note 9, at 10–12.

214. *See generally* John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 115–16 (2020) (discussing the practice of "[r]egulatory arbitrage" as "tak[ing] advantage of generally applicable laws that imperfectly cover all transaction types" and "undermin[ing] the spirit of the law [by] exploiting legal loopholes").

215. *See, e.g.*, Edelman et al., *supra* note 9, at 10–12; Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market*, 2012 WISC. L. REV. 1077, 1109–10.

216. *See, e.g.*, Memorandum from Jennifer Abruzzo, *supra* note 49, at 1.

do not have statutory protections [presumably, including the right to worker's compensation] is a violation of [the NLRA]."[217] Although a memorandum coming from the NLRB's general counsel is merely guidance and not legally binding, these views typically gain some traction within Board jurisprudence and have a reasonable opportunity to ultimately make their way into later decisions reached by federal court judges.[218] As such, this change in perception, at least at the NLRB general counsel level, is quite telling.

College athletes, as employees, would be entitled to workers' compensation benefits according to their employer's policy and applicable state law.[219] Workers' compensation benefits provided by state laws "vary dramatically" given variances among those laws.[220] The maximum weekly rate a worker can receive in one state can be three times higher than in another.[221] This disparity could prove meaningful since colleges in states with higher workers' compensation costs for employers will be poised to absorb a greater share of costs with college athletes as employees.

D. Immigration

The employment of college athletes will spark compliance issues for athletes and their school-employers, but those issues could be mitigated by collective bargaining and contracting. International college athletes comprise about 12 percent of college athletes and typically enter the United States through an F visa.[222] These athletes can work up to twenty hours per week on campus while school is in session and longer hours when school is out of session.[223] Athletes could also work at off-campus locations that are deemed "educationally affiliated with the school."[224] These visa requirements apply regardless of whether the athlete is classified as an employee or independent contractor.[225] Failure to adhere to the requirements carries the risk of severe penalties, with athletes subject to potential removal

217. *Id.*

218. *See* Sheryl Jaffee Halpern & Matthew J. Feery, *NLRB General Counsel Takes Issue with "Stay-or-Pay" Employment Provisions*, NAT'L L. REV. (Oct. 22, 2024), https://natlawreview.com/article/nlrb-general-counsel-takes-issue-stay-or-pay-employment-provisions [https://perma.cc/3DWJ-ZKMK].

219. As an example of a school policy, the University of Texas at Austin notes that undergraduate students employed by the school are eligible for workers' compensation. *Student Employment Questions and Answers*, UNIV. TEX. AUSTIN HUM. RES. https://hr.utexas.edu/student/student-employment-qa [https://perma.cc/EWR4-UDD6] (last visited Mar. 7, 2025). This is a common policy for schools.

220. Jonathan Barry Forman, *The Income Tax Treatment of Social Welfare Benefits*, 26 U. MICH. J. L. REFORM 785, 793 (1993).

221. In Mississippi, the highest rate is $608.58 as of Jan. 1, 2024, whereas in Washington, the highest rate is $2228.45 as of Jan. 1, 2024. *DI 52150.045 Chart of States' Maximum Workers' Compensation (WC) Benefits*, SOC. SEC. ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0452150045 [https://perma.cc/Y3F6-QDNR] (last visited Mar. 7, 2025).

222. Victoria J. Haneman & David P. Weber, *The Abandonment of International College Athletes by NIL Policy*, 101 N.C.L. REV. 1599, 1602 (2023).

223. *See id.* at 1614.

224. *Id.* (quoting 8 C.F.R. § 214.2(f)(9)(i) (2022)).

225. *Id.* at 1621.

