Are College Student-Athletes Employees? A Legal Historical Analysis of College Student-Athlete Employment Claims

By

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DEDICATION

This dissertation is dedicated to my late mother, Debra Yvonne Jackson Tucker. Mama, while you supported us in everything we did, I will always remember that you wanted us to get a good education and be happy. Mama, I have gotten a great education, and I am happy!

Thank You.

Love,

Mario

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This dissertation is the culmination of an educational journey that began several decades ago. No one achieves this alone. Many family members, friends, teammates, teachers, coaches, professors, and peers have aided me on this journey.

From the earliest days, when my aunts would buy me books to read, to the teachers and coaches who nudged me to take advantage of my blessings and opportunities, to those in the community who constantly supported me and urged me to keep rising, I say thank you!

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As my formal educational journey concludes, please know I will never stop learning and growing.

ABSTRACT

Intercollegiate athletics are undergoing a transformative phase. Over the last few decades, student-athletes have valiantly fought for and successfully secured more rights, benefits, and freedoms, including the right to compensation for their name, image, and likeness (NIL). This progress, however, is just the beginning. Many student-athletes and their advocates are pushing for an equitable share of the billions of dollars in revenue they help to produce. Student-athletes also seek employee status and benefits, such as the right to bargain collectively. This wave of change is a beacon of hope for a more equitable future in intercollegiate athletics.

This dissertation presents a comprehensive legal analysis of relevant case law, tracing the development and judicial treatment of collegiate student-athlete employment claims. The journey of student-athlete employment benefits began with *University v. Nemeth* (1953). Since then, student-athletes have lodged claims under workers' compensation statutes, the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA). While their success rate has historically been limited, recent cases suggest a potential shift. Courts employ various legal tests, each with different factors, to evaluate student-athlete employment claims. This dissertation delves into these factors, shedding light on the intricate legal landscape of student-athlete employment claims.

The study concludes with recommendations for intercollegiate athletics governing bodies, higher education institutions, and administrators to address the issue of collegiate student-athlete employment proactively and boldly.

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CHAPTER ONE: INTRODUCTION TO THE STUDY

Statement of the Problem

The past two decades have seen a notable increase in the number of lawsuits filed by intercollegiate student-athletes against the National Collegiate Athletic Association (NCAA), its member institutions, and athletic conferences. These legal battles have primarily revolved around two polarizing issues: the right of student-athletes to profit from their name, image, and likeness (NIL), and the question of whether student-athletes should be recognized as employees entitled to compensation and benefits. The litigation has also targeted issues such as redress for medical injuries sustained during athletic competition and fighting for access to enhanced healthcare benefits (Caputo, 2019; *In re NCAA Student-Athlete Concussion Injury Litig.*, 2019; *Keller v. Elec. Arts Inc*., 2014; *O'Bannon v. NCAA*, 2010; Scerbo, 2022). Noteworthy cases include *In re NCAA Student-Athlete Concussion Injury Litig.* (2019), which addressed health risks, and *O'Bannon v. NCAA* (2010), focusing on NIL rights.

Additionally, these lawsuits have sought injunctive relief against NCAA rules that prohibit student-athletes from earning money from their NIL and have also contested limitations on financial aid and other benefits related to education (*NCAA v. Alston*, 2021; *O'Bannon v. NCAA*, 2010; Scerbo, 2022). A landmark victory in this arena was the Supreme Court's ruling in *NCAA v. Alston* (2021), which affirmed that NCAA restrictions on education-related benefits for student-athletes violated antitrust law.

The outcomes of these litigations have been markedly positive for student-athletes, resulting in increased educational benefits, monetary damages awarded for past grievances, and notably, the establishment of precedents that enhance the ability of student-athletes to profit from their NIL (*NCAA v. Alston*, 2021; Caputo, 2019; *In re NCAA Student-Athlete Concussion Injury*

Litig., 2019; *Keller v*. *Elec*. *Arts Inc*., 2014; *O'Bannon v*. *NCAA*, 2010; Scerbo, 2022). The *NCAA v*. *Alston* case, for instance, directly led to a relaxation of NCAA rules regarding education-related compensation, setting a precedent for future legal challenges and policy reforms (*NCAA v. Alston*, 2021).

Student-athletes have been very successful in recent litigation and are continuing to keep the pressure on the NCAA. Their call for a larger share of revenue is grounded in the significant financial contributions their performances make, evident from the billion-dollar agreements like the $1.3 billion annual contract the College Football Playoff recently signed with ESPN, which will purportedly yield significant revenue annually to these schools (Dinich, 2024). Additionally, the stark salary disparities between coaches and the limited financial compensation athletes receive have further fueled their demands. The introduction of name, image, and likeness rights, allowing them to earn from endorsements, represents a step forward but does not directly address the broader issue of revenue sharing from the sports they help popularize and profit from. Against this backdrop and heightened by the financial inequities laid bare during the COVID-19 pandemic, student-athletes want a larger distribution of the revenue, and some believe they should have employee status and collective bargaining rights (S. Berkowitz, 2023; Hill, 2023; *House v*. *NCAA*, 2021).

Currently, the NCAA, its conferences, and member institutions are facing multiple threats on two distinct but related fronts. The first issue addresses whether student-athletes ought to receive a greater portion of the revenue produced by collegiate sports. This debate centers on the financial contributions of student-athletes to their programs and the broader collegiate sports economy, underscored by calls for a more equitable distribution of profits (S. Berkowitz, 2023; Hill, 2023). In *House v*. *NCAA*, 2021, several former student-athletes are suing to strike the

remaining rules on NIL, which, if granted, would allow conferences and schools to pay student-athletes for the use of their NIL related to television broadcasts (*House v. NCAA*, 2021). If the NCAA loses, it might have to adopt revenue-sharing practices similar to professional sports for the multibillion-dollar TV contracts of major college football and March Madness due to the involvement of the players' NIL (Associated Press, 2023).

Separately, there is a growing dialogue around the legal status of student-athletes as employees. The crux of this debate is whether the significant time and effort student-athletes devote to their sports, under the guidance and regulation of the NCAA and its member institutions, qualify them as employees under the law. This issue has been brought into focus by the *Johnson v. NCAA* case, where student-athletes from several universities are asserting that they should be recognized as employees of their respective institutions, citing violations of the Fair Labor Standards Act.

Additionally, two significant student-athlete employment cases allege the NCAA, intercollegiate athletic conferences, and/or member institutions are violating the National Labor Relations Act (NLRA). On February 5, 2024, a regional officer with the National Labor Relations Board (NLRB) ruled that members of the Dartmouth University men's basketball team were employees within the meaning of the NLRA and were eligible to hold a vote to determine whether to unionize and be represented in collective bargaining (*NLRB, n.d.-e*). On March 5, 2024, the Dartmouth men's basketball team held a vote among all its members, resulting in a 13–2 decision to join the Service Employees International Union 560 (Associated Press, 2024).

While the Dartmouth NLRB ruling is significant, NLRB actions traditionally only apply to private institutions. In another NLRB case that could have broader implications for college athletics, the NLRB filed a complaint against the University of Southern California (USC), the

NCAA, and the Pac-12 athletic conference, alleging violations of the NLRA (Prisbell, 2024). The National Labor Relations Board complaint alleged that the three respondents were joint employers and that they illegally and intentionally misclassified the athletes as nonemployees to deprive them of their rights as employees (Iafolla, 2023). Gabe Feldman, director of the Tulane Sports Law Program and associate provost for NCAA compliance at Tulane University, noted that if the joint employer theory is upheld, the NLRB's decision could extend to all student-athletes (S. Berkowitz, 2023). The case is scheduled for trial through April 2024 (Christovich, 2024).

Historically, courts have generally been deferential to the NCAA in treating student-athletes as amateurs and not employees, but that may be changing (Jenkins, 2006; Mitten, 2017). In *NCAA* v. *Alston* (2021), the Supreme Court affirmed a federal district court's decision that NCAA rules restricting education-related compensation breach Section 1 of the Sherman Act. In a concurring opinion, Justice Brett Kavanaugh took the Association to task, writing, "[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" (*NCAA v. Alston*, 2021, p. 2169). Justice Kavanaugh continued his criticism of the NCAA's compensation model, saying,

> Those enormous sums of money flow to seemingly everyone except the student-athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. However, the student-athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. (*NCAA v. Alston*, 2021, p. 2168)

"Key language . . . from the Court's ruling involves referring to student-athletics as a 'profitable enterprise' and that the NCAA was "depressing wages" of 'student-athlete labor'" (Wood, 2023, para. 15). Justice Kavanaugh suggested an alternative solution to litigation, writing that schools and student-athletes:

> could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student-athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. (*NCAA v. Alston*, 2021, p. 2168)

This approach would grant student-athletes the right to negotiate terms related to compensation, healthcare, and other critical benefits, ensuring a fair share of the collegiate sports economy. Moreover, adopting revenue-sharing models could align collegiate sports more closely with professional leagues, distributing revenues based on the collective contributions of athletes. Alternatively, establishing educational trust funds could offer a balanced approach, providing financial benefits to athletes while preserving the educational focus of collegiate sports.

Nonetheless, the threat of student-athletes being declared employees by courts and the NLRB has spurred the NCAA into action. The association is aggressively lobbying Congress to declare that student-athletes are not employees and, therefore, not entitled to the rights and benefits that would accrue to employees (R. D. Russo, 2023c). In testimony before the U.S. Senate, Charlie Baker, President of the NCAA, suggested many institutions would shutter their athletic programs if student-athletes were declared employees (R. D. Russo, 2023c). The presumed rationale is that if all student-athletes are declared employees, institutions could not afford the full employment model, where they would be subject to paying the minimum wage, workers' compensation, and other employee-related benefits.

Assuming the NCAA's efforts to lobby Congress to declare student-athletes nonemployees fail, the NCAA and its member institutions again find themselves at the mercy of a judicial system that has not been going well for them as of late. Everyone recognizes that the current collegiate athletic model is changing. There are several possible outcomes, with many potentially leading to student-athletes eventually being declared employees. How do higher education administrators evaluate the risks and consequences of student-athlete employment status? Can institutions do anything to ensure that student-athletes are clearly deemed students instead of employees? The association and member institutions may need to consider what policies, procedures, and practices subject them to student-athlete employment risks.

These legal and policy debates have unveiled deep-rooted tensions between maintaining the traditional amateur model of collegiate sports and adapting to evolving notions of fairness and equity in the digital age. The problem at the heart of this discourse is the NCAA's existing framework, which restricts student-athletes from fully capitalizing on their personal brand and contributions amidst a landscape where the commercialization of college sports has escalated dramatically. Simultaneously, the question of whether student-athletes should be considered employees underlines a broader debate about the nature of their contributions to their institutions and the extent to which they should receive corresponding benefits and protections.

This tussle over NIL rights and employment status reflects differing perspectives on student-athletes‘ roles and rights within the collegiate sports ecosystem and signals a critical juncture in the evolution of NCAA policies. Thus, the problem this study sought to address is twofold: first, identifying equitable and legally sound approaches to enabling student-athletes to be compensated within the collegiate sports framework, and second, determining the viability and implications of reclassifying student-athletes as employees, considering the financial,

operational, and cultural ramifications for collegiate sports. I aimed to explore the tensions between tradition and modernity in NCAA policies, examining the potential for reforms that respect student-athletes‘ contributions while ensuring collegiate sports‘ sustainability.

Purpose of the Study

The purpose of this study was to analyze relevant case law to trace the development and judicial treatment of collegiate student-athlete employment claims in a legal-historical context. Utilizing principles developed in American court cases involving student-athlete employment claims, I analyzed the factors courts have weighed when determining whether student-athletes are employees. These factors may assist universities and higher education administrators in evaluating their policies, procedures, and practices regarding student-athlete employment risks.

The analysis includes a historical review of cases involving student-athlete employment claims against colleges, universities, intercollegiate athletic associations, and other institutions responsible for adjudicating employment claims. The study includes an analysis of legal claims for student-athlete employment status and benefits involving the Fair Labor Standards Act (FLSA), the National Labor Relations Act (NLRA), and workers’ compensation statutes from 1950 to 2024.

I sought to answer the following questions:

1. What primary legal issues have arisen in college student-athlete employment claims, and what have been the judicial responses to those claims?
2. What does the case law analysis suggest are the primary factors that courts consider when evaluating whether college student-athletes qualify as employees under workers’ compensation statutes, the FLSA, and the NLRA?

3. Are there other legal theories or arguments advanced by plaintiffs in collegiate student-athlete employment cases that have yet to be fully adjudicated?

Table 1 presents keywords used in relation to each case type.

Table 1

Keywords

Case type	Keywords
Workers' compensation	Compensation Contract Economic benefit Intent Rendering service Right to control or discipline Statutory exclusion
National Labor Relations Act	Compensation Contract Rendering service Right to control or discipline
Fair Labor Standards Act	Expectation of compensation Statutory exclusion Right to control or discipline Rules conceived to evade the law Permanence of the working relationship Economically dependent

Researcher's Positionality

As a former Division I national champion football player for the University of Alabama, I have significantly benefited from the opportunity to participate in collegiate athletics at the highest level. I utilized that opportunity to gain access to higher education and change the trajectory of my life and the pathway of many of my family members' lives. Although I was grateful to receive a football scholarship, I always knew I was exchanging something of value for those benefits. My talent, skills, time, and physical and academic prowess were of great value to

the university. Moreover, although the university did not pay me in cash, I knew they were paying me in other ways and that I was required to work for it. Playing football at a major Division I institution, like Alabama, is not an extracurricular activity. In exchange for the "free" room, board, books, tuition, and medical care, I would be required to adhere to an academic and athletic schedule, fully participate in athletic strength and conditioning training, practice, study film, attend athletic meetings, participate in other activities, and be subject to discipline and control by my coaches and athletic administrators and to all policies and procedures of the University of Alabama, the University of Alabama athletic department, the University of Alabama football team, the Southeastern Conference (SEC) and the NCAA.

My experience as a student-athlete is balanced by my background as a senior athletics administrator, a position in which I have served for over 14 years. I previously worked to create sustainable funding models for two high-revenue-producing Division I athletic departments and now for the NCAA. One of the significant challenges to the current intercollegiate athletics model is the potential for student-athletes to be declared employees. As a former student-athlete in the top revenue-generating sport at the highest level, I can understand those who argue for student-athletes being declared employees and receiving the rights and benefits of being an employee. As a senior athletics administrator specializing in developing and maintaining a sustainable athletics financial model, I can also foresee negative implications of student-athletes being declared employees.

In presenting all the information above, I want to acknowledge my own experiences and any potential bias. I have considered how those experiences could influence my interpretation of the study results. I conducted a thorough literature review and comprehensive legal research to

mitigate potential bias and fully grasp the context around my research questions. In Chapter 3, I address the steps I took to increase the validity of my research.

Finally, while my positionality and experiences are limitations, they are also strengths. Unlike many, I have seen this issue through many lenses and given it thought from my different stations in life. I am passionate about providing objective research that could yield solutions to one of the most pressing challenges in intercollegiate athletics today.

Significance of the Study

Other studies have been conducted on student-athlete litigation (Franey, 2013; Stotlar, 1980), but gaps remain in the literature. For example, while prior studies have focused on the analysis of litigation involving the student-athlete and the NCAA and NCAA member institutions, they have primarily examined contractual, constitutional, and limited employment issues such as workers' compensation (Stotlar, 1980) or a broad overview of litigation between student-athletes and the NCAA (Franey, 2013). Franey's (2013) study included a brief review of three workers' compensation cases but did not include an in-depth analysis of the factors the court weighed to determine whether student-athletes were employees. One law review article by Epstein and Anderson (2016) examined the contractual relationship between student-athletes and universities by exploring several legal cases, including a brief overview of a small sample of student-athlete employment cases. My study is more comprehensive and recent, as several cases have been filed and adjudicated since Epstein and Anderson's (2016) article was published. Franey (2013) presented two relevant recommendations for future research:

1. Court cases settled since 2012 should be examined to determine if there are any new issues and relevant case laws that might affect future litigation.

2. Pending litigation should be reviewed, especially the ongoing litigation involving the antitrust claims of *O'Bannon v. NCAA* (2010), which was consolidated into a class action lawsuit. While the current citations deal with admissible exhibits, consolidation of cases, etcetera, a final disposition of this case may set a precedent for future litigation or may be settled out of court with amendments to the NCAA bylaws. (pp. 168–169).

Building on Franey's research, I reviewed relevant student-athlete employment cases, both those that have been decided and those currently in various litigation stages. Previous studies presented a broader overview of student-athlete litigation and are dated. Over the past decade, significant litigation has occurred between student-athletes, the NCAA and NCAA member institutions. Many cases, such as *O'Bannon v. NCAA* (2015), were adjudicated or settled after Franey's 2013 study. These cases and others, such as *NCAA v. Alston* (2021), involve student-athletes receiving more financial benefits and freedom from NCAA bylaws, allowing them to be compensated for their NIL. An analysis of these cases and other litigation since Franey's study is critical to understanding the current landscape of intercollegiate athletics in which some student-athletes advocating for employee status want to be compensated for their participation in athletics and anticipate receiving a share of the revenues produced in some sports (e.g. *House v. NCAA*, 2021; *Johnson v. NCAA*, 2021).

While the previous studies may have described some limited student-athlete employment issues, such as workers' compensation (Stotlar, 1980), or present-case briefs of some cases that involve student-athlete employment claims (Franey, 2013), none of them comprehensively or specifically reviewed litigation to trace the development and judicial treatment of collegiate student-athlete employment claims in a legal-historical context. As such, it is helpful to elucidate

the principles developed in American court cases involving student-athlete employment claims. By conducting a legal historical analysis of student-athlete employment claims involving the Fair Labor Standards Act (FLSA), the National Labor Relations Act (NLRA), and workers' compensation statutes from 1950–2024, I hoped to deduce the factors the courts have weighed when determining whether student-athletes are employees. Unlike previous studies, this research should assist universities and higher education administrators in evaluating their policies, procedures, and practices regarding student-athlete employment risks.

As colleges and universities face increasing litigation, they are exposed to growing costs associated with those lawsuits, significant monetary damages, and injunctions that could interrupt their internal affairs (Kaplin et al., 2020). From 2014 to 2020, the NCAA spent $304 million on outside legal expenses while recouping $69 million from legal cost-sharing insurance policies (R. C. Berkowitz, 2022). In addition to legal costs, the litigated issues impact the day-to-day work of colleges and universities (Poskanzer, 2003). This impact is likely to grow. For these reasons, Poskanzer (2003) posited that "faculty and administrators have a solid understanding of the most important legal concepts and rules applicable to American higher education" (p. 1).

Many, including NCAA President Charlie Baker in testimony to the Senate Judiciary Committee on October 17, 2023, have predicted that Division II, Division III, and some Division I institutions would "get out of the interscholastic sports business" (Libit, 2023; R. D. Russo, 2023c). Although it is not likely to occur, institutions may need to change their policies, practices, and procedures to mitigate student-athlete employment risks.

This study provides an analysis of how courts have interpreted and treated collegiate student-athlete employment claims, as well as the principles upon which those claims have been evaluated and adjudicated in the past.

Understanding how courts have treated student-athlete employment claims is vital as college athletics continues to change. We may be headed toward a new model in which some student-athletes are employees, and some are not; thus, it will be important for higher education administrators to understand what makes a student-athlete an employee and what does not to mitigate potential student-athlete employment risks for those not intended to be employees.

Theoretical Framework

Introduction

For many years, the NCAA and its member institutions have adhered to the principle of amateurism, asserting that student-athletes should not receive payment or benefits for their athletic participation (NCAA LSDBI, n.d.-a; NCAA, 2023b). The principle of amateurism is incorporated into the NCAA Constitution, specifically Article 1(B), which reads, "Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by their NCAA division." Furthermore, under Article 12.01.1, the NCAA bylaws clarify "12.01.1 Eligibility for Intercollegiate Athletics. Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport" (NCAA LSDBI, n.d.).

Although the principle of amateurism and its governing policies remain in place, their influence has significantly diminished. This change is largely due to student-athletes successfully challenging and dismantling policies that restrict compensation for their NIL, as evident in landmark cases such as *O'Bannon v. NCAA* (2015) and *NCAA v. Alston* (2021). Furthermore, student-athletes and their advocates are pushing for the removal of all compensation restrictions and seeking employee status, along with the associated benefits (*Carter et al. v. NCAA et al.*,

2023; *Fontenot v. NCAA*, 2023; House *v. NCAA*, 2021; *NLRB*, n.d.-d, n.d.-e; *Trs. of Dartmouth Coll.*, 2024; *Univ. of S. Cal.*; *Pac-12 Conference*, 2024).

Granting student-athletes employee status would fundamentally alter the NCAA's foundational principle of amateurism, abolishing policies that have prohibited compensation for athletic participation since the organization's inception. The rapid pace of these policy changes, previously unimaginable, highlights a significant shift in the landscape of collegiate athletics.

Through this research, I aim to better understand this change in the landscape of intercollegiate athletics and the significant role litigation has played—and continues to play—in driving these changes. Additionally, I sought to explore potential strategic actions that could restore equilibrium. I reviewed several theories on how public policies and laws change, including retrenchment theory, coalition theory, and punctuated equilibrium theory.

