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The college sports industry is deeply rooted within the culture of the United States. Its popularity has only grown, which has led to business opportunities and vast economic wealth for many within the National Collegiate Athletic Association ("NCAA"). This wealth is mainly distributed among, but not limited to, NCAA executives, conference commissioners, university presidents, coaches, and athletic directors. The individuals actually taking part in the athletic contests, the college athletes, are excluded from this list. Specifically, looking at Division I college athletes, the harsh reality is that these young men and women are participating in a billion-dollar industry and not being adequately compensated for their services. One proposed solution to remedy this inadequacy is to recognize college athletes as employees.

This Note will assess the possibility of college athletes becoming employees by first, analyzing the history within the court system and the adoption of breakthroughs within (1) the Supreme Court (reducing barriers to college athlete compensation); (2) the National Labor Relations Board (recognizing that some college athletes are employees under the Fair Labor Standard Act); and (3) Congress (Senate introducing bills recognizing the rights of college athletes). Second, in light of these breakthroughs, this

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Note will examine the class action filed on behalf of former Villanova football player Trey Johnson against the NCAA. At bottom, this Note suggests that it is all but inevitable for college athletes to be considered employees. Different from other articles pertaining to this subject, this Note recognizes the overwhelming negative effects an employment model will have for many college athletes. Additionally, treating college athletes as employees will hurt each university, conference, and the NCAA entity as a whole and force the NCAA Division I Model to make significant changes.

With the support of diverse Division I administration members, ranging from those representing Football Championship Subdivision and Football Bowl Subdivision universities and conferences, this Note will address the challenges associated with changing the Division I Model and offer solutions to help control the issues associated with a college athlete employment model. Of these solutions, the most compelling is removing the Football Bowl Subdivision from the revenue distribution formula and creating a separate entity for that level of football coined the National College Football Association. The best route, however, is to avoid an employment model by choosing not to classify college athletes as employees and instead proactively implement a licensing model that allows for revenue sharing among college athletes participating in revenue earning sports.

INTRODUCTION

College athletics provides a unique opportunity for students to participate in sports and earn a higher education while also creating a product that encapsulates vast popularity throughout the United States. A college athlete, by definition, is exactly what it sounds like: an individual who engages in, and is eligible to engage in, an intercollegiate sport.[1] College athletes[2] have the ability to earn tuition scholarships and are given access to (1) state-of-the-art facilities; (2) exceptional coaching; (3) and academic support.[3] Many see these perks, combined with the opportunity

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1 15 U.S.C.S. § 7801(9) (2023). Note this is the definition for a "student-athlete" rather than a college athlete, however, the two are often used interchangeably (wrongly) in society.

2 This Note purposely uses the term "college athletes" instead of "student-athletes" to define athletes that participate in college athletics. It is important to discontinue the use of the word "student-athletes" as it derives from limiting the benefits athletes can receive from playing a sport in college. Specifically, the NCAA coined this term in the 1950s to protect themselves from a death-benefits claim filed by the widow of Ray Dennison. Dennison was a college football player who died because of a skull injury he had while participating in a college football game. By being identified as a "student-athlete" Dennison's family received nothing and the claim was denied. *See* Liz Clarke, *The NCAA Coined the Term "Student-Athlete" in the 1950s. Its Time Might Be Up.*, WASH. POST (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/.

3 *See Want to Play College Sports?*, NCAA, https://www.ncaa.org/sports/2021/2/8/student-athletes-future.aspx (last visited Nov. 10, 2022).

to play a sport at the next level, as adequate compensation for college athletes' contribution to their respective sport. However, there is growing concern that college athletes are overworked and that their athletic demands take precedence over their academic responsibilities.[4] Financially, most universities are incentivized to perform well because of the revenue associated with winning programs. The money generated from the most profitable sports (mainly football and basketball) is dispersed among the universities' programs and administration, with very little reserved for the college athletes.[5] Contrary to the National Collegiate Athletic Association's ("NCAA") position that college athletes are treated fairly, many view college athletes' time-commitment to athletics combined with their inability to profit off their hard work and popularity to be inexcusable.[6] With the National Labor Relation's Board ("NLRB") and the Court taking this latter approach to the treatment of college athletes, it may be all but inevitable that college athletes are soon classified as employees.[7]

This Note predicts that, if left to the court system, it is highly likely that college athletes will be considered employees. To support this assertion, Part I will explore (1) the history of amateurism in the NCAA; (2) how amateurism has been interpreted in the court system; and (3) amateurism's newfound limitations concerning the rights of college athletes in a post-*NCAA v. Alston* society.[8] With an understanding of amateurism's evolution, Part I further explores the doctrinal shift of amateurism's significance through pending litigation, including the case *Johnson v. NCAA*.[9] Due to the weakened support of amateurism, the factors necessary to prove employment status that weigh in favor of employment, the recent trend in Congress, and the public perception surrounding the exploitation of college athletes, this Note predicts that the court in *Johnson v. NCAA* will find in favor of the college athletes and

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4 *See generally* Peter Jacobs, *Here's The Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 11:44 AM), https://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.

5 Of the money reserved to college athletes, it is strictly for scholarships and stipends. *See* Tommy Beer, *NCAA Athletes Could Make $2 Million A Year If Paid Equitably, Study Suggests*, FORBES (April 14, 2022, 2:05 PM), https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2million-a-year-if-paid-equitably-study-suggests/?sh=3dc6f8be5499.

6 *See, e.g.,* Memorandum from Jennifer A. Abruzzo, Gen. Couns. of the Nat'l Lab. Rel. Bd. on Statutory Rts. of Coll. athletes to all Reg'l Officers and Directors (Sept. 29, 2021).

7 *See id.*; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2167-69 (2021) (Kavanaugh, J., concurring).

8 *See Alston*, 141 S. Ct. at 2141.

9 Currently in the Third Circuit Court of Appeals. *See* Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

create a circuit split.[10] With a circuit split, combined with the popularity of college athletics, the Supreme Court will likely hear this case should the litigants seek certiorari review.[11] Part I concludes by hypothesizing the court system's clear remedy for the mistreatment of college athletes under the amateurism model: a switch to a college athlete employment model.

Part II transitions into analyzing what it means for a college athlete to be classified as an employee and what problems may arise. Part II highlights issues pertaining to labor and employment law such as potential bargaining units; compensation (wages, scholarships, or both); and the mandatory bargaining subjects. These issues ultimately overshadow their assumed purpose: helping college athletes and justly compensating them for the work they provide. Relying on interview data by those working at the Division I level, there is overwhelming support for the notion that without a plan, universities employing college athletes will lead to the demise of sports programs throughout the country. Therefore, the NCAA must address the fact that college athletes will get paid to play in the near future.

Part III begins by introducing the current framework of the Division I Model, highlighting its inability to pass meaningful policies. Part III then transitions to an explanation of the NCAA's revenue distribution and its current inadequacies. If an employment regime is unavoidable, Part IV proposes solutions to both the revenue distribution systems and the Division I Model to help the NCAA adjust through such a detrimental change. Most notably, Part IV proposes three approaches to changing the Division I Model. First, creating a new entity for the Football Bowl Subdivision ("FBS") to be funded by the College Football Playoff ("CFP"); second, replicating the college football structure by creating more subdivisions between sports; and third, giving universities the autonomy to decide what tier they are playing in. The importance of creating a plan before the court system rules on the employment status of college athletes is highlighted by the recent lack of regulations involving college athletes profiting from their name, image, and likeness ("NIL") and the chaos that ensued.[12] To avoid a similar situation, Part IV seeks to

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[10] *See* Nicole Auerbach & Mike Vorkunov, *Understanding* Johnson v. NCAA*, The Next Case That Could Upend The College Sports Model*, THE ATHLETIC (Aug. 12, 2022), https://theathletic.com/3497617/2022/08/12/johnson-v-ncaa-college-athletes-employees (creating a split between the Third Circuit and the Seventh and Ninth Circuits).

[11] *See Writs of Certiorari*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Nov. 10, 2022).

[12] *See* Seth Emerson, *The NCAA, its NIL Reluctance and The Man On The Inside Who Was Right All Along*, THE ATHLETIC (May 23, 2022), https://theathletic.com/3324796/2022/05/23/ncaa-name-image-likeness-greg-shaheen/. Described by some as the "wild west," NCAA by-laws did not address NIL regulations, so when states enacted NIL laws

serve as a resource for college athletes, teams, universities, and the NCAA to begin planning for the inevitable.

Lastly, and more optimistically, Part V suggests that a college athlete employment model is preventable with collaboration between Congress and the NCAA in developing a licensing model that shares revenue with college athletes who participate in revenue earning sports. By doing so, the NCAA will be able to compensate the college athletes who generate millions for the NCAA, while also preserving the sports programs who do not generate revenue yet provide their college athletes with all of the intangible benefits of participating in collegiate athletics. Ultimately, change is coming in one form or another and the NCAA must be prepared.

I. COLLEGE ATHLETES AS EMPLOYEES

Whether college athletes are employees under the Fair Labor Standards Act ("FLSA") has been a recent issue permeating throughout the federal court system.[13] Currently, *Johnson v. NCAA* is awaiting a decision in the U.S. Court of Appeals for the Third Circuit as to whether student athletes can be considered employees.[14] This Section explores the judicial history pertaining to this issue. Starting with the Seventh Circuit's 2016 decision in *Berger v. NCAA* and the Ninth Circuit's 2019 decision in *Dawson v. NCAA*, the courts relied on amateurism in college athletics to define college athletes' economic expectations and used that to find, as a matter of law, college athletes are not employees.[15] By contrast, the U.S. District Court for the Eastern District of Pennsylvania's decision in *Livers v. NCAA*, which is highly relevant to *Johnson* because they both derive from the same court,[16] provides a legal framework for how a college athlete can argue their employment status.[17]

With an understanding of these three cases, this Section transitions to the doctrinal shift of how amateurism is interpreted in college athletics. First, the Supreme Court's decision in *NCAA v. Alston* provides a great example of this shift, evidenced by the Court's hostility and rejection of

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to allow college athletes to profit from their NIL, there was uncertainty for college athletes, universities, and the NCAA.

13 *See* Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021).

14 *See generally id.*; *see also* Auerbach & Vorkunov, *supra* note 10.

15 *See* Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905, 909 (9th Cir. 2019)..

16 *See Johnson*, 556 F. Supp. 3d at 491; Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. May 17, 2018). Both cases started in the United States District Court for the Eastern District of Pennsylvania.

17 *See* Sam E. Ehrlich, *But They're Already Paid: Payments In-Kind, College Athletes, and the FLSA*, 123 W. VA. L. REV. 1, 11 (2020).

the NCAA's conclusory claims that amateurism is critical for the success of college football in both oral arguments and in Justice Kavanaugh's concurrence.[18] Second, the NCAA's amateurism justification, beyond its application in an antitrust defense, is weakened by a 2021 NLRB memo advocating for college athletes right to collectively bargain.[19] This memo opened the door for the National College Players Association ("NCPA") to bring an unfair labor practice claim against the University of Southern California ("USC").[20] Considering the power of the Supreme Court, the NLRB General Counsel's disapproval of amateurism, and the NLRB finding "merit" in the NCPA's unfair labor practice claim,[21] this Section analyzes *Johnson* and suggests that *Johnson* is the case to classify college athletes as employees.

This Section concludes with the strongest arguments for why college athletes will be classified as employees. These arguments include both legal and public perception arguments. First, under the legal arguments, the multi-factor test discussed in *Johnson* will be addressed to further explain why they favor college athletes' employment status.[22] Second, this Section will acknowledge the push from some members of Congress to recognize the rights of college athletes, including a right to compensation and employment status. Transitioning to the pressure induced by public perception, this conversation starts with the Supreme Court's 1984 decision in *NCAA v. Oklahoma Board of Regents*.[23] This case effectively opened the door for universities and conferences to negotiate their own television agreements.[24] By doing so, it has led to massive television agreements between conferences and broadcasting stations.[25] With these agreements made available to the public, it has begged the question as to why college athletes, the ones who bring in the money, are not sharing in this revenue. Further, the Tenth Circuit's decision in *Law v. NCAA*, which

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18 *See* NCAA v. Alston, 141 S. Ct. 2141, 2167-69 (2021) (Kavanaugh, J., concurring); *see also* Transcript of Oral Argument at 17-18, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512).

19 *See* Abruzzo, *supra* note 6.

20 *See* Dan Murphy, *NLRB to Pursue Unlawful Labor Practices Against USC, PAC-12, NCAA*, ESPN (Dec. 15, 2022, 5:52 PM), https://www.espn.com/college-football/story/_/id/35259868/nlrb-pursue-unlawful-labor-practices-usc-pac-12-ncaa.

21 *See* Daniel Libit, *NLRB Region Finds USC, PAC-12, and NCAA Employ Trojan Athletes*, SPORTICO (Dec. 15, 2022, 5:50 PM), https://www.sportico.com/leagues/college-sports/2022/nlrb-usc-pac-12-ncaa-trojan-athletes-1234698669/.

22 Johnson v. NCAA, 556 F. Supp. 3d 491, 509-11 (E.D. Pa. 2021).

23 NCAA v. Okla. Bd. of Regents, 468 U.S. 85 (1984).

24 *See id.* at 93.

25 *See* Alan Blinder and Kevin Draper, *Topping $1 Billion a Year, Big Ten Signs Record TV Deal for College Conference*, N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/18/sports/ncaafootball/big-ten-deal-tv.html.

held coaches' salaries cannot be capped,[26] adds even more confusion as to why college athletes are not "getting a piece of the pie." Taken in its entirety, with *Johnson* entering the court system after both the *Alston* decision and the NLRB's memo advocating for college athletes to attain employment rights; and at a time where legal justifications and public perceptions are trending towards compensating college athletes, it is inevitable they are soon classified as employees.

A. History

The federal court system previously addressed the issue as to college athletes' employment status in *Berger v. NCAA*, *Dawson v. NCAA*, and *Livers v. NCAA*.[27] Although college athletes were not recognized as employees in any of these cases, each case provides helpful background in how the courts have traditionally addressed this controversy, highlighting their reliance on amateurism and college athletes' economic expectation.

In *Berger*, two former track and field college athletes ("Appellants") at the University of Pennsylvania ("Penn") alleged college athletes are employees and entitled to minimum wage.[28] The court disagreed and held that the Appellants did not state a claim that gives rise to a cause of action.[29] The court, agreeing with the district court, found that they have a flexible standard in determining who an employee is under the FLSA[30] and chose to define employment status by the economic reality of college athletes rather than applying the Second Circuit's multifactor test known as the *Glatt* factors.[31] By failing to analyze the *Glatt* factors, the court chose a limited framework to define employees under the FLSA, despite its admittedly flexible discretion. Although the Seventh Circuit is not bound by the decision in *Glatt*, the court missed an opportunity to apply each factor and add more clarity to the issue.[32] When discerning the

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26 *See* Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998).