(deportation) and employers vulnerable to fines and other sanctions.[226] Although there have been no reported examples of international college athletes facing deportation over NIL deals, the same fundamental concern is at play: those athletes might violate their visa restrictions by the manner in which they generate earnings.[227]

These framework constraints present obvious worries for both international athletes and their schools, especially with respect to road games. An international athlete who "works" more than twenty hours per week during the semester could run afoul of their visa, as could their school.[228] Playing road games could also raise compliance issues unless the play at a visiting team's arena counted as work at an educationally affiliated location.

One possible compliance strategy for schools would be to follow the advice of John "Jake" Krupski, the attorney for Dartmouth College basketball players. Krupski noted in an interview that the school could commit in a collective bargaining agreement (CBA) to classify work as adherent to visa requirements.[229] Dartmouth has adopted this practice with the team's student manager, who is an employee and paid by the school to work twenty hours a week—despite the manager traveling with the team on road trips and seemingly exceeding twenty hours of work.[230] A similar measure that limits the counting of work hours would provide a layer of protection to an athlete in the event their visa is subject to review.[231] A more logical solution to these questions, Professor David P. Weber has argued, would be for Congress to amend visa requirements to categorize college athletes separately and offer sensible rules for their situation.[232]

E. Tax Issues

College athletes, as employees of their school, would present both straightforward and complicated tax consequences. As employees, college athletes would be subject to various types of taxation, withholdings, and deductions that are consistent with employment. Federal and state income taxes, as well as Social Security, Medicare, and federal unemployment taxes, are all routinely at issue.[233] Employees paying taxes is, of course, nothing new in the U.S. economy. It is a rite of passage. Indeed, a standard feature of new employee orientation at U.S. companies is the completion of

226. *Id.* at 1613–14.

227. *See* David P. Weber & Daniel L. Real, *Will the Professionalization of Student-Athletes Kill The NCAA?*, 103 B.U. L. REV. 1591, 1633–34 (2023).

228. *F-1 Student On-Campus*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/sevis/employment [https://perma.cc/2C2K-XN4E] (Dec. 11, 2024).

229. Michael McCann, *This Lawyer Is Taking on Dartmouth to Fight for College Athletes*, SPORTICO (Mar. 25, 2024), https://www.sportico.com/law/analysis/2024/jake-krupski-dartmouth-players-attorney-1234772236/ [https://perma.cc/ECU7-CEB8].

230. *Id.*

231. *Id.*

232. David P. Weber, *Athletes in Transit: Why the Game Is Different in Sports and the Visas Should Be Too*, 96 TUL. L. REV. 893, 945 (2022).

233. *See* Neal S. Schelberg & Carrie L. Mitnick, *Same-Sex Marriage: The Evolving Landscape for Employee Benefits*, 22 HOFSTRA LAB. & EMP. L.J. 65, 71 (2014).

on-boarding tasks, including the setting of applicable tax withholdings as well as setting up direct deposit, reviewing benefits, and similar protocols.[234] Universities normally have long-standing basic procedures in place for new employees, including student employees.[235] The prospect of college athletes paying taxes has generated considerable discussion in recent years.[236] But, the phenomenon is a natural outgrowth of the lifting of restrictions on college athlete compensation. As U.S. District Judge Jeffrey Alker Meyer succinctly noted in *United States v. Morgan*:[237] "Americans have to pay taxes, and the Government has a right to bring collection actions when they do not."[238]

Although colleges are likely well-equipped to handle the individual tax ramifications of college athletes as employees, they could worry about the legal relationship between paying athletes a wage and the federal tax-exemption athletic departments at private universities and some public universities enjoy. These departments are deemed exempt under the education requirements of 501(c)(3) of the Internal Revenue Code[239] (IRC).[240] As an alternative form of tax exemption, some public universities deduce they are exempt because no provision of the IRC explicitly taxes them, whereas others rely on other IRC provisions to reach the same conclusion.[241] Colleges have enjoyed this exemption despite some paying coaches many millions of dollars a year to coach their players and despite generating numerous millions in revenue through athletics.[242] Whether the Internal Revenue Service and state treasuries continue to recognize the exemption with college athletes as employees is a *multi*-million-dollar question.