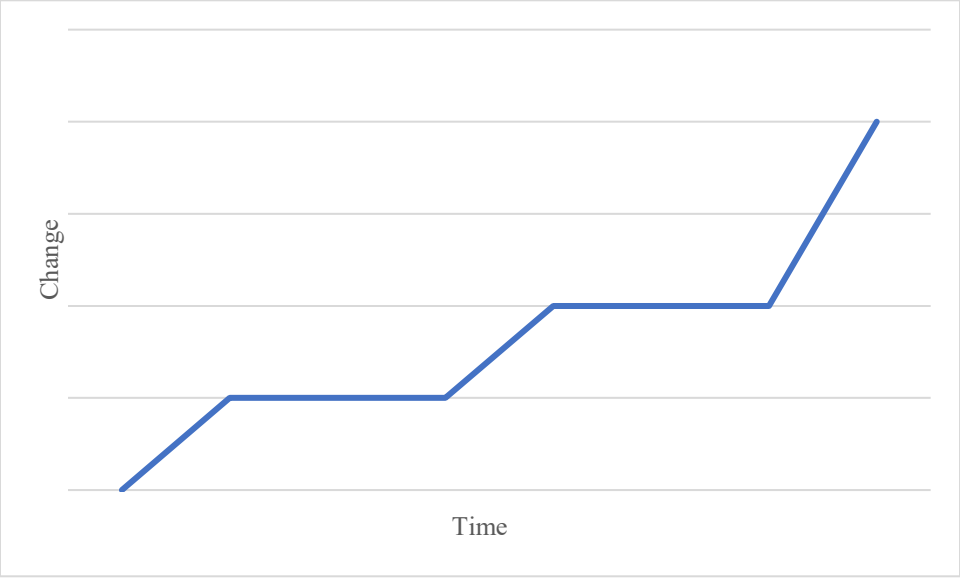
Retrenchment theory posits that after periods of progress of changing laws or policies, there is a period where those in power slowly chip away at those policy or law changes (Crenshaw, 1998; McQuillan, et al., 2022). Another theory that I reviewed was coalition theory. Coalition theory proposes that public policy change is attributable to coordinated acts of like-minded individuals with similar core beliefs (Stachowiak, 2011). Over the past decade, student-athletes have gained significant new rights, benefits, and freedoms. There is no sign of retrenchment as the NCAA and higher education continue to lose or settle the litigation. Additionally, there is no evidence in the literature that demonstrated a coordinated effort or agreement among coalitions to change the NCAA's policies. For these reasons, I did not further explore retrenchment theory or coalition theory. Of the various theories offering insights into public policy changes, punctuated equilibrium theory stood out in its compelling explanation of the dynamics of play.

Punctuated Equilibrium Theory

Punctuated equilibrium theory seeks to explain why public policies experience long periods of stability, interrupted by brief episodes of swift and significant change (Adebisi et al., 2023; Jones et al., 1993). The origins of punctuated equilibrium theory are derived from a theory of paleontology, which refuted the theory of gradual, incremental change (Givel, 2006; S. J. Gould & Eldredge, 1977). While proponents of incrementalism theory argue for a slow evolution of species through minor mutations, S. J. Gould and Eldredge (1977) contended that such gradual changes are insufficient for evolutionary progress. Instead, they suggested that rapid shifts—punctuations—are the catalysts for the sudden emergence of new species. In *Agendas and Instability in American Politics*, Jones et al. (1993) adapted S. J. Gould and Eldredge's theory from its biological roots, applying it to understand the triggers, mechanisms, and timing of shifts in public policy (see Figure 1).

Figure 1

Baumgartner and Jones's Punctuated Equilibrium Theory



The theory has been applied in several other contexts. For example, Jones et al. (1993) conducted a detailed quantitative analysis, examining public policy changes across extended periods within various domains, including smoking, alcohol, drugs, nuclear power, urban affairs, and auto safety. Their findings indicated a predominance of stability in these policies over time, aligning with the incrementalism perspective. However, they observed that this stability could be disrupted by sudden changes or shocks, illustrating the concept of punctuated equilibrium (Jones et al., 1993).

The punctuated equilibrium mechanism is influenced by the interaction between how issues are portrayed (policy image) and the jurisdiction of the institution overseeing the issue (policy venue; Jones et al., 1993). Jones et al. (1993), along with Jolicoeur (2017), highlighted that significant policy shifts are more probable when groups dissatisfied with the status quo manage to broaden the scope of conflict, attract broader support, redefine the narrative around the policy, and either shift the focus of decision-making or increase the number of decision-making venues. Despite these possibilities for change, Jones et al. (1993) and Jolicoeur (2017) warned that policy monopolies—defined by their "definable institutional structure responsible for policymaking" and powerful ideas tied to core societal values like patriotism, fairness, or equity—are difficult to contest. When faced with challenges, these systems will likely deploy various defense mechanisms to protect their interests.

Policy monopolies maintain equilibrium by managing the policy image and policy venue, maintaining conflict internally, and excluding outside influences (Adebisi et al., 2023; Jones et al., 1993). Jones et al. (1993) and Jolicoeur (2017) describe policy image as how a policy is represented in public discourse and media. Policy venues refer to the institutions or settings where decisions about the policy are officially made (Jones et al., 1993). These issues may fall

under a single institution's or multiple institutions' jurisdiction simultaneously (Jones et al., 1993).

Policy Image. The way in which an issue is viewed is defined as its policy image (Jolicoeur, 2017; Jones et al., 1993). Jolicoeur (2017) noted, "A policy's image, which determines how we view a policy, can be positive or negative. A positive policy image typically leads to incremental changes, whereas a negative image is more likely to lead to punctuation" (p. 3). A policy monopoly supports the positive policy image by using the media and other mediums to promote the image (Jones et al., 1993). Discontented groups try to change the policy's image; if successful, this could significantly destabilize and punctuate the policy (Jones et al., 1993, 2002).

Policy Venue. Policy venues are defined as "the institutional locations where authoritative decisions are made concerning a given issue" (Jones et al., 1993, p. 31). Issues can be adjudicated across multiple policy venues simultaneously (Jones et al., 1993). Altering the policy venue or expanding the number of venues where issues are deliberated is a tactic for those dissatisfied with current public policies.

Negative Feedback. These internal defense mechanisms are also called negative feedback. Baumgartner and Jones (2002) described negative feedback as self-corrective mechanisms that counter pressures from discontented groups, dampen shocks to the system, and keep the system stable. Baumgartner and Jones (2002) noted that some examples of negative feedback are the Federal Reserve's counter-inflationary measures, antipoverty programs, or other entitlement programs. The programs are designed to quell dissent while keeping elected officials in power.

Positive Feedback. As negative feedback stabilizes a system, positive feedback destabilizes a policy subsystem. Baumgartner and Jones (2002) noted, "A positive feedback mechanism includes a self-reinforcing process that accentuates rather than counterbalances a trend" (p. 15). Some positive feedback mechanisms can be unpredictable as they accentuate explosive change with unknown outcomes (Baumgartner & Jones, 2002). Positive feedback mechanisms can be observed by clustering events followed by dramatic change (Baumgartner & Jones, 2002). These events can be self-reinforcing as discontented groups may mimic the successful strategies of others to hasten change (Adebisi et al., 2023; Baumgartner & Jones, 2002). "Policy image and policy venues can become mutually self-reinforcing agents of change" (Jolicoeur, 2017, p. 6; Jones et al., 1993). This means that if a policy venue is changed, depending on the outcome, the policy image may change as well (Jolicoeur, 2017).

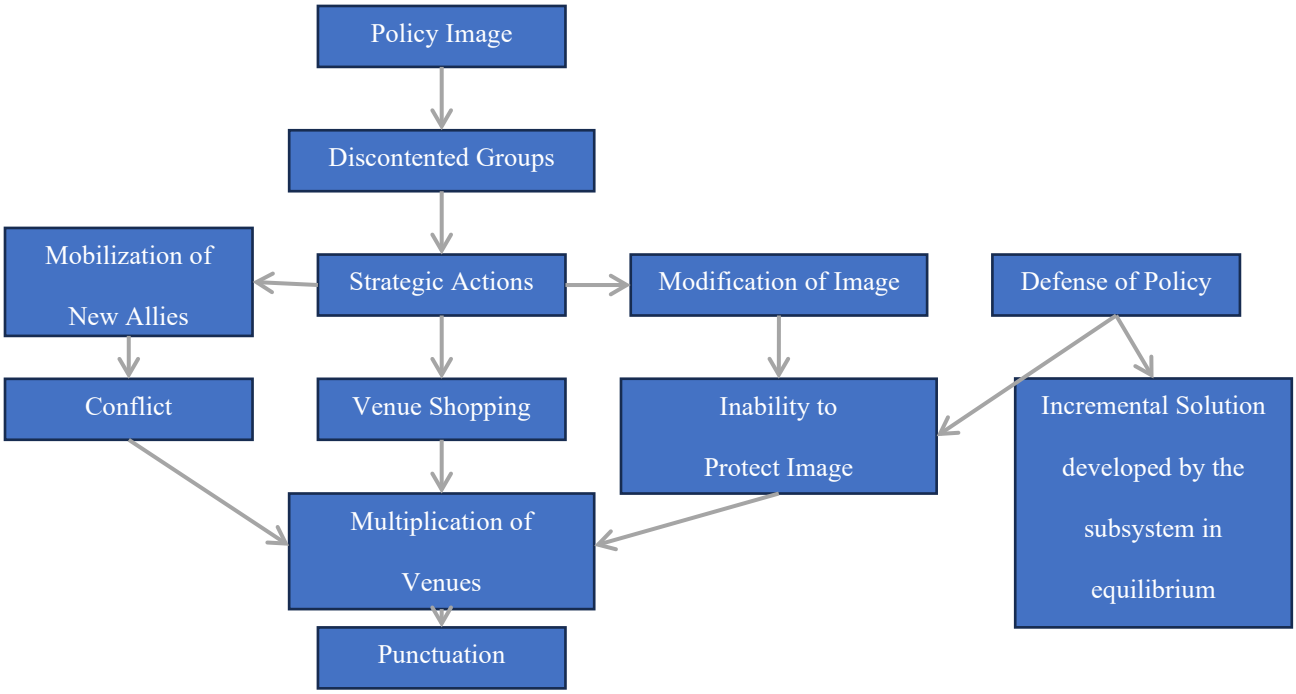
Jolicoeur (2017) identified three primary limitations of punctuated equilibrium theory: (1) the disaggregated American political system provides avenues of appeal to the discontented groups that may not exist in other political contexts, potentially restricting the application of the theory; (2) the theory does not address institutional constraints that impact subsystems, and (3) it overlooks that significant influence that political parties may exert within these subsystems (see Figure 2).

Despite these limitations, this theory might be helpful when examining how college-student athlete employment cases have contributed to the punctuation of NCAA policies. For decades, college athletics appeared stable, with the NCAA, athletic conferences, and member institutions firmly in control. However, over the last 20 years, the college athletics industry has shifted dramatically, with more benefits and authority transitioning from traditional governing bodies of collegiate sports to the student-athletes themselves. Despite efforts to uphold its policy

of amateurism, which prohibits student-athletes from earning compensation for participating in athletics, the NCAA is witnessing its control and policy monopoly being contested by student-athletes and supportive entities.

Figure 2

Equilibrium and Punctuation in Relation to a Policy's Image (Jolicoeur, 2017)



This theoretical framework may help us understand how this change happened, the ongoing role of litigation in driving it, and the identification of opportunities and strategies for action and restoring stability.

Organization of the Dissertation

Chapter One of this dissertation introduced the study and the problem statement, in addition to demonstrating the significance of the study, the researcher's positionality, and the theoretical framework. Chapter Two presents a literature review examining the historical evolution of student-athlete benefits. Additionally, it includes a review of student-athlete

employment literature, including a brief overview of workers' compensation, the FLSA, and the NLRA, which is enforced by the NLRB. Chapter Three details the research design and methodology used in the study. Chapter Four discusses the data and results of the study. Finally, Chapter Five provides an analysis of the data, recommendations, and suggestions for practice and future research.

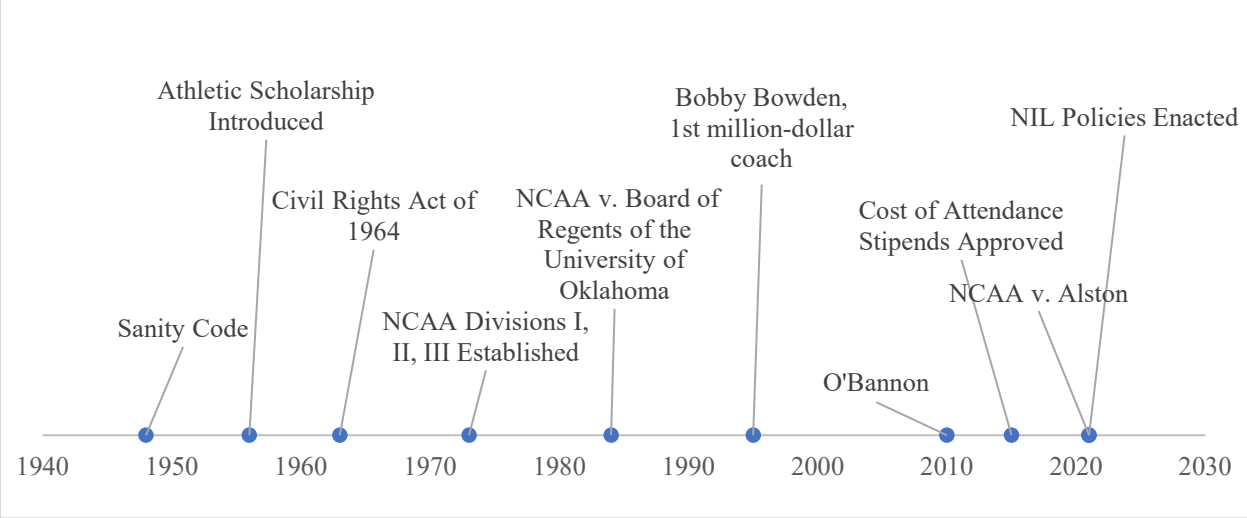
CHAPTER TWO: LITERATURE REVIEW

Introduction

This chapter provides additional context for the research undertaken for this dissertation and a thorough review of the applicable literature. Student-athletes have been fighting for more rights, benefits, and freedoms for nearly 75 years (see Figure 3). The battle for "employee" status has been a part of that effort. The first section of the literature review presents a historical overview of the struggle for and evolution of student-athlete rights and benefits. Next, the literature review examines relevant studies concerning student-athlete employment, including a detailed overview of the currently litigated laws, the FLSA, and the NLRA. I also reviewed the role of the NLRB in enforcing the NLRA. I used Google Scholar and Lexis-Nexis legal databases to identify relevant literature.

Figure 3

Timeline of Student-Athlete Rights Evolution



Note. NCAA = National Collegiate Athletic Association; NIL = name, image, likeness.

Evolution of Student-Athlete Benefits

Several scholars and reporters have examined issues related to student-athlete benefits in higher education (Gurdus, 2000; Haden, 2001; Roberts, 1996; Tiscione, 2007; Whitmore, 1991; Yasser, 1984). These studies have often covered a specific student athletic program or controversy; unfortunately, they do not provide a comprehensive evolution of the benefits student-athletes have gained. This section pieces together some of the previous work in this area.

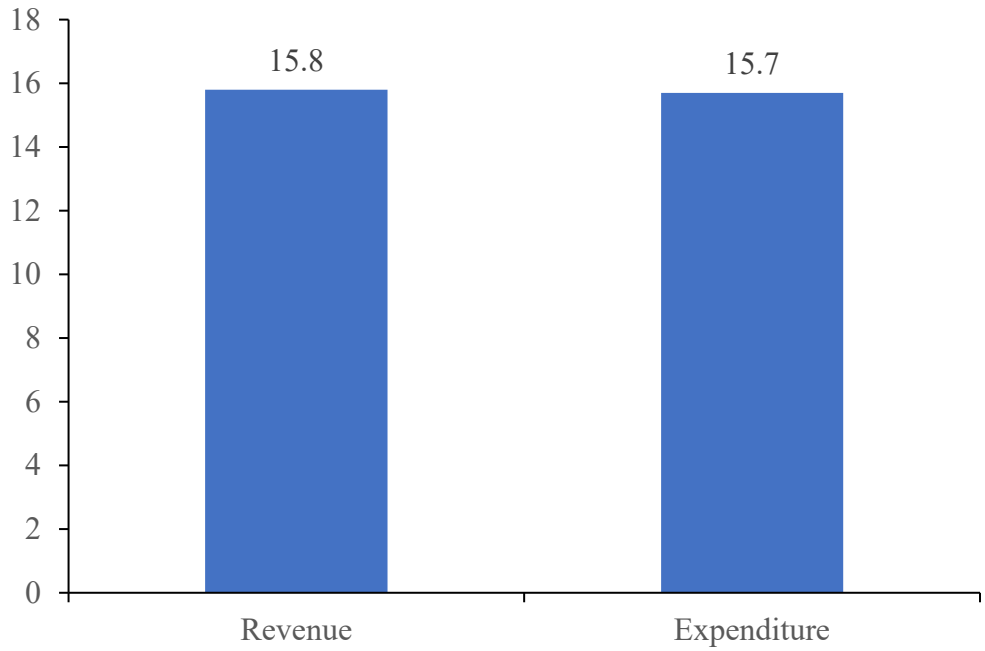
To begin, intercollegiate athletics is essential to many stakeholders in the United States. For many student-athletes, participation in college athletics is transformative, given the opportunity to attain a higher education degree. To others, it is a training ground necessary to achieve Olympic or professional sports aspirations. Colleges and universities use college athletics to advertise and raise the university's profile, entertain fans and donors, fundraise, and rally around the alma mater (Duderstadt, 2000; Fisher, 2009). Collectively, university athletic programs generate billions of dollars and provide entertainment for millions of fans worldwide (Branch, 2011). Over 1,100 higher education institutions that sponsor intercollegiate athletics are members of the NCAA. At the same time, more than 500,000 student-athletes participate annually in the NCAA's three divisions, Division I, II, and III (NCAA, n.d.-b).

Division I institutions offer the broadest financial support for student-athletes of the three divisions and generate the most revenue (NCAA, n.d.-b). From 2018 to 2019, Division I institutions reported nearly $16 billion in revenue (NCAA, n.d.-c), sources of which included broadcast media rights, ticket sales, licensing and royalties, corporate sponsorships, donor contributions, institutional support, student fees, and other ancillary revenues (NCAA, n.d.-c). While the institutions reported billions of dollars in revenue, they also incurred billions in expenses (NCAA, n.d.-c; Osborne, 2014). In 2018–2019, Division I institutions reported $15.7

million in expenditures, including financial aid, coach and administrative compensation, game and travel, medical-related care, recruitment, and facility expenses (NCAA, n.d.-c; see Figure 4). With billions of dollars in revenues and expenses, intercollegiate athletics is big business for some of America's colleges and universities (Clotfelter, 2019; D. Day, 2021; Duderstadt, 2000).

Figure 4

Revenue Versus Expenditure of Division I Institutions (2018–2019)



Universities must recruit, train, and retain talented student-athletes to entertain millions of fans and generate billions of dollars. Student-athletes and higher education institutions enter a contractual relationship in which promises and obligations are exchanged between the parties (Epstein & Anderson, 2016). The most significant element of that relationship is the National Letter of Intent (NLI), an agreement between student-athletes and universities whereby student-athletes agree to participate in collegiate athletics at a particular college or university. In turn, the

college or university agrees to provide that athlete with financial aid for the entire academic year (NLI, n.d.).

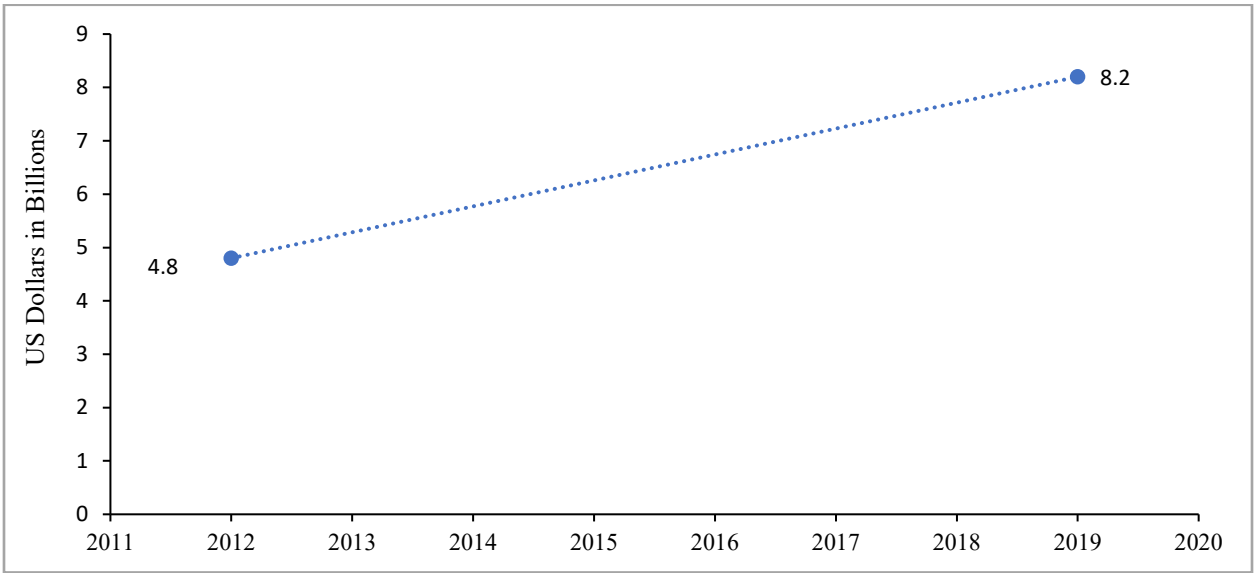
The National Letter of Intent is intended for prospective student-athletes enrolling as full-time students at 4-year institutions for the first time, including those transferring from other schools. More than 48,000 student-athletes sign an NLI yearly, indicating their commitment to participate in college athletics at a specific college or university. (NLI, n.d.). For many years, this exchange of obligations, rights, and benefits was deemed sufficient for students (Osborne, 2014; Schneider, 2001). Specifically, the promise of a 4-year degree served as a significant benefit for many students who might otherwise lack available options to attend college. However, the winds have shifted dramatically; college athletics' revenue has grown exponentially over the past several decades due in part to the growth of media/television, ticketing, licensing, and fundraising revenue associated with big-time college football and men's college basketball (D. Day, 2021; Sanderson & Siegfried, 2015). While the revenues have risen, top college coaches and administrators have seen their fortunes rise much more than the students who entertain millions of fans each week (Schneider, 2001).

To illustrate, annual Football Bowl Subdivision (FBS) revenues in Division I schools grew from $4.8 billion in 2012 to $8.2 billion in 2019 (NCAA, n.d.; see Figure 5). As a result, many intercollegiate athletic coaches and administrators have seen their compensation packages increase while student-athlete benefits have grown far more slowly (Haden, 2001; Osborne, 2014; Schneider, 2001). Bobby Bowden became the first million-dollar coach in 1995 when he and Florida State University agreed to a contract extension to pay him $975,000 plus bonuses for athletic and academic success (Harig, 1995). While Coach Bowden was the first, he was not the last million-dollar coach. In 2022, 117 of 131 FBS college football head coaches had contracts

worth at least $1 million annually, with 43 making over $5 million yearly; the average FBS coaching salary was $3.5 million (Coaches Hot Seat, 2023). While college athletics administrators make less, they also are well compensated. In the 2020–2021 athletic directors' college compensation survey conducted by AthleticDirectorU, at least 25 Division I athletic directors made over $1 million annually, with Texas's Chris Del Conte topping the list with $2.37 million (Lattinville, n.d.).