27 Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019); Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. May 17, 2018).

28 *See Berger*, 843 F.3d at 289.

29 *See id.* at 294.

30 *Id.* at 291. Mainly relying on the fact that the definition of an employee under the FLSA is "unhelpful and circular [in] fashion[.]" *Id.* at 290.

31 *See id.* at 290-91; *see* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536-41 (2d Cir. 2015). Essentially finding that the relationship between college athletes and universities has a closer nexus to the relationship between an inmate and a state prison rather than the relationship between an intern and company. *See* Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992) (adopting the economic reality approach for inmates and a state prison).

32 *See Glatt*, 811 F.3d at 534-75.

economic reality of college athletes, the court found that amateurism defines the relationship between a college athlete and their university.[33] "[T]he long tradition of amateurism in college sports, by definition, shows that college athletes-like all amateur athletes-participate in their sports for reasons wholly unrelated to immediate compensation."[34] Thus, since college athletes do not expect compensation due to their amateur status, they do not have an economic expectation, and therefore the court found that they should not be considered employees under the FLSA.[35]

Pertinent to this Note, *Berger* is important for its stance on joint-employment and the concurring opinion addressing the difference between scholarship and non-scholarship athletes. First, relevant to Part II.A. *infra*, the court declined to find the NCAA as a joint-employer, or even address this issue, because the Appellants had "not plausibly alleged any injury traceable to, or redressable by, any defendant other than Penn."[36] Second, Judge Hamilton concurred in the majority opinion because track athletes are not offered athletic scholarships and they do not compete in a revenue-generating sport.[37] Thus, consistent with the decision by the court, these types of college athletes have no economic expectation.[38] Following this case, the Ninth Circuit Court of Appeals had the opportunity to hear a case of a scholarship college athlete, competing in a revenue earning sport, arguing classification as an employee in *Dawson v. NCAA*.

In *Dawson*, the Ninth Circuit found that, under the FLSA, Division I FBS college football players are not employees at the University of Southern California, are not employees of the NCAA, or their respective athletic conference (collectively, "NCAA/PAC-12").[39] Similar to the reasoning in *Berger*, the court determined that the employer/employee relationship is determinative on the college athletes' economic reality.[40] However, unlike in *Berger*, the court analyzed whether the NCAA/PAC-12 were joint-employers of the players who brought suit.[41] The court declined to acknowledge the NCAA/PAC-12 as joint employers under the FLSA mainly because college athletes' do not have expectation of

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33 *Berger*, 843 F.3d at 291. The court relied on amateurism to discredit the *Glatt* factors, stating that the *Glatt* factors could not adequately capture the role of amateurism. *See id.*

34 *Id.* at 293.

35 *See id.*

36 *See id.* at 289.

37 *Id.* at 294 (Hamilton, J., concurring).

38 *See id.*

39 Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019).

40 *Dawson*, 932 F.3d at 909; *see also Berger*, 843 F.3d at 291.

41 *See Dawson*, 932 F.3d at 909; *see also Berger*, 843 F.3d at 289. This distinction is important because it helps determine how broad or narrow college athletes' employment status is and whether that status extends pass the university they represent (discussed further in Part II.A., *infra*).

compensation and the NCAA/PAC-12 has no ability to hire or fire college athletes.[42] Here, although the appellant football player asserted his injury resulted from a violation of state and federal law,[43] the court only defined "employer" and "employee" under the FLSA, and not federal labor law.[44] Further, the court also declined to acknowledge college athletes as employees solely for the revenue they bring in by using past precedent and comparing salon workers with college football players.[45] This is a weak comparison as the court did not address the difference in the revenue generated, as the PAC-12 accounts for over $200,000,000 annually just from its television agreements (not to mention the ancillary benefits that universities receive from winning sports programs).[46]

The *Dawson* court, however, did show some type of sympathy toward college athletes as it addressed college athletes' rights under California labor law and acknowledged the long hours per week college athletes devote to athletics and that their "efforts 'generate large revenues.'"[47] They found that, instead of gaining employment rights, the California legislature provides college athletes with insurance deductibles, relief on medical expenses, financial and skills workshops, and due process protections.[48] By including the college athletes' state rights, the court seemed to suggest these added protections are an alternative to employment status under state law.[49]

Lastly, *Livers v. NCAA* outlines how a plaintiff, advocating for college athlete employment recognition, can overcome a defendant's motion to dismiss in a court within the Third Circuit's jurisdiction. In *Livers*, a scholarship athlete at Villanova University ("Villanova") argued that he

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42 *See Dawson*, 932 F.3d at 909. The court also analyzed the economic reality of the college athletes by addressing any evidence of an arrangement by the NCAA/PAC-12 to evade the law. Here, the court found no evidence of this as NCAA's by-laws were enacted in the early 1920s and the FLSA was enacted in 1938. *Id.* at 910.

43 *Id.* at 908.

44 *See* NLRB Joint Employer Status Under the National Labor Relations Act, 29 C.F.R. § 103 (2020).

45 *See Dawson*, 932 F.3d at 910 ("[T]he revenue generated by college sports does not unilaterally convert the relationship between college athletes and the NCAA into an employment relationship."); *see also* Benjamin v. B&H Educ. Inc., 877 F.3d 1139, 1148 (9th Cir. 2017) (explaining cosmetology students were not employees although they performed services for paying customers at a salon).

46 *See, e.g.,* Justin Byers, *New Pac-12 Media Rights Deal Won't Come in 2022*, FRONT OFF. SPORTS (Dec. 5, 2022, 4:34 PM), https://frontofficesports.com/new-pac-12-media-rights-deal-wont-come-in-2022/ (expecting a new media rights deal, surpassing two-hundred and fifty million dollars annually, in the near future).

47 *Dawson*, 932 F.3d at 913.

48 *Id.; see also* Cal. Educ. Code § 67452(a)(1), (b), (c); Cal. Educ. Code § 67453(a).

49 College athlete benefits, similar to those guaranteed under California state law, will be discussed further in Part II.B.3., *infra*.

and other scholarship college athletes have a right to be paid as an employee under the minimum wage provisions of the FLSA, alleging violations against the NCAA, Villanova, and several other institutions.[50] *Livers* shows the court's prejudice towards a showing of actual economic dependence to prove the economic reality between employer and employee.[51] This case is useful to apply to *Johnson v. NCAA* as both derive in the Third Circuit's jurisdiction.[52] With no cause to foresee a reason for dismissal, such as the statute of limitations,[53] this Circuit proves to rule favorably for college athletes, with a showing of economic dependence, in considering their employment status under the FLSA.[54] Unlike *Berger* and *Dawson*, this case represents the start of the shift from discrediting college athletes' employment recognition, to slowly starting to accept that college athletes are more than what their name suggests.

B. Doctrinal Shift in the Court: NCAA v. Alston and the NLRB's Impact on Johnson v. NCAA

This Section builds on the momentum created by *Livers* by addressing three important considerations that expand on the progressive climate surrounding the recognition of college athletes as employees: (1) the Supreme Court's dismay of amateurism in *NCAA v. Alston*; (2) the NLRB's push for college athletes attaining employment status; and (3) the NLRB allowing athletes at the University of Southern California to pursue an unfair labor charge against the University. Lastly, in light of the above, this section analyzes *Johnson v. NCAA* by interpreting the district court's holding and predicts that the Third Circuit will rule in favor of college athletes being considered employees.

1. NCAA v. Alston

NCAA v. Alston primarily focuses on college athletes' right to education related benefits and whether the NCAA is in violation of Section 1 of the Sherman Act by imposing limitations to those benefits.[55] Although the Court's analysis of the antitrust implications is important in its own respect, *Alston* also demonstrates the Court's criticism towards amateurism. *Alston* rejected the NCAA's amateurism argument because

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50 Livers v. NCAA, No. 17-4271, 2018 U.S. Dist. LEXIS 83655, at *4 (E.D. Pa. May 17, 2018)

51 *Id.* at *48-50.

52 Both *Livers* and *Johnson* originated in the United States District Court for the Eastern District of Pennsylvania.

53 Ehrlich, *supra* note 17, at 12.

54 *Livers*, 2018 U.S. Dist. LEXIS 124780 at *17-18.

55 *See* NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

of the NCAA's failure to (1) adopt a consistent definition for amateurism and (2) consider consumer demand.[56]

The Court openly stated their disapproval of the NCAA's model of exploiting college athletes, primarily shown through its animosity toward that model in oral arguments.[57] Additionally, in his concurrence, Justice Kavanaugh rejected amateurism while also questioning the NCAA's business model and advocating for college athletes to be fairly compensated.[58] Justice Kavanaugh wrote: "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."[59] However, Justice Kavanaugh acknowledged that compensating college athletes is easier said than done as there are complex issues such as the compensation for athletes in non-revenue earning sports, the implications of Title IX, and the logistics of how the NCAA could sustain paying 180,000 college athletes.[60]

Additional issues were identified by Justice Breyer in oral arguments, as he acknowledged the difficulty in fixing a product that is only partly economic and brings such joy to millions of people.[61] With such difficulty, Justice Breyer expressed unease in allowing the Court to interfere with the business of college sports,[62] a similar stance to the one taken by Justice Kavanaugh in his concurrence.[63] Yet, Justice Kavanaugh offered how these questions may be addressed, namely, through legislation and/or allowing college athletes to collectively bargain for their fair share of revenue.[64]

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56 *Id.*

57 *See id.* at 2167-69 (Kavanaugh, J., concurring); *see also* Transcript of Oral Argument at 9-10, 17- 18, 21, 32-36, 47-48, 53, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512). Justice Thomas questioning the amateur ranks of college athletes and coaches; acknowledging college athletes receive no payment while coaches' salaries are indistinguishable from those at the professional level. Justice Alito bringing awareness to the fact that college athletes contribute to a billion-dollar industry and do so facing constant pressure and inadequate compensation. Justice Sotomayor blatantly asking the attorney on behalf of the college athletes if he was sure he did not want broader relief alluding to the idea that the NCAA was in violation of much more than in-kind benefits.

58 *See Alston*, 141 S. Ct. at 2158, 2167-69 (Kavanaugh, J., concurring).

59 *Id.* at 2169.

60 *Id.* at 2168.

61 Transcript of Oral Argument at 48, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512).

62 *See id.*

63 *See Alston*, 141 S. Ct. at 2169 (Kavanaugh, J., concurring).

64 *Id.*; *see also infra* Part II.A.3.

2. NLRB Memo

After *Alston*, Justice Kavanaugh's stance on collective bargaining was quickly adopted in a memo sent out by the General Counsel of the NLRB.[65] On September 29, 2022, General Counsel of the NLRB, Jennifer Abruzzo, released a memo stating "certain Players at Academic Institutions are employees under the [NLRA]. Further . . . misclassifying such employees as mere 'student-athletes,' and leading them to believe that they do not have statutory protections is a violation of Section (8)(a)(1) of the [NLRA]."[66] First, Abruzzo addressed the most recent case in identifying college athletes as employees, *Northwestern University*, where "the Board declined to exercise jurisdiction over a representation petition filed by a union seeking to represent Northwestern University's scholarship football players."[67] The Board, however, specified that their decision would not preclude a finding of similar situated college athletes to be classified as employees under the Act.[68] Transitioning from the Board's decision, Abruzzo argued that college athletes are employees because Section 2(3) of the NLRA broadly defines "employee" and this broad interpretation has been recognized within the Supreme Court.[69] Additionally, Division I FBS college athletes are employees under the common-law test because they perform services at the subject of another's (the NCAA and each athlete's respective university) control, while also receiving compensation.[70]

Traditionally, the argument against recognizing college athletes as employees is that they are amateurs. After the Court made it clear in *Alston* that college athletics are not a product of amateurism, the door was opened for Abruzzo to justify her decision to find college athletes have a right to engage in collective bargaining.[71] In moving away from amateurism, Abruzzo argued that the more athletes are compensated for activity unrelated to academics, the more they will fit the definition of employee.[72]

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65 *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring); *see also* Abruzzo, *supra* note 6.

66 Abruzzo, *supra* note 6; *see* National Labor Relations Act, 29 U.S.C. § 157 (1988) (stating it is unlawful for an employer to interfere with the rights enumerated in Section 7 of the Act).

67 Abruzzo, *supra* note 6, at 2; *see also* 362 NLRB No. 167 (N.L.R.B 2015).

68 *Id.*

69 *Id.* at 2-3; *See* Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016); *see also* Boston Med. Ctr. Corp., 330 NLRB 152, 160 (1999).

70 *See* Abruzzo, *supra* note 6, at 3. Payment, or consideration, is a strong indication of employment status. This argument is only bolstered by the fact that many college athletes receive, or have the ability to receive, NIL compensation.

71 *See id.* at 5; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

72 *See* Abruzzo, *supra* note 6, at 5.