IV. WHY EMPLOYMENT STATUS MIGHT ACTUALLY BRING STABILITY

Having concluded that many of the myths about the ramifications about collegiate athlete-employees miss the mark, that leaves us with the challenge of projecting what will truly come from the changing workplace environment of college sports. Although nothing in this world is certain, as authors, the

234. *See* Randi Renee Doerr, *What Are the Most Important Onboarding Forms?*, EXACTHIRE, https://www.exacthire.com/workforce-management/what-are-the-most-important-onboarding-forms/ [https://perma.cc/UZL5-DB4G] (last visited Mar. 7, 2025).

235. *See, e.g.*, DARTMOUTH COLL., STUDENT EMPLOYEE HANDBOOK FOR STUDENT EMPLOYEES AND SUPERVISORS OF STUDENT EMPLOYEES (2024), https://www.dartmouth.edu/hr/docs/employment/seohandbook.pdf [https://perma.cc/J3QT-AA2L].

236. *See, e.g.*, Rebecca Lake, *NIL Deals and Tax Implications: A Guide for College Athletes*, INVESTOPEDIA (May 30, 2024), https://www.investopedia.com/nil-deals-tax-implications-8599929 [https://perma.cc/EQB6-GW7A].

237. No. 18-cv-1647, 2021 U.S. Dist. LEXIS 146635 (D. Conn. Aug. 5, 2021).

238. *Id.* at *18.

239. I.R.C. § 501(c)(3).

240. *See* Karla M. Nettleton, *I.R.C. § 4960's Impact on College Sports: In Light of IRS Guidance Certain Universities Will Need to Engage in Tax Planning*, 32 MARQ. SPORTS L. REV. 117, 120 (2021) (citing I.R.C. § 501(c)(3) (2017)).

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

242. Edelman et al., *supra* note 9, at 36.

three of us have reached a conclusion that may surprise some readers. The long-term result of employee-status will be stability—real and meaningful stability in both the industry dynamics and the relationship between colleges and their athletes.

There are at least three reasons why we believe employment status and unionization of certain college athletes will bring about greater stability for the college sports enterprise. First, good-faith collective bargaining could lead to a system that is more acceptable to all stakeholder groups in college sports, and thus, no stakeholder group has a strong incentive to try to challenge the system's rules in court.[243] Second, collective bargaining could lead to the imposition of a neutral system for arbitration of disputes that would largely insulate the arbitrator's decision from further legal scrutiny.[244] Finally, the products of good-faith collective bargaining negotiations between an appropriate bargaining unit of employers and athletes could enjoy freedom from challenge under federal antitrust laws under the nonstatutory labor exemption.[245] As such, an era of constant chaos and public-facing litigation between college athletes and their colleges would largely come to a screeching halt. This part discusses each of these three expected stabilizing outcomes.

A. A New System That All Stakeholder Groups Can Accept

First, a collective bargaining system in which athletes and member colleges bargain over mandatory terms and conditions, especially via multiemployer or joint-employer bargaining units, would bring stability to the rules governing intercollegiate sports for the members of the bargaining unit, as it would lead to new rules that all stakeholder groups can accept.[246] As one court notes, "[c]ollective bargaining agreements are not imposed by legislatures or government agencies," but "[r]ather, they are negotiated and refined over time by the parties themselves so as to best reflect their priorities, expectations, and experience."[247]

Perhaps the most notable topic where collective bargaining in college sports could yield stability is in terms of the compensation of employee-athletes. The Supreme Court's May 2021 decision in *Alston* provides a strong basis to conclude that future courts would find NCAA restraints on both direct and third-party pay to college athletes to violate federal antitrust laws.[248] In a recent law review article, we call into doubt