Figure 5

Growth of Annual Football Bowl Subdivision Revenues



Until 2015, a student-athlete's athletic scholarship could only include assistance for room, books, board, and tuition (Bradbury & Pitts, 2018; D. Day, 2021). Since then, student-athletes have received increased financial benefits and have gained the ability to monetize their names and personas. However, this increase in benefits pales in comparison to the financial benefits gained by coaches and administrators (Haden, 2001; Shults, 2022). Critics have continually assailed this imbalance of benefits between coaches, administrators, and student-

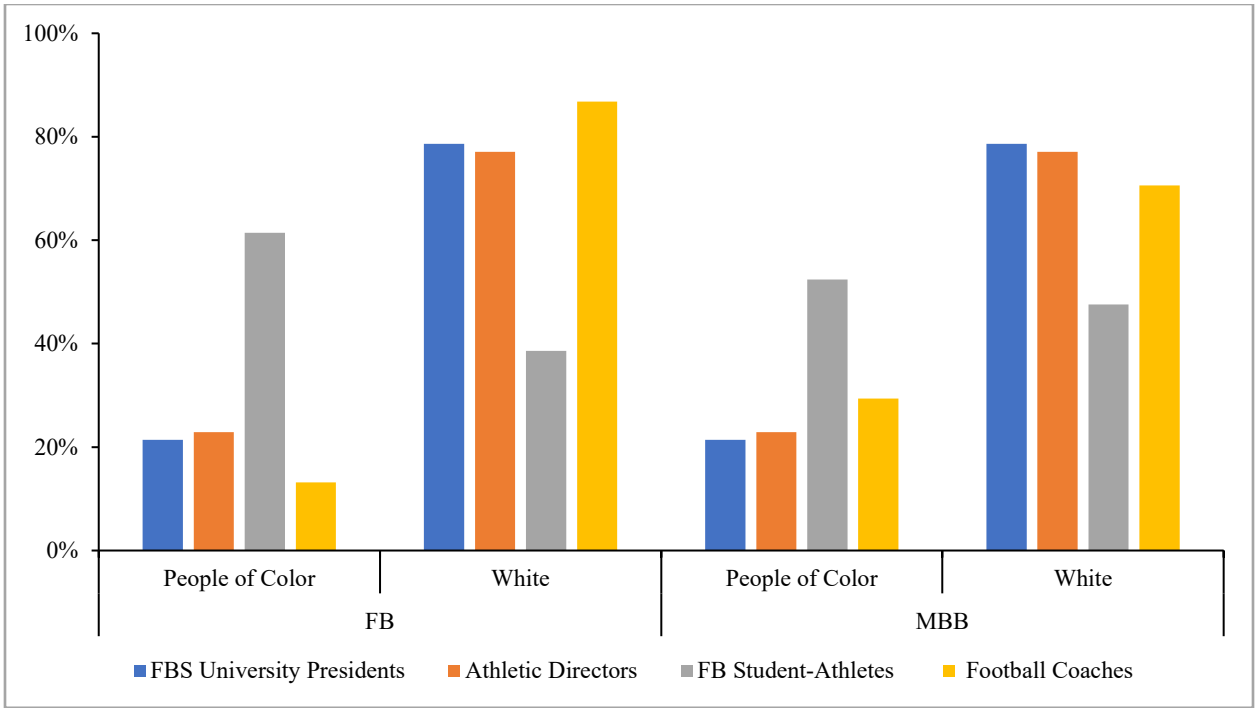
athletes (Fresh, 2022; Sanderson & Siegfried, 2015). Many have also criticized college sports leaders because of the apparent racial impact of this imbalance of benefits (Collins-Dexter, 2018; Sailes, 1986). To illustrate their point, while 65.7% of Division I FBS football student-athletes are of color, over 80% of college football coaches, athletic directors, faculty athletics representatives, conference commissioners, and college presidents are White (Lapchick, 2023). In the 2022 DI FBS Leadership College Racial and Gender Report Card, published by The Institute for Diversity and Equity in Sport (TIDES) at the University of Central Florida, Lapchick (2023) noted that "[w]hile there were some notable improvements made in the hiring practices of people of color in 2022, America's colleges and universities continue to show an enormous underrepresentation of women and people of color in campus leadership positions" (para. 4; see Figure 6). In "The Shame of College Sports," Branch (2011) argued that the current system is akin to colonialism, where well-meaning organizations enrich themselves and others from the work of uncompensated or under-compensated student-athletes. Branch (2011) dismissed the Knight Commission's assertion that student-athletes are paid with an education, stating, "[t]his echoes masters who once claimed that heavenly salvation would outweigh earthly injustice to slaves" (p. 33).

While not as provocative, many others, including college football coaches, have voiced support for providing student-athletes with additional benefits, including compensation. Barnett (2022) cited Jim Harbaugh, the head football coach at Michigan, as advocating for student-athletes to receive NIL benefits from broadcast TV deals. In a recent interview with ABC News, Penn State head football coach James Franklin expressed similar sentiments, stating, "I also think that ultimately, whether it is in the next three years or next five years or next two years, there is going to be some form of revenue sharing or collective bargaining agreement (with the

players)" (R. D. Russo, 2023a, para. 3). Noting the inevitability, Franklin said he believed the new system with actual contracts would be better than the current model, as the student-athletes and the university would know what they are bargaining for (R. D. Russo, 2023a).

Figure 6

Football Bowl Subdivision (FBS) Demographics



Note. FB = Football; MBB = Men's Basketball

Student-athletes have also found their voices and have taken action to secure more rights and benefits. Over the past two decades, student-athletes have filed many lawsuits against the NCAA, member institutions, and athletic conferences, which include claims for compensation for using a student-athlete's NIL by institutions or third parties for medical injuries sustained during athletic competition and for access to new healthcare procedures (Caputo, 2019; *In re NCAA Student-Athlete Concussion Injury Litig*., 2019; *Keller v. Elec. Arts Inc*., 2014; *O'Bannon*

v. *NCAA*, 2010; Scerbo, 2022). They have also sought injunctive relief from NCAA rules that prohibit student-athletes from profiting from using their NIL and that restrict or limit financial aid and other education-related benefits (Elfman, 2008; McCann, 2021; *O'Bannon v*. *NCAA*, 2010; Sanderson & Siegfried, 2015). Lastly, student-athletes have fought for employee status and employee benefits for over 70 years (*State Comp. Ins. Fund et al*. *v*. *Indus. Comm'n of Colo. et al*., 1957; *Univ. of Denver v. Nemeth*, 1953; *Van Horn v*. *Indus. Accident Comm'n*, 1963).

Many have echoed their sentiments, arguing for collective bargaining, employment benefits, or other alternative solutions to provide more benefits to student-athletes (Barrowman, 2015; Corrada, 2020; Kennebrew, 2022; Leppler, 2014; Lonick, 2015; Nelson, 2022). Even the NCAA realizes more must be done for student-athletes. In December 2023, NCAA President Charlie Baker introduced Project D-I, a program where schools would have the ability to offer student-athletes more educational benefits. Under the plan, schools that opted into the program would need to give at least 50% of their student-athletes a minimum of $30,000 per year in additional educational benefits. Schools also can offer NIL opportunities directly to their student-athletes and compensate them for those opportunities (Dellenger, 2024a). The benefits would have to comply with Title IX. In exchange, these schools would become a part of a new subdivision with more governing authority. In January 2024, the Division I Board of Directors directed the Division I Council to study and develop a framework to address elements of the plan (NCAA, 2024).

This next section of the literature review examines some of the rights and benefits student-athletes have gained over the years and the rule changes the NCAA has slowly implemented, several resulting from litigation, mounting public pressure, congressional concern, and state legislative action. This section concludes with a brief review of recent developments

regarding student-athlete's claims for more benefits, rights, and freedoms. It is important to note that student-athlete employment claim cases are covered sparingly in the literature review but are introduced, reviewed, and discussed in other dissertation sections.

Early History of the Student-Athlete Contract and Grant-in-Aid

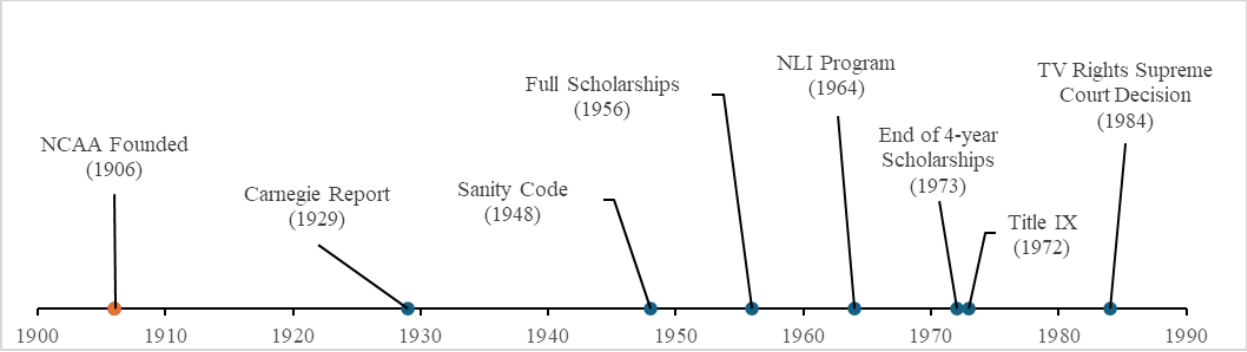
Over the past 100 years, the contractual relationship between the NCAA, universities, and the student-athlete has evolved from oral agreements and gifts to sophisticated legal documents with non-negotiable terms prepared by highly compensated attorneys at the behest of the NCAA and universities (T. A. Baker et al., 2012; Oriard, 2009; Sack & Staurowsky, 1998). When founded in 1906, the NCAA's primary focus was improving college athletes' health and safety and reducing the influence of commercialization on college athletes (Richard, 2022). Over time, however, the association's scope grew to include the governance of other areas of intercollegiate athletics, such as financial aid, recruitment, academic standards, amateurism, and national championships. In its early years, the NCAA was against granting scholarships or financial aid based on athletic ability (Richard, 2022). Specifically, intercollegiate athletics was considered an extracurricular activity and educational experience (Duderstadt, 2000). To further explore these issues, this section is divided into key areas to explore the early history of the student-athlete contract and grant-in-aid (see Figure 7).

Changes to Financial Aid. Between 1920 and 1990, many critical changes were related to student-athlete financial aid and scholarships. Although the governing bodies of sports did not initially accept the idea of paying for athletic performance in intercollegiate athletics, athletes were being recruited and paid by alums and supporters of universities (Savage et al., 1929). In 1929, the Carnegie Foundation for the Advancement of Teaching issued "Bulletin Number 23," a comprehensive study on intercollegiate athletics (Savage et al., 1929). Its authors concluded that

most schools that participated in intercollegiate athletics gave some financial assistance to students based on athletic ability. The typical financial assistance during this period consisted of a financial aid package provided by the school, booster club, or alums to help an athlete pay for his or her room, board, tuition, and reasonable expenses. This practice varied at colleges and universities nationwide but was more dominant in the South (Sack & Staurowsky, 1998).

Figure 7

Timeline of Key Events in Student-Athlete Contracts and Grants-in-Aid



Note. NCAA = National Collegiate Athletic Association; NIL = name, image, likeness.

In 1948, the NCAA adopted the "Sanity Code," a set of governing principles covering financial aid, recruitment, and academic standards (Sack & Staurowsky, 1998). The code limited the granting of financial aid based on athletic ability to those only in financial need (Zimbalist, 1999, as cited in Muenzen, 2003). It further restricted the definition of allowable financial aid to be tuition and incidental expenses only, which meant student-athletes would still need to pay for room and board unless they qualified for aid based on superior academic scholarship (Zimbalist, 1999, as cited in Muenzen, 2003). In 1950, the NCAA attempted to enforce compliance with the Sanity Code by calling for a vote to expel seven members deemed noncompliant; that motion failed to meet the NCAA constitutional requirement of two-thirds of the members (Byers, 1995;

Gaona, 1981). In 1951, the Sanity Code was repealed due to the lack of an enforcement mechanism (Gaona, 1981).

In 1956, the NCAA voted to allow full scholarships consisting of room, board, books, tuition, and $15 per month in laundry money (Byers, 1995; J. Meyer & Zimbalist, 2020). Institutions could offer multiyear scholarships covering all costs, including attendance expenses. These scholarships could not be revoked if a student-athlete did not perform or decided not to participate (Byers, 1995). Another significant development during this period was the growth and participation of women in college athletics, due in large part to the passage of Title IX of the Federal Education Amendments in 1972, which stated that: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” (n.p.). As applied to college athletics, colleges and universities were now required to provide equitable opportunities for men and women to compete in college sports. While this may not have expanded the scope of the student-athlete contract, it did extend contractual rights, benefits, and obligations to include more women. Even though the original governing body for women’s sports, the Association for Intercollegiate Athletics for Women, initially prohibited athletic scholarships, participation by women in intercollegiate athletics grew from 15% in 1973 to 43% in 2001 (Bell, n.d.). As will be discussed, other developments have included evolving litigation that influenced policy, the creation of the NLI program in 1964, and the elimination of the 4-year scholarship in 1973.

Defining the Contractual Relationship. In the mid-20th century, litigation influenced NCAA policy concerning student-athlete contractual rights. Several court cases helped to further define the contractual relationship between the student-athlete, the NCAA, and universities by

either validating that relationship, necessitating that the NCAA change its contract wording and procedures, or both (Champion, 2005; Sack & Staurowsky, 1998).

In *Taylor v. Wake Forest Univ.* (1972), the North Carolina Court of Appeals upheld the trial court's ruling that Gregg Taylor, a former student-athlete at Wake Forest University, had violated his contractual commitments by failing to participate in athletic activities despite having agreed to do so in return for a financial aid grant. Gregg Taylor and his father had signed a grant-in-aid application whereby Gregg agreed to participate on the football team, maintain academic eligibility, and abide by the NCAA, conference, and institution rules. Due to his poor academic performance early in his tenure, Taylor refused to participate in football until his grades improved. Wake Forest terminated Taylor's scholarship for his refusal to participate on the football team (*Taylor v. Wake Forest Univ.*, 1972). After he graduated, Taylor and his father brought a claim against the university, seeking reimbursement of educational expenses. The plaintiffs claimed that a representative of Wake Forest had orally agreed that should conflict arise between academic progress and athletic involvement, athletic activities could be limited to ensure academic progress. The state trial court held that Gregg Taylor had agreed to maintain athletic eligibility, both physically and scholastically, and that participation in athletic activities was required to maintain eligibility. Gregg failed to fulfill his contractual obligations when he refused to participate in athletic activities without injury (*Taylor v. Wake Forest Univ.*, 1972).

While the *Taylor* case was among the first to distinctly establish a contractual relationship between a student-athlete and a university, it was not the final case to explore this issue. In *Ross v. Creighton* (1999), a federal district court in Nebraska also recognized the existence of a contractual relationship between student-athletes and universities. In *Ross*, Kevin Ross, a student-athlete, sued Creighton University for negligence and breach of contract. Ross

alleged that the university breached its contractual obligation by failing to provide him with real access to its academic curriculum as it had promised in exchange for his participation in basketball. The federal district court dismissed the plaintiff's claim on several grounds, including for failure to state a breach of contract claim (*Ross v. Creighton*, 1992).

The Seventh Circuit Court of Appeals affirmed in part and reversed and remanded in part (*Ross v. Creighton*, 1992). The federal appellate court found that Ross identified a contractual promise by alleging that the university agreed to provide him with specific services as they knew he was academically challenged. The plaintiff alleged that the university agreed (1) "to provide adequate and competent tutoring services, (2) to require [Mr. Ross] to attend tutoring sessions, (3) to afford Mr. Ross a reasonable opportunity to take full advantage of tutoring services, (4) to allow Mr. Ross to red-shirt, and (5) to provide funds to allow Mr. Ross to complete his college education" (pp. 410, 415–416). The circuit court of appeals found that these claims were sufficient to warrant further proceedings and that the district court could adjudicate these claims (*Ross v. Creighton*, 1992).

Another significant event that defined the contractual relationship between student-athletes and higher education institutions was the development of the NLI program in 1964. As discussed, the NLI program was created to reduce recruiting pressure on student-athletes and preserve intercollegiate athletics' amateur nature (S. Meyer, 2004). The program created a series of obligations and restrictions on the student-athlete in exchange for a scholarship. Once a student-athlete signs the NLI, no other school may recruit them, and the institution receiving the NLI must provide the student-athlete with financial aid for one academic year (Collegiate Commissioners Association, n.d.). A student-athlete who decides not to fulfill their NLI obligations must sit one year in residence and lose one season of eligible competition in all

sports. However, this penalty can be waived if the student-athletes current school grants a complete release (CCA, n.d.). According to Yasser and Hanlon (2006), "[c]ourts have recognized the NLI and the Statement of Financial Aid as the two main documents that form a contract between the student-athlete and the university or college" (p. 283). Yasser and Hanlon (2008) observed that many critics viewed the NLI as a "contract of adhesion," which is "a standard-form contract prepared by one party, to be signed by the party in a weaker position . . . who adheres to the contract with little choice about the terms" (p. 285). Other writers have asserted that these one-sided contracts created by more powerful parties are overly restrictive and always favor the institution (Hanlon, 2006; Hruby, 2017). The national letter of intent is not required, but schools use it to keep a recruit from shopping for new schools and other schools from poaching their signees. Student-athletes who want the guarantee of a scholarship sign the NLI with no questions asked. However, in rare cases, elite athletes assured of a scholarship decide to forgo the NLI to keep their recruitment options open (Hruby, 2017). For example, Roquan Smith, a highly recruited linebacker from Georgia, chose UCLA as his school. However, he refused to sign an NLI after he learned that the "Bruins defensive coordinator Jeff Ulbrich lied to him about taking a job in the NFL" (Watson, 2015, para. 1). Instead of playing for UCLA, Smith went on to star for the University of Georgia (Watson, 2015). Had Smith signed an NLI, he would have lost a year of eligibility and had to sit a year in residence before playing at his next school. Unfortunately, most players are not in this position, as schools could always pull the verbal scholarship offer up to the actual signing of the financial grant-in-aid agreement on signing day.

Another significant change of this period was the adoption of NCAA legislation in 1967 that allowed an institution to cancel or reduce athletic aid for student-athletes who failed to

participate adequately (by choice or injury), fraudulently misrepresented themselves on any signed documents, or were subjected to significant disciplinary actions by the institution (Sack & Staurowsky, 1998). Coaches wanted more control over the student-athletes on their rosters and the ability to cut them from those rosters if they so choose.

The most decisive blow to student-athletes was the elimination of the 4-year scholarship in 1973 (Oriard, 2009). Many institutions that offered 1-year scholarships argued it was unfair that others offered multiyear scholarships, although they also had the opportunity to do so (Byers, 1995). This rule change was a decisive move by the NCAA and institutions because it significantly shifted the balance of power and control to those institutions and organizations and away from the student-athletes. With these changes, the bargaining power of athletes diminished, except for the ability to say "no" and forgo participation in intercollegiate athletics (T. A. Baker et al., 2012). For several decades, the 1-year renewable agreements that offered a student-athlete a scholarship of room, board, books, and tuition remained the same. Student-athletes were at the mercy of their coaches and administrators to renew their grant-in-aid each year and had to find other ways to deal with expenses the scholarship did not cover.

The End of Amateurism and the Expansion of Student-Athlete Benefits

In the 1980s, the NCAA and its member institutions effectively controlled all aspects of the student-athlete relationship. Students had no options and no bargaining power (Hanlon, 2006). Universities, athletic departments, and coaches were in charge, and students had to take the 1-year renewable agreements for room, board, books, and tuition in exchange for participating in athletics. The greatest threat to the NCAA, its membership, and the amateurism model did not come from student-athletes; it unintentionally came from the universities

themselves, as they sought greater control over the right to televise more college football games (T. A. Baker & Brison, 2016).

In the early 1950s, the NCAA took control of the broadcasting of college football games due to concerns about how televised games might impact live attendance. The NCAA established the number of games that could be televised annually and restricted the frequency with which any single team could appear on television each year (*NCAA v. Bd. of Regents*, 1984). Television network partners would then select the games and divide the revenues among the participating teams. Although the plan was slightly modified every few years, the controls remained unchanged (*NCAA v. Bd. of Regents*, 1984).

In 1977, major college football programs established the College Football Association (CFA) to advance the interests of football-playing institutions within the NCAA framework (Dunnavant, 1997). By 1979, CFA members expressed a desire for greater control over television distribution. In 1981, they entered into a separate television contract with the National Broadcasting Company (NBC), aimed at increasing the number of games televised and the revenues for the participating members (*National Collegiate Athletic Association v. Bd. of Regents*, 1984). In response, the NCAA threatened disciplinary action against any members participating in the agreement. The *Board of Regents* of the University of Oklahoma and the University of Georgia Athletic Association, both CFA members, filed a lawsuit against the NCAA in a Federal District Court in Oklahoma, seeking to prevent the NCAA from enforcing its disciplinary actions (*National Collegiate Athletic Association v. Bd. of Regents*, 1984).

The plaintiffs claimed the NCAA's control over the televising of college football games breached the Sherman Antitrust Act (*National Collegiate Athletic Association v. Bd. of Regents*, 1984). The District Court ruled in favor of the plaintiffs, holding that the NCAA did violate the

law as they acted to fix prices, restrict output, organize a group boycott, and exercise monopoly power in the way they controlled the television of college football games. The court set forth the following remedies: (1) The plaintiffs were accorded declaratory judgment affirming that the right to sell football games for television belonged to the plaintiffs and that the NCAA had no such right; (2) the current television contracts were deemed illegal and declared void and unenforceable; and (3) the NCAA was enjoined from enforcing provisions of the current contracts against the member institutions or the networks, , and from requiring member institutions to grant their football television rights to the NCAA. The NCAA was also prohibited from making any future contracts that granted television networks the right to televise football games of member institutions and from requiring an institution to grant their football television rights to the NCAA as a condition of membership (*National Collegiate Athletic Association v. Bd. of Regents*, 1984).