After *Alston*, and as a result of states implementing name, image, and likeness ("NIL") legislation,[73] the NCAA lifted their rules banning athletes from profiting from their NIL.[74] With more opportunities for college athletes to profit from their NIL, which is profitable as a result of their athletic--not academic--achievement, college athletes are getting closer to employment status.[75]

Abruzzo concluded her memo by restating her position that college athletes are employees under the Act and that her memo is to notify the public, as well as academic institutions, conferences, and the NCAA as a whole.[76] Additionally, Abruzzo made clear that in any pending case related to this matter, she would advocate for college athlete employment recognition.[77]

3. NCPA Unfair Labor Practice Charge on Behalf of USC College Athletes

Consistent with Abruzzo's memo, the NLRB Los Angeles Region found merit in an unfair labor charge against USC filed by the National Collegiate Players Association on behalf of college athletes at USC.[78] In December 2022, the NLRB directed its Los Angeles Region "to pursue an unfair labor practice charge against USC, the Pac-12 Conference, and the NCAA[.]"[79] In the context of addressing college athletes' employment rights, this charge has a narrow application to college athletes who play football, men's basketball, or women's basketball at USC. [80] Thus, if the NLRB finds that these athletes are employees, only athletes who attend a private university and participate in football, men's basketball, and women's basketball will enjoy the rights of employees. This case has the opportunity to reform the college sports labor market without having to address every issue regarding college athlete employment.[81] In a narrow application of employment status, this case is specifically addressing college athletes in revenue generating sports, rather than those who

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73 *See generally* Fla. Stat. § 1006.74 (2023).
74 Abruzzo, *supra* note 6, at 6.
75 *See id.* at 5-6.
76 *Id.* at 9.
77 *See id.*
78 *See id.*; *see also* Libit, *supra* note 21.
79 Marc Edelman, *Labor Board To Pursue Unfair Practices Charges Against USC, PAC-12 And NCAA*, FORBES (Dec. 16, 2022, 9:43 AM), https://www.forbes.com/sites/marcedelman/2022/12/16/bidens-nlrb-tackling-college-athletes-rights-one-step-at-a-time.
80 *See* Murphy, *supra* note 20.
81 *See* Edelman, *supra* note 79; *see also* NLRB Charge Against Employer, 31-CA-290326 (Feb. 8, 2022).

participate in sports that do not turn a profit, and those who attend a private university, rather than those who attend a public university.[82]

Prior to this charge, the Board declined to assert jurisdiction and answer whether similarly situated college athletes at Northwestern University were employees or not because of a more prominent concern that their decision would negatively impact the labor stability within college football.[83] In the charge against USC, however, the Board *has* to assert jurisdiction, unlike the Board in *Northwestern*, because this case arose from an unfair labor practice charge rather than a union petition.[84] Since *Northwestern*, the inequalities between the NCAA and college athletes have only grown. In 2019, the NCAA reported that "Division I college sports brought in $15.8 billion in revenue . . . with $10.2 billion coming from the sports activities themselves."[85] Again, none of this revenue went to college athletes. Further, with the recent trend of athletic conference's realigning "into leagues that resemble the pros" there is a stronger legal argument for employment recognition as these athletes "are the labor for enormous media and TV contracts [and] they travel to play games across the country as do pro athletes[.][86] According to Jordan Bohannon, member of the NCPA's athlete board, the NCPA's case is an important step forward to implement change and to finally treat college athletes fairly.[87] As Abruzzo had repeatedly reiterated in her memo, the goal now and in the future is to ensure players can fully exercise their rights.[88] With the NCPA's case coming before *Johnson v. NCAA* is heard in the Third Circuit Court of Appeals, it will likely provide the court with persuasive authority in determining whether college athletes are employees.

4. Johnson v. NCAA

Currently, the case *Johnson v. NCAA* is before the Third Circuit Court of Appeals and raises the issue whether the U.S. District Court for the Eastern District of Pennsylvania applied the right standard when denying the NCAA's motion to dismiss a college football athlete's claim that

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82 Edelman, *supra* note 79.
83 *See id.*
84 *See* Libit, *supra* note 21 (emphasis added).
85 Edelman, *supra* note 79.
86 Michael McCann & Daniel Libit, *PAC-12 Chaos May Boost USC Athlete Employee Charge, Enmesh Big Ten*, SPORTICO (Aug. 16, 2023, 12:01 AM), https://www.sportico.com/law/analysis/2023/usc-athletes-employees-pac-12-chaos-1234734234/.
87 *See* Murphy, *supra* note 20.
88 *See id*.

college athletes are employees under the FLSA.[89] Before the district court, the plaintiffs mainly argued that they are employees of the defendants (the NCAA and Villanova) and are entitled to minimum wages under the FLSA because they are under the direct control of the defendants.[90] As a consequence of this control, the plaintiffs argued they are being taken advantage of because they contribute to a team and organization that generates substantial revenue, yet they are not compensated for their contributions monetarily or through the education they were promised.[91] The plaintiffs argued that they must schedule their classes around their athletic responsibilities, which prevented a majority of college athletes from taking the classes they wanted or from majoring in their preferred major.[92] The defendants, however, countered by arguing that the college athletes are compensated through the intangible educational benefits that come with being a college athlete such as leadership skills, discipline, and work ethic.[93] Additionally, the defendants argued that the plaintiffs failed to allege they are employees for three reasons, they are amateurs; the Department of Labor finds interscholastic athletes are not employees; and the complaint did not address a multi-factor test to determine whether somebody is an employee or not.[94] The court rejected each.

First, the defendant's asserted that by tradition, college athletes are not paid and that this practice is what defines amateurism.[95] The court, relying on the majority and concurring opinions in *Alston*, found the argument to be a circular argument and that amateurism no longer defines the economic reality of college athletes.[96]

Second, the defendants argued that students participating in interscholastic activities are *generally* not employees under the FLSA, relying on the Department of Labor's Field Operations Handbook ("FOH").[97] The FOH, however, also states that activities unprotected by the employee/employer relationship, such as interscholastic activities, are defined by "[a]ctivities of students . . . conducted primarily for the benefit of the [college athlete] as a part of the educational opportunities provided

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89 Michael McCann, *NCAA Amateurism Roasted by 'Hot Bench' in Federal Appeals Hearing* (Feb. 15, 2023, 5:45 PM), https://www.sportico.com/law/analysis/2023/federal-appeals-court-rebukes-ncaa-1234710033/; *see also* Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

90 *See Johnson*, 556 F. Supp. 3d at 496-98.

91 *See id.*

92 *Id.* at 496-97.

93 *Id.* at 497.

94 *Id.* at 500.

95 *See id.* at 501.

96 *Id.*; *see also* NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

97 *Johnson*, 556 F. Supp. 3d at 502 (emphasis added).

to the student by the school or institution[.]"[98] In construing the complaint most favorably to the plaintiffs, the court held that the college athletes participation in interscholastic athletics was not for the primary benefit of the college athletes, rather the NCAA and its member institutions are benefitted more favorably.[99] In so holding, the court relied upon: (1) the fact that college athletes have to schedule their classes around athletic activities; (2) the time commitment college athletes devote to athletics per week; and (3) the belief held by college athletes that participating in athletics prevents them from adequately keeping up with their academics.[100] Additionally, the court acknowledged that the NCAA and its members benefit from the college athletes because they would not generate any revenue without college athlete participation and that this revenue from tournaments, sales, and sponsorship agreements, outweigh the intangible benefits that defendants claim the college athletes receive.[101] Thus, the court concluded the FOH did not require them to find the plaintiffs were not employees of defendants.[102]

Third, after disproving the economic reality of college athletes is defined by amateurism, the court used the *Glatt* multifactor test to determine whether it is plausible for college athletes to be employees.[103] The *Glatt* multifactor test is a balancing test of each factor, with no one factor being dispositive, and is ultimately used to determine the primary beneficiary of the relationship.[104] The benefit of using the *Glatt* test is it analyzes the economic expectations of the employee, the benefits to both parties, and the level of control exemplified by the employer.[105] Utilizing this test, the court held that the complaint sufficiently alleged that college

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98 *See id.*; *see also see also* Field Operations Handbook, U.S. Dep't of Labor (Mar. 31, 2016), https://www.dol.gov /sites/dolgov/files/WHD/legacy/files/FOH_Ch10.pdf.

99 *Johnson*, 556 F. Supp. 3d at 506.

100 *See id.* at 505.

101 *See id.* at 505-06. Intangible benefits such as discipline, leadership skills, worth ethic, time management, strategic thinking.

102 *Id.* at 506.

103 *See id.* at 509-12.

104 *Id.* at 509-10; *see also* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533, 536-37 (2d Cir. 2015) (considering the following seven factors: (1) the expectation of compensation and any promise of compensation, expressed or implied; (2) the extent of training similar to that which is given in an educational environment; (3) the relationship between the internship and education program through integrated coursework or academic credit; (4) how accommodating the institution is to academic commitments corresponding with the academic calendar; (5) the extent of the beneficial learning associated with the internship; (6) the similarity between the work provided and the work of paid employees, while providing significant educational benefits; and (7) the expectation that the internship does not entitle the intern to a paid job at the conclusion of the internship).

105 *Johnson*, 556 F. Supp. 3d at 509-10.

athletes are employees under the FLSA.[106] Although the court did not find the plaintiffs had an economic expectation because there are no options for plaintiffs to compete in their respective sport for a wage or to bargain for a wage,[107] the court did acknowledge the lack of benefits received by the plaintiffs.[108] In doing so, the court found in favor of finding the plaintiffs as employees because their participation in athletics did not lead to significant educational benefits; namely, plaintiffs participation in athletics did not lead to academic credit and their athletic activities interfered with their "academic pursuits."[109]

Johnson adds to the newfound support of recognizing college athletes as employees. Due to the findings at the district court level, in conjunction with the doctrinal shift discussed above,[110] it is likely that the appellate court will find in favor of recognizing the college athletes as employees under the FLSA.[111] First, and most significantly, the long tradition of amateurism used to explain the economic reality of college athletes in *Berger* is dispelled by the Supreme Court in *Alston* and Abruzzo's NLRB memo, and this rejection is applied by the district court in *Johnson*.[112] The Third Circuit will likely affirm this rejection of amateurism, particularly in light of the shift away from an amateurism model as espoused by *Alston* and the NLRB Memo. Second, for college athletes to achieve employment status, the Third Circuit will review the district court's application of the college athletes' economic reality and discern who primarily benefits from the relationship between the athletes, their universities, and the NCAA.[113] As set forth below, the Third Circuit will likely find in favor of the college athletes.[114]

If, as expected, the Third Circuit recognizes college athletes as employees, this will create a circuit split between the Third Circuit (in favor of recognizing college athletes as employees) and the Seventh and Ninth Circuits (in favor of not recognizing college athletes as employees). In the event of a circuit split, the Supreme Court should step in to decide finally whether or not college athletes should be employees.[115] Coming off

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106 *See id.*
107 *See id.* at 510.
108 *See id* at 511-12.
109 *See id.*
110 *See* discussion *supra* Part I.B.
111 It is important to note that in *Johnson*, if the court does find in favor of Plaintiffs, the remedy would be the right to minimum wage and overtime pay.
112 *See* NCAA v. Alston, 141 S. Ct. 2141, 2158 (2021); *see also* Abruzzo, *supra* note 6, at 5; *contra* Berger v. NCAA, 843 F.3d 285, 291 (7th Cir. 2016).
113 *See Johnson*, 556 F. Supp. 3d at 510.
114 *See* discussion *infra* Section C.
115 *See* Auerbach & Vorkunov, *supra* note 10; *see generally* Writs of Certiorari, *supra* note 11.

of a decision in *Alston* that vehemently opposed the NCAA's tradition of amateurism it is likely the Court would follow the Third Circuit in accepting college athletes as employees.[116] The Court, however, may find great clarity in this issue by waiting on what the NLRB does in the case involving the NCPA and USC.[117] In that case, the Board will certainly address the employment status of college athletes, which will provide deference for the Court in determining the employee relationship in *Johnson*.[118] That said, however, the USC case primarily concerns labor law and, although it would be persuasive, without the NLRB decision, there is still a strong argument that college athletes are employees.

C. Initial Support for Treating College Athletes as Employees

When ultimately decided, *Johnson* can become the first federal appellate decision to acknowledge college athletes as employees. This Section breaks down the arguments, judicially and legislatively, for the possibility of college athletes achieving employment recognition. First, this Section will analyze the economic reality of college athletes by going through the primary beneficiary test set forth in *Glatt*. The court system, however, is not the only place that has the power to recognize college athletes as employees. Congress has the ability to enact laws and to take matters into their own hands.[119] This Section transitions into the possibility of Congress taking such measures, exemplified by recent federal NIL bills that have been introduced to Congress that collectively protect and support college athletes' rights.[120] Lastly, as a democracy, our governmental system is designed to reflect and represent the majority. Applying this fundamental idea to college athletes' rights, this Section ends with the discussing inadequacies in college sports, addressing the television agreements and coaches' contracts and the pressure that the public may have in enacting change.

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116 *See generally Alston*, 141 S. Ct at 2158, 2167-69 (Kavanaugh, J., concurring); *see also infra* Part I.C.

117 *See generally* Libit, *supra* note 21.

118 *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (coining the term "*Chevron* Deference" to give agency's wide discretion to make policy choices based on their expertise in a specific subject matter).

119 *See generally* U.S. Const. art. I, § 8, cl. 18 (granting Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers).

120 *See, e.g.*, College Athlete Right to Organize Act, S. 1929, 117th Cong. (as introduced by Senate, May 27, 2021); College Athletes Bill of Rights, S. 4724, 117th Cong. (as introduced by Senate, Aug. 2, 2022); ; *see also* Kristi Dosh, *4 New NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023, 9:31 AM), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/

1. Judicial Interpretation

The term "employee" is broadly defined by both the FLSA and NLRA, as it includes any individual employed by an employer[121] and is not limited to employees of a particular employer.[122] This broad definition requires a test of an individual's economic reality, to determine employment status.[123] There are many tests that inquire over an individual's status as an employee; however, "the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context[.]"[124] The *Glatt* test utilizes a "primary beneficiary" model analyzing the benefits to both parties, their expectations, and the level of control by the employer.[125] If the *Glatt* test were to be applied to college athletes involved in revenue earning sports, the college athletes are likely to be classified as employees.

Going through this test, in *Johnson,* the district court found that college athletes do not have, or rather did not allege, that they have an expectation of compensation.[126] The topic of economic expectation, a highly relevant factor, was also the main determination as to why college athletes were not seen as employees in *Berger* and *Dawson*.[127] Today, with NIL deals overtaking the NCAA, college athletes (participating in both revenue generating and non-revenue generating sports) have a strong argument that they have an expectation of compensation.[128] In the new age of college athletics, college coaches now use NIL deals to entice recruits to both attend their school and earn a profit.[129] Although not necessarily pay-to-play, with these new recruiting strategies in place, athletes can argue that as this recruiting practice becomes more popular, athletes are choosing schools (and transferring from one school to another) contingent

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121 Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (1938).

122 National Labor Relations Act, 29 U.S.C.S. § 152(3) (1988).

123 Johnson v. NCAA, 556 F. Supp. 3d 491, 500 (E.D. Pa. 2021); *see also* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985).

124 *Johnson*, 556 F. Supp. 3d at 509; *see also* Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147 (9th Cir. 2017).

125 *See Johnson*, 556 F. Supp. 3d at 509-10.

126 *Id.* at 510.

127 *See, e.g.*, Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016); Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019).

128 *See* Tyler J. Murry, *The Path to Employee Status for College Athletes Post-Alston*, 24 VAND. J. ENT. & TECH. L. 787, 812-13 (2022).

129 *See id.* at 813 (explaining the University of Texas' NIL initiative to compensate offensive lineman $150,000); *see also* Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting (showing the effect college booster members have as a strategy to recruit athletes to their university).

on the NIL opportunities they are promised.[130] The NCAA will be sure to address the fact that this economic expectation derives from brands paying athletes and that no university, or entity affiliated with an NCAA university, can compensate athletes.[131] Whether courts choose to side with athletes or the NCAA regarding this particular issue it to be determined.