243. *See infra* notes 247–57 and accompanying text.
244. *See infra* notes 258–65 and accompanying text.
245. *See infra* notes 266–83 and accompanying text.
246. *See infra* notes 247–57 and accompanying text.
247. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 536 (2d Cir. 2016).
248. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2158 (2021) (explaining that although the Supreme Court's decision in *Board of Regents* suggests that "courts should take care when assessing the NCAA's restraints on student-athlete compensation . . . these remarks do not suggest that courts must reflexively reject *all*

whether the NCAA would be able to insulate these restraints from antitrust scrutiny through a class action settlement with plaintiffs' lawyers currently challenging the restraints on college athlete pay.[249] But, by setting forth house rules on athlete compensation in a collective bargaining agreement, the parties are able to reach their own private terms of compensation in what would likely prove to be a more acceptable manner.

Rules pertaining to the transfer of college athletes are also well suited to being addressed through collective bargaining.[250] For more than a century, colleges have sought to limit the movement of college athletes between schools for many reasons, including efforts to maintain on-field stability within a college sports season.[251] At the same time, college athletes have long sought the freedom to move between colleges to maximize their playing time and television exposure, as well as to ensure they receive their optimal educational experience.[252] Although the present rules governing college athlete transfers are largely driven by the whimsical preferences of NCAA administrators subject to their reigning in by judicial scrutiny,[253] collective bargaining would provide an opportunity for a direct athlete voice in setting these rules. Indeed, reasonable common ground may emerge between colleges and an athlete union in bargaining over transfer rules. As much as colleges are unlikely to want players to leave their schools to play for a rival in the midst of a sports season, the athletes themselves may wish to avoid losing their starting positions midseason due to new college athletes transferring into their school and onto their team.

Not only would a new system of collective bargaining facilitate negotiations over player compensation, transfer rules, and other matters directly tied to their employment, but, as at least one previous law review article astutely stated, it would allow for bargaining over rules related to athletes' publicity rights and entering into third-party endorsements.[254] This

challenges to the NCAA's compensation restrictions"); *see also id.* at 2167 (Kavanaugh, J., concurring) ("After today's decision, the NCAA's remaining compensation rules should receive ordinary 'rule of reason' scrutiny under the antitrust laws.").

249. *See* Holden et al., *supra* note 2. For another law review article published in this same edition of *Fordham Law Review*, which goes into even more detail on these issues, see Edelman & Carrier, *supra* note 57.

250. *See* Reynolds v. Nat'l Football League, 584 F.2d 280, 289 (8th Cir. 1978) (concluding that "the subject of player movement restrictions is a proper one for resolution in the collective bargaining context").

251. *See* Michael A. Carrier & Marc Edelman, *An Antitrust Analysis of the NCAA Transfer Policy*, 11 TEX. A&M L. REV. 999, 1003–06 (2024) (discussing the history and reasoning behind NCAA efforts to limit college-athlete player transfers, including an episode of team-hopping during the 1896 college football season by law student and football great, Fielding Yost).

252. *See, e.g.*, Ohio v. Nat'l Collegiate Athletic Ass'n, 706 F. Supp. 3d 583, 589–90 (N.D. W. Va. 2024) (overturning, as a matter of antitrust law, the NCAA's restraints on college athlete transfers, and illustrating examples as to why certain college athletes sought to transfer schools and compete immediately in intercollegiate sports).

253. *See id.* (temporarily restraining the NCAA from enforcing its rules limiting college athlete transfers).