The NCAA appealed the ruling to the U.S. Supreme Court but received no relief. The higher court affirmed the circuit court's decision, which confirmed the district court's findings of illegal price fixing, improper monopolization of the market, and illegal group boycotts by the NCAA (*National Collegiate Athletic Association v. Bd. of Regents*, 1984). However, it reversed the injunction and remanded it for further consideration (*National Collegiate Athletic Association v. Bd. of Regents*, 1984). However, college athletics had changed forever; the NCAA would never again control the regular season football television media rights for individual member institutions. Perhaps seeing what was to come, the district court stated the following in its original opinion:

> It is the court's fond hope and genuine belief that the result of this litigation will be an open and competitive market that will ultimately serve the best interests of the football-

> playing colleges, the telecasters, television advertisers, and, most importantly, the viewers of college football television. (*Bd. of Regents v. National Collegiate Athletic Association*, para. 268)

The open and competitive television market served the best interests of football-playing colleges, telecasters, advertisers, and viewers and benefited coaches, administrators, and student-athletes. From 2012 to 2022, media revenue for Division I FBS institutions grew from $1.4 billion to $3.5 billion. Student-athletes directly benefited from this growth in revenue, as financial aid benefits paid on their behalf of increased from $1 billion to $1.6 billion over the same period. However, they did not gain as much as coaches, whose compensation nearly doubled in less than 10 years, increasing from $1.24 billion to $2.4 billion (NCAA, n.d.-c).

In Re NCAA vs. Bd. of Regents of the University of Oklahoma (1984) might be considered the beginning of the end of amateurism as the shift to student-athletes gaining more benefits may have begun with this opinion. Compared to the limited room, board, books, and tuition student-athletes received, the escalating salaries for coaches and administrators fueled a moral debate about the lack of fairness and equity regarding student-athlete compensation.

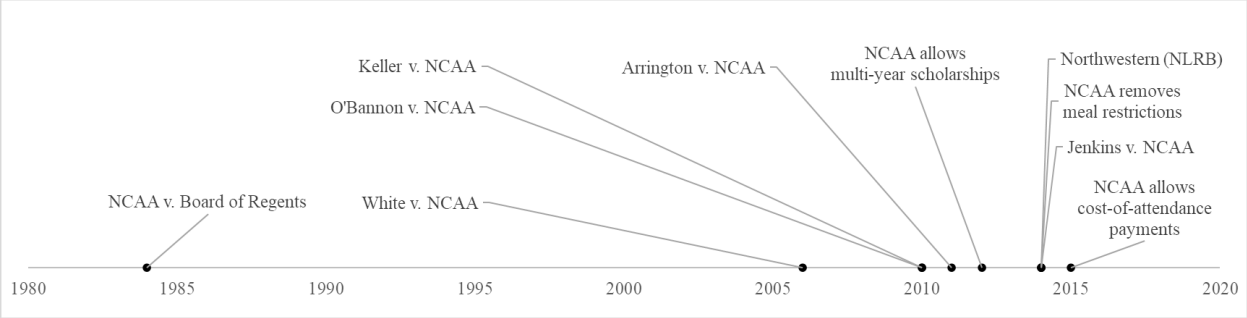
While the NCAA lost in *the Board of Regents*, they scored a significant victory. Writing for the majority, Justice Stevens wrote as dictum:

> Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. To preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class and the like. (*NCAA v. Bd. of Regents of the Univ. of Okla.*, 1984, p. 2960)

The NCAA used this dictum for decades to assert that student-athletes must not be paid to preserve the integrity of college athletics (Epstein & Anderson, 2016). Likewise, the NCAA was emboldened to continue using amateurism to justify denying student-athletes the economic liberties other students on university campuses enjoyed (Epstein & Anderson, 2016; see Figure 8).

Figure 8

End of Amateurism Timeline



Note. NCAA = National Collegiate Athletic Association; NLRB = National Labor Relations Board.

That was until a group of former student-athletes decided to challenge the NCAA's limit on the athletic scholarship, which only included room, board, books, and tuition (Hosick, 2014). The following section examines the expansion of student-athlete benefits linked to litigation. In addition to reviewing the overall impact of the litigation, the following related areas are highlighted: (1) limits on grant-in aid and scholarships; (2) health-related and other benefits; (3) name, image, and likeness.

Limits on Grant-in-Aid and Scholarships. In 2006, plaintiffs Jason White, Brian Polak, Jovan Harris, and Chris Craig filed a lawsuit against the NCAA in a Federal District Court in

California, challenging the NCAA's limits on grant-in-aid. They claimed that the NCAA and its member institutions were engaged in a horizontal agreement that restricted the value of student-athlete grants-in-aid (White v. NCAA, 2006). The plaintiffs contended that without the NCAA rule, they would have received additional financial aid to cover various incidental expenses like travel, laundry, and school supplies, which are determined by each institution (White v. NCAA, 2006). The lawsuit was granted class-action status, defining the class as all Division I football and men's basketball student-athletes who had received athletic grant-in-aid scholarships from February 17, 2002, through the end of the 2007–2008 academic year (Elfman, 2008). Class action certification raised the stakes for the NCAA, as violations of antitrust law are subject to treble damages and attorney's fees (Lande, 1993). The NCAA agreed to settle the case while not admitting wrongdoing (White v. NCAA, 2006), an NCAA tactic frequently used to mitigate the risks of losing at trial and potentially being forced to change its rules.

By settling *White*, the NCAA avoided having to immediately alter its rules on permitting schools to include the cost of attendance amounts in the financial aid that student-athletes received. In the settlement, the NCAA agreed to make available a total of $218 million for the academic years 2007-–2008 through 2012–2013 for Division I institutions to use as a part of their student-athlete opportunity fund, as well as $10 million over 3 years to reimburse class members for qualified educational expenses; to adopt a rule permitting, but not requiring, member institutions to provide year-round comprehensive medical insurance; to allow financial aid through graduation for students who no longer qualified for athletic aid; and to examine the question of whether colleges and universities should provide multiyear scholarships (Hosick, 2012).

While, initially, most of the *White v. NCAA* settlement provisions benefited a smaller group of student-athletes, it showed that the organization was vulnerable to future antitrust litigation. It likely influenced the association to change its rules regarding "cost of attendance" expenses permanently. In 2015, under its new governance structure, the largest five conferences in Division I, the "Autonomy 5 (A5)," voted to allow schools to give students additional financial aid to pay for the cost of attendance expenses (S. Berkowitz, 2015; Hosick, 2015).

In *Agnew v. NCAA* (2011), two former student-athletes, Joseph Agnew and Patrick Courtney, who lost their athletic scholarships, sued the NCAA in an Indiana Federal District Court for their rules capping the number of scholarships a sport could offer and for prohibiting multiyear scholarships (*Agnew v. NCAA*, 2011). The district court dismissed the plaintiff's complaint for failing to allege a relevant market on which the NCAA's bylaws had an anticompetitive effect; the Seventh Circuit Court of Appeals affirmed the Federal district court's decision (*Agnew v. NCAA*, 2011). To prove a violation of Section 1 of the Sherman Act, the plaintiff must show that there was "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury" (*Agnew*, *Denny's Marina*, *Inc. v. Renfro Productions*, *Inc.*, 1993, para. 8). The Federal circuit court of appeals held that there was no question about the first element, as all schools had agreed to the NCAA bylaws. It also found that plaintiffs strategically decided not to allege a relevant market to which the NCAA's bylaws could have had anticompetitive effects despite having several opportunities to do so (*Agnew v. NCAA*, 2011).

Although Agnew failed to successfully challenge the NCAA's scholarship limit and multiyear scholarship prohibition, the plaintiffs could take solace in the fact that their complaint may have moved forward had they identified a relevant market in which the NCAA bylaws

could have anticompetitive effects. Their litigation and the potential for future litigation may have also been a factor in a decision by NCAA Division I institutions to begin allowing for multiyear scholarships in 2012 (Hosick, 2012). With student-athletes continuing to make gains in and out of court, they would keep the pressure on by continuing to look to the courts for remedies.

In *Jenkins v. NCAA et al*. (2014), a group of student-athletes filed a class action lawsuit on behalf of Division I FBS football and men's and women's basketball players, challenging the NCAA's overall scholarship or compensation limits (Ingels, 2017; Steckler, 2016). The plaintiffs argued that by agreeing to the definition of the scholarship, the NCAA and the schools in the Autonomy 5 conferences fixed prices for signing student-athletes and that there should not be dollar limits for procuring student-athlete services (Edelman, 2018; Ingles, 2017). As predicted, the NCAA eventually agreed to settle the claims in *Jenkins* (*In re NCAA Ath*. *Grant-In-Aid Cap Antitrust Litig.*, 2017; McCann, 2018). The NCAA agreed to pay $208 million to settle the lawsuit. An average award of $6,000 was awarded to student-athletes who would have received the total cost of attendance award but for the NCAA bylaw that restricted the scholarship at less than the cost of attendance (*In re NCAA Ath*. *Grant-In-Aid Cap Antitrust Litig.*, 2017; McCann, 2018; *NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, *Martin Jenkins v*. *NCAA*, 2014). Although this was a large settlement, the NCAA avoided answering whether student-athletes could be paid unlimited scholarship amounts to sign up to play sports at NCAA colleges and universities.

In June 2021, the U.S. Supreme Court confirmed a lower court's decision in *NCAA v*. *Alston*, ruling that the NCAA had breached antitrust laws by illegally limiting the education-related benefits that student-athletes could receive. This included post-eligibility scholarships for

graduate or vocational schools. The NCAA was also enjoined from limiting academic awards at a level below the limits on awards for athletic participation. In a 2021 article in *USA Today*, Paul Myerberg noted that, in a concurring opinion, Justice Kavanaugh seemed to invite more potential litigation by stating that "the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year" (para. 10) and the remaining compensation rules of the NCAA pose significant concerns under antitrust laws.

One practical consequence of the *Alston* decision was that institutions could now offer student-athletes an additional education-related cash stipend of up to $5,980 per academic year (Carmin, 2022). While that case only applied to football and men's and women's basketball student-athletes, schools have provided benefits to more young people to avoid running afoul of Title IX anti-discrimination obligations as well as the appearance of being unfair or favoring some student-athletes over others (Carmine, 2022; Wittry, 2022). For an institution with 700 student-athletes, this payment could result in an additional $4.2 million in annual expenses. Furthermore, there could be no limits on postgraduate education-related benefits, meaning that schools could offer graduate school scholarships to recruit and retain student-athletes, which could set off another arms race in college athletics. In addition, the NCAA realized it could no longer operate as it had in the past. NCAA regulations limiting compensation for student-athletes could be subject to more antitrust litigation, which Justice Kavanaugh appears to invite, stating that "[p]rice-fixing labor is price-fixing labor . . . it is not clear how the NCAA can legally defend its remaining compensation rules . . . the NCAA is not above the law" (Myerberg, 2021, para. 9).

The most terrifying part of the *Alston* ruling for the NCAA was the Supreme Court's strike down of the NCAA's long-held amateurism defense, which had been used to justify all compensation restrictions (*NCAA v. Alston*, 2021; Gregory, 2021). Until *Alston*, the NCAA had relied on the dicta in the *Board of Regents* (1984), which reasoned that to preserve amateurism and to differentiate college sports from professional sports, student-athletes should not be paid (*National Collegiate Athletic Association v. Bd. of Regents*, 1984). The Court in *Alston* destroyed this long-held defense, stating,

> Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because we are final," . . . but those sorts of stray comments are neither. (*NCAA v. Alston*, 2021, p. 2158)

Amateurism was essentially eliminated as a future defense for the NCAA.

In April 2023, former student-athletes Chuba Hubbard and Keira McCarrell filed a class action lawsuit against the NCAA and the A5 conferences seeking retroactive academic achievement payments, which were allowed after the *NCAA v. Alston* lawsuit (*Hubbard v. NCAA*, 2023). The proposed class includes all current and former Division I student-athletes who participated from April 1, 2019, until the date of class certification and who would have met the requirements for receiving the academic award at their institution (*Hubbard v. NCAA*, 2023; R. D. Russo, 2023a). According to R. D. Russo (2023a), the plaintiffs are seeking treble damages, estimated to be between $200 million and $1 billion.

Health-Related and Other Benefits. Student-athletes have not only found success in expanding financial aid benefits; they have also pursued and been able to increase their health-related benefits. In 2011, Adrian Arrington, a former football player for Eastern Illinois

University, brought a class action lawsuit against the NCAA in the District Court for the Northern District of Illinois, alleging the association and member institutions had failed to implement concussion monitoring programs to develop and implement return-to-play guidelines for those that suffered concussions; to address or implement correct coaching methodologies that prevent head injuries; to execute legislation to address the treatment and eligibility of student-athletes who had sustained multiple concussions; and to establish a support system for those unable to participate in sports after sustaining a concussion (Arrington v. NCAA, 2011; Pretty, 2014). In addition to Arrington, several other concussion-related lawsuits were filed against the NCAA during this time, cases that were combined and transferred to the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation (*In re NCAA Student-Athlete Concussion Injury Litig.*, 2019). After several years of settlement negotiations, a Federal District Court in Illinois approved the settlement agreement, which included the following conditions:

- The NCAA had to pay $70 million to establish a medical monitoring fund that would last 50 years. Class members were entitled to medical screenings every 5 years up until and every 2 years after the age of 50. Scores on the medical screenings would determine whether class members are eligible for medical evaluations. Class members became eligible for up to two medical evaluations, with the possibility of a third during the medical monitoring period. The NCAA was also required to set aside $5 million for concussion-related research.
- The NCAA agreed to continue implementing its return-to-play and concussion management protocols, which included: a) baseline concussion testing for all student-athletes; b) return-to-play clearance requirements when a student-athlete sustains a concussion; c) concussion-trained medical personnel are required to be present at all

> contact sport games, which include football, lacrosse, wrestling, ice hockey, field hockey, soccer, and basketball, and made available during contact sport practices; d) NCAA member institutions must provide concussion education and training to all coaches, student-athletes, and athletic trainers before each season; and e) NCAA member institutions are required to provide educational material to academic faculty regarding available accommodations for student-athletes who have sustained concussions (*In re NCAA Student-Athlete Concussion Injury Litig*., 2019).

These concussion-related lawsuits were a big win for student-athletes. Although they have gained several additional benefits over the past several years, not all progress has been due to litigation. Some can be attributed to the public speaking out under the pressure of student-athletes. For example, for years, the NCAA stood by its archaic rule of allowing athletic programs to provide one training table meal per day (i.e., a meal explicitly provided for student-athletes, usually by the athletic department, the cost of which was deducted from a student's scholarship; Jessop, 2014). This rule was passed in 1991 by the NCAA Presidents Commission to contain the growing costs of college athletics (Maisel, 2014). The rule also attempted to support the NCAA's goal of competitive equity since many schools with fewer resources could not afford an expansion of allowable training table meals.

In 2012, the Collegiate and Professional Sports Dieticians Association Board of Directors (CPSDA) provided data to the NCAA showing that student-athletes needed to receive proper nutrition. The Collegiate and Professional Sports Dietitians Association (CPSDA) recommended that the NCAA permit institutions to provide student-athletes with unlimited meals (CPSDA, 2012; CPSDA, n.d.; Smith, 2016). Although the NCAA should have implemented this policy immediately, it delayed action for 2 years. On April 7, 2014, following the University of

Connecticut (UCONN) men's basketball team's victory in the NCAA Division I Championship, star player Shabazz Napier revealed to the press that he sometimes went to bed "starving" (Ganim, 2014). This comment greatly embarrassed the NCAA, especially considering it had generated nearly $1 billion in revenue that year (Ganim, 2014). One week after Napier's comments, the NCAA Division I Legislative Council approved legislation allowing unlimited meals for student-athletes (Hosick, 2014). While the NCAA claimed it had been working on the issue for years, there is little doubt that Napier's statement, which had garnered national attention, propelled the organization to act quickly. However, while that incident was an example of student-athletes using their voices to alter the NCAA's policies, many significant changes continued to happen because of litigation against the NCAA by former student-athletes.

Name, Image, and Likeness (NIL). One of the most critical developments in NCAA history was the movement to allow student-athletes to earn compensation related to using their NIL (Williams, 2022; Wynn, 2023). This vital right/benefit can be attributed to two crucial class action lawsuits filed against the NCAA and others by Sam Keller, a former quarterback for Arizona State University, and Ed O'Bannon, a former men's basketball player for UCLA (*O'Bannon v. NCAA*, 2010).

Over its 100-year history, the NCAA did not allow student-athletes to earn compensation from participating in athletic competitions or for using their names, images, and likenesses as they related to their participation in athletics. During this time, the NCAA received deferential treatment from courts when enforcing its compensation rules, which sought to preserve the association's principle of amateurism (Eckert, 2019; Gouveia, 2003). Buoyed by victories in cases like *Bloom v. NCAA* (2004), in which a Colorado football student-athlete appealed a lower court ruling that held that he was not entitled to injunctive relief, the NCAA continued to deny

student-athletes the right to profit from their NIL.[1] However, the association still took advantage of student-athletes by licensing their NILs for use in popular video games (*Keller v. Elec. Arts Inc*., 2009). In May 2009, Sam Keller filed a lawsuit against the NCAA, Electronic Arts Sports (E.A. Sports), and Collegiate Licensing Company (CLC), asserting that those entities conspired to use his NIL in a video game without his consent or compensation. E.A. Sports had developed the popular game, "NCAA Football," while CLC facilitated the licensing agreements between the NCAA, E.A. Sports, and CLC, and the NCAA permitted E.A. Sports to use marks, logos, and the likeness of the institutions and student-athletes. E.A. Sports would sell the popular game and distribute royalties and fees to CLC and the NCAA. The players depicted in the game had the exact numbers, heights, weights, skin colors, and other physical characteristics as the actual college players (*Keller v. Elec. Arts Inc*., 2014).

According to the suit, all three defendants participated in a civil conspiracy and were unjustly enriched by their actions. Further, the NCAA violated Indiana's right of publicity statute and breach of contract, having ignored its own rules on amateurism, which prohibited the commercial licensing of the NIL of student-athletes (*Keller v. NCAA*, 2010). Further claims against E.A. Sports were for violations of California's Unfair Competition Law and California's statutory and common law rights of publicity (*Keller v. NCAA*, 2010).

In 2009, Ed O'Bannon, a former men's basketball player for UCLA, filed a similar class action lawsuit against the NCAA and E.A. sports (*O'Bannon v. NCAA*, 2010). In his complaint, O'Bannon alleged the NCAA exclusively controlled the student-athlete's NIL rights and entered

[1] In *Bloom v. NCAA*, 93 P.3d 621, a Colorado football student-athlete appealed a lower court ruling that held that he was not entitled to injunctive relief. Bloom sought to prevent the NCAA from enforcing its rules, preventing him from receiving compensation from endorsements and media appearances for his participation in professional skiing while remaining eligible to compete in college football.

into licensing agreements without the student's consent and compensation, asserting that these actions violated Section 1 of the Sherman Act (*O'Bannon v. NCAA*, 2010). The plaintiffs sought monetary damages and a permanent injunction prohibiting the defendants from continuing to do this without the student's permission in the future (*O'Bannon v. NCAA*, 2010).

During this time, the NCAA required student-athletes to sign documents giving the NCAA, conferences, institutions, and other organizations the right to use their NILs and prohibited the athletes from receiving compensation other than the reimbursement of ordinary expenses (*O'Bannon v. NCAA*, 2010; Wolken & Berkowitz, 2014). Athletic conferences also had separate NIL waivers that student-athletes were required to sign (Keilman & Hopkins, 2015). While some athletic leaders stated that these agreements were voluntary, others testified they believed they were mandatory for the student-athlete to remain eligible to participate in intercollegiate athletics (Keilman & Hopkins, 2015; Wolken & Berkowitz, 2014).

In January 2010, Judge Claudia Wilkens consolidated the Keller and O'Bannon cases before the defendants filed a motion to dismiss the case on several grounds. E.A. Sports filed a motion to dismiss all claims, asserting that California's anti strategic lawsuit against public participation (SLAPP) statute prohibited the claims because the use of the student-athlete likeness by E.A. was protected by the First Amendment (*In re NCAA Student-Athlete Name & Likeness Licensing Litig.*; *Keller v. Elec. Arts Inc*.). Judge Wilkens rejected this argument, holding that California's anti-SLAPP statute did not bar the former player's right of publicity. The court dismissed the breach of contract claim against the NCAA as no contract was attached to the filing. The Ninth Circuit Court of Appeals affirmed Judge Wilkens' ruling, which held that E.A. Sport's use of the likeness of the college athletes was not protected by the First Amendment (*In re NCAA Student-Athlete Name & Likeness Licensing Litig.*; *Keller v. Elec. Arts Inc*.). After

this ruling, two defendants, E.A. Sports and CLC, agreed to settle with the plaintiffs for $40 million (Farrey, 2014). Over 100,000 former players were estimated to receive up to $4,000 for using their NILs. Although they initially objected to their codefendants' settlement agreement, in June 2014, the NCAA also settled the *Keller* claims, agreeing to pay $20 million to specific Division I student-athletes who appeared in the video games, stating that "[w]ith the games no longer in production and the plaintiffs settling their claims with E.A. and the Collegiate Licensing Company, the NCAA viewed a settlement now as an appropriate opportunity to provide complete closure to the video game plaintiffs" (NCAA, n.d.-e, para. 3).

Keller was a significant victory for student-athletes; in addition to the monetary damages, the litigation resulted in a significant policy change by the NCAA when the organization removed the NIL rights waivers from the student-athlete statements that every student-athlete was required to sign each year (Lodge, 2016). While some conferences kept these waivers in place, more emphasis was placed on these being voluntary forms (Wolken & Berkowitz, 2014). The outcome of that settlement shifted some contractual rights and leverage ever so slightly toward student-athletes as institutions began to ask permission to use their NILs instead of requiring them to sign away that right to participate in intercollegiate athletics.