In addition to economic expectation, college athletes can prove their relationship is primarily an economic relationship for their institution, rather than an educational relationship that benefits them, by alleging facts regarding: low graduation rates, "sham" exams, and poor attendance records.[132] Further, as athletic conferences continue to realign, certain athletes are now forced to travel further distances to play a sport that generates millions of dollars for media and tv contracts.[133] This not only serves the NCAA's economic motivation, it hinders the athletes educational opportunities and "judges will [be sure to] take notice."[134] Lastly, proving the NCAA has control over their college athletes is a straight forward analysis because of the oversight the NCAA has over eligibility rules, recruitment, hours of participation, and disciplinary actions.[135] In conclusion, although going through the court system provides college athletes an avenue for employment rights, doing so can be an expensive and lengthy process. But the judiciary is not the only body of government that is sympathetic towards the inequalities surrounding college sports.

2. Legislative Trends

In addition to the court system, Congress has also made an effort to recognize college athletes as employees through the College Athlete Right to Organize Act. This Act was first introduced in May of 2021, one month before *Alston* was decided and four months before Abruzzo's memo and reintroduced to Congress in December of 2023.[136] Similar to Kavanaugh's

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130 *See* Murry, *supra* note 128, at 812-13.

131 *See also* Michelle Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx (illuminating the fact that NIL laws are highly evolving, particularly due to controversy relating to NCAA's policy and conflicting state laws).

132 *See* Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 651-54 (2010) (highlighting different universities' inability to provide an adequate educational experience for their college athletes).

133 *See* McCann and Libit, *supra* note 86.

134 *See id.*

135 Johnson v. NCAA, 556 F. Supp. 3d 491, 497 (E.D. Pa. 2021).

136 College Athlete Right to Organize Act, S. 1929, 117th Cong. (as introduced by Senate, May 27, 2021); *see* NCAA v. Alston, 141 S. Ct. 2141, 2141 (2021); *see also* Abruzzo,

concurrence in *Alston* and Abruzzo's memo, this Act rejects the exploitation of college athletes.[137] The purpose of this Act is to create legislation for college athletes' right to collectively bargain.[138] If enacted, this Act would amend the NLRA to allow college athletes to bargain collectively with private and public institutions.[139] This Act supports collective bargaining by showing the positive impact of collective bargaining on professional sports, mainly through the use of labor organizations resulting in a fair share of revenues, equitable terms of employment, and protecting athletes' health.[140] Additionally, similar to professional athletes, the Act defines college athletes as employees because "[t]hey perform a valuable service for their respective colleges under a contract for hire in the form of grant-in-aid agreements[.]"[141] The Act expresses the need for collective bargaining among college athletes and their schools and conferences to establish adequate rules and standards that benefit both parties mutually.[142]

Additionally, Congress has introduced several bills that enhance the benefits allotted to college athletes without granting them employment status. Of the bills introduced recently, the most convincing are the College Athletes Bill of Rights, Student Athlete Level Playing Field Act, and the College Athlete Economic Freedom Act.[143] Although all three bills have only been introduced by the Senate and are not binding law, they represent the need to address college athletes' rights.

The College Athletes Bill of Rights is a bill that was introduced in the Senate in order to establish fair and equitable protections for college athletes, in areas addressing: economic opportunities; health, wellness,

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supra note 6, at 1; *see also* Amanda Christovich, *Five Pro Sports Unions Endorse College Athlete Employment*, FRONT OFFICE SPORTS (Dec. 6, 2023, 1:37 PM), https://frontofficesports.com/five-pro-sports-unions-endorse-college-athlete-employment/ (stating that College Athletes Right to Organize Act was reintroduced by Senators Chris Murphy and Bernie Sanders).

137 *See Alston*, 141 S. Ct. at 2167-69 (Kavanaugh, J., concurring); *see also NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, NLRB (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of.

138 *See generally* College Athlete Right to Organize Act, S. 1929, 117th Cong.

139 *See id.* § 2(9).

140 *Id.* § 2(4)

141 *Id.* § 2(7).

142 *See id.*§ 2(8).

143 College Athletes Bill of Rights, S. 4724, 117th Cong. (as introduced by Senate, Aug. 2, 2022); Kristi Dosh, *4 New NIL Bills Have Been Introduced In Congress*, FORBES (July 29, 2023, 9:31 AM), https://www-forbes-com.cdn.ampproject.org/c/s/www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/amp/.

and safety; and education standards.[144] For economic opportunities the bill addresses a college athletes NIL and their newfound ability to profit from their NIL and their ability to hire representation for money-earning possibilities.[145] To better protect the health of college athletes this bill also serves to establish a medical fund to better provide healthcare services, while also creating standards to further wellness initiatives.[146] In order to improve educational standards this bill sets requirements for advising, tutoring, and prohibiting institutions from limiting their athletes' choices in selecting courses and majors.[147] To see that the requirements of this bill are met, the bill creates the Commission on College Athletics that is a separate entity, distinct from the NCAA.[148] Although the College Athletes Bill of Rights does not explicitly address college athletes employment rights, its goals align well with those that advocate for employment rights. The overarching philosophy of both this bill and the College Athletes Right to Organize Act is to create a solution for the exploitation of college athletes' labor.[149]

The Student Athlete Level Playing Field Act allows a college athlete to profit off their NIL without facing prohibition by the collegiate institution they are attending.[150] This Act, as well as the College Athlete Economic Freedom Act, would preempt state laws relative to NIL.[151] Although outside the scope of this Note, a federal Act addressing NIL would create more clarity and structure for college athletes as it relates to their rights, which is widely beneficial. The Student Athlete Level Playing Field Act "would also ensure athletes are not considered employees[.]"[152] Rather, this Act would look to protect college athletes by providing oversight over NIL activities in two ways. First, through the possible involvement of the Federal Trade Commission ("FTC") for NIL deals over five hundred dollars.[153] For these deals, (1) the deal would need to be uploaded to a clearinghouse platform and (2) the FTC would create a platform for registered agents and ensure the agents were registered before

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144 College Athletes Bill of Rights, S. 4724, 117th Cong. (as introduced by Senate, Aug. 2, 2022).

145 *See id.* § 3(c)(1).

146 *See id.* §§ 5-6.

147 *Id.* § 7(3)(B)(b)-(c).

148 *See id.* § 11.

149 S. 4724; *see also* College Athlete Right to Organize Act, S. 1929, 117th Cong. (as introduced by Senate, May 27, 2021).

150 Student Athlete Level Playing Field Act, H.R. 3630, 118th Cong. § 2 (as introduced by the House, May 24, 2023).

151 Dosh, *supra* note 143.

152 *Id.*

153 *Id.*; H.R. 3630 § 5(2)(b)(i).

working with the athlete.[154] This serves to protect the interests of college athletes to guarantee they are not taken advantage of. Second, this Act would create the Covered Athlete Organization Commission that would consist of a diverse group of members affiliated with the collegiate sports industry, including current and former athletes as well as administration.[155] This Commission would be tasked with advocating for college athletes and making recommendations to Congress relating to current and future NIL rules.[156] This Act's power is derived from its position to promote college athletes' ability to profit from their hard work, while also protecting them from outside third parties who may try to take advantage of them.

The College Athlete Economic Freedom Act, which was first introduced in 2021,[157] has been reintroduced by Senator Chris Murphy and Representative Lori Trahan.[158] This Act promotes college athletes' pursuit of profitable opportunities by granting athletes the unrestricted right to market their NIL, allowing college athletes to have representation, and lifting visa restrictions on international collegiate athletes.[159] Most importantly, this bill also introduces the idea of revenue sharing between college athletes and universities/conferences.[160] A revenue sharing model, as it relates to players' NIL would require a university or a conference to obtain a group license from their athletes to use "their NIL for any kind of promotion, including through their media rights deals."[161] An Act requiring universities to obtain a group license could pave the way for another revenue sharing model (discussed in Part V, *infra*) that goes beyond NIL and creeps closer to pay-for-play.

Lastly, it is worth mentioning the Protecting Athletes, Schools, and Sports Act, which is backed by the support of the NCAA, including their President, Charlie Baker.[162] This Act aims to address NIL by balancing the integrity of college sports with protecting the rights of college athletes.[163] This Act does this by "protecting" athletes through enhanced NIL

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154 H.R. 3630 § 5(2)(b)(i).

155 *Id.*

156 *Id.*

157 *See* College Athlete Economic Freedom Act, H.R. 850, 117th Cong. (as introduced by the House, Feb. 4, 2021); The Act was introduced prior to the NCAA changing their NIL Policy.

158 *See* Dosh, *supra* note 143.

159 *See id*; *see also* College Athlete Economic Freedom Act, S. 238, 117th Cong. §§ 3(a)(1), 6(b)(1) (as introduced by the Senate, Feb. 4, 2021).

160 *See* Dosh, *supra* note 143.

161 *Id.*

162 *Id.*

163 *See* Ralph D. Russo, *Manchin, Tuberville Introduce College Sports Bill to Standardize NIL Rules, Regulate Collectives*, ASSOCIATED PRESS (July 25, 2023, 10:12 PM), https://apnews.com/article/nil-ncaa-manchin-tuberville-0f76f1065e8a6cf075a2590ab06acab0.

transparency: (1) the establishment of a uniform NIL contract; (2) a public website for NIL data; and (3) a requirement to disclose NIL deals within thirty days of signing.[164] The objective of such transparency, as stated by Senator Tommy Tuberville, is to keep the playing field level and ensure athletes can profit from their NIL and also earn a higher education.[165] As opposed to the College Athlete Economic Freedom Act, this Act "would make it illegal for states to pass laws that permit college athletes to share revenue with schools and conference[s.]"[166] Although this bill provides benefits to athletes, such as the establishment of long-term healthcare,[167] it essentially limits an athlete's right[168] to future earnings by not allowing them to share in the revenue that generates billions of dollars for their respective university and conference.

With hesitation from the judiciary over whether to classify college athletes as employees or not, and multiple bills before Congress, there is clear uncertainty. While our judges and policy makers grapple with how to address the situation regarding college athletes, both the legislature and judiciary may be moved by the largest group in our democracy: the public.

3. Public Perception

There are two important court cases that have shaped much of the public's view of college athletics: *NCAA v. Oklahoma Board of Regents* and *Law v. NCAA*. In *NCAA v. Oklahoma Board of Regents*, the Court found that the NCAA could not restrict their member institutions from engaging in their own television broadcasting agreements.[169] By restricting them, the Court found the NCAA was "blunting the ability of member institutions to respond to consumer preference . . . [and] restrict[ing] rather than enhanc[ing] the place of intercollegiate athletics in the Nation's life."[170] Due to the popularity of college sports, specifically basketball and football, the holding of this case has led to the NCAA and their institutions and conferences generating massive revenues from broadcasting agreements.[171]

Law v. NCAA involved a class action against the NCAA for their rule limiting the annual compensation for certain entry-level coaches to

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164 *See id.*
165 *Id.*
166 *Id.*
167 *See id.*
168 Specifically, athletes who participate in revenue earning sports such as football and basketball. *See id.*
169 NCAA v. Okla. Bd. of Regents, 468 U.S. 85 (1984).
170 *Id.*
171 *See generally* Blinder and Draper*, supra* note 25.

$16,000.[172] The Tenth Circuit struck down this rule and found that the NCAA violated antitrust law and could not impose this salary restriction.[173] The court reasoned, among other things, that the NCAA could not prove that these restrictions had any procompetitive effects such as enhancing competition and/or reducing coaching inequalities.[174] As a result, colleges today spend a considerable amount of money on their coaches' contracts with the hope of retaining them for a long period of time and bringing a championship (and therefore, more money) to their institutions.[175]

With television contracts and coaches' agreements being publicized, society is keenly aware of the true injustice rendered towards college athletes. Beyond awareness, the public wants answers, as do those within college sports. Former star college football quarterback, Robert Griffin III, shared his thoughts on the matter when he took to Twitter, writing to his three million followers: "TV Networks pay billions of dollars to Conferences/Colleges to air their games. It's time for college athletes to get a significant share of that money. They increase the value of these College Brands year after year and College Sports isn't amateur when coaches are making $100 [million]."[176] Jim Harbaugh, coach of the University of Michigan's football team, acknowledges the disparity between the colleges and athletes and expressed his opinion, saying "I do believe the players should receive a revenue share from the massive TV deals that have been worked out[.]"[177] This Note addresses both Griffin and Harbaugh's revenue sharing solution in Part V *infra*; for now, it is important to highlight the sentiment surrounding college sports: college athletes are being undeniably cheated by the system they are in. As discussed throughout Part I, the sought-out remedy for this long-lasting injury is to recognize college athletes as employees.

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172 Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998).

173 *See id.* at 1024.

174 *Id.*

175 *See generally* Leigh Steinberg, *Are College Football Head Coaches Worth Their Massive Salaries?*, FORBES (Dec. 6, 2017, 7:02 PM), https://www.forbes.com/sites/leighsteinberg/2017/12/06/are-college-football-head-coaches-worth-their-massive-salaries/?sh=5f2fb5a65acd (highlighting Jimbo Fisher's ten year, seventy-five million dollar contract to coach a college a football team).

176 Robert Griffin III (@RGIII), TWITTER (Aug. 26, 2022, 9:54 AM), https://twitter.com/RGIII/status /1563162978576 666629

177 Nicole Auerbach and Stewart Mandel, *The Future of College Football, Inc.: Where the Sport's Money and Management Go From Here*, THE ATHLETIC (Sep. 27, 2022), https://theathletic.com/3627099/2022/09/27/college-football-ncaa-breakaway-revenue-sharing.

II. COLLEGE ATHLETE-EMPLOYEE-REGIME

If and when college athletes are considered employees, there are several key issues that will need to be addressed by the NCAA: (1) bargaining units; (2) whether college athletes will earn wages, scholarships, or both; and (3) mandatory bargaining subjects. First, it is likely that the most appropriate bargaining unit for college athletes is a "per team" unit that will bargain either directly with the NCAA or independently with their school/conference. Second, it will become evident that giving college athletes a wage and a scholarship is an unlikely outcome and that, because of employment status, the NCAA will be forced to give college athletes wages. Third, this Note will explore, broadly, the terms of a potential collective bargaining unit and which terms the NCAA and/or its member institutions will be forced to bargain over.[178]

A. Issues That Will Need to Be Addressed

The complexity of bargaining units will present an issue for the NCAA, its member institutions, and the college athletes. This Section begins by explaining what bargaining units are and the likely outcome based on the NLRB's criteria and the overarching goals of the NLRA, the college athletes, and the NCAA. This Section then transitions to who the college athletes will be bargaining with by exploring the possibility of the NCAA being classified as joint-employers, as well as the possibility of each university and conference joining together as multiemployers. Second, this Section identifies the issue with how the college athletes will be compensated and whether the universities or the NCAA has the financial resources to give each athlete a wage and a scholarship. Lastly, the issues involving mandatory and permissive bargaining subjects will be addressed to determine what an employer is obligated to bargain over and the potential to severely limit college athletes' in-kind benefits that they enjoy currently.