254. *See* Corrada, *supra* note 97, at 844 ("Collective bargaining would allow a union to bargain to preserve educational benefits and guarantees for these students.").

is important as certain NCAA member schools purport to have good faith concerns over the nature of certain goods and services that college athletes may seek to endorse, as well as about the use of school-owned intellectual property in college athlete endorsement deals.[255]

At the same time, collective bargaining may help bring stability to college athletes' long-term educational experience. It is not unusual for workers, even outside of the sports industry, to negotiate future education-related benefits, including setting aside funds to be earmarked for workers' future education.[256] In the context of collective bargaining between colleges and their athletes, an agreement could help to legally ensure that guarantees about future educational opportunities are honored, including guaranteed admission and free tuition to graduate programs.[257]

B. Facilitation of a Reasonable Dispute Resolution Process

Beyond the ability to negotiate over terms of importance to both players and schools, a collective bargaining relationship may also facilitate the creation of a neutral arbitration system to resolve disputes arising out of their collective bargaining agreement.[258] This system of neutral arbitration is overwhelmingly insulated from judicial scrutiny.[259] Under the Labor Management Relations Act, the standard by which a court is to review the decision of a neutral arbitrator that the parties select is to determine if the arbitrator was "even arguably construing or applying the [collective bargaining agreement] and acting within the scope of his authority."[260] As one court has explained, "[t]hese standards do not require perfection in arbitration awards," but "[r]ather, they dictate that even if an arbitrator makes mistakes of fact or law, [a court] may not disturb an award so long as he acted within the bounds of his bargained-for authority."[261]

This uniquely high level of deference afforded to the results of labor arbitration under the Labor Management Relations Act promotes finality in the arbitrator's decision, as well as helps to ensure the parties have someone

255. *See* John T. Holden, Marc Edelman & Michael A. McCann, *A Short Treatise on College-Athlete Name, Image and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV. 1, 49–50 (2022) (discussing NIL deals involving purported vice products); *see id.* 53–55 (discussing protection of college intellectual property in NIL deals).

256. *See, e.g.*, *CEP Guide for Players*, MAJOR LEAGUE BASEBALL, https://www.mlb.com/official-information/scholarship/player-guide-2017 [https://perma.cc/4MUK-Z7TV] (last visited Mar. 7, 2025).

257. *See* Corrada, *supra* note 97, at 843 (opining that "[a]nother benefit of unionization and collective bargaining to the NCAA relates to NIL issues.").

258. *See, e.g.*, Nat'l Football League Mgmt. Council v. Nat'l Football Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016).

259. *See id.* (noting that it is well-established that "a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law").

260. United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

261. *Nat'l Football League Mgmt. Council*, 820 F.3d at 532.

knowledgeable about their industry rendering judgments rather than simply a generalist. The Supreme Court has described this arbitration system as "part and parcel of the ongoing process of collective bargaining,"[262] as well as one in which "arbitrators are chosen by the parties because of their expertise in the particular business and their trusted judgment to 'interpret and apply [the] agreement in accordance with the industrial common law of the shop and the various needs and desires of the parties.'"[263]

Although finality is overwhelmingly important to management because it reduces litigation costs, increased certainty is valuable to both sides of the collective bargaining relationship in that it affords a more predictable workplace environment. Furthermore, the decisions of neutral, outside arbitrators have led to a number of important victories for athletes in certain sports workplaces. For example, one of the most overlooked benefits of the Major League Baseball players' decision to unionize was their ability to negotiate for neutral dispute resolution[264] and then to convince the neutral arbitrator that baseball's reserve clause should be interpreted in a manner that allowed players the option to elect free agency after a period in their employment.[265]

C. The Preemption of Most Antitrust Lawsuits

Finally, depending upon the nature of the bargaining unit established, many, if not most, of the outcomes of collective bargaining between college athletes and their employers would be exempted from antitrust scrutiny based on what is known as the nonstatutory labor exemption from antitrust law.[266] Thus, depending on the nature of the collective bargaining unit established, it may become possible for individual athletic conferences, or perhaps even the entire NCAA, to impose restraints on athlete eligibility, athlete movement, or even athlete salaries that could not be reasonably challenged by the unionized athletes under federal antitrust law.

Highly important within the broader world of professional sports, the nonstatutory labor exemption is a court-created exemption from antitrust law that "applies where needed to make the collective-bargaining process work."[267] It is based on this exemption that the teams in sports leagues such as the National Basketball Association and National Football League are

262. *United Paperworks Int'l Union*, 484 U.S. at 38.