The NCAA's move to put the *Keller* claims behind them would allow them to focus all their energy on the remaining antitrust claims alleged by plaintiffs in *O'Bannon*, who were challenging the organization's rules prohibiting student-athletes from receiving revenue from the royalties earned from the use of the student-athletes' NILs in video games, live game telecasts, and archived footage as an unreasonable restraint of trade that violated the Sherman Antitrust Act (*O'Bannon v. NCAA*, 2010). The NCAA argued that the restraints were necessary and reasonable, as they preserved amateurism, promoted competitive balance, supported the

integration of academics and athletics, and increased the "output" or opportunities for schools and student-athletes to participate in FBS football and Division I basketball (*O'Bannon v. NCAA*, 2010).

Judge Claudia Wilken was not convinced by the arguments presented, promptly dismissing them and ruling in favor of the plaintiffs. She determined the NCAA's rules unfairly restricted trade, thereby violating Section 1 of the Sherman Act. Judge Wilken issued an injunction preventing the NCAA from enforcing any regulations that stop member institutions from compensating student-athletes up to the cost of attendance or from depositing a portion of licensing revenues into a trust fund accessible upon graduation. Furthermore, she prohibited the NCAA from enforcing any policies that impose a licensing revenue cap of less than $5,000 per year for each year a student-athlete is eligible to compete (*In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014).

The Ninth Circuit Court of Appeals confirmed that the NCAA had violated antitrust laws and would be required to permit its member institutions to provide up to the cost of attendance to their student-athletes (*O'Bannon v. NCAA*, 2010). However, the court vacated the judgment and injunction related to the $5,000 shared licensing revenue compensation, reasoning that the payments were arbitrary and untethered to education, which completely crossed the line of amateurism (*O'Bannon v. NCAA*, 2010). Recognizing the shifting landscape, in January 2015, the Autonomy Five conferences voted to permit payments covering the cost of attendance for student-athletes (S. Berkowitz, 2015). The Ninth Circuit's affirmation of *O'Bannon* meant the NCAA could not prohibit any Division I member from paying student-athletes cost of attendance payments, and other Division I schools would follow the Autonomy Five conference lead (C. Smith, n.d.).

The impacts of the *O'Bannon* and *Keller* decisions were far-reaching. The plaintiffs in the *Keller* case settled with E.A. Sports, CLC, and the NCAA for a combined $60 million. NCAA member institutions would now be permitted to pay student-athletes cost-of-attendance stipends (C. Smith, n.d.), resulting in many student-athletes receiving additional financial aid awards ranging from over a $1,000 to nearly $6,000 per academic year (NCAA, n.d.-f). The cases also continued to dissolve the NCAA's much relied-upon amateurism or collegiate model in which student-athletes were not expected to be compensated outside of their scholarship (Lodge, 2016). The NCAA also changed practices by removing the NIL waivers from the student-athlete statements that student-athletes were required to sign yearly (Lodge, 2016). They also stopped licensing student-athletes NIL in video games as E.A. Sports stopped producing the NCAA football video game during this time (NCAA, n.d.-e; Wolken & Berkowitz, 2014). Like *White v. NCAA* before, *O'Bannon* continued to chip away at the NCAA's antitrust defense (T. A. Baker et al., 2011). The ruling in *O'Bannon* was less far-reaching than some might have hoped, as the appellate court refused to allow the original deferred licensing payments that were untethered to education. This meant that some notions of amateurism survived post-*O'Bannon* (Lodge, 2016, *O'Bannon v. NCAA*, 2010). Nevertheless, litigation attacks on amateurism were far from over.

The Era of Compensation

Beginning with *White* in 2008 and continuing with *Keller*, *O'Bannon*, *Jenkins*, *Arrington*, *Alston*, and others, the NCAA has lost or settled many lawsuits over the last several years. Those losses have led to increased financial gains, rights, and benefits for student-athletes. While the victories have been notable, student-athletes have continued their fight, seeking compensation

from NIL and media revenue, status and benefits as employees, and additional economic benefits.

In 2020, former Arizona swimmer Grant House and Oregon women's basketball player Sedona Prince filed a class action lawsuit against the NCAA and the A5 conferences, alleging antitrust violations and challenging the association's rules against allowing student-athletes to profit from their NIL's and prohibiting member institutions from sharing revenue accrued from the institution's use of the NIL's with those student-athletes (*House v. NCAA*, 2021). A few weeks later a former football player for the University of Illinois, Tymir Oliver, filed a similar complaint (Sigety, 2021). In July 2021, the lawsuits were combined into one case, *In re Coll. Athlete NIL Litig.* (Sigety, 2021). The plaintiffs seek class certification, which could severely impact the NCAA, the A5 conferences, and college athletics (T. Baker, 2023).

For example, antitrust cases are subject to treble damages, and class certification would multiply the effect of the potential damages (United States Department of Justice, 2009). The plaintiffs seek certification of the following classes: (1) an injunctive relief class consisting of all former Division I student-athletes from 4 years prior to the date of the filing (June 15, 2020) to the date of the judgment; (2) a social media damages sub-class consisting of all former Division I student-athletes, from A5 institutions, from 4 years prior to the date of the filing (June 15, 2020), to the date of the judgment; and (3) a group licensing subclass consisting of all Division I football and men's and women's basketball student-athletes from A5 institutions, from 4 years prior to the date of the filing (June 15, 2020), to the date of the judgment (*Grant House v. NCAA*, 2021). The plaintiffs seek injunctive relief that would restrain the NCAA and conferences from enforcing the rule that does not allow students to profit from their NILs and monetary damages from social media, licensing, and television broadcast revenue (*Grant House v. NCAA*, 2021).

With the lawsuit pending, the NCAA passed an interim NIL policy in June 2021, which loosened some restrictions and allowed student-athletes to profit from using their NILs (Brutlag Hosick, 2021; Haws, 2022). The plaintiffs subsequently amended their complaint, expanding the classes to include a "Lost Opportunities Damages Sub-Class" comprised of all current Division I athletes in their second or subsequent year of eligibility after receiving a redshirt the previous year and who receive compensation for the use of their NIL for any part of the period from July 1, 2021, to June 30, 2022. This also applies to athletes in their first year of eligibility after receiving a redshirt the previous year, who receive NIL compensation during the same period (Brutlag Hosick, 2021; *Smith v. NCCA*, 2021).

In September 2023, Judge Claudia Wilken certified the injunctive relief class, and 2 months later, in November 2023, Wilken certified the remaining classes (Associated Press, 2023b). In November 2023, the NCAA and A5 conferences appealed Judge Wilken's ruling to the Ninth Circuit Court of Appeals, asserting that the ruling was based on erroneous assumptions about NIL and that they would suffer staggering losses of over $4 billion if the petition is denied (Christovich, 2023; McCann, 2023). The defendants seek an interlocutory appeal, i.e., an appeal before the case is decided (McCann, 2023). Although rarely granted, the Ninth Circuit has previously allowed an interlocutory appeal, reasoning that an interlocutory review of a class is "justified when there is a 'presence of a death knell situation for either party absent review'" (McCann, 2023, para. 9). The defendants argued they could be forced to settle the case for over $4 billion before the merits of that case are decided, which would be a "death knell" to the athletic associations (McCann, 2023). Even if the NCAA and A5 conferences were to share the costs, the NCAA could be in trouble; recently released financial statements for the fiscal year 2022–2023 showed that the NCAA has only $565 million in net assets (S. Berkowitz, 2024).

Several recent compensation cases were filed in late 2023 against the NCAA and the A5 conferences. In November 2023, former Colorado football player Alex Fontenot filed a prospective class action lawsuit, alleging that the NCAA and the A5 conferences were unlawfully denying compensation they would otherwise receive in a competitive market (*Fontenot v. NCAA*, 2023; Scarella, 2023). The lawsuit alleges that the NCAA and A5 conferences earn billions in television revenue but do not share it with the student-athletes who produce it. In their complaint, the plaintiffs argue that the NCAA's bylaw 12, which continues to restrict compensation to student-athletes and prevents schools and conferences from compensating student-athletes, is an unlawful restraint of trade (*Fontenot v. NCAA*, 2023; NCAA, n.d.). The lawsuit seeks to certify a class that includes Division I full-athletic-scholarship athletes in football, men's basketball, or women's basketball in the A5 conferences or at the University of Notre Dame, which has an independent, nonconference affiliated Division I football team (*Fontenot v. NCAA*, 2023). Fontenot argued that their case was distinguishable from others because it was not limited to compensation for "name, image, and likeness" (*Fontenot v. NCAA*, 2023; Scarella, 2023).

In December 2023, Dwayne Carter, a football player for Duke University, Nya Harrison, a women's soccer player for Stanford University, and Sedona Prince, a women's basketball player for Texas Christian University (TCU), filed a prospective class action lawsuit against the NCAA and A5 conferences seeking damages and to eliminate all rules restricting student-athlete compensation (*Carter v. National Collegiate Athletic Association*, 2023). The complaint seeks to build on the Supreme Court's *Alston* ruling, asserting that "the NCAA's pay-for-play restraints can no longer be justified and must finally be struck down in their entirety as violations of

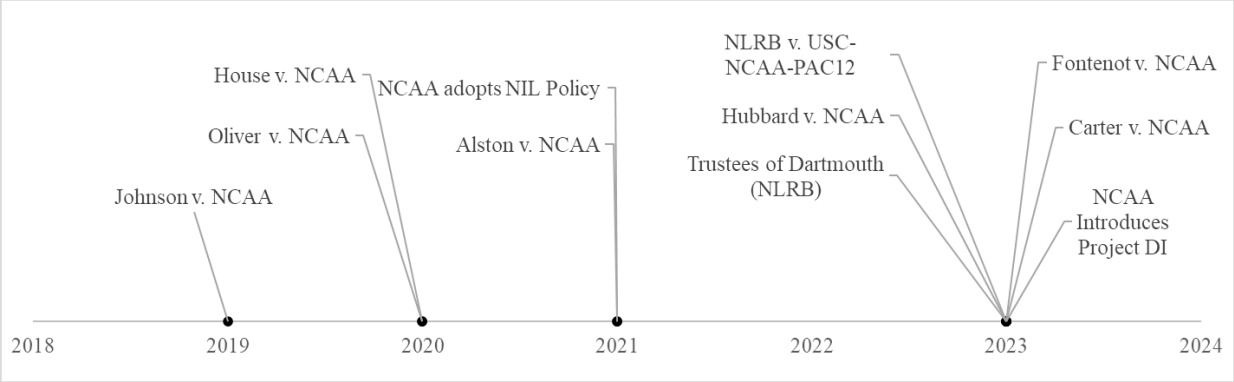
Section 1 of the Sherman Act" (*Carter v. National Collegiate Athletic Association*, 2023, para 129; see Figure 9).

Discussion

This section of the literature review noted that the last two decades have been tremendously chaotic for intercollegiate athletics. While the fortunes of large university athletic departments, coaches, and administrators have grown, so have the challenges concerning the relationship between student-athletes and NCAA member institutions. Student-athletes have found their voices and have repeatedly taken the NCAA and influential A5 conferences to court to gain more rights, medical protections, and other economic benefits. The NCAA and member institutions have lost or settled many lawsuits over the past several years, costing hundreds of millions in settlement costs, attorney's fees, and costs to change practices. Some of these changes make it necessary for member institutions to pay student-athletes the cost of attendance payments and academic achievement awards.

Figure 9

Era of Compensation Timeline



Note. NCAA = National Collegiate Athletic Association; NIL = name, image, likeness; NLRB = National Labor Relations Board; USC = University of Southern California.

Many of the legal actions reviewed in this section have common themes. In sum, the revenue and profit from college athletics have grown exponentially over the last decade. Student-athletes believe that many coaches and administrators are making money from college athletics while excluding them or significantly limiting their ability to do so. Student-athletes believe they should not be prohibited from earning compensation for their participation in intercollegiate athletics, that conference and member institutions should be allowed to compensate them for participating in intercollegiate athletics, and that those organizations should not maintain rules restricting or fixing that compensation. Students are not the only ones who feel this way; NCAA President Charlie Baker (2023) acknowledged the NCAA must find a way to "develop a sustainable and equitable way to address the financial interests of the small percentage of student-athletes whose teams generate a significant amount of revenue for their universities" (para. 5).

In December 2023, NCAA President Charlie Baker put forth a new proposal, Project DI, that I aided along with other senior leaders, that tried to address the issue by suggesting a way for NCAA member institutions to provide more benefits to student-athletes (C. Baker, 2023; Russo, 2023d). Project DI would allow institutions to provide unlimited educational benefits to student-athletes and to compensate student-athletes directly for the use of their NILs; it also would create a new subdivision where member institutions would be required to provide 50% of their student-athletes with a minimum of $30,000 in annual trust fund payments (Dellenger, 2024a; Russo, 2023d). While the proposal was initially met with enthusiasm, some powerful athletic conferences have been critical or resistant. Notably, Project DI does not address employment issues and would likely need help from Congress to do so (Dellenger, 2024a). In its January 2024

meeting, the NCAA Division I Board of Directors instructed the Division Council to develop recommendations for a framework to address the elements of Project DI (Wright, 2024).

In addition to eliminating the NCAA's and A5 conferences' rules and restrictions barring their right to compensation, student-athletes are seeking employee status, the right to bargain collectively, and other rights associated with employee status (*Johnson v. NCAA*, 2021; McCann, 2023; *NCAA v. Univ. of S. Cal.*; *Pac-12*, 2022). While student-athletes have been waging this fight for the last 70 years, current student-athlete employment claims could have a significant impact on the future of intercollegiate athletics (*Johnson v. NCAA*, 2021; McCann, 2023; *NCAA v. Univ. Of S. Cal.*; *Pac-12*, 2022; *State Comp. Ins. Fund et al. v. Indus. Comm'n of Col. et al.*, 1957; *The Trs. of Dartmouth College*, 2021; *Univ. of Denver v. Nemeth*, 1953; *Van Horn v. Indus. Accident Comm'n*, 1963).

Should the NCAA remove all restrictions on compensation, allowing schools to pay student-athletes without national compensation limits? This action would bring into plain view the question of student-athlete employment, to which the association is currently resistant (Associated Press, 2023a). Should some student-athletes be employees? ESPN analyst and former Ohio State quarterback Kirk Herbstreit thinks student-athletes will eventually receive compensation from TV broadcasts and could unionize (Spencer, 2022). The next section of the literature review examines relevant literature concerning student-athlete employment.

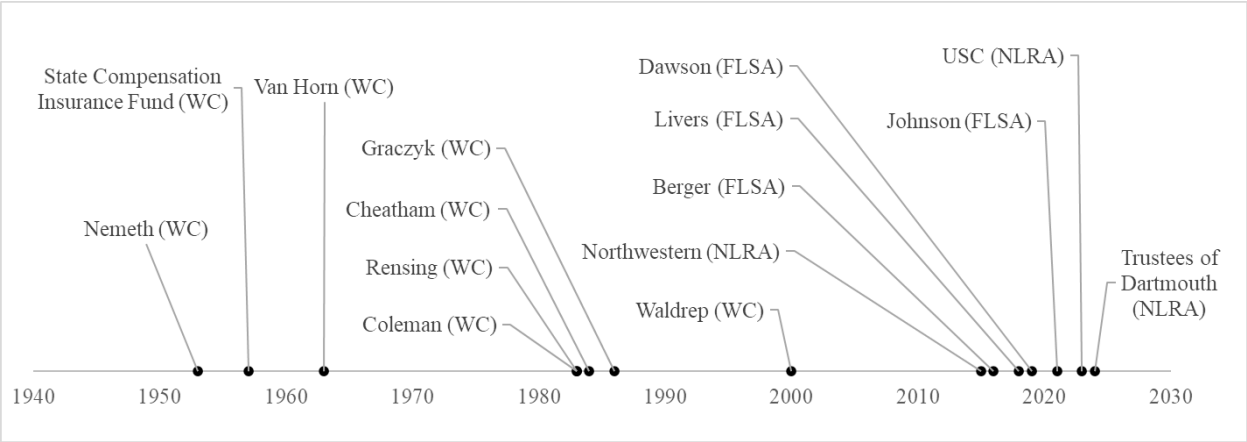
Student-Athlete Employment Literature

Student-athletes have been litigating employment status and the rights to employee benefits for over 70 years (*Univ. of Denver v. Nemeth*, 1953). This literature review section provides an overview of the criteria courts typically employ to determine if student-athletes are employees (see Figure 10). It examines key issues in early student-athlete employment cases,

including claims for workers' compensation and death benefit claims. The literature review then details the FLSA and NLRA, the two laws at the heart of the most recent student-athlete employment claims, and the relevant literature discussing the rights and benefits of student-athlete employment and the potential consequences of student-athlete employment.

Figure 10

Student-Athlete Employment Cases



Note. WC = workers' compensation; FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

Employment Tests

Courts have used several tests to determine whether an employment relationship exists between student-athletes and higher education institutions (Roberts, 1996; Tiscione, 2007; Whitmore, 1991). Many courts utilize the "control" test, the "relative nature of work" test, or the "economic reality" test, with the control test being the most widely used. The control test and the relative nature of the work test are derived from the Restatement of Second Agency, which is also used to determine whether an employment agreement exists (Whitmore, 1991). The control test examines whether the employer has the right to control the employee's actions, job role,

payment method, discipline rights, and provision of work equipment, among other factors (Roberts, 1996; Tiscione, 2007). Notably, no single element is decisive, as courts assess these factors on a case-by-case basis (Roberts, 1996; Tiscione, 2007).

The relative nature of the work test evaluates whether the employee's duties are a substantial and integral part of the employer's business (Roberts, 1996; Whitmore, 1991). This assessment considers the nature of the work, the skill required, the employee's independence in maintaining a separate business, and the expectation to manage their accident risk (Roberts, 1996). Roberts (1996) noted a trend where courts have been shifting from the control to the relative nature of work tests due to their flexibility.

The economic reality test combines elements of the control and the relative nature of work tests. It principally scrutinizes four factors: the employer's control over the employee, the power to dismiss or discipline, the payment method, and the significance of the employee's duties to the employer's business (Tiscione, 2007). Like the previous tests, no one element is definitive, and courts balance these elements in their deliberations (Tiscione, 2007). Table 2 summarizes employment tests.

Table 2

Employment Test

Employment test	Criteria	Application to student-athletes
Control test	Employer's right to control work Method of payment Right to fire	Coaches' control over athletes Scholarships as payment Team membership conditions

Employment test	Criteria	Application to student-athletes
Relative nature of work	Employee's duties as an integral part of employer's business	Athletes' roles in generating revenue and representing the school
	Skill involved	Specialized skills
Economic realities test	Degree of employer's control	Institution's control over athletes
	Opportunity for profit/loss	Scholarships and benefits
	An integral part of business	Sports as a key part of the school's operation and branding

Although most courts use one of those tests, some reject them entirely, reasoning that no single test can evaluate whether an employee-employer relationship exists (Roberts, 1996; Tiscione, 2007). As a part of some tests, courts weigh multiple factors when determining whether an employment relationship exists (*Miller v. Garford Lab.*, *Inc*., 1939; Tiscione, 2007). Mondello and Beckham (2002) and Tiscione (2007) noted that courts looked at the parties' intent to form a contract in early student-athlete workers' compensation cases to determine whether an employee-employer relationship existed.

Workers' Compensation

Background. Workers' compensation statutes are in effect in every jurisdiction in the United States (Yasser, 1984); their purpose is to provide employees with a guaranteed remedy for injuries arising while serving their employers (Whitmore, 1991). Horovitz (1944) and Whitmore (1991) noted that before adopting workers' compensation laws, over 80% of industrial accident claims failed due to the robust defenses of corporations. Workers' compensation statutes require the employer to pay for a worker's injury through private insurance by paying into the state workers' compensation fund (Gurdus, 2000; Whitmore, 1991). In exchange for

these benefits, the employee gives up the right to sue for excessive damages, and the employer relinquishes most of their tort defenses (Gurdus, 2000; Tiscione, 2007; Whitmore, 1991).

Applicability to Student-Athletes. Three workers' compensation cases—*Univ. of Denver v. Nemeth* (1953), *State Comp. Ins. Fund et al. v. Indus. Comm'n of Colo. et al.* (1957), and *Van Horn v. Indus. Accident Comm'n* (1963)—served as early indicators to the NCAA and member institutions that student-athletes would challenge the amateurism principle to seek employee status and benefits. The NCAA's response to these cases began to define the contractual relationship between student-athletes and universities (Epstein & Anderson, 2016). These cases discussed further in Chapters 4 and 5, influenced the early contractual rights of student-athletes and signaled future litigation regarding amateurism, employee status, rights, and benefits.

While student-athletes achieved varying degrees of success in these early cases, scholars including Yasser (1984), Roberts (1996), Whitmore (1991), Gurdus (2000), and Tiscione (2007) have critiqued the courts' reasoning in decisions unfavorable to the plaintiffs, arguing that student-athletes should be recognized as employees entitled to workers' compensation benefits in the event of injury. Yasser (1984) asserted that courts that deny student-athletes employee status and the rights that come with that status are clinging to the outdated principle of amateurism, leaving the student-athlete without remedy should they be injured while playing a sport for a college or university. While a plethora of scholars support the notion that student-athletes are employees by definition and that they should receive workers' compensation benefits for injuries sustained while playing sports, their opinions are not unchallenged (Gurdus, 2000; Haden, 2001; Roberts, 1996; Tiscione, 2007; Whitmore, 1991; Yasser, 1984). In an article critiquing Haden's (2001) position that student-athletes should be paid a monthly stipend, Mondello and Beckham

(2002) took the position that scholars supporting compensation for student-athletes often ignore the complexity of intercollegiate athletics. Mondello and Beckham (2002) asserted that "pay for play" advocates had not conducted a systematic review of the costs and benefits associated with intercollegiate athletics, stating,

> The institution's primary duty is not to maintain and manage a sports franchise in which athletes are compensated for employment services; instead, the institution's duties are to effectively monitor progress towards the degree, to be accountable for the provision of educational services leading to the completion of degree requirements, and to establish standards of eligibility that promote an appropriate balance between the athlete's desire to participate in competition and the institution's responsibility to keep its educational mission foremost. (p. 303)

Instead, Mondello and Beckham (2002) maintained that the NCAA and member institutions fear granting student-athletes employee status and making them eligible for workers' compensation because it would reshape the mission of higher education institutions and potentially lead to other demands for employee rights and benefits by student-athletes. To qualify for workers' compensation benefits, there must be an employee-employer relationship, and the injury must have occurred due to or be connected with employment (Tiscione, 2007; Whitmore, 1991). Courts in the early student-athlete workers' compensation cases initially sought to determine whether there was an employment contract that defined the employee-employer relationship (*State Compensation Insurance Fund v. Industrial Comm'n*., 1957; *Van Horn v. Indus. Accident Comm'n* 1963). Yasser (1984) and Roberts (1996) observed that the test for whether a student-athlete is an employee should be whether an implied or express contract for hire exists, coupled with a quid pro quo relationship with the university. Roberts (1996),

although narrowly focusing on Texas state law, noted Texas could be one of the first states in the nation to grant substantial legal protections to student-athletes as it could include student-athletes in their definition of employees. States such as California and Hawaii expressly exclude the term "student-athlete" from the definition of employee in their workers' compensation statutes while, in contrast, Nevada expressly includes student-athletes in their workers' compensation statute (Baton, 2001; Whitmore, 1991). This inconsistency in state statutes and the silence on whether student-athletes are employees in many state workers' compensation statutes leave the issue up to the courts (Whitmore, 1991).