1. Bargaining Units

When college athletes are classified as employees, they will have the right to bargain collectively under the NLRA.[179] To exercise this right, college athletes will need to form bargaining units. Bargaining units are a

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[178] Each issue in this section, collectively and on their own, is critical in understanding the true impact of classifying college athletes as employees. It is important to acknowledge that these issues are not the only issues associated with a college athlete employment model. Although there are many other considerations, such as antitrust and tax implications, this Note focuses on the labor law implications of the classification of college athletes as employees.

[179] *See* National Labor Relations Act, 29 U.S.C. §§ 151-69 (1935).

group of employees who share a community of interest and are grouped together for the purposes of collective bargaining.[180] The NLRA gives wide discretion to the Board to determine the appropriateness of a bargaining unit.[181] To determine appropriateness, the Board will focus on whether there is a community of interest between the employees by focusing on whether there are: (1) distinct skills and training; (2) separated supervision; (3) distinct job functions and/or distinct work; (4) their contact with the other employees in the unit and their work functions; and (5) distinct terms and conditions of employment.[182]

In the context of determining an appropriate bargaining unit for a college athlete there are as many questions as there are possibilities. Applying the community of interest standard described above, it is plausible for a unit to consist of a small or large group of college athletes. Using football as an example, this *one* sport could theoretically have a bargaining unit consisting of players from: a football team at a university, all the football teams in a specific conference, all the football teams in the FBS, or all the football teams in the NCAA. Here, because of the wide discretion of the NLRB, each option is possible with proof of similar training, contact with other football players in the unit, and/or similar rules regarding coaches' supervision.[183] It is unlikely that the bargaining units would get smaller than that by, for example, subdividing the teams by position group. There is the argument that these athletes have different roles and responsibilities, however, the NLRB has made clear that when there is a community of interest an appropriate unit will not be "'composed of a gerrymandering grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit.'"[184] Although it is likely a bargaining unit will not consist of members smaller than a team, there is still the issue of what the bargaining units will look like with the overwhelming amount of sports, teams, and conferences there are in the Division I ecosystem—combined with the ability to either narrow or broaden the community of interest test because of the Board's ambiguous interpretation of it. Ultimately,, there is no one answer. In searching for one, it is important to remember that the goal of the NLRA is to facilitate collective bargaining between union and employer.[185] With this goal in mind, the NLRB

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180 *See* NLRB, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.

181 *See* 29 U.S.C. § 159(b).

182 SAMUEL ESTREICHER & MATTHEW T. BODIE, LABOR LAW 106 (Saul Levmore et al. eds., 2d ed. 2020).

183 *See id.*

184 *See id.* at 107 (quoting PCC Structurals, Inc., 365 N.L.R.B. No. 160 at *7 (2017)).

185 *See id.* at 106.

generally defers to the interests of the petitioning labor organization because that unit represents a majority support in the union to effectively represent them.[186]

To help guide the NCAA and its member institutions, this Note suggests the most beneficial unit for the NCAA and its college athletes consists of separate bargaining units for each Division I team. There are two labor models that make the most sense for these units to bargain with: (1) the NCAA as a joint-employer of each university and (2) a group of multiemployer associations made up of each conference and their member institutions. These units are predicated on the idea that they have the best opportunity to advance competition, promote the health and safety of all of their college athletes, and will justly compensate those in revenue earning sports. These models strictly serve as guidance.

First, for there to be a single bargaining unit representing each team in Division I, the NCAA would need to be classified as a joint-employer to have the ability to collectively bargain with each unit.[187] A joint-employment relationship arises when an employer (the NCAA) has significant authority over aspects of the employee's (the college athletes) essential terms of employment such as wages, hiring, firing, discipline, and working conditions.[188] To determine a joint-employer, the NLRB will consider both direct and indirect control of the employee's essential terms of employment.[189] In *Dawson*, the court declined to acknowledge the NCAA as a joint-employer, however, it did so by analyzing the FLSA, not the joint-employer test under the NLRB's interpretation.[190] It presumably did so because the plaintiff's brought a claim under the FLSA, with no reference to any violation of the NLRA.[191] Using *Johnson*, the plaintiff's alleged facts provide direct evidence, through the NCAA's bylaws, that the NCAA would be a joint-employer because of their ability to (1) control college athletes' hours of participation; (2) discipline college athletes; and (3) govern their conduct on and off the field.[192]

The benefits of involving the NCAA in the bargaining process with a union representing each team is that, individually, each sport would be able to create its own collective bargaining agreement ("CBA") that deals directly with the specific intricacies of that sport. A CBA would also have

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186 *See id.*

187 *See generally id.* at 110.

188 *See NLRB Issues Notice of Proposed Rulemaking on Joint- Employer Standard*, NLRB (Sept. 06, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-notice-of-proposed-rulemaking-on-joint-employer-standard.

189 *See id.*

190 *See* Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019).

191 *See id.* at 907.

192 *See* Johnson v. NCAA, 556 F. Supp. 3d 491, 497-98 (E.D. Pa. 2021).

the potential to address the revenue some sports earn through the inclusion of a group licensing provision, similar to those in major league sports, which would allow teams to bargain for the right to share in revenues.[193] Conversely, a bargaining unit of this nature could cause Title IX issues for the NCAA if the terms of employment between men's and women's teams differ.[194] This model also does not include the conferences as an employer, cutting them out of the bargaining process. The CBA would likely have the ability to address each conference, however, this presents a problem, nonetheless.

Second, each Division I team could bargain with its conference and unit together, as multiemployer associations. For this to be possible, each university and conference will have to consent to engage in joint-bargaining with the union that represents each sport.[195] There are benefits for the conference and university as they would not have to worry about being undercut by one another regarding labor costs as there would be a uniform bargained for standard.[196] Additionally, for the universities, they would get the advantage of negotiation resources of their larger conference partners.[197] For college athletes, they would get more specified terms of employment bargaining with their conference and their university, rather than the NCAA. This has the potential to enhance competition within conferences. Alternatively, with different terms and conditions of employment between each conference, out-of-conference competition could be stifled by the potential for different resource allocation afforded to college athletes. Again, like the first model, there would also be the potential for Title IX implications between teams.[198]

The biggest issue with this model would be the college athletes' inability to transfer out of conference. Recently, college athletics has been dominated by the transfer portal and college athletes using their remaining years of eligibility to transfer from one school to the other.[199] With CBA's at the conference level and different terms and conditions of employment,

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193 *See, e.g., Collective Bargaining Agreement*, Nat'l Football League Mgmt. Council & Nat'l Football League Players Ass'n, (Mar. 15, 2020); *see also* Dosh, *supra* note 143 (explaining the College Athlete Economic Freedom Act's proposal to achieve revenue sharing through group licensing).

194 *See generally Title IX Frequently Asked Questions*, NCAA, https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx, (last visited, Jan. 26, 2023).

195 *See* Estreicher, *supra* note 182, at 152.

196 *See id.*

197 *See id.*

198 *See generally Title IX Frequently Asked Questions*, *supra* note 194.

199 *See Transfer Portal Data: Division I College athlete Transfer Trends*, NCAA, https://www.ncaa.org/sports/2022/4/25/transfer-portal-data-division-i-student-athlete-transfer-trends.aspx (last visited Jan. 26, 2023) (finding 11,547 Division I college athletes entered the transfer portal between 2020 and 2021).

it would be unlikely for college athletes to transfer from one school to the other. This lack of freedom could hurt college athletes and would be an issue the NCAA would have to address.

2. Wages Versus Scholarships

Another issue with college athletes becoming employees is whether they would receive wages, scholarships, or both. Currently, athletic scholarships are dispersed depending on whether the college athlete is participating in a headcount or equivalency sport.[200] Headcount sports are sports that offer full-ride scholarships for a restricted number of college athletes.[201] These sports include FBS football, men's and women's basketball, women's volleyball, tennis, and gymnastics.[202] Headcount sports are *generally* those that generate substantial revenue.[203] Equivalency sports are sports that do not generate the revenue of headcount sports, and consequently, these scholarships can be divided and dispersed among the college athletes as the university sees fit.[204] Additionally, the NCAA has the discretion to aid college athletes financially through programs such as the NCAA Division I College Athlete Opportunity Fund.[205] Presuming that college athletes are employees, they will also be entitled to wages. Similar to the issues regarding bargaining units, this presents a multitude of problems for the NCAA.

This Note suggests college athletes will only be able to earn a wage, not coupled with a scholarship, because both the revenue and non-revenue sports would not be able to sustain a model where they must pay every college athlete a wage and still give out full or partial scholarships.[206] For example in 2021, although the NCAA distributed sixty percent of its revenue to Division I schools,[207] each Division I Subdivision, for example, reported a negative net generated revenue.[208] This shows that although

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200 Brooke Kruhm, *Defining Head Count and Equivalency Sports*, ASM (Nov. 10, 2021), https://asmscholarships.com/defining-head-count-and-equivalency-sports/

201 *Id.*

202 *Id.*

203 *Id.* (emphasis added).

204 *See id.*

205 *See Scholarships*, NCAA, https://www.ncaa.org/sports/2014/10/6/scholarships.aspx, (last visited, January 23, 2023).

206 *See* Telephone Interview with Ryan Mitchell, Director of Compliance, University of Pittsburgh (Oct. 6, 2022); *see also* Telephone Interview with Dan Isaaf, Director of Compliance, Bucknell University (Oct. 6, 2022).

207 *Division I Finances*, NCAA, https://www.ncaa.org/sports/2021/5/11/division-i-finances.aspx (last visited Jan. 26, 2023).

208 *Finances of Intercollegiate Athletics Database*, *Summary: Revenues and Expenses 2021*, NCAA (Oct. 2022), https://www.ncaa.org/sports/2019/11/12/finances-of-intercolleg

Division I schools, collectively, brought in more than $13 billion revenue (attained through initiatives such as media rights, bowl revenues, and donors) their total expenses led to a negative net revenue.[209] This shows either a flaw in the Division I Model or the amount of financial upkeep a sports team needs. Regardless, there simply will not be enough money to pay college athletes both a wage and a scholarship. That said, it could depend on the CBA's that are made and the financial resource of each team. With increasing television agreements and the increasing popularity of gambling,[210] the generated revenue may soon outweigh the expense associated with a team and open the door for college athletes to earn both a wage and scholarship. At the present moment, however, it is unlikely that the NCAA can sustain a model giving college athletes a wage and a scholarship.

3. Mandatory Bargaining Subjects

Under the NLRA, the employer and representative of the employees have a duty to bargain over mandatory terms such as wages, hours, and other terms and conditions of employment.[211] Subjects that fall outside of these categories, are called permissive subjects and neither the employer or the representative of the employees have a duty to bargain over them.[212] If either the employer or the union insist on bargaining over these subjects, that would be a violation of their duty to bargain in good faith under the NLRA.[213] Distinguishing between a mandatory and permissive subject is difficult because of the broad language in the NLRA, which defines a mandatory subject as wages, hours, and other *terms and conditions of employment*, with no further definition of what is included in those terms and conditions.[214] One explanation is that Congress intentionally left these mandatory subjects broad to not overstep their authority and allow the NLRB to "define those terms in light of specific industrial practices."[215] To clarify whether a term is mandatory or permissive, the Supreme Court requires courts to look at the term's impact on the employment

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iate-athletics-database.aspx (showing the revenues and expenses for FBS Autonomy schools, Nonautonomy schools, FCS schools, and the remaining subdivisions).

209 *See id.*

210 *See generally How Much Do Leagues Stand to Gain From Legal Sports Betting?*, AM. GAMING ASS'N, https://www.americangaming.org/wp-content/uploads/2018/10/Nielsen-Research-All-4-Leagues-FINAL.pdf (last visited Jan. 26, 2023) (explaining the increase in revenues the legalization of betting provides professional leagues).

211 *See* National Labor Relations Act, 29 U.S.C. § 158(d) (1935)

212 Estreicher, *supra* note 182, at 144.

213 *See id.* at 134; *see also* 29 U.S.C. §§ 158(a)(5), (b)(3).

214 *See* 29 U.S.C. § 158(d) (emphasis added).

215 First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 675 (1981).

relationship; the term is permissive if there is an "indirect and attenuated impact" on the relationship.[216] If, however, the term has a substantial impact on the employment relationship, courts will apply a benefit/burden test to determine whether the benefits from the collective-bargain process outweigh the burden placed on the employer's business, if so, it is mandatory.[217]

Terms such as what college athletes will be paid as well as their practice and training hours are undeniably mandatory bargaining terms under the NLRA.[218] But beyond these terms, there are many unanswered questions. A majority of today's college athletes, whether they acknowledge it or not, receive the benefits of being an athlete on campus through their access to state-of-the-art facilities, trainers, physical therapy, nutrition, and counseling.[219] The most important benefit college athletes currently receive, which could be jeopardized with an employee classification, is a college education and the weight that carries in society.[220] Without addressing who college athletes would bargain with,[221] the employment relationship of college athletes will be for the money they provide their employer through their athletic participation, not their academic participation. Although neither universities nor the NCAA will abandon education for their athletes, the fact that employers may not have to bargain for education because of its attenuated impact on the true relationship between employer and employee, should scare college athletes.[222] Additionally, although it is a subject that will likely be included in a CBA, because education is a permissive term, college athletes would not have any bargaining power which could lead to the bare minimum and inadequate educational opportunities for college athletes.[223]

As for the other benefits such as training, facilities, nutrition, and team issued gear, these could also be in jeopardy. Here, college athletes would likely have a stronger argument that these subjects have a direct impact on their athletic success, however, the NLRB would likely weigh their burden on the employer's business (mainly, the economic impact).[224] Regardless of the NLRB's determination, the employer would likely want to provide the same level of training and facilities because they want their college

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216 *Id.* at 676-77.
217 *See id.* at 679.
218 *See* 29 U.S.C. § 158(d).
219 Telephone Interview with Jennifer Heppel, Conference Commissioner, Patriot League (Oct. 13, 2022).
220 *See Benefits to College Student-Athletes*, NCAA, https://www.ncaa.org/sports/2014/1/3/benefits-to-college-student-athletes.aspx (last visited Jan. 23, 2023).
221 *See supra* Part II.A.1.
222 *See First Nat'l Maint. Corp.*, 452 U.S. at 677.
223 *See* McCormick, *supra* note 132, at 651-54.
224 *See First Nat'l Maint. Corp.*, 452 U.S. at 679.

athletes to perform well, so its "business" can succeed. However, the team issued gear that college athletes come to expect could be severely limited depending on the team and/or school and the revenue they produce for their employer.