263. *Nat'l Football League Mgmt. Council*, 820 F.3d at 536 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974)).

264. *See* LeRoy, *supra* note 215, at 1110 n.167 (referencing the formation of the Major League Baseball Players Association in 1966).

265. *See id.* at 1110 (explaining that "[t]he reserve clause in baseball eventually was modified after players voted to form a union and challenged the restriction in arbitration").

266. *See* Marc Edelman, *Does the NBA Still Have "Market Power?": Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L. J. 549, 552 (2010) (describing application of this exemption to professional sports); *see also* Corrada, *supra* note 97, at 843 (purporting that "[t]he probable primary benefit to the NCAA would be antitrust immunity").

267. Brown v. Pro Football, 518 U.S. 231, 234 (1996).

allowed to impose salary caps, free agency rules, and league drafts, all typically without facing antitrust scrutiny based on the underlying wage fixing, market allocation and group boycott nature of these rules.[268] But, it is also the case that the courts assessed this exemption primarily within a very narrow set of facts, involving a very narrow form of collective bargaining over a narrow range of issues.[269]

For some courts, delineating the outer contours of the nonstatutory labor exemption has been a challenge.[270] At least one federal court has noted that the "interaction of the Sherman Act and federal labor legislation is an area of law marked more by controversy than by clarity."[271] And, a law review article from just four years prior suggested that, beyond a limited series of facts, the contours of this antitrust exemption "hardly exist[]."[272] Nevertheless, most federal courts have adopted one of two tests for determining the exemption's outer contours. The U.S. Court of Appeals for the Eight Circuit, among others, has adopted a majority view first set forth in *Mackey v. National Football League*,[273] which recognizes the nonstatutory labor exemption, at least in the context of an employer-worker agreement, applies "where an alleged restraint of trade: (1) involves mandatory subjects of bargaining; (2) primarily affects the parties involved; and (3) is reached through bona fide, arm's-length bargaining" ("Majority View").[274] Meanwhile, the U.S. Court of Appeals for the Second Circuit has adopted a

268. *See* Edelman, *supra* note 266, at 553 (explaining that "courts have found various league-wide restraints [including salary caps and league drafts], in the presence of market power and in the absence of union approval, might violate Section 1 of the Sherman Act"); Moultrie v. Nat'l Women's Soccer League, 544 F. Supp. 3d 1063, 1075 (D. Or. 2021) (explaining that "[i]n the context of professional sports leagues, courts have consistently held that rules created through or incorporated by collective bargaining agreements between leagues and their respective players unions are immune from scrutiny under § 1 of the Sherman Act").

269. *See, e.g.*, Scheinholtz & Kettering, *supra* note 156, at 347–48 (discussing the narrowness of the issues under which courts, to date, had addressed the nonstatutory labor exemption); *cf. Moultrie*, 544 F. Supp. 3d at 1075 (explaining, in particular, that the court found that "Defendant had not identified a single case where the non-statutory labor exemption applied to a regulation created before the recognition of a union, and which had not been subsequently included or implicitly incorporated into a collective bargaining agreement").

270. *See, e.g.*, California *ex. rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1125 (9th Cir. 2011) ("The Supreme Court has never delineated the precise boundaries of the [nonstatutory labor] exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market." (quoting Clarett v. Nat'l Football League, 369 F.3d 124, 131 (2d Cir. 2004))).

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

272. Scheinholtz & Kettering, *supra* note 156, at 347.

273. 543 F.2d 606 (8th Cir. 1976).