Although student-athletes won some victories in the early cases, they have lost many as courts held that they were not employees (Mondello & Beckham, 2002; Tiscione, 2007). The NCAA and its member institutions have also taken steps to mitigate the need for and call for workers' compensation by implementing several injury insurance programs (NCAA, n.d.-h; Sheely, n.d.). In 1992, the NCAA implemented the catastrophic injury program, which provides up to $20 million in lifetime benefits for student-athletes who become disabled as a result of an athletically related injury; after the $90,000 deductible is met, the policy will also cover other injuries that do not result in permanent disability (Sheely, n.d.). In addition to the catastrophic injury program, the NCAA offers up to $90,000 in medical benefits for student-athletes who suffer an athletically related injury while participating in an NCAA championship through the Participant Accident Program (Sheely, n.d.).

In 1990, the NCAA (n.d.-i) implemented the Exceptional Student-Athlete Disability Program. Initially intended to cover only football and men's basketball student-athletes, the policy was expanded in 1991, 1993, and 1998 to include baseball, men's ice hockey, and women's basketball, respectively (NCAA, n.d.-i). The program allowed student-athletes to

purchase disability insurance that protects them against future loss of earnings as a professional athlete due to a disabling injury or illness incurred while participating in intercollegiate athletics (NCAA, n.d.-i). Tiscione (2007) criticized the NCAA and its member institutions for not providing long-term benefits like those offered by workers' compensation and noted that the program failed to cover student-athletes participating in sports other than football, baseball, men's basketball, ice hockey, and women's basketball.

In 2023, the NCAA Board of Governors adopted the Post Eligibility Insurance Program (PEI; NCAA, 2023). For athletics-related injuries occurring on or after August 1, 2024, the PEI program will provide medical benefits for student-athletes up to two years after they leave their college or university (NCAA, 2023). This secondary insurance policy will provide up to $90,000 in benefits per related injury, including $25,000 for mental health services related to such an injury (NCAA, 2023).

The NCAA's implementation of several injury insurance programs, combined with the deferential treatment often shown to the NCAA and member institutions in workers' compensation cases, has perhaps led to a shift in strategy by student-athlete claimants.[2] While early student-athlete employment cases almost exclusively involved workers' compensation claims and legal theories, more recent claims are challenging the employee status of student-athletes under the laws of the Fair Labor Standards Act and the National Labor Relations Act. (S. Berkowitz, 2023; *Johnson v. NCAA*, 2021; *Northwestern Univ. v. Coll. Athletes Players Assoc'n*, 2014). The following section provides a detailed overview and discussion of the FLSA and the NLRA.

[2] The courts have continued to defer to the NCAA principle of amateurism and have articulated that higher education's primary goal and "business" is to educate and not to manage sports enterprises (Mondello & Beckham, 2002).

The FLSA and NLRA

In addition to antitrust litigation, student-athletes continue challenging the restrictive compensation rules of NCAA, A5 conferences, and member institutions (Kennebrew, 2022; Rosenthal, 2017; Shults, 2022). Specifically litigating student-athlete employment, students are bringing claims against the NCAA, A5 conferences, and member institutions, arguing they are violating the FLSA and the NLRA (*Johnson v. NCAA*, 2021; *The Trs. of Dartmouth Coll.*, 2021). The plaintiffs claim they are employees under the FLSA or the NLRA and are due compensation, rights, and benefits due to employees (Corrada, 2020; Kennebrew, 2022; Rosenthal, 2017; Shults, 2022). The differences between the FLSA and the NLRA are the protections the employees receive (Harris, 2009). Under FLSA, employees receive minimum wage and overtime rights, while under the NLRA, employees receive more procedural rights, like the right to collectively bargain (Harris, 2009; LawInfo, n.d.).

Understanding the FLSA

Background. President Franklin D. Roosevelt enacted the Fair Labor Standards Act in 1938, which is noted for its historical struggle through years of judicial opposition and congressional debates before its finalization (Grossman, 1978). The FLSA aimed to improve working conditions by setting federal standards for minimum wages, overtime pay, child labor, and employer recordkeeping (Burch, 2002; Daniel, n.d.). The Act applies to employees working for federal, state, or local government agencies, hospitals, and institutions primarily engaged in caring for the sick, aged, or mentally ill or developmentally disabled individuals living on the premises, as well as preschools, elementary or secondary schools, higher education institutions, schools for mentally or physically handicapped or gifted children, and companies or

organizations with annual sales or receipts of $500,000 or more (FLSA Advisor, n.d.; Mayer et al., 2013).

Individuals working for a company that does not have sales or receipts of $500,000 or more may still be covered under FLSA if they engage in interstate commerce (Mayer et al., 2013). The Fair Labor Standards Act exempts certain employers and employees, such as executive, administrative, and professional employees, from overtime and the minimum wage if they meet a salary test and a job duties test (Mayer et al., 2013). While the FLSA is a federal statute, state laws take precedence if they provide greater protections for employees through more stringent minimum wage, overtime, or child labor regulations (Mayer et al., 2013). Many states have higher minimum wage rates than the current federal rate of $7.25 (U.S. Department of Labor, n.d.-c). In those states, the state minimum wage law would apply.

The Fair Labor Standards Act also created the Wage and Hour Division, which enforces the provisions of the FLSA under the Department of Labor (DOL; Daniel, n.d.; Mayer et al., 2013). The FLSA has been amended several times since 1938 (Mayer et al., 2013), with the latest revision, effective March 11, 2024, published in January 2024 (Strickland, 2024). The revision replaced what the U.S. DOL believed to be inconsistent "with the law and longstanding judicial precedent" with the new rule based on, among others, the core factor of "the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss based on initiative, investment, or both" (DOL, as cited in Strickland, 2024, para. 5–6).

Employment Tests. In cases concerning the FLSA, courts have recognized that the FLSA's broad definition of "employee" includes any individual employed by an employer and is not limited to employees of a particular employer (*Berger v. NCAA*, 2016; *Dawson v. NCAA*,

2017; Fair Labor Standards Act Advisor, n.d.; *Livers v. NCAA*, 2018). The definition of an "Employer" in the FLSA

> includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. (Legal Information Institute, n.d., para.1)

Since the 1940s, the Department of Labor and courts have utilized an economic reality test to ascertain whether a worker qualifies as an employee or an independent contractor under the FLSA (Department of Labor, 2024; *Sec'y of Labor v. Tony Susan Alamo*, 1991). This test evaluates economic dependency by determining if the worker relies on the employer for their livelihood or if they are effectively running their own business (Department of Labor, 2024; *Livers v. NCAA*, 2018).

The economic reality test was developed in the 1940s as the U.S. Supreme Court grappled with legal disputes from the relatively newly enacted Federal statutes, the FLSA, the NLRA, and the Social Security Act (SSA; Department of Labor, 2024). In *NLRB v. Hearst Publ'ns.* (1944), a dispute concerning the employee status of newspaper delivery boys, the U.S. Supreme Court reversed a decision by the United States Circuit Court of Appeals for the Ninth Circuit, which denied enforcement of the NLRB's orders that found that the publishers had violated the NLRA (*NLRB v. Hearst Publ'ns*, 1944). The Court rejected the common law tests of the master-servant relationship between employee and employer, stating that,

> Broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying

> economic facts rather than technically and exclusively by previously established legal classifications. (*NLRB v. Hearst Publ'ns*, 1944, p. 129)

The second foundational case that contributed to the development of the economic realities test was *U.S. v. Silk* (1947; Ehrlich, 2019; n.a., 2024). In that case, the U.S. Supreme Court affirmed in part and reversed in part a decision by the Circuit Court of Appeals for the Tenth Circuit, which affirmed a district court decision that found that the respondents, a coal yard and a carrier, were due a refund of social security taxes because it found that their workers were independent contractors (*U.S. v. Silk*, 1947). In the district court, the plaintiff, the owner of a coal company, sued the United States to recover taxes paid to the U.S. Government under the SSA (*U.S. v. Silk*, 1947). In partially reversing the Tenth Circuit Court of Appeals decision, the U.S. Supreme Court held that although most workers were independent contractors, the coal certain workers unloaders were employees (*U.S. v. Silk*, 1947). Although the Federal statute under review was the SSA, the Court held that the same rules used to determine whether workers were independent contractors or "employees" in *NLRB v. Hearst Publ'ns* (1944) were applicable in *Silk* (*U.S. v. Silk*, 1947).

In *Hearst*, the Court ruled there was no "simple, uniform and easily applicable test" to determine whether a person is an employee or independent contractor but that the determination should be based on economic reality (*NLRB v. Hearst Publ'ns*, 1944, p. 120). In the case of *U.S. v. Silk* (1947), when examining the economic reality, the Court noted that the unloaders provided only their own picks and shovels. The Court found that the unloaders had no opportunity for profit or loss beyond the use of their hands and tools, worked within the scope of the employer's trade or business and that the employer, Silk, had the capacity to supervise all necessary aspects of their work.

The Court distinguished the unloaders from the truckers who were found to be independent contractors, noting the truckers were small businessmen who owned their own trucks, hired their own helpers, and that, in some cases, they chose to work for multiple customers (*U.S. v. Silk*, 1947). The Court further reasoned that "the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, which marks these driver-owners as independent contractors" (*U.S. v. Silk*, 1947, p. 719). The Court stated that no one factor controls when determining whether a person is an employee or independent contractor (*U.S. v. Silk*, 1947).

Building on *Silk*, the U.S. Supreme Court affirmed the decision by the Tenth Circuit Court of Appeals, which held that beef boners were employees of the company and that the company had violated the FLSA by failing to pay overtime to the workers and by failing to keep proper employee records (*Rutherford Food Corp. v. McComb*, 1947). The Court reasoned that the FLSA was "a part of the social legislation of the 1930s of the same general character as the [NLRA] and the [SSA] and that the definition of employer and employee used in those acts was persuasive and should be considered when analyzing FLSA cases (*Rutherford Food Corp. v. McComb*, 1947).

In *Schultz v. Cap. Int'l Sec.* (2006), the Fourth Circuit detailed the "Silk" factors used to determine the relationship between worker and employer as follows: (1) the extent of control the presumed employer has over how the work is performed; (2) the worker's potential for profit or loss depending on managerial skill; (3) the worker's investment in equipment or materials, or employment of other workers; (4) the level of skill required to perform the work; (5) the permanence of the working relationship; and (6) the extent to which the services provided are integral to the employer's business (pp. 307–309).

In *Shultz* (2006), the Court reiterated that "[n]o single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer" (p. 305). Since the 1940s, federal courts have used a multifactor, totality-of-the-circumstances economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. This approach considers various factors, with no single factor or subset of factors being decisive in the analysis *(Bartels v. Birmingham*, 1947; *Goldberg v. Whitaker House Cooperative*, *Inc*., 1961; *Schultz v. Cap. Int'l. Sec*., *Inc*., 2006; *Sec'y of Labor v. Tony Susan Alamo*, 1991).

Courts have analyzed the economic realities of the employment relationship to ascertain whether a worker is economically dependent on the employer or is independently conducting their own business. Although there is some variation in how courts express these factors, the core assessment remains consistent (*McFeeley v. Jackson St. Entm't*, *LLC*, 2016; *Rutherford Food Corporation v. McComb*, 1947; *Schultz v. Cap. Int'l Sec*., 2006). Despite these variations, many courts continue to reference the factors initially outlined in Silk as valuable indicators. They recognize these factors are not exhaustive and should not be rigidly applied, emphasizing a flexible approach to understanding each unique employment scenario (*Goldberg v. Whitaker House Cooperative*, *Inc*., 1961; *Schultz v. Cap. Int'l Sec*., *Inc*., 2006; *Sec'y of Labor v. Tony Susan Alamo*, 1991).

Applicability to Student-Athletes. Several authors have suggested that student-athletes are employees under FLSA and that they should continue to litigate for employee status, rights, benefits, and status (Corrada, 2020; Gordon, 2023; Kennebrew, 2022; Rosenthal, 2017; Shults, 2022). In "College athletes in revenue-generating sports as employees: A look into the alt-labor future," Corrada (2020) compared student-athletes to students in work-study programs and

reasons that football and basketball players in revenue-generating sports could easily be treated as employees, writing that work-study programs can serve as a template for how to structure the relationship between a college or university and its football or basketball players. Corrada noted that only minor changes in the DOL regulations governing FLSA would be necessary to do this. Similarly, Ehrlich (2019) suggested that, although unlikely, the NCAA could be more proactive in developing a model similar to graduate assistantships, "where student-athletes are afforded protections under the FLSA and collective bargaining rights while still being held to educational commitments as students at their respective universities" (p. 112).

Shults (2022) argued that student-athletes should build off their success in the *Alston* case and continue to fight for employee classification. Although the Court did not address student-athlete employment claims or the Fair Labor Standards Act (FLSA) statute in that case, Shults noted it might pave the way for future challenges by student-athletes. Specifically, the court in *NCAA v. Alston* (2021) rejected the NCAA's amateurism defense, previously used in FLSA cases to argue that student-athletes were not employees. This decision could undermine a critical defense in previous FLSA and NLRA cases. Johnson (2015) proposed developing a new model that includes student-athlete compensation and optional educational requirements. To do so, Johnson posited Congress should recognize student-athletes as employees under the FLSA.

While many authors have supported student-athlete employment classification under the FLSA, some have not (Nelson, 2022; Osborne, 2014). While generally supportive of the notion that student-athletes should receive compensation, Nelson (2022) argued that student-athletes are independent contractors, as they (1) do not "undertake a specific project" by playing for their respective teams, (2) are not controlled by their coaches, as they only contract their services out for the season and can leave the university due to the new transfer rules, (3) play without

scholarships in some cases, and (4) student-athletes do not create vicarious liability issues for the university. Sims' (2015) analysis was criticized for being faulty because he based his understanding of an independent contractor solely on the definition provided by Black's Law Dictionary, neglecting to incorporate statutory or case law definitions and interpretations that offer a broader and potentially more accurate context regarding the distinctions between independent contractors and employees. Osborne (2014) summarily dismissed the notion that student-athletes are employees, arguing that student-athletes are already well compensated by their scholarship and that education should be their goal and reward. She further stated that "College athletes are not hired as employees of the university—and they are not denied 'free market' compensation for their athletic talents—they can take their talents to professional, semiprofessional, or developmental leagues" and "If an athlete does not have the interest or intention of receiving an education, he or she should not participate in college athletics" (p. 151).

Colwell (2019) suggested that student-athletes are not employees under the FLSA and that the only practical solution is to allow them to earn compensation based on their NIL. While her analysis of the FLSA as it applies to student-athletes is useful, her article is dated as student-athletes gained the right to earn compensation from their NIL (Hosick, 2021).

Schumaker and Lower-Hoppe (2020) maintained that student-athletes should not be classified as employees under the FLSA because doing so would make them eligible for minimum wage and overtime pay; this would make it too costly for universities and universities would likely cease sponsoring some sports. However, the authors reluctantly conceded that universities would not be successful if they tried to circumvent the FLSA by classifying student-athlete opportunities as "unpaid internships," reasoning that several factors of the primary

beneficiaries' test,[3] a version of the economic realities test would weigh against the university. Schumaker and Lower-Hoppe (2020) reasoned that the factors weighing in the student-athlete's favor would be that student-athletes would likely expect compensation, their work could be held to displace the work of a paid employee, and the business of intercollegiate athletics would not be viable without the contributions of student-athletes.

Kennebrew (2022) explored both viewpoints by examining the NLRA and the FLSA to determine whether student-athletes should be classified as employees under each statute, concluding that student-athletes should be employees under the FLSA and NLRA. Unlike many authors who advocate one viewpoint or the other, Kennebrew (2022) offered recommendations and practical guidance on how to move forward.

Much of the literature regarding student-athlete employment under FLSA centers around the multifactor tests and the economic realities tests that different Federal courts of appeals use to determine whether student-athletes are employees (Ehrlich, 2019; Kennebrew, 2022; Murry, 2021; Rosenthal, 2017). A thorough review of the literature and a preliminary examination of relevant case law suggests that courts analyze FLSA claims on a case-by-case basis and that no one test applies to all cases (*Berger v. NCAA*, 2016; *Dawson v. NCAA*, 2017; Ehrlich, 2019; Kennebrew, 2022; *Livers v. NCAA*, 2018; Murry, 2021; Rosenthal, 2017). Rosenthal (2017) argued that courts have gotten it wrong by giving deference to the NCAA and its amateurism defense. Kennebrew (2022) analyzed the student-athlete employment claim under FLSA using

[3] In *Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 2015*, Inc., the U.S. Court of Appeals for the Second Circuit established the "primary beneficiary test" for determining whether an individual is an intern or an employee. The court focused on what the intern received in exchange for his or her work and the economic reality of the intern-employer relationship. The court also held that such a relationship should be analyzed differently than the standard employer-employee relationship because the intern enters into the agreement with the expectation of receiving educational or vocational benefits not necessarily expected with all forms of employment.

the Donovan test.[4] Moreover, the *Glatt* test suggests the earlier courts used the wrong tests when evaluating student-athlete employment claims under FLSA. Many authors agree that the U.S. Supreme Court ruling in *Alston* weighs in favor of student-athletes being successful in future FLSA cases (Gordon, 2023; Murry, 2021; Shults, 2022). These tests are further explored in Chapter 4 and Chapter 5. In addition to their claims for employee status under the FLSA, student-athletes are also challenging their employment status under the NLRA (Ensinger, 2022; *Johnson v. NCAA*, 2021; Kennebrew, 2022; Shults, 2022). The next section of the literature review provides a detailed overview of the NLRA and a review of relevant literature related to the NLRA and student-athlete employment claims.

NLRA and Collective Bargaining

In 1935, after years of strife between employers and employees who tried to organize and form unions, Congress passed the National Labor Relations Act, which President Franklin Roosevelt signed into law (NLRB, n.d.-h). The Act intended to guarantee employees' right to organize, initiate, and join labor organizations and choose representatives who could engage in collective bargaining on their behalf (NLRB, n.d.-h).

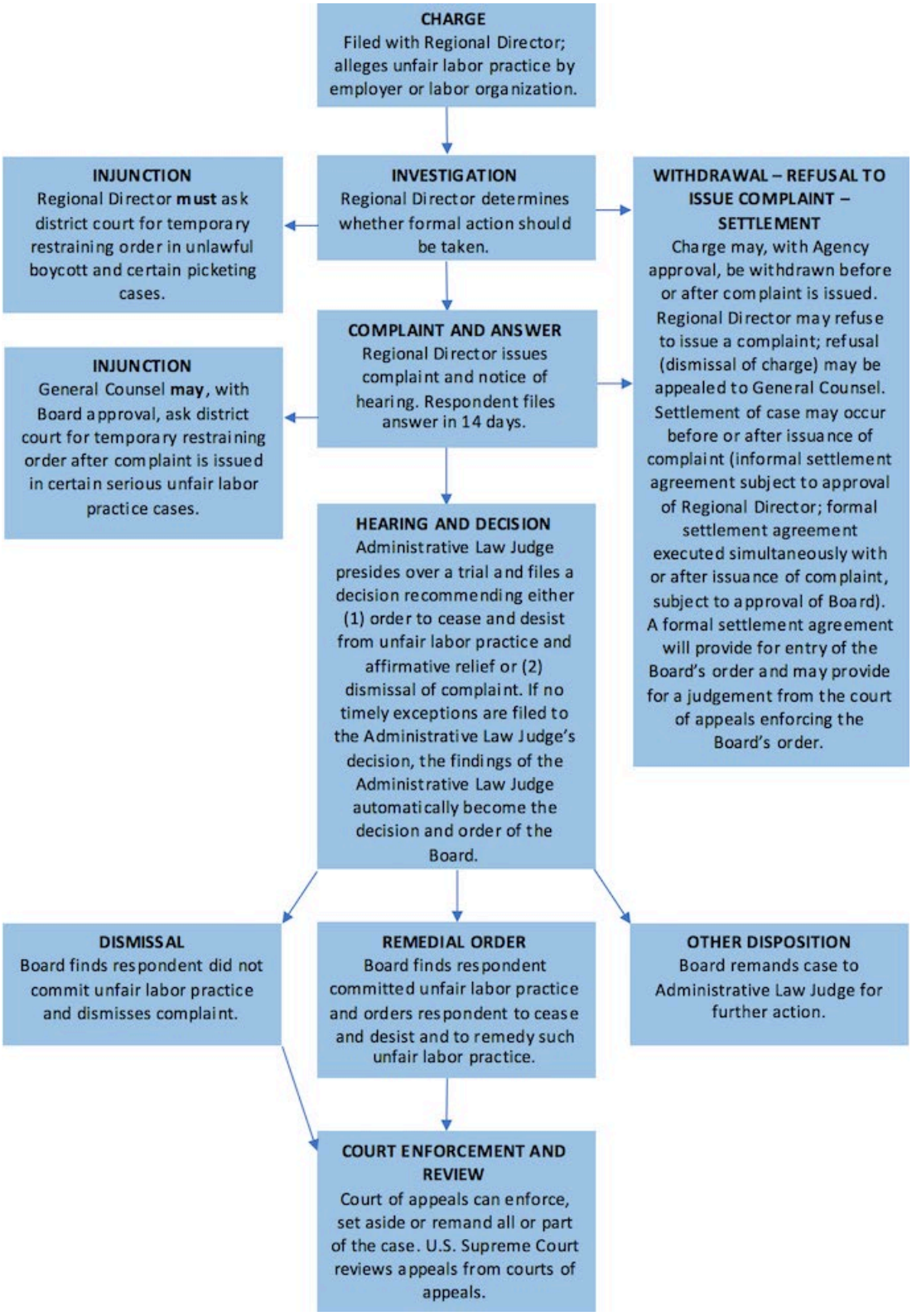
The Act also created the NLRB to arbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employers (NLRB, n.d.-h; see Figure 11). In addition, the NLRB determines proper bargaining units, conducts

[4] In *Donovan v. Dialamerica Marketing, Inc*. (1985), the U.S. Court of Appeals for the Third Circuit adopted the test in *Donovan v. Sureway Cleaners*, 1981, to determine whether home researchers were employees under FLSA. The factors used to determine whether the home researchers were employees were: "1) the degree of the alleged employer's right to control how the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business." The court reversed the decision by the district court, holding that the court erred in finding that the home researchers were not employees. They remanded the case back to the district court for further proceedings.

elections for union representation, and investigates charges of unfair labor practices by employers (NLRB, n.d.-h). The National Labor Relations Board has five members, appointed by the president, and 33 regional directors assist them. Its members have limited, staggered terms, and the Board's composition often changes when a new U.S. president is elected (W. B. Gould, 2014; Meltzer, 1962). W. B. Gould (2014) noted that the President, on the advice and with the consent of the Senate, can influence the decisions of the Board through the appointment process and that each president can change the makeup of the Board reasonably quickly. W. B. Gould (2014) observed that the Eisenhower administration was the first to recognize the ability to initiate policy shifts by changing the composition of the NLRB.