By analyzing the issues with mandatory and permissive bargaining subjects, this Note looks to warn college athletes of the possibilities and the inherent bargaining power an employer will have over college athletes. That said, the NLRA does allow for the use of economic weapons such as striking,[225] but this is an unlikely tactic by college athletes participating in revenue earning sports because of their professional aspirations. Therefore, although college athletes will be getting wages and a more uniform standard for their hours of participation, there are many other considerations college athletes must evaluate to decide whether they would benefit from an employment classification. As emphasized throughout this Note, an employment model is not the solution to adequately compensate college athletes.

B. Classifying College Athletes Will Hurt More Than it Helps

A college athlete employment model will lead to uncomfortable and unfamiliar territory for all involved.[226] Moreover, the negative impacts of classifying a college athlete as an employee will create a ripple effect, hurting college athletes and universities, which will ultimately hurt the NCAA. A majority of college athletes, especially those participating in non-revenue sports, will be hurt by employment classification because this will lead to many universities dropping athletic programs.[227] If this were to happen, college athletes would lose not only potential compensation but the intrinsic characteristics that sports teach, such as discipline, leadership skills, and teamwork.[228] For universities, cancelling sports programs will not only hurt their student population by providing a disservice to their college athletes, it hurts universities' public image by inviting bad press, angry donors and alumni, and potential lawsuits.[229] This combination for college athletes and universities reflects poorly on the NCAA and its goals of furthering the college athlete experience. In the unfortunate event that the NCAA waits for the judicial system, college athletes will likely be considered employees. If the NCAA must adhere to a new college athlete

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225 *See* National Labor Relations Act, 29 U.S.C. § 157.

226 Telephone Interview with Marra Hvozdovic, Former Director of Compliance, Atlantic Coast Conference (Oct. 12, 2022).

227 Telephone Interview with Jennifer Heppel, *supra* note 219.

228 *Id.*

229 *See* Donna Lopiano, *Why Cutting College Sports Programs Is A Bad Idea – Especially Now*, FORBES (Oct. 4, 2020, 8:52 PM), https://www.forbes.com/sites/donnalopiano/2020/10/04/why-cutting-college-sports-programs-is-a-bad-idea--especially-now/.

employment model, the NCAA must be willing to reform their Division I Model to help curtail the harm that will result for their athletes and universities.

III. DIVISION I MODEL

The purpose of the NCAA Division I Model (the "Model") is to create a system of governance that furthers the well-being of its college athletes.[230] The academic and financial inequalities among college athletes are hindering the well-being of student athletes.[231] To overcome the harm to its college athletes, the NCAA must make changes to the Model and revenue distribution system. This Section will begin by explaining the current setup of the Model, including its failure to implement meaningful policy, as displayed by the NCAA's continuous "interim" NIL policy and inability to compensate college athletes participating in revenue earning sports. Beyond identifying the issues associated with this Model, this Section addresses the revenue distribution system and further emphasizes its inability to fairly compensate college athletes, as well as its inequality of distribution between each conference.

A. Current Division I Model

The current Model is highlighted by Division I's Board of Directors, the Council, and smaller committees that recommend and propose new rules.[232] The Board of Directors, for better or worse, is dominated by FBS football.[233] Fifteen of the twenty-four members are presidents of institutions with a football program: five presidents from the highest resource conferences;[234] five from the other FBS conferences;[235] and five from the Football Championship Subdivision ("FCS").[236] The remaining members of the Board of Directors are comprised of five presidents from institutions without a football program, the Chair of the Division I College

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230 Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA, (Aug. 7, 2014, 11:49 AM), https://www.ncaa.org/news/2014/8/7/board-adopts-new-division-i-structure.aspx.

231 *See* discussion *supra* Part I.C. (providing support for college athletes not receiving an adequate education, while also being restricted from any of the revenue the college athletes' school or conference receives from their performance in their sport).

232 *See generally* Hosick, *supra* note 230.

233 *See id.*

234 The Atlantic Coast Conference, Big Ten Conference, Big 12 Conference, Pacific 12 Conference, and Southeastern Conference.

235 The American Athletic Conference, Conference-USA, Mid-American Conference, Mountain West Conference, and the Sun Belt Conference.

236 Hosick, *supra* note 230.

Athlete Advisory Committee, Chair of the Council, one member from the Faculty Athletics Representatives Association, and a campus senior women's athletics representative.[237] The distribution of members exemplifies the NCAA's emphasis on governance relying on football, its highest earning revenue sport.[238] The Council is responsible for the day-to-day operations of the Division I schools and is made up of forty representatives: two college athletes, four conference commissioners, two designated faculty members, and thirty-two of the conference commissioners.[239] Similar to the Board of Directors, a majority of the power resides with the highest resource conferences and the remaining FBS conferences, totaling a little over fifty-six percent of the voting power of the Council.[240]

Among the numerous committees associated with the NCAA, the most progressive is the Transformation Committee. The Transformation Committee is comprised of a diverse group ranging from athletic directors, university presidents, and conference commissioners.[241] The Transformation Committee was created to address the evolution of college athletics and to further commit to the NCAA's goal of serving college athletes.[242] To accomplish this goal, the Transformation Committee proposes recommendations to the Board of Directors by identifying opportunities that will modernize college athletics.[243] On January 3, 2023, the Transformation Committee sent its final report to the Board of Directors advocating for enhanced mental health support for college athletes, greater college athlete representation in the decision making process, and a modification to the revenue distribution program to include more sports than just men's basketball.[244]

Although the Transformation Committee is a step in the right direction, the Model continues to have inadequacies regarding the well-being of their college athletes. This is exemplified by the Model's inability to provide a timely policy for college athletes regarding their ability to profit from their NIL. On June 30, 2021, the NCAA implemented an Interim NIL Policy just one day before numerous states would implement

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237 *Id.*

238 *See* Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017, 3:36 PM), https://www.businessinsider.com/college-sports-football-revenue-2017-10.

239 Hosick, *supra* note 230.

240 *Id.*

241 *See Division I Transformation Committee*, NCAA, https://www.ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx (last visited Jan. 23, 2023).

242 *See id.*

243 *Id.*

244 NCAA DIV. I TRANSFORMATION COMM., FINAL REPORT 8, 15 (2023).

their own NIL policy.[245] When adopted, the NCAA clarified that this was a temporary policy and would only "remain in place until federal legislation or new NCAA rules are adopted."[246] Since then, college athletes have navigated through this "temporary" policy, with no other guidance from the Division I Board beyond a mere clarification of certain situations.[247]

Ultimately, college athletes deserve better. With the classification of Division I college athletes as employees on the horizon, the NCAA will need to handle this situation more efficiently than they did NIL. Although this Note suggests employment status will hurt both college athletes and their respective universities,[248] the NCAA Division I Board will need to be prepared for the inevitability of some reform. The NCAA can prepare by adjusting their revenue distribution system and changing the Model's system of governance.

B. Division I Revenue Distribution System

While state and federal laws pertaining to college athletes' rights are going through their respective legislative processes, the NCAA can implement change to the policies under its control. This starts with how they distribute its revenue among each conference and university. This Section will provide an overview of the current system for Division I revenue distribution and show the inadequacies of this system for both the universities and college athletes.

In 2022, a total of $625,491,249 was distributed among Division I universities and conferences through their distribution system.[249] This distribution system is dominated by the sport of basketball which directly reflects its main source of revenue, the March Madness Tournament (the "Tournament").[250] With no control of the College Football Playoff or the

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245 Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate*, ESPN (Sept. 1, 2021, 10:59 AM), https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate.

246 Hosick, *supra* note 131.

247 *See generally* Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx; Additionally, with some states implementing state laws that directly conflict with the NCAA's NIL policy, college athletes are disadvantaged further with a complete lack of clarity in the NIL industry.

248 *See* discussion *supra* Part II.B.

249 NCAA, 2022 DIV. I REVENUE DISTRIB. PLAN 1 (2022).

250 *See* Eben Novy-Williams, *March Madness Daily: The NCAA's Billion Dollar Cash-Cow*, SPORTICO (Mar. 26, 2022, 9:00 AM), https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/

FBS bowl games,[251] the NCAA relies on the marketing, television agreements, and ticket sales of the Tournament to fund its initiatives.[252] There are three main funds that directly relate to the Tournament: the Basketball Performance Fund, Equal Conference Fund, and Conference Grants.[253] In 2022, the NCAA distributed the most revenue to Division I conferences based on their performance in the Tournament through the Basketball Performance Fund.[254] These conferences are encouraged, but not required, to disperse this revenue evenly between the institutions in their conference.[255] Similarly, the Equal Conference Fund disperses revenue to conferences that merely participate in the Tournament, while Conference Grants recognize the women's basketball tournament and distributes its revenue to the men's and women's conferences that automatically qualify for their respective tournament.[256]

In 2022, behind Tournament-related funds, the most revenue was distributed to the Grants-in-Aid Fund and Sports Scholarships Fund, accounting for thirty-six percent of the revenue earned by the NCAA collectively.[257] These Funds are distributed directly to the Division I institutions that are eligible to receive them, rather than sent to the conferences.[258] Eligibility and the amount distributed to each institution depends on the number of sports programs sponsored by that school surpassing fourteen (the sponsorship requirement for Division I membership), an institution that meets the minimum contest requirement (as described in NCAA Bylaw 20.9.6.3), and an institution whose postseason is hosted by the NCAA.[259] FBS football is granted an exception by having the ability to receive revenue from both the Grants-in-Aid Fund and Sports Scholarships Fund, although they do not contribute any of the revenue they earn either through bowl games or the College Football Playoff.[260]

Only around twenty-seven percent of the NCAA's total revenue in 2022 was reserved for providing services or incentives to the college

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(explaining that of eighty-five percent of the NCAA's revenue in 2021 came from March Madness).

251 Highly profitable events that profit directly from the athletic participation of football players at NCAA universities.

252 *Id.*

253 *See generally* 2022 DIV. I REVENUE DISTRIB. PLAN, *supra* note 249, at 7, 10, 12.

254 *Id.* at 2, 7.

255 *Id.* at 7.

256 *Id.* at 10, 12.

257 *See id.* at 3.

258 *See id.* at 8.

259 *Id.*

260 *See id.*

athletes.[261] This revenue was distributed through the Student Assistance Fund, the Academic Performance Fund, and the Academic Enhancement Fund. First, the Student Assistance Fund accounted for eleven percent of the total amount of revenue distributed and was primarily used to provide financial assistance for students and to award academic achievement.[262] Second, the Academic Performance Fund, which accounted for five percent of the total amount of revenue distributed, rewarded individual institutions based on their college athletes academic achievements.[263] Lastly, the Academic Enhancement Fund, which was distributed equally among Division I institutions, distributed revenues to support and enhance the academic services for the college athletes.[264] Some of these services include supplies, tutoring, summer school, and personnel salaries.[265] This Fund accounted for a mere eight percent of the total revenue distributed in 2022.[266]

There are several issues with the NCAA's distribution. First, FBS football's participation in the annual distribution. In 2022, universities and conferences associated with FBS football were eligible to participate in about sixty percent of the NCAA's total revenue distribution.[267] As reported by the Knight Commission, in 2018, when NCAA revenues were around $590 million, about sixty-one million was attributable to FBS football factors.[268] These are funds that could have been redistributed into the pool of available money for other NCAA programs that contribute directly to the revenue generated.[269] Additionally, unlike non-FBS sports programs that solely rely on the revenue distributed by the NCAA, FBS conferences-mainly the Power Five conferences-receive funding from both their lucrative television agreements and revenues generated by the College Football Playoff.[270] Within the context of this Note, the potential

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261 *See id.* at 3.
262 *See id.* at 3, 13.
263 *See id.* at 3, 6.
264 *Id.* at 4.
265 *Id.*
266 *Id.* at 3.
267 *See id.*
268 *See* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, AN ASSESSMENT ON FOOTBALL SUBDIVISION FOOTBALL FACTORS ON NATIONAL COLLEGIATE ATHLETIC ASSOCIATION DIVISION I 2018 REVENUE DISTRIBUTION 12 (2020), https://www.knightcommission.org/wp-content/uploads/2020/09/kcia-cla-report-revenue-distribution-impact-fbs-football-factors-093020-01.pdf [hereinafter ASSESSMENT ON FBS FOOTBALL FACTORS].
269 *See id.* at 13.
270 *See* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA D-I MODEL: RECOMMENDATIONS FOR CHANGE 11-12 (2021), https://www.knightcommission.org/wp-content/uploads/2021/02/transforming-the-ncaa-d-i-model-recomme

money redistributed back into the NCAA revenue pool would be additional funds to help non-revenue programs fund the possibility of college athlete employees.

The other issues with the NCAA's revenue distribution are the percentage, or lack thereof, of funds directly targeted towards the college athletes and the dependence on men's basketball. For example, the Academic Performance Fund which serves to increase the educational training and success of its college athletes, only accounted for five percent of all of the NCAA's revenue in 2022.[271] Additionally, this Fund is distributed equally among Division I institutions failing to recognize the availability of resources at each specific institution, and the need one school may have over another.[272] As for the dependence on men's basketball, from a financial perspective, the distribution of revenue from the Tournament is understandable as it accounts for a majority of the NCAA's total revenue.[273] While recognizing the importance of the Tournament, this Note suggests adopting the Transformation Committee's recommendation and "account[ing] for athletic performance in more sports than [just] men's basketball."[274] By rewarding more sports and each university's contribution in their respective postseasons, the NCAA will be furthering its commitment to gender equality and broad-based sports sponsorship.[275] Additionally, the extra revenue would serve as another resource to set aside for the potential impact on college athlete employment recognition. The impact of a college athlete employment model, however, will require much more of a substantial change: it will require Division I reformation.

IV. DIVISION I REFORMATION: WORKING WITHIN THE CONFINES OF THE NCAA

If the NCAA is forced to accept college athletes as employees, both the Division I revenue distribution system and the Model will need to be revised. Without any reformation the consequences of an employment model will be detrimental to the NCAA and the survival of sports programs across the country. This Part first recognizes how the NCAA can improve the revenue they generate and distribute, but more importantly, it

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ndations-for-change-1220-022221-update-01.pdf [hereinafter TRANSFORMING THE NCAA].