274. Marc Edelman & Brian Doyle, *Antitrust and "Free Market" Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT. L. & BUS. 403, 416 (2009); *see Mackey*, 543 F.2d at 614. For an example of some recent court decisions that have adopted the Majority View of the nonstatutory labor exemption in the context of employer-worker agreements, see, e.g., State Line Construction & Maint. LLC v. American Line Builders Chapter NECA, No. 24-11047, 2024 WL 3567405, at *4–5 (E.D. Mich. July 29, 2024); Evans Hotel LLC v. Unite Here! Local 30, No. 18-CV-2763, 2021 WL 10310815, at *31 (S.D. Cal. Aug. 26, 2021).

somewhat different test, stating that the nonstatutory labor exemption applies anywhere where subjecting a rule to antitrust law would "subvert fundamental principles of our federal labor policy" ("Second Circuit View").[275]

Based upon the above standards, if college athletes were to establish multiemployer bargaining units much as observed in the National Football League and the National Basketball Association, and then agreed through collective bargaining to implement restraints on athlete eligibility, movement, or salaries that exclusively affected members to the bargaining unit, then these restraints would very likely be insulated from antitrust scrutiny by the nonstatutory labor exemption under both the Majority View and the Second Circuit View.[276] Meanwhile, if the imposed restraints were intended to apply to athletes beyond just those athletes who had unionized and bargained over these rules, the Majority View might still find an exemption to apply if (a) a majority (or perhaps supermajority) of the affected athletes were part of a union that had collectively bargained over these rules and (b) the rules were bargained with the union in good faith.[277] Meanwhile, the Second Circuit View might find the exemption to apply even more broadly.[278]

By contrast, if college athletes formed a single-employer bargaining unit, such as has been attempted by the Northwestern University grant-in-aid football players and the Dartmouth College men's basketball players, and then attempted to impose restraints on a broader scale, it is unlikely that the nonstatutory labor exemption would serve as an antitrust defense against liability given that the rule would affect more than just the players to the collective bargaining relationship.[279] Under the Majority View, these rules would not "primarily" affect athletes who are part of a collective bargaining relationship over which the rules are bargained, given that many, if not most, of the athletes affected by the rule would seemingly remain ununionized.[280] In addition, even if a court were to apply the Second Circuit View, it seems doubtful whether the exemption could apply, as similar restraints could still be imposed on the athletes at unionized schools through the collective bargaining process, even if antitrust law prevents these rules from applying on a more uniform basis to encompass nonunionized schools and athletes.[281]

Lastly, there is the question of the application of the nonstatutory labor exemption to potential joint-employer bargaining relationships, such as one where, theoretically, college athletes are simultaneously found to be

275. Clarett v. Nat'l Football League, 369 F.3d 124, 135 (2d Cir. 2004) (quoting *Wood*, 809 F.2d at 959); *see also* Edelman, *supra* note 85, at 1656.

276. *See* Edelman, *supra* note 85, at 1657.

277. *Id.*

278. *Id.* (implying that under the Second Circuit test, the primary questions about applicability of the nonstatutory labor exemption to a given restraint would seem to relate to whether the restraint pertained to a mandatory term of bargaining).

279. *See id.*

280. *See id.*

281. *See id.*

employees of their given school as well as either their conference, the NCAA, or both. Courts do not seem to have directly addressed this circumstance, even though the terms "multiemployer bargaining unit" and "joint employer bargaining unit" are sometimes conflated and used interchangeably in both court decisions and academic literature.[282] But still, common sense, coupled with an understanding of the underlying principles of the broader nonstatutory labor exemption, should lead to a logical and reasonable result about where, if at all, the nonstatutory labor exemption would apply. Applying as much, to the extent that a bargaining unit consists of all of those individuals who would be restrained by a collectively bargained rule, that rule would seem to be exempted from antitrust scrutiny under the nonstatutory labor exemption, irrespective of whether one was to call that bargaining unit a "multiemployer bargaining unit," a "joint-employer bargaining unit," or a "multiemployer joint bargaining unit."[283]

Indeed, in such a case, the verbiage used to define the bargaining relationship would be impertinent. What seems to matter instead is the question of whether the college athletes restrained by the rule had representatives, on their behalf, who engaged in bargaining over the rule. And thus, in a case where college athletes at private and public schools have the opportunity to bargain over a rule with their member schools and their conference or the NCAA that restrains certain free-market rights, that rule should be exempted from antitrust scrutiny in the exact same manner as if the athletic conference and/or the NCAA were not, as a separate entity, sitting at the bargaining table.