Figure 11

Unfair Labor Practice Process Chart



In his 1962 article, Meltzer examined the impact of the reversal of NLRB decisions by subsequent Boards on the purposes of the NLRA and its provisions. Meltzer (1962) noted that rapid changes in the Board personnel and ambiguities within the NLRA lead to inconsistent decisions by the NLRB. This inconsistency still plagues the NLRB today.

The National Labor Relations Board complaint and resolution process for unfair labor practices differs from a regular court proceeding. In National Labor Relations Board cases, the burden of establishing worker status rests with the party asserting that an individual is an independent contractor, as demonstrated in their decision in the *Amalgamated Transit Union Local vs*. *Supershuttle Int'l Denver*, *Inc*. case in 2010 (Carrieri, 2019). The process of adjudicating an unfair labor practice complaint is as in Figure 11.

Employment Tests. The National Labor Relations Act granted employees in private-sector workplaces the right to pursue improved working conditions and to have designated representation, all without the fear of retaliation. The definition of "employee" within the NLRA was originally broad and included only a few exceptions (Kennebrew, 2022; Lofaso, 2016). As amended by the Taft-Hartley Act of 1947, the NLRA set forth that certain workers were exempt from the NLRA, including agricultural laborers, domestic workers, anyone employed by parents or a spouse, independent contractors, supervisors, and those whose employer was subject to the Railway Labor Act.

To determine whether a worker is an employee or an independent contractor, the NLRB (n.d.) applies a common law agency test. The Board in the *SuperShuttle* case examined factors that included

a. The extent of control which, by the agreement, the master may exercise over the work details.

b. Whether or not the one employed is engaged in a distinct occupation or business.

c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the employer's direction or by a specialist without supervision.

d. The skill required in the particular occupation.

e. Whether the employer or the workman supplies the instrumentalities, tools, and workplace for the person doing the work.

f. The length of time for which the person is employed.

g. The method of payment, whether by the time or by the job.

h. Whether or not the work is part of the employer's regular business.

i. Whether or not the parties believe they are creating the relation of master and servant.

j. Whether the principal is or is not in business. (NLRB, n.d.-c, p. 1)

Like courts weighing multiple factors in FLSA cases, the NLRB (n.d.) in *SuperShuttle* noted that no one factor was decisive, and that the totality of the relationship must be weighed to determine whether the worker is an employee or an independent contractor. While the NLRB continues to employ the common-law agency test to determine employment status, the focus of this test has evolved (Kennebrew, 2022). The common-law test now emphasizes the workers' entrepreneurial opportunities for gain or loss rather than primarily considering the employer's right to control the worker and their work activities, as illustrated in the case of *Roadway Package System*, *Inc*. (1998).

Like the different economic reality tests used by courts in FLSA cases, the NLRB's decisions can be inconsistent and change over time (Kennebrew, 2022; Meltzer, 1962). These inconsistencies could influence the results of unfair labor practice complaints from student-athletes or those on their behalf.

Applicability to Student-Athletes. Numerous authors have argued that student-athletes should or will eventually be recognized as employees under the NLRA, granting them collective bargaining rights and the ability to negotiate their conditions of work (Bird, 2015; Corrada, 2020; Ensinger, 2022; Leppler, 2014).

Leppler (2014) argued that the common law right of control test and the NLRB statutory test show that these student-athletes are employees. He maintains that the relationship between these student-athletes and the NCAA is principally economic rather than one based on education. Similarly, Corrada (2020) was emphatic that "only" student-athletes in revenue-generating sports should be treated as employees, explaining that because these student-athletes participate in sports that generate large sums of revenue, they should be treated as employees. He supported his premise by citing concurring circuit court Judge Hamilton in *Berger*, who reasoned that the analysis of the economic reality of the student-athlete-NCAA relationship may point in a different direction because of the billions of dollars of revenue the student-athletes in those sports help generate.

Ensinger (2022) disagreed with Corrada's belief that only student-athletes in revenue-generating sports should be treated as employees. He extended his argument, positing that students in equivalency sports, in which there are a maximum number of scholarships awarded, should be granted employee status like those in headcount sports, i.e., in which a limited number of scholarships are offered. Awards cannot be divided among recipients, such as football and basketball. Ensinger (2022) supported his argument by pointing out that student-athletes who participate in equivalency sports still receive compensation for their services and are subject to the same control by their school. Hernandez (2023) agreed with Ensinger that student-athletes in revenue- and nonrevenue-producing sports could be considered employees. However, he

questioned whether they should be, suggesting that the area of law is too unsettled and subject to the rapid changes in the NLRB's precedents and potential congressional preemption. Hernandez (2023) and others have advocated for the parties, student-athletes, the NCAA, and its member institutions to come together to design a solution that offers student-athletes "labor rights" (Barrowman, 2015).

While clearly, many authors have argued that student-athletes should be granted employee status under the NLRA, a minority of them do not (Cianfichi, 2014; Gunter, 2014; Reinbrecht, 2015; Sims, 2015). They have maintained that there are significant negative consequences of unionization or granting student-athletes employee status, including but not limited to the complicated nature of complying with Title IX requirements, the potential tax liability students might incur, should they be determined to be employees, and the increased compensation and benefits, potential negative consequences to international student-athletes who attend school on student-visas, and the potential negative effect on sports sponsorship (Fattore, 2017; Reinbrecht, 2015; Sims, 2015; Weber & Real, 2023).

Reinbrecht (2015) theorized that female student-athletes would not be able to unionize under the standards set by the Regional Director in the *Northwestern* case. She also broadly asserted that, should they be able to unionize, they would still lose the ground gained under Title IX. Reinbrecht (2015) reasoned that any benefits collectively bargained for by the Northwestern football team would need to be shared with female student-athletes under Title IX. The author implied that should female student-athletes gain employee status; their recourse would be to file a discrimination claim under Title VII, the primary vehicle used by employees for sex discrimination claims. Reinbrecht stated that because Title VII allows for the market value of employees to be used in the discrimination determination, female student-athletes will lose Title

VII claims as the market value of female student-athletes and football and men's basketball players are vastly different. Reinbrecht (2015) ignored that, although the law is unsettled, female student-athletes determined to be employees could still file claims under Title IX (U.S. Department of Education Office for Civil Rights, n.d.; Weber & Real, 2023). Edelman (2014) and Trahan (2014) have said that the negative impacts of Title IX are overblown and used as a red herring. After reviewing relevant caselaw and NCAA practices, Edelman (2014) succinctly noted that "Title IX does not directly touch upon whether there is a requirement of equal financial terms for all student-athletes, above and beyond their athletic scholarships" (para. 5).

While recognizing that courts rarely analyze Title IX in terms of pay, when they have done so, they have reviewed the Act in parallel with the Equal Pay Act of 1963 and the Civil Rights Act of 1964 (Edelman, 2014). Edelman (2014) cited *Stanley v. Univ. of S. Cal.*, in which "the U.S. Court for Appeals for the Ninth Circuit noted that it may be permissible for the University of Southern California to offer higher pay to its men's basketball coach because the men's team generated far greater annual revenues" (para. 8). He also noted the NCAA member institutions' hypocrisy as they seem to rely on *Stanley* to justify disparate pay between male and female coaches.

In addition to Title IX concerns, the potential increase in compensation costs and the likely reduction in the number of sports that institution sponsors are also an often-cited reason why student-athletes should not be granted employee status (Cianfichi, 2014; Falak, 2024). Trahan (2014) disagreed, noting that the NCAA could mandate institutions to spend a certain percentage of revenue on nonrevenue sports, including women's sports, but that the organization will not because of the threat of the larger schools' leaving the association. Others have argued

that universities spend on lavish facilities and exorbitant coaching salaries instead of properly compensating student-athletes (Givens, 2013; *NCAA v. Alston*, 2021).

While the debate over whether to grant student-athletes employment status under the NLRA rages, some authors have proposed alternative solutions that generally seek to preserve college athletics while simultaneously compensating student-athletes fairly (Barrowman, 2015; Corrada, 2020; Kennebrew, 2022; Leppler, 2014; Lonick, 2015; Nelson, 2022).

Leppler (2014) proposed that the NCAA establish an escrow account for each student-athlete to provide compensation while maintaining college athletics' amateur status. This account would collect funds from designated revenue streams, and payments to players would be made based on their performance in games. Leppler (2014) said this would be preferable and more free-market-friendly than allowing the NLRB to regulate distributions.

While noting that student-athletes in revenue-generating sports should be employees with rights to bargain and be compensated for their efforts collectively, Corrada (2020) posited that existing college “work-study” programs could be used as a mechanism to hire and compensate these student-athletes. Corrada (2020) countered critics who argued that all student-athletes would need to be paid by stating “[t]he practical and moral arguments for extending employee status to students in sports that do not generate this kind of revenue are much harder to make” (p. 32).

Barrowman (2015) suggested that Congress step into the fray and pass legislation to grant student-athletes more rights and benefits. While his arguments are a little dated—in 2015, student-athletes were allowed to begin receiving cost-of-attendance financial aid payments and in 2021 the right to be compensated for the use of their NIL—his principal position that Congress should act to create a special employee status for student-athletes has been proposed by

current NCAA President Charlie Baker (2023) and has been suggested by Hosick (2015; 2021) and McCann (2023). Other literature suggests that all parties agree to develop a workable solution to student-athlete employment (Corrada, 2020; Lonick, 2015). While Lonick (2015) supported this proposition, he suggested that as a precondition, all parties must recognize that student-athletes should have the right to bargain for their employment conditions.

As noted above, much has been written about student-athletes fighting for more rights, benefits, and freedoms. This includes the fight for employment status and the rights that come from that status, including the right to bargain collectively, and be compensated for their participation in intercollegiate athletics. The literature presents the seriousness of the issue. Generally, it advocates that Division I football and men's basketball student-athletes, primarily those who participate on teams that collectively bring in billions of dollars for universities, should be compensated for their efforts beyond room, board, books, and tuition.

Over the past decade, student-athletes have mainly been successful in litigation against the NCAA, athletic conferences, and member institutions. Despite the potential negative consequences of student-athlete employment espoused by several authors, recent caselaw suggests student-athletes are on the precipice of being declared employees and gaining the rights and benefits afforded unto that status. Most of the literature examines different parts of this issue. However, none present a comprehensive systematic legal historical analysis of applicable federal, state, and administrative cases involving student-athlete employment claims under workmen's compensation statutes, the FLSA, and the NLRA.

This dissertation aimed to fill a gap by presenting a detailed case law analysis, offering a new perspective on the judicial criteria applied in determining the employment status of student-athletes. The insights gained from this research were intended to guide universities and higher

education administrators in critically assessing and, if necessary, revising their policies, procedures, and practices to either minimize the risk of employment claims by student-athletes or to manage such claims more effectively should they arise. This dissertation also aimed to present a comprehensive and systematic case law analysis and provide an in-depth view of the factors courts have used to determine whether student-athletes are employees. This methodological exploration will lay the groundwork for understanding the judicial perspective on student-athlete employment status and its implications for the future of collegiate sports governance and athlete welfare.

CHAPTER THREE: RESEARCH DESIGN AND METHODOLOGY

The aim of this dissertation was to analyze legal trends regarding collegiate student-athlete employment claims. The study utilized a legal historical approach to review cases involving collegiate student-athlete employment claims with the goal of answering the following questions:

1. What primary legal issues have arisen in college student-athlete employment claims, and what have been the judicial responses to those claims?
2. What does the case law analysis suggest are the primary factors to consider when evaluating whether college student-athletes are employees under FLSA and NLRA?
3. Are there other legal theories or arguments advanced by plaintiffs in collegiate student-athlete employment cases that have not been fully adjudicated?

Pathak (2019) advocated that legal research methods are optimal for addressing these questions. They highlighted the historical approach to legal research, which offers benchmarks illustrating how laws have developed and transformed over time. Legal research systematically examines legal issues across a timeline—encompassing the past, present, and future—to provide a comprehensive perspective on legal disputes. This approach informs policymakers and practitioners about the current interpretation and status of the law and identifies areas for future investigation (Permuth et al., 2006). This study used legal research methodology to bring forth legal principles espoused by American courts in adjudicating various claims of student-athlete employment arising in colleges, universities, and intercollegiate athletic associations. This legal research method has been used by several scholars to determine the legal parameters of a given area of the law (LaNear, 2005). I used the methods to identify a set of cases and then determined trends regarding the nature and disposition of collegiate student-athlete employment claims, as

well as the factors that courts have used to decide if student-athletes are employees. This research may assist universities and higher education administrators in evaluating their policies, procedures, and practices regarding student-athlete employment risks.

Foundation of Legal Analysis

This study primarily involved reviewing, examining, and analyzing cases decided by American courts. The study also evaluated filings and pleadings from current cases that are yet to be adjudicated; these cases' immediacy and potential impact on higher education institutions and intercollegiate athletic associations require inclusion in this study. Finally, the study reviewed legislative acts such as the FLSA and the NLRA. It is essential to understand these legislative acts as there are current complaints against the NCAA and some member institutions based on the idea that student-athletes are employees and that the NCAA, athletic conferences, and member institutions are violating the FLSA or the NLRA.

When conducting a legal analysis, it is essential to understand the origin and sources of American law. The United States Constitution is the original source of American law, as it provides the framework within which the entire legal system operates (Permuth et al., 2006). Clause 2 of Article VI of the Constitution provides that the Constitution and federal law are the supreme authority (Schmedemann & Kunz, 2017). All federal or state laws must be consistent with the Constitution, and laws that conflict with the Constitution are invalid and unenforceable (Voigt, 2022). At the federal and state levels, four types of laws exist: constitutions, statutes, administrative regulations, and case law (Voigt, 2022). The Constitution establishes three co-equal branches of government, the legislative, executive, and judicial, which provide the three other sources of law (Permuth et al., 2006).

Article I, Section I of the federal Constitution establishes the legislative branch, entrusting legislative authority to "a Congress of the United States," which is composed of the Senate and the House of Representatives (Voigt, 2022). This branch is responsible for lawmaking, with laws being enacted upon the signature of the Chief executive of the executive branch, who also holds the authority to enforce these laws (Permuth et al., 2006). While the statutes provided by the legislative branch generally outline broad directives, the executive branch elaborates on these laws by crafting detailed regulations or rules through administrative agencies (Permuth et al., 2006; Voigt, 2022).

Article III, Section I of the federal Constitution establishes the judicial branch, conferring power on one Supreme Court and such other "inferior" Courts as may be established by Congress (Voigt, 2022). "Courts in the federal and state judicial systems create laws called case law when they decide legal issues and write judicial opinions" (Voigt, 2022, p. 46). Courts may add to the body of law when they find a term to be vague or subject to interpretation included in a statute and can create what are called common laws, which are those established in the absence of a statute, administrative regulation, or other enacted law (Voigt, 2022). An important construct of case law is precedent or *stare decisis*; the basis of this concept is that of fairness, recognizing that similarly situated persons should be treated similarly and that the judgments should be consistent and not arbitrary (Cohen et al., 1989). A majority ruling from the highest court in each jurisdiction is binding on all lower courts within its jurisdiction; that is referred to as "mandatory" authority (Permuth et al., 2006). A ruling from the United States Supreme Court is mandatory or binding on all courts in the United States (Permuth et al., 2006). Jurisdiction refers to the power of a given court to hear and adjudicate a case (Cornell Law School, n.d.-a). Courts must have personal and subject matter jurisdiction to hear and adjudicate a case

(Schmedemann & Kunz, 2017). Personal jurisdiction "refers to a court's power over a person (or entity) who is a party to, or involved in, a case or controversy before the court, including its power to render judgments affecting that person's rights" (Constitution Annotated, 2014, para. 2). Subject matter jurisdiction pertains to the court's authority to hear and adjudicate the specific type of claim brought to the court (Cornell Law School, n.d.-b).

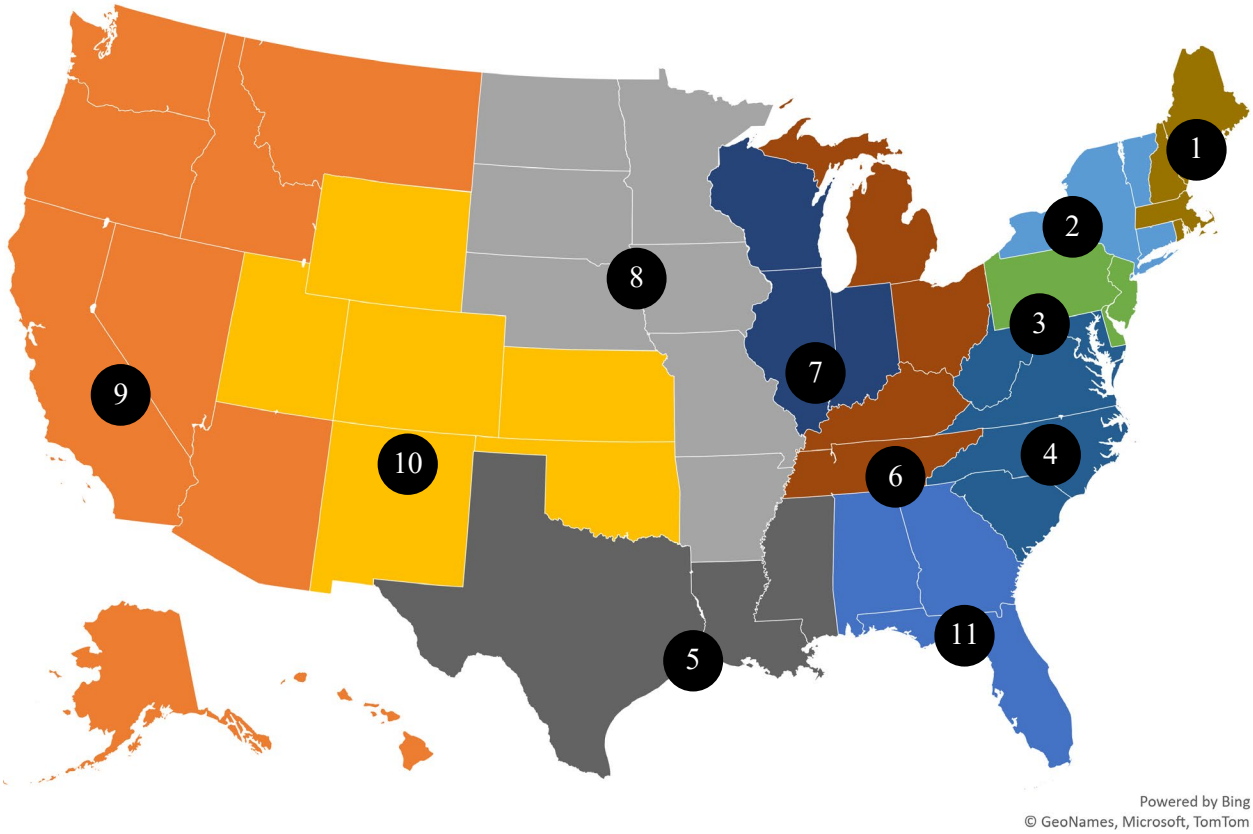
Federal courts entertain cases that present a federal question (Schmedemann & Kunz, 2017). Federal courts may decide cases regarding state law in specific circumstances enumerated by the Constitution and federal statutes (e.g., diversity disputes between citizens of different states or disputes that have a substantial relationship to authentic federal questions where federal courts hold jurisdiction; Schmedemann & Kunz, 2017). Where a court has no jurisdiction, its decisions are not mandatory or binding but provide only persuasive authority (Schmedemann & Kunz, 2017). Courts may be influenced by but do not have to follow judicial decisions that are persuasive in nature (Cohen et al., 1989). Court decisions may also be mandatory, or persuasive based on whether the court's opinion is "published" or "unpublished" (Gough-McKeown, 2013).

Federal courts and most state courts have a three-tiered system consisting of a trial court, appellate court, and court of last resort (Permuth et al., 2006; Schmedemann & Kunz, 2017). In the federal court system, the trial courts are known as federal district courts (Voigt, 2022). Evidence is typically presented to a judge and jury at trial courts. The judge decides what evidence is admissible, and the jury weighs the evidence and decides for or against the plaintiff (Permuth et al., 2006; Voigt, 2022). There are 94 district courts, with at least one in each state. More heavily populated states such as California, Texas, or Florida have three to four district courts (Voigt, 2022).

Parties typically may appeal a district court's decision to a United States Circuit Court. The federal system is divided into 11 numbered circuits (the First through Eleventh), each governing an assigned geographic area, the D.C. Circuit, which governs the District of Columbia, and the Federal Circuit, which governs certain statutorily designated cases (Schmedemann & Kunz, 2017; see Figure 12). The circuit courts review the cases for errors in the trial court record rather than the facts (Permuth et al., 2006). A party not satisfied with the decision from the circuit court may appeal the decision to the United States Supreme Court by filing a petition seeking a *writ of certiorari* (Permuth et al., 2006). The Supreme Court receives about 10,000 petitions annually and typically hears less than 100 cases (Judicial Learning Center, n.d.). If a party loses its case in the Supreme Court, no other court can hear the grievance (Voigt, 2022).