271 *See* 2022 DIV. I REVENUE DISTRIB. PLAN, *supra* note 249, at 3.

272 *See id.* at 4.

273 *See* Novy-Williams, *supra* note 250.

274 NCAA DIV. I TRANSFORMATION COMM., *supra* note 244, at 24.

275 *Id.*

focuses on providing reforms to the Model that are in the direct control of the NCAA.

A. Reforming the Division I Revenue Distribution System

This Section focuses on fixing the inadequacies associated with the revenue distribution system, specifically the issues that overcompensate FBS programs and undercompensate college athletes. To address these issues, the NCAA should cut FBS programs from their revenue distribution calculation and take action in pursuing additional revenue streams.

One reform to the distribution system directly under the NCAA's control is exempting FBS football from their distribution calculation. As mentioned above, FBS programs do not generate any revenue for the NCAA, yet they receive funding. Cutting FBS programs from receiving revenue from the NCAA will reflect FBS football's already sought out independence from the NCAA and will provide an opportunity for more money to be allocated to other institutions.[276] Beneficial for the NCAA, removing FBS programs from counting towards the NCAA's revenue distribution formula "[could] be made under the existing Division I governance [but] . . . more sweeping governance changes are necessary."[277]

Although out of the direct control of the NCAA, the NCAA can seek additional revenue from Congress vis-à-vis a federal tax on sports gambling to subsidize collegiate athletics.[278] Victoria Jackson, a sports historian at Arizona State University, argues that with the revenue earned by college football, the collegiate business is evolving.[279] With the potential of losing subsidization from revenue earning sports,[280] the NCAA needs to find another revenue stream.[281] Setting aside money from sports gambling for college athletics would "offer at least one positive outcome [from] a potential problematic industry."[282] For this tax to be

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[276] KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA, *supra* note 270, at 12, 17.

[277] *Id*. at 17.

[278] *Cf.* Victoria Jackson, *The NCAA Must Go Bigger to Hold the Attention of Congress*, SPORTICO (Feb. 1, 2023, 8:30 AM), https://www.sportico.com/leagues/college-sports/2023/ncaa-redesign-1234707816/.

[279] *See id.*

[280] *See id*; *see also* discussion *infra* Part IV on the consequences of a revenue sharing model.

[281] Although this Section continues to discuss a revenue stream from the tax collected on sports gambling, the NCAA could also look into regulating the NIL industry and possibly taking a "cut" of the deals between brands and college athletes. The viability of this idea, however, is beyond the scope of this Note.

[282] Jackson, *supra* note 278.

effective, the NCAA would have to accept the infrastructure they have created for non-revenue sports in developing athletics.[283] This would potentially require the NCAA to work with the United States Olympic and Paralympic Committee as well as National Governing Bodies,[284] and this would likely require the NCAA to relinquish some level of control over the governance and regulation of their programs and collegiate championships.[285] This Note predicts this would be a last effort approach by the NCAA, although a federal tax on sports betting would create a new revenue stream, it is unlikely the NCAA will willingly give up control for Olympic development. The NCAA has built such a strong structure for young athletes to develop their skills, yet they have never associated with the Olympics. Unless forced, it is unlikely they do so voluntarily.

B. Reforming the Division I Model

Beyond reforming the revenue system, it would be in the best interest of the NCAA to explore alterations to the Model. This Note endorses the Knight Commission's suggestion to create a new entity for FBS Football coined the National College Football Association ("NCFA"), released to the Division I Council on December 4, 2020, and amended on April 5, 2021.[286] Beyond the Knight Commission's report, this Note explores the advantages and disadvantages of changing the system to allow for different subdivisions across more sports and giving universities the autonomy to decide what Division tier they are in. These proactive solutions look to serve as guidance for the NCAA Division I Board of Directors and the Council to further conversations as to how to best serve college athletes for future transformation.

1. FBS Football Creating Its Own Entity

The Knight Commission's report advocated for a change to the Division I governmental structure because of its failure to "evolve with the transformation of FBS football and Division I men's basketball . . . ."[287] FBS football, more specifically the Power Five conferences, have evolved to earn high revenues and, as a result of this financial dominance, create a system of governance within Division I where they are given autonomy to streamline decision making processes.[288] Additionally, adopted in the

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283 *See id.*
284 *Id.*
285 *See id.*
286 *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA, *supra* note 270, at 4-5.
287 *Id.* at 8.
288 *See id.* at 10-11; *see also* Hosick, *supra* note 230.

2014 college football season, the College Football Playoff ("CFP") was created independent from the NCAA and served as a four-team playoff bracket operated by CFP Administration, LLC.[289] Upon its creation, the CFP created a twelve year contract with ESPN worth more than seven billion dollars.[290] A large majority of the revenues earned by the CFP goes to the Power Five schools[291] and because it is not regulated by the NCAA, these schools can do whatever they want with the revenue.[292] The NCAA does not benefit from FBS revenue, "yet the NCAA absorbs all national expenses for FBS football."[293] The disparity between FBS football and the rest of the NCAA is further shown by how both entities chose to handle the COVID-19 pandemic.[294] For the health and safety of their college athletes, the NCAA cancelled all of its championships while FBS football continued with its season.[295] Overall, the clear disparity between revenue and governance has led to the Knight Commission's recommendation that FBS football form its own entity under the CFP.[296]

The benefits of creating the NCFA, which would be funded solely by the CFP revenues, would allow for another entity to oversee all of the football operations of the FBS while leaving the NCAA to reorganize their Division I governance system.[297] By being the sole entity the NFCA will be able "to more effectively shape the future of FBS football . . . ."[298] The majority of this Note has discussed the potential for college athletes to earn employment rights or share in the revenue from the massive television agreements,[299] and the NFCA has the capability to implement these changes to FBS college athletes without effecting the rest of the NCAA. This decentralization allows for the college athletes that bring in generous revenues for their university to be fairly compensated, without their university having to take on that expense, thereby potentially saving many

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289 *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA, *supra* note 270, at 10.

290 *Id.*

291 *See id.* at 12 (showing that eighty percent of CFP revenues going to Power Five conferences).

292 *See id.* at 12-13 (finding that between 2005 to 2018 Power Five schools increase in revenue led to a growth in coaching salaries, non-coaching administrative salaries, and major investments in athletics facilities).

293 *Id.* at 12.

294 *See id.*

295 *Id.*

296 *Id.* at 19.

297 *Id.*

298 *Id.* at 20 (providing an example of this new entity having the autonomy to seek an antitrust exemption to cap coaches' salaries).

299 *See supra* Part I.C.

sports programs from dissolving.[300] Although not a perfect solution for reasons discussed *infra*, it is important to remember that NCAA college athletes could still have the ability to be compensated through the NCAA's NIL policy.[301]

Another benefit of the creation of the NCFA is it would give the NCAA an opportunity to reform their governance system to a model "that equally represents the interests of each institution through their conferences."[302] As demonstrated in Part III.A., *supra*, the current Division I Model is dominated by FBS football with generous autonomy given to the Power Five conferences.[303] With FBS football now in the NFCA, the Division I Board of Directors and Council members could represent the equal interests of all of the conferences through equal representation of conference administration, presidents, athletic directors, and college athletes. Additionally, this change in governance would be reflected positively in their financial report as the NCAA would be able to reduce expenses that would have been spent on the operating costs for FBS football and their revenue distribution would be expanded as they would only be distributing revenue determined by the sports that have an NCAA championship.[304]

Although the creation of the NCFA does provide many benefits and has the potential to help both college athletes and the NCAA, there are issues associated with this plan. First, contrary to the Knight Commissions conclusion that the formation of the NCFA will further the education, health, and safety of college athletes,[305] it is likely to have the opposite effect. As a separate entity, distinct from the NCAA, the NCFA will be "fully empowered to make decisions that . . . reflect its distinct business model . . . ."[306] With no obligation to the NCAA or the universities, the NCFA's responsibility is to make a profit, not to ensure its college athletes' education. The NCFA will also likely not enjoy the tax-exempt status the NCAA enjoys. Indeed, besides its mission to further the well-

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300 *See supra* Part II.B (explaining that non-revenue earning sports will likely be dropped by their respective university).

301 *See* Hosick, *supra* note 131.

302 KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA, *supra* note 270, at 21.

303 *See* Hosick, *supra* note 230.

304 KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, TRANSFORMING THE NCAA, *supra* note 270, at 21; Other benefits for the NCAA addressed by the Knight Commission are (1) the possibility for greater geographic cohesion without having to worry about competitive affiliations tied solely with football interests, which would lead to easier scheduling and the reduction of costs associated with excessive athletic travel and (2) reducing legal liabilities associated with the legal settlements related to FBS football. *Id.*

305 *See id.* at 22.

306 *Id.*

being and education of their college athletes,[307] the NCAA is primarily exempt from paying taxes because it is furthering the education of its college athletes—serving a public objective rather than a commercial objective.[308] Without a similar exemption, the NFCA will have no obligation to further the education of its athletes which will prove to be a major disadvantage for the athletes. The disservice of limited educational opportunities will outweigh any of the financial benefits this solution provides.

The other issue is the assumption that the CFP will even agree to the creation of the NFCA. This is a bold assumption as, by creating this entity, the CFP would be responsible for funding these programs, creating all the rules and regulations associated with the game, and facing liability for all potential lawsuits.[309] As a private company, it may not be in the CFP's best interest to assume this liability, especially with the success it is enjoying now without having to deal with these risks.

These issues can potentially be resolved by the National Football League ("NFL") taking action.[310] The NFL would do this by acknowledging the benefit it receives from FBS Football, mainly from the Power Five conferences, and using the NFCA to develop players for the NFL.[311] College football players from Power Five conferences dominate the majority of the NFL, for example, in the 2022 NFL draft seventy percent of the players selected were from the Power Five conferences.[312] With skin in the game, it could potentially be in the NFL's best interest to ensure a high level of competition by funding the NFCA. Similar to the NFL's treatment of their own players, the NFL could provide educational funds and opportunities for the players participating in the NFCA.[313]

It is important to note that if the NFL associates itself with the NFCA, the players would likely be treated as semi-professionals and would be tasked with just focusing on football.[314] Although this may seem contradictory to furthering educational goals, prioritizing football gives these athletes the ability to allocate their time towards football without

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307 *See* Hosick, *supra* note 230.

308 *See* McCormick, *supra* note 132, at 656–57.

309 Telephone Interview with Jennifer Heppel, *supra* note 219.

310 Telephone Interview with Victoria Jackson, Sports Historian, Ariz. State Univ. (Feb. 6, 2023).

311 *See id.*

312 *See* James Parks, *2022 NFL Draft Picks Ranked by College Football Program, Conference, SEC Still the King*, SPORTS ILLUSTRATED (May 1, 2022, 11:34 AM), https://www.si.com/fannation/college/cfb-hq/ncaa-football/2022-nfl-draft-picks-college-football-program-conferences-rankings (showing that 184 players out of the 262 players selected in the 2022 NFL draft were players from Power Five conferences).

313 Telephone Interview with Victoria Jackson, *supra* note 310.

314 *Id.*

sacrificing their education.[315] These athletes will be able to make a good faith effort towards going professional, and whether they do or not, they will now be empowered with the decision to go back to school and receive their education. Thus, unlike the bogus education received by most football players in Power Five conferences today,[316] these athletes will have the opportunity to receive the education they deserve.

Ultimately, the formation of the NCFA brings great opportunities for the NCAA and its college athletes. With the CFP expanding its playoff format from four teams to twelve in the 2024 season, CFP revenue is sure to raise, making it well suited to fund a potential NFCA.[317] The creation of the NFCA carries pros and cons for every party involved and is not something that will be adopted overnight. With such a monumental change to college sports and the NCAA's unwillingness to change their model (unless forced), the creation of the NFCA is just one idea to foster conversation to implement real change.

2. Different Subdivisions Across More Sports

Another possibility is creating governance that implements subdivisions among sports. In the current Model, the only sport that has a subdivision is football. Division I football is split into two subdivisions: FBS and FCS. Historically, the major difference between these two subdivisions was the resources schools were willing to allocate towards football.[318] Still holding true today, the FBS allows eighty-five scholarships per university and the FCS allows sixty-three.[319] The FCS programs also participate in a postseason controlled by the NCAA, whereas the FBS's postseason is independently controlled by either the bowl games or the CFP.[320] This disparity has led to different media exposures and FBS schools generally entering into larger television agreements, whereas FCS schools are generally entering into more agreements with local networks.[321] Thus, the biggest disparities between the two subdivisions boils down to the allocation of resources, the revenue

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315 *See id.*

316 *See* McCormick, *supra* note 132, at 652-54.

317 *See* College Football Playoff Expands to 12 Teams Beginning in 2024, COLL. FOOTBALL PLAYOFF (Dec. 1, 2022, 10:00 AM), https://collegefootballplayoff.com/news/2022/12/1/cfp12-2425.aspx.

318 *See FBS v. FCS*, FOOTBALLCOLLEGES (Dec. 27, 2022), https://www.footballcolleges.com/fbs-vs-fcs/.

319 *Id.*

320 *See id.*

321 *See id.*

earned as a result, and the ability for self-sufficiency.[322] In 2019, the median amount of expenses FBS schools allocated to their programs was over eighty million dollars, whereas in the same year FCS schools allocated a median of just over twenty million.[323] In return, the median revenues earned by FBS schools and FCS schools were very similar to their median expenses, however, no FCS school netted a positive generated revenue.[324] As a result, only around 27% of FCS schools are self-sufficient, whereas FBS schools are approximately 72% self-sufficient.[325] These numbers show the willingness of the FBS schools to devote resources towards their athletic programs, with the expectation of a return on their investment, unlike the FCS schools who have different priorities. To maximize profits, with different schools who have priorities in sports other than football, a new Division I Model could benefit from an increase in subdivisions.[326]

The goal of splitting into different subdivisions would be to increase the self-sufficiency of schools by maximizing profits. Different schools have greater interest in some sports over others. For example, in 2021 (and traditionally), the majority of the top college baseball programs were located in southern states.[327] With an interest in baseball, these schools could maximize their profits by prioritizing these programs, such as how FBS schools prioritize football. Logistically, to increase subdivisions, conference realignment would first be required to reflect this interest and then there can be a split similar to the "FBS, FCS" structure.[328] With an increase in self-sufficiently, it would increase the likelihood of schools having the funds to pay college athletes a wage. A model that increases its subdivision by sport is a solution that should be, at the least, addressed by the NCAA and the Division I Board of Directors.