CONCLUSION

Absent congressional intervention (which we certainly do not support), it is nearly inevitable that within the next decade we will see certain college athletes legally declared to be employees.[284] Various leaders of NCAA member schools purport such a declaration will be the death knell of college sports, much like just about every court-ordered industry reform that has occurred before it. From our perspective, however, the granting of employee status to some college athletes is not a bad thing—not even for the collegiate sports industry. Rather, it is the most reasonable path forward.[285]

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282. *See, e.g.*, Tollen, *supra* note 150, at 192 (explaining that, as a practical reality, under pure labor law, "a joint employer bargaining unit *is* a multiemployer bargaining unit").

283. *See, e.g.*, Scheinholtz & Kettering, *supra* note 156, at 354 (suggesting that the nonstatutory labor exemption from antitrust law would "exempt any joint employer restraints in the labor market that are both (a) *no broader than the union on the other side of the labor market* and (b) *valid as a matter of labor law*").

284. John Nucci, *The Inevitability of College Athletes as Employees*, SPORTS BUS. J. (Sept. 2, 2024), https://www.sportsbusinessjournal.com/Articles/2024/09/02/opinion-nucci [https://perma.cc/3TA2-CF84].

285. *See* Michael McCann, *Colleges Declaring Athletes Are Employees Might Make Sense*, SPORTICO (Feb. 20, 2024), https://www.sportico.com/law/analysis/2024/college-president-declaring-athletes-employees-1234767315/ [https://perma.cc/ZUH6-PFRL].

Although the NCAA struck a landmark settlement with plaintiffs' counsel resolving a number of prominent antitrust challenges to organizational policies, the settlement is far from a long-term solution.[286] The settlement resolves a relatively narrow set of questions regarding the application of antitrust law to NCAA rules. It does not reflect negotiation by athletes, does not address a range of other, unresolved legal questions linked to college athletes, and is not a substitute for an operating agreement. Indeed, the only path forward to lasting labor peace in college sports, or at least the ability to bring about lasting labor peace, is to recognize certain college athletes as employees and for colleges to collectively bargain with them.

For decades, the NCAA and many of its supporters have held up various reasons for why no college athletes should be deemed employees, but the fact of the matter is that the NCAA's contentions are false and increasingly unconvincing. There are undoubtedly questions to be resolved about what a future with athletes as employees at collegiate institutions looks like, but none of those questions justify the ongoing deprivation of employment status that athletes have earned through the labor they contribute to their institutions and revenue they generate.

Absent congressional intervention (which we believe should not happen), at least some college athletes at some schools will almost certainly in the near future be legally declared as employees. Rather than fighting the inevitable, NCAA member schools with large revenue-generating programs should embrace the legal reforms and begin planning for ways that the forthcoming collective bargaining relationships could facilitate win-win solutions for the entirety of the college sports industry.

286. Even if everything were to be approved with the settlement, and hypothetically the NCAA resolved all other challenges and everything else remains unchanged, the settlement only provides a revenue-sharing roadmap for ten years. Shehan Jeyarajah, *How Historic House v. NCAA Settlement Will Impact College Athletics on and off the Field for Years to Come*, CBS SPORTS (May 24, 2024, 1:59 AM), https://www.cbssports.com/college-football/news/how-historic-house-v-ncaa-settlement-will-impact-college-athletics-on-and-off-the-field-for-years-to-come/ [https://perma.cc/2QL4-N5CF].