Figure 12

U.S. Courts of Appeals (Circuit Courts)



Note. Some locations are not displayed on the map. The 1st district includes Puerto Rico, the 3rd district includes the US Virgin Islands, and the 9th district also includes American Samoa, Guam, and the Northern Mariana Islands. The D.C. Circuit and the Federal Circuit Courts have jurisdiction over certain matters.

Definitions of Legal Terms

Unless otherwise indicated, legal terms utilized in this study are derived from definitions provided in *Black's Law Dictionary* (Garner, 2019).

Certiorari (*Cert*)—To be informed. A writ of certiorari is issued by a superior court to an inferior court, requiring the lower court to produce a certified record of a particular case. The Supreme Court uses the writ of certiorari to review most cases it wishes to hear.

Concurring opinion—A separate opinion delivered by one or more judges that agrees with the judgment reached by the majority of the court but offers different reasons for reaching that decision.

Dicta—The court's opinion on a question briefed or argued before the court but not essential to the decision. Although dicta may be afforded some weight, it is not binding on future courts as legal precedent.

Disposition—The final judgment of the court.

Dissenting opinion—An opinion by one or more judges who disagree with the majority's decision.

Finding—A determination from a judge, jury, or administrative agency based on factual evidence presented at a trial or hearing.

Holding—A legal principle drawn from the decision of the court.

Judgment—The final decision of the court that disposes of all issues, resolves the dispute, and determines the rights and obligations of the parties.

Legal reasoning—Applying legal rules to fact patterns to arrive at enforceable decisions.

Majority opinion—An opinion joined in by more than half of the members of the court deciding a case.

Motion to dismiss—A legal request to terminate a case; it aims to discharge or remove the matter from the court's consideration. This motion seeks to have a lawsuit dismissed outright, without any further hearings or deliberation by the court.

Precedent—A decided case that provides a basis for determining future cases with similar facts. A lower court is bound to follow the decision of a higher court in the same jurisdiction.

A list of acronyms is also included (see Appendix 2).

Legal Research Methods

This study used the five-step approach to legal research described by Cohen et al. (1989). In the past, LaNear (2005), Rich (2002), and others effectively utilized this methodology to research legal issues related to higher education. Cohen's model consists of five steps: (1) analyze the facts and frame the question(s); (2) obtain an overview of the subject area; (3) complete an in-depth search for legal authority; (4) read and evaluate the primary authorities; and (5) bring the law up to date. Complementing Cohen's model, this study utilized the legal content analysis method advanced by Hall and Wright (2008) to assist with case selection, coding, and analysis of the cases. Hall and Wright's (2008) foundational study, cited over 600 times, posits that content analysis can be helpful in coding and understanding judicial opinions and complement traditional interpretive legal analysis.

Following Cohen's model, I modified the research questions as I learned more about the history of student-athlete employment claims (Cohen et al., 1989). The first research question was revised to: "What primary legal issues have arisen in college student-athlete employment claims, and what have been the judicial responses to those claims?" The second research question was modified to include workers' compensation in addition to the FLSA and NLRA. Preliminary research showed that many workers' compensation cases were filed in the 20th century.

When performing legal research, primary sources, secondary sources, and research (or finding) tools need to be considered (Permuth et al., 2006). Primary sources are governmental institutions' authorized statements of the law (Mersky et al., 1990). Primary sources include constitutions, statutes (and their legislative histories), the rules, regulations, and opinions of administrative agencies, and case law (judge-made law; Cohen et al., 1989; Mersky et al., 1990; Permuth et al., 2006). Primary sources must be updated as the law constantly changes and can be either mandatory or persuasive (Mersky et al., 1990). In contrast to primary sources, "secondary sources are writings about the law, rather than the law itself" (Permuth et al., 2006, p. 16) and can be used to explain, interpret, further develop, locate, or update primary sources (Mersky et al., 1990). Secondary sources include treatises, hornbooks, periodical articles, restatements, encyclopedias, and dictionaries (Mersky et al., 1990; Permuth et al., 2006). According to Permuth et al. (2006), "[t]he source of law one begins with is, in large part, a matter of preference, depending on how familiar one is with legal sources and research" (p. 5).

To conduct the second step of Cohen's model, I utilized secondary sources to understand that area of the law better. In Cohen's model, the goals of the initial overview are to learn the different types of law, the language of the area to be studied, and the "black letter" rules (Cohen et al., 1989). I utilized secondary sources to learn more about student-athlete employment and compensation claims against higher education institutions, intercollegiate athletic conferences, and workers' compensation appeals boards. I used Google Scholar and LexisNexis initially to identify relevant secondary sources. Although I expected to find cases to review, this area of law as applied to collegiate student-athletes has been relatively dormant until recently. Secondary sources helped guide and frame the research questions and supplement the study. Secondary sources were also used to help triangulate the study's conclusions about legal principles

embedded in the primary sources, and they assisted with step four of Cohen's model by providing a basis for evaluating primary resources (LaNear, 2005). Secondary sources include law reviews, dissertations, books, and other published peer-reviewed journals.

In this study, I employed traditional legal research methodology to uncover relevant primary sources, which is the third step in Cohen's model. I used those sources to complete an in-depth search for legal authority. Case law was the primary source used in this study, initially including cases from the U.S. Supreme Court, Federal Courts of Appeals, Circuit Courts, U.S. District Courts, state courts of last resort, state appeals courts, and cases from the NLRB from 1950–2024. I also included cases that are post-complaint but not yet fully adjudicated. Step four of Cohen's model requires the researcher to read and evaluate the primary sources, allowing for the location of tools that will uncover additional authorities (Cohen et al., 1989).

Finding tools or research tools does not solely involve locating authorities but serves multiple purposes (Gallagher Law Library, n.d.). These tools provide access to the vast body of law developed throughout U.S. legal history (P. G. Day, 2000). Commonly used finding tools are case digests, annotated reports, descriptive word searches, and citations such as LexisNexis' Shephard's citations and Westlaw's "KeyCite" (Permuth et al., 2006). Citators list later sources that have relied upon, affirmed, questioned, or overruled earlier precedents (P. G. Day, 2000). Shephard's citations helped to determine whether a case has been followed, distinguished, limited, or questioned by subsequent courts (Mersky et al., 1990). This study used LexisNexis' Shephard's citations to assist with step five of Cohen's model, which is to "bring the law up to date" (Cohen et al., 1989). The Westlaw legal database and KeyCite citation tool were used to cross-reference and validate the law. To further validate the law, I engaged a licensed attorney

with significant legal research experience to replicate the search for cases concerning student-athlete employment claims.

Data Collection

My life experience, professional experience, and previous research informed my research interests and helped me to frame my research questions, which is the first step in Cohen et al.'s (1989) legal research model. To complete the second step of Cohen et al.'s (1989) model, I utilized Google Scholar and LexisNexis to search for secondary sources to obtain an overview of intercollegiate student-athlete employment claims. Using the search terms "student-athlete" and "employment" or "employee" and limiting the search to "Articles" returned 6,850 results on Google Scholar (see Appendix 1). Using the same search terms with LexisNexis returned 2,453 results when limited to "Secondary Materials." Because I wanted the broadest overview of secondary sources, I did not limit the search to a date range. After briefly reviewing the secondary sources and using my previous research experience and knowledge of current student-athlete employment issues, I narrowed my focus to student-athlete employment claims involving workers' compensation, the FLSA, and the NLRA.

To complete an in-depth review of legal authority, which is the third step of Cohen et al.'s (1989) model, I utilized LexisNexis. To begin my search, I reviewed several well-known cases. During my search for cases, I revised or narrowed my search four times to include a comprehensive data set of cases relevant to my research questions.

Search 1

For the first search, I used the following terms in LexisNexis: "student-athlete" and "employment" or "employee." I did not limit the search to a specific date range to complete a broad search. Additionally, I searched for all federal and state cases and unpublished and

published opinions. These search terms returned 1,030 results. There were 646 federal court results and 384 state court results. The search results spanned from 1952–2024. After a quick review, I determined this search was too broad, and it did not return several known workers' compensation student-athlete employment cases I had discovered through prior research and secondary sources. For example, one of the first workers' compensation cases, *Van Horn v. Industrial Accident Commission* (1963), was not included in the results. After reviewing the case and the search terms, I found that the term "student-athlete" was not used in the *Van Horn* case. I determined I needed to remove some of the restrictions on the terms and add relevant terms such as workers' compensation, FLSA, and NLRA to narrow down and focus the search results. I worked with LexisNexis' research support for the second and third searches to focus my search and return more precise results.

Search 2

For the second search, I used the following search string to locate relevant cases: (college or university w/10athlete) and FLSA or Fair Labor Standards Act or (worker w/2comp!) or NLRA or National Labor Relations Act. I searched for all federal and state cases and unpublished and published opinions with no specific date range. This search returned 101 cases, but like the first search, it did not return results for several well-known workers' compensation cases. After briefly reviewing the secondary sources and the known cases, I realized that workers' compensation cases, such as *Van Horn v. Industrial Accident Commission* (1963) *and State Compensation Insurance Fund v. Industrial Com* (1957) were not litigated against colleges or universities but against state entities that had primary jurisdiction over approving or denying workers' compensation benefits.

Search 3

For the third search, I revised the search terms as follows: FLSA or Fair Labor Standards Act or (work! w/2 comp!) or NLRA or National Labor Relations Act and student w/25 athlet! w/50 college or university. I searched for all federal and state cases and unpublished and published opinions with no specific date range. These search terms produced 232 cases. This search included all relevant cases except *Cheatham v. Workers Comp. Appeals Bd. Of Cal.* (1984), which I found in several secondary sources, such as Smith (2022) and Tiscione (2007). Secondary sources can be used to help triangulate the study's conclusions about legal principles embedded in the primary sources, and they can assist with step four of Cohen's (1989) model by providing a basis for evaluating primary resources (LaNear, 2005).

Additionally, I did not expect to find the NLRA/NLRB cases, which were included in the study, in the LexisNexis case searches. The steps taken to locate these cases are detailed in "Search 4" below.

Search 4

To find the relevant NLRA/NLRB cases, I utilized secondary sources found in the LexisNexis database and Google Scholar. I searched for all articles and secondary sources related to "student-athlete" and "employment" and "NLRA" with no specific date range. After reviewing several articles, I identified three relevant cases, which included *Northwestern University v. College Athletes Players Association* (2014), *Dartmouth College* (2021), and *NCAA v. Univ. Of S. Cal.* (2022). I confirmed these cases using the NLRB website. Of these cases, *Northwestern* and *Dartmouth* were the only ones that have reached some level of adjudication. As of April 2024, the *USC* case is currently in the trial phase of litigation, with initial adjudication likely later in 2024.

Validity

I cross-referenced the search results with information from secondary sources and the Westlaw legal research database. Using the Westlaw database, I used the same search terms used in Search #3 above utilizing the LexisNexis database. Those search terms were: FLSA or Fair Labor Standards Act or (work! w/2 comp!) or NLRA or National Labor Relations Act and student w/25 athlet! w/50 college or university. The search produced 2,231 cases. I suspected the difference was in the search formats between LexisNexis and Westlaw, I contacted Westlaw search support and gave them the search terms that I used in Search #3 in the LexisNexis database. They confirmed that the primary differences in the search were due to formatting. In Westlaw, the terms "Fair Labor Standards Act" and "National Labor Relations Act" needed to be in quotations and the connector "or" did not need to be used in Westlaw. The equivalent Westlaw search terms were: FLSA "Fair Labor Standards Act" (work!/2 comp!) NLRA "National Labor Relations Act" & student/25 athlet!/50 college university. The revised search terms returned 227 cases.

Data Screening

The fourth step in Cohen's model in the research process is reading and evaluating the primary sources (Cohen et al., 1989). Of the 232 search results found in the LexisNexis search #4 and the 227 search results found in the Westlaw database, 184 search results cases were found in both databases; 48 found only in the LexisNexis search results; and 43 found only in the Westlaw search results.

The inclusion criteria included (1) cases directly addressing the employment status of student-athletes under workmen's compensation statutes, the Fair Labor Standards Act, or the National Labor Relations Act, and (2) cases decided within the last two decades were prioritized.

The exclusion criteria included (1) duplicates, (2) cases without a final ruling or outside the U.S. jurisdiction, and (3) cases not centrally focused on the employment status of student-athletes.

In applying these criteria, I reviewed the 43 search results found only in the LexisNexis search, the 48 search results found only in the Westlaw search, and the 184 search results found in both searches. Of the 43 cases only found in the LexisNexis search results, only one, *Livers v. NCAA*, met the inclusion criteria. The remaining 42 results were excluded as they did not meet the inclusion criteria. None of the 48 search results found only in the Westlaw database met the inclusion criteria, and all 48 search results were excluded.

Of the 184 search results found in both LexisNexis and Westlaw, only 18 met the inclusion criteria. After reviewing these search results and removing duplicate cases, I included 11 unique cases in the study. These 11 cases, the three NLRA/NLRB cases (*Northwestern*, *Dartmouth*, *USC*), and the *Cheatham* case found through secondary sources were included in the final study. The final number of cases included in the study was fifteen.

Ensuring Data Validation and Accuracy

In addition to using the Westlaw database to ensure data validation, I engaged a licensed attorney with significant legal research experience to replicate the search for cases concerning student-athlete employment claims. The general instructions given were as follows:

> I need to build a legal research database for all cases involving college student-athlete employment issues. This would involve cases dealing with workmen's compensation, FLSA, NLRA, contractual issues, and any other laws or regulations. The research should include all federal and state cases. I would like to be able to quickly sort and analyze cases for each decade from 1950 to the present. You will need access to West Law or

> LexisNexis. Please document your search process and the search terms used. (S. Bagnall, personal communication, March 9, 2024)

The researcher returned 18 results, with two cases represented twice and one represented three times due to appeals or decisions on other issues. The researcher did not find the *VanHorn*, *Coleman*, or *Cheatham* cases due to the instructions given. Additionally, the researcher was not asked to search for the NLRA/NLRB cases on the NLRB website, which accounts for their not finding the *Dartmouth* and *USC* cases. The researcher did find the *Northwestern* NLRA/NLRB case on LexisNexis. After excluding the cases represented multiple times, there were 14 unique results. Of the 14 cases, five were outside the study's scope. The remaining nine cases were also included in my independent research results and are now included in this study.

To ensure the caselaw was still good law, I completed the 5th step in Cohen's process: "bring the law up to date" (Cohen et al., 1989, p. 602). To complete this step, I used LexisNexis to *Shepardize* the available cases to ensure that the cases had not been overturned or reversed. Throughout the dissertation process, all the cases were closely monitored to ensure *there were no new developments*. This step was important, as three cases (Dartmouth, Johnson, and USC) were currently being adjudicated or in the appeals process. I subscribed to the email updates available on the NLRB website for updates to the *Dartmouth* and *USC* cases. I also subscribed to Law360.com's legal updates to monitor any potential developments in the cases currently adjudicated. In addition, as a part of the NCAA senior leadership team, I received regular legal updates regarding all ongoing litigation from NCAA general counsel Scott Bearby.

Having selected the 15 cases for the study, the next step was to code them and analyze the results. Systematically coding the cases can yield meaningful insights and highlight areas of

uncertainty in past decisions (Hall & Wright, 2008). Additionally, systematic coding can reduce bias and strengthen the objectivity and reproducibility of the research (Hall & Wright, 2008).

Coding

In this study, I used legal content analysis to assist with coding the cases and analyzing the results to find themes, conflicts, and trends and track the historical development of the law. I employed the three-step method developed by Hall and Wright (2008). The three steps in Hall and Wright's (2008) method include (1) selecting cases, (2) coding cases, and (3) analyzing the case coding. This section of the study focuses on Hall and Wright's (2008) second and third steps as the cases have been selected.

Hall and Wright (2008) studied 154 projects that required the content analysis of judicial opinions. They observed that content analysis would be most useful when dealing with many cases in which the judicial decisions held roughly the same value, asserting that content analysis was a better way to read cases, as "it brings the rigor of social science to our understanding of case law, creating a distinctively legal form of empiricism" (Hall & Wright, 2008, p. 64).

In response to critics of systematic content analysis in legal research, Hall and Wright (2008) acknowledged that content analysis could not replace traditional legal research but could be complementary, as traditional legal analysis can be wrong about case law or what factors or variables affect the outcomes. Hall and Wright (2008) also noted that supporters of systematic content analysis, such as Karen Jordon and Lon Fuller, rightly argued that the study of judicial opinions could yield unexpected insights and help uncover areas of further research.

To answer the research questions presented, this study included cases from the U.S. Supreme Court, Federal Courts of Appeals, also called Circuit Courts, U.S. District Courts, state courts of last resort, state appeals courts, and the NLRB from 1950 until 2024. The study also

cited cases that are post-complaint but not yet fully adjudicated. Although this carries the risk of including cases of unequal value, against which Hall and Wright (2008) cautioned, one of the research goals was to document the breadth of primary legal issues concerning student-athlete employment claims.

The gap in this area of research necessitated a comprehensive overview of student-athlete employment litigation, wherein some judicial decisions may carry unequal weight. The judicial decisions' case jurisdiction and precedential value were noted among many other variables. The study yielded three distinct legal claims: workers' compensation benefits and alleged violations of the FLSA and the NLRA. In Chapters Four and Five, part of the analysis groups the cases by the type of legal claim and discusses similarities and differences between the cases with similar legal claims. This helped reduce the risk noted by Hall and Wright (2008) of comparing cases with unequal value.

To answer research question three, "Are there other legal theories or arguments advanced by plaintiffs in collegiate student-athlete employment cases that have yet to be fully adjudicated?" The study included information from complaints, filings, and pleadings in recently filed student-athlete employment cases that have yet to be fully adjudicated.

To code the cases, I created a codebook and recorded the defined elements of each case. To answer the first research question regarding the primary legal issues that have arisen in college student-athlete employment claims and how courts have responded to these issues, I recorded basic case information, including the case name, case citation, date decided, court jurisdiction, publication status, state of origin, publication status, the outcome of the case, and the law under which the claim was brought.

To answer the second research question, as to the primary factors the courts considered when evaluating whether college student-athletes are employees under workers' compensation statutes, the FLSA and the NLRA, I recorded the tests and factors the court used to determine whether the student-athlete was an employee.

To answer the third research question, regarding other legal theories or arguments advanced by plaintiffs, in collegiate student-athlete employment litigation that has yet to be fully adjudicated, I recorded the case status, "other legal theories," and "other documents reviewed." The codes also helped to determine overall litigation trends and themes. The cases were coded according to Table 3, and these data were recorded in an Excel spreadsheet for efficient tracking and analysis.

Table 3

Codebook Terms

Variable	Label
Case name	Open
Case citation	Open
Date decided	Open
Month decided	1–12
Year decided	1953–2024
Deciding court name:	Open
Court jurisdiction	Federal, state, NLRB
Publication status	Published, unpublished
Case status	Adjudicated, trial, appeal
State of case origin case	50 states, DC, Puerto Rico
Type of legal claim	FLSA, NLRA, workers' compensation
Legal test used to determine employee status	Open
Factors used to determine employee status	Open

Variable	Label
Terms used to define "employee"	Open
Legal issues	Open
Holding	Open
Other documents reviewed	Open
Other legal theories	Open
Type of court action	Open
Disposition	Open
Overall outcome	Open

Note. NLRB = National Labor Relations Board; FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

Coding Validation

Demonstrating the reliability of coding is critical when conducting legal content analysis (Hall & Wright, 2008). As there is likely to be some level of subjectivity or uncertainty in applying coding to the selected legal cases, Hall and Wright (2008) recommended that "[t]he best method is to conduct formal reliability tests during at least two stages in the process: initially, while piloting the draft coding instructions, and later, once coding categories and instructions are completed" (p. 113).

Lincoln and Guba (1985) put forth four general purposes of peer debriefing: (1) the process can help probe for meaning and bias; (2) the debriefing process can help in testing emerging hypotheses; (3) the process provides an opportunity to develop and test next steps in the methodological design; and (4) the process provides the researcher emotional support or an opportunity for catharsis. The primary role of the peer debriefers in this study was to reduce potential researcher bias, test emerging hypotheses and testing methods, and establish reliability.

While developing the code and coding instructions, I engaged a peer debriefer with a Ph.D. and experience in qualitative research to review selected cases and the first draft of the coding scheme to ensure that there were no gaps in the analysis. When comparing the results of the original coding scheme with the peer debriefer results, we found that the codes used were nearly identical. The peer debriefer did identify a gap in my analysis as they added the code category "terms used to define employee" to the codebook. Identifying gaps in the analysis is one of the purposes of using a peer debriefer (Lincoln & Guba, 1985).

After reviewing the peer debriefer results and the cases selected, I decided to modify the coding categories to more readily align with the categories used in the case analysis method. I added the following categories: "legal issues," "holding," and "disposition." Finally, I added the categories "case status," "other legal theories," and "other documents reviewed." These categories were added to capture relevant information from cases that have yet to be adjudicated.

After finalizing the coding categories and instructions, I used a second peer debriefer with experience in labor and employment law to code a sample of cases. I asked the peer debriefer to code four cases, which was 26% of the total cases. Specifically, I asked my colleague to select and code one workers' compensation case, one FLSA case, one NLRA case, and one additional case of their choosing.

After the coding was completed, we compared the results for analysis. Due to his legal training and familiarity with employment law, we found that our coding results matched 95%. However, we noticed that many of the categories were duplicative. To resolve this issue, I deleted the following categories, "legal standard," "application of legal standard," "type of court action," and "outcome of court action." We also disagreed about the category "legal tests used to determine employee status." In some cases, the court analyzed employee status using multiple

tests. In those cases, the court used some tests to distinguish the present case and not necessarily to determine the employee status in the present case. I determined that the coding instructions were vague. I adjusted the coding instructions to clearly state, "What specific test was used to determine whether the student-athlete was an employee in the present case?"

With the coding in place, the next step in the process was to analyze the results, which is the third and final step in Hall and Wright's (2008) model. In acknowledging criticism from some scholars, who have asserted that the content analysis gives a "false sense of