In December 2023, a version of this solution was supported by NCAA president Charlie Baker in a letter sent to Division I schools.[329] In his letter,

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322 *See 15-Year Trends in Division I Athletics Finances*, NCAA RESEARCH, https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf (last visited Jan. 23, 2023).

323 *Id.*

324 *See id.*

325 *Id.* (finding that the autonomy conferences (Power Five) are nearly one hundred percent self-sufficient).

326 *See* Telephone Interview with Jennifer Heppel, *supra* note 219.

327 *See, e.g.*, *Geography with Goudge: NCAA College Baseball Rankings*, KMA LAND (May 23, 2021), https://www.kmaland.com/news/geography-with-goudge-ncaa-college-baseball-rankings/article_fbd5f562-b966-11eb-ad53-6f48d64033d9.html.

328 *See* Telephone Interview with Jennifer Heppel, *supra* note 219.

329 *See* Jesse Dougherty, *NCAA Proposal Would Allow Schools to Pay Their Athletes Directly*, WASHINGTON POST (Dec. 5, 2023, 6:01 PM), https://www.washingtonpost.com/sports/2023/12/05/ncaa-economic-model-proposal/.

President Baker "pitched a new subdivision within Division I that would allow well-resourced schools, should they opt into it, to form their own set of rules to better suit their investment in athletics."[330] Through the adaptation of their own rules, the goal of the new subdivision would be to better serve the athletes who are attending a school with higher athletic resources while keeping those schools within the NCAA's control.[331] The major difference between the creation of this subdivision and the FBS creating its own entity is that the NCAA would retain control and the individual universities would have the freedom to either opt-in or opt-out of it. This has the potential to be more beneficial than the creation of the NFCA because of the discretion given to the universities, as every FBS school does not have the same resources across each university and each team. Although only a proposal, it is reassuring that the President Baker is starting to take actionable steps into addressing the issues within their model. President Baker cannot act alone, however, as the adoption of this proposal (or one similar) will require collaboration with member institutions and approval from the Division I Board of Directors.[332]

3. Universities Deciding What Tier They are In

Limited to solutions under the NCAA's direct control, the Board of Directors and Council could explore a model, similar to President Baker's proposal, that gives universities much more autonomy. Unlike President Baker's proposal that focused on the creation of a new subdivision, this idea focuses on universities having the freedom to decide what division tier they are in for each sport. For example, allowing a school to be Division I in basketball, Division III in wrestling, and Division II in baseball. The Board of Directors and Council should also revisit what it means to be a Division I institution, as right now a school must sponsor at least fourteen Division I sports to be a Division I institution.[333] For universities, having the ability to move up or down a division would allow schools to manage their funds and revenues better, similar to the goal of President Baker's new subdivision,[334] and allocate resources to the sports

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330 Although outside the scope of this paper, as part of the requirements to "opt-in" universities would have to invest a minimum of $30,000 per athlete per year into an educational trust fund for at least half of the eligible college athletes. The universities then could provide their athletes with unlimited educationally related benefits from this fund. *Id.*

331 *See id.*

332 *See id.*

333 *See Divisional Differences and the History of Multidivision Classification*, NCAA, https://www.ncaa.org/sports/2013/11/20/divisional-differences-and-the-history-of-multidivision-classification.aspx (last visited Feb. 23, 2023).

334 *See* Dougherty, *supra* note 329.

the university can expect to turn a profit.[335] An additional benefit, in regards to expenses, is the capability of saving money on travel and chartering costs for universities.[336]

Although there are benefits to a model implementing this autonomy, there are several issues. First, this would create regulation issues for universities as they would potentially have to follow different regulatory bodies for each sport (Division I, II, or III) which could get confusing for universities and their compliance department. Second, it has the potential to create competition issues with the potential of saturating any one of the divisions and having to continuously realign conferences. To sustain a solution like this, the NCAA would likely need a set date for movement between divisions, constant communication between divisions, and a major reform to team and league rules. Although this solution does have the capability to help universities maximize their funds to pay college athletes in the future, it is likely a solution that provides more issues for the NCAA.

C. The NCAA Can Do Better

Part IV.B, *supra*, addresses different solutions to overcome the major issues of a college athlete employment model. Unfortunately, no one solution is optimal for either the college athletes, the universities, or the NCAA. Although each reform has the capability to provide value, these reformations to the Division I Model are limited because their target goal is to minimize the damage from the judicial system classifying college athletes as employees. Rather than waiting for the judicial system, the best solution derives from the combined action of the NCAA and Congress. Specifically, having these two entities proactively address the crux of this Note: adequately compensating college athletes that participate in a billion-dollar industry and preserving the intangible benefits of playing sports at the collegiate level, all while maintaining athletic programs that participate in revenue and non-revenue earning sports. The solution: do not classify college athletes as employees, rather, create a licensing model that shares revenue with college athletes participating in revenue earning sports.

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335 *See* Telephone Interview with Ryan Mitchell, Dir. of Compliance, Univ. of Pittsburgh (Oct. 6, 2022).

336 *Id.* (discussing the new Big Ten governance that now allows, for example, UCLA and Penn State to play one another in football. Although this is great for football this would now mean, because they are in the same conference, their soccer teams (for example) would also play each other and be forced to expense that travel for a competitive match that would not bring in the revenue a football game would).

V. SOLUTION: A LICENSING MODEL THAT OPTIMALLY SERVES COLLEGE ATHLETES AND STAKEHOLDERS INTERESTS

Granting college athletes greater protections for the revenue that is generated from their hard work and sacrifice should not come from an employment model. Rather, to avoid the issues addressed throughout this Note, the NCAA should implement some form of a licensing model. This Note suggests a model that shares the revenue from television agreements with the college athletes participating in revenue earning sports. College athletes trying to plead their right to the massive television agreements negotiated by conferences is not a new concept and has even been presented in front of our judicial system in *House v. NCAA*.[337] In *House*, the court dismissed the NCAA's motion to dismiss the college athletes claim regarding their injury from being prohibited from participating in revenue sharing with their schools and conferences.[338] Although promising for the college athletes, this case still has a long way to go with "several litigation hurdles-including [the] summary judgment stage, the class certification stage, and a potential trial[.]"[339] Consistent with the theme of this Note, it would be in the best interest of the NCAA to be proactive in addressing a revenue sharing model, before the court system makes a final ruling.[340]

There are several licensing models that the NCAA could adopt to share revenues with college athletes,[341] some of which include splitting the revenue among the college athletes as a percentage from the agreement or setting a fixed number for all revenue earning sports. There would likely need to be some sort of bargaining involved, and without giving the college athlete employment rights, that would require Congress to step in and codify a statutory exemption.[342] The benefit of a licensing model, rather than an employment model, is that college athletes would be

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337 *See* House v. NCAA, 545 F. Supp. 3d 804, 808-09 (N.D. Cal. 2021) (pertaining to college athletes challenging NCAA rules that "prohibit NCAA member conferences and schools from sharing the revenue they make from their broadcasting contracts with networks . . . and other commercial activities that involve the use of college athletes' NIL.").

338 *See id.* at 815, 18 (finding that the college athletes sufficiently plead a relevant market and injury in fact while also making a reasonable inference that without the NCAA rules, competition among schools and universities would increase competition and this increased competition would incentivize revenue sharing).

339 Michael McCann, *NCAA Athletes' Suit for Pay Gains Steam After Alston, NIL*, SPORTICO (July 27, 2021, 10:01 AM), https://www.sportico.com/law/analysis/2021/house-v-ncaa-nil-1234635491/.

340 *See supra* Part IV.C.

341 For example, licensing models in the entertainment and professional sports industries.

342 Telephone Interview with Tom McMillen, President and Chief Exec. Officer, LEAD1 Ass'n (Dec. 22, 2022).

protected from getting "fired" by their coach or athletic administration because of his or her performance on the field; instead, the money from the revenue distribution would derive as a result of the college athlete's publicity rights.[343] This solution is similar to a bill introduced in 1991 to the U.S. House of Representative by Maryland Representative Tom McMillen titled the College Athletics Reform Act.[344] This Bill proposed an antitrust exemption for the NCAA to negotiate all broadcasting deals and in return the NCAA's institutions would be authorized to provide a stipend for college athletes.[345] Additionally, the NCAA would have the burden of creating a more equitable revenue distribution system and establishing a more powerful Board of Presidents.[346] Congressman McMillen wrote this Bill out of "fear that the power of the purse strings will continue to devolve upon the strongest [NCAA] conferences and schools and the NCAA will wither into a 'paper tiger.'"[347] This fear, written over thirty years ago by McMillen in his book *Out of Bounds*, is true now more than ever.[348]

The optimal solution is a revenue sharing model that combines Congressman McMillen's ideas with the current structure of the NFL's revenue sharing model. Under the NFL's current CBA, players receive forty-eight percent of football related revenues.[349] This forty-eight percent is divided among all thirty-two teams,[350] however, player benefits are subtracted before going towards the team. Player benefits are a fixed number and very important for the NFLPA because they "include things like healthcare, pensions, [and] 401K[.]"[351]

To implement a model that builds on the NFL model and McMillen's model, the NCAA first would have to identify the revenue earning sports and conferences.[352] Next, the NCAA and Congress would need to allow for college athletes to bargain with their respective conference on how they

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343 *Id.*

344 *See* College Athletics Reform Act, H.R. 3046, 102d Cong. (1991).

345 *See* TOM MCMILLEN WITH PAUL COGGINS, OUT OF BOUNDS 224-25 (1992)

346 *See id.* at 224.

347 *See id.* at 225.

348 *See id.*

349 JC Tretter, *NFL Economics 101*, NFLPA (Oct. 27, 2021), https://nflpa.com/posts/nfl-economics-101. Football revenues mainly consists of local revenues, television/broadcast deals, and ticket sales. *Id.*

350 *See id.* In the form of a salary cap, for teams to spend on individual players. *Id.* Due to the complexity of individual contracts for each player, this Note does not address giving college athletes' individual contracts. The NFL's distribution of revenue is primarily utilized to show a potential split for conferences and universities.

351 *Id.*

352 With the possibility of conference realignment to maximize the universities that generate revenue from their sports programs.

define revenue and what percentage will go to the college athletes.[353] Similar to the NFL model, this Note advocates for the NCAA also setting a fixed number for player benefits, regardless of the revenues earned for that year, to account for healthcare and educational opportunities for their college athletes.[354] Lastly, the revenue generated by each revenue earning conference, with respect to each revenue earning sports program, will be split among the universities in that conference.[355] For example, Conference A will take the revenue it earns from men's and women's basketball, subtract the player benefits for both sports, and then distribute the remaining to the universities in their conference.

This revenue model allows for athletes in revenue earning sports to earn adequate compensation for the billion-dollar industry in which they participate. This model will certainly lead to questions such as what should be included in player benefits, the allocation of money towards these player benefits, and what conferences must abide by this model. To provide the solution for all of these issues is beyond the scope of this Note, however, the model above begins the discussion of how to establish revenue sharing without a college athlete employment model. Without establishing employment rights and forcing programs to pay each college athlete a wage, this solution will allow for those college athletes to share in the revenue they generate while allowing the other college athletes to continue participating in collegiate sports. The intangible benefits these students get by continuing to participate at a high level is crucial for their development not only as an athlete but as a well-rounded individual.[356] Beyond the intangible benefits, non-revenue earning sports hold value that the NCAA has failed to accept for years, the world's best Olympic development infrastructure.[357]

Although the revenue sharing model described above is just one suggestion, one major implication of this model would be the potential for a change in the revenue distribution system. As mentioned in Part IV.A, *supra*, this revenue could be replaced by the subsidization from a federal income tax on sports gambling.[358] By accepting this revenue and subsidizing each university, the NCAA would be furthering their mission of higher education by embracing what is best for their college athletes, even at the expense of relinquishing control to the United States Olympic

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353 *See* Telephone Interview with Tom McMillen, *supra* note 342; *see generally* JC Tretter, *supra* note 349.

354 *See generally* Tretter, *supra* note 349. The fixed player benefits would vary by sports program.

355 *See id.*

356 *See* Interview with Jackson, *supra* note 310.

357 Jackson, *supra* note 278.

358 *See supra* Part IV.A; *see also* Jackson, *supra* note 278.

and Paralympic Committee.[359] Supporting a revenue sharing model that would compensate college athletes' participating in revenue earning sports, while also conceding power for Olympic development and the survival of non-revenue sports, has the potential to "rewrite [the NCAA's] narrative arc and transform [them] from villain into hero."[360]

Creating a model that addresses the inadequacies with revenue earning sports, without establishing employment rights, is going to take effort from not only the NCAA but Congress as well.[361] Beyond the revenue generated by college sports, the NCAA and Congress should aim for a solution that protects all of the good that is associated with being a college athlete and the effect this has on each university, including their student population and outside community.[362]

CONCLUSION

Unless warned of the inadequacies of a college athlete employment model, there is a high probability that college athletes will be given employee classification in the future. Both *Johnson* and the NLRB's pursuit of an unfair labor charge against USC[363] reflect the sentiment to protect college athletes shared by the public, the Court, and policy makers. If the decision to classify college athletes as employees is left to the court system, it is likely they rule college athletes as employees under both the FLSA and NLRA. Although this decision will look to once and for all free college athletes from the shackles of "amateurism," a decision of this magnitude will only prove to jeopardize the well-being of college athletes, their respective universities, and the NCAA.

By mainly focusing on the labor law implications of a college athlete employment model, this Note exemplifies only a small portion of the issues with a model classifying college athletes as employees. Through that small portion, it is abundantly clear that the small "win" of earning a wage will cost many college athletes their sport and many universities their programs. Unwilling to accept this reality, intercollegiate athletics and their respective athletes deserve an alternative. Though this prized "solution" will likely come as a result of congressional action, the NCAA must be willing to adjust their model of governance and revenue distribution system. By proactively addressing the need to adequately

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359 *See* Jackson, *supra* note 278.

360 *See id.*

361 Telephone Interview with Hvozdovic, *supra* note 226.

362 *Id.*

363 *See, e.g.*, Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021); *see also* Edelman, *supra* note 79.

compensate college athletes, the NCAA will find itself in a better position to handle any ruling by the Court, new state laws, and federal legislation from Congress. Intercollegiate athletics is here to stay, but change is on the horizon. To facilitate lasting success, the resolution enacted will need to be fair for both revenue and non-revenue sports and prioritize the college athletes' long-term well-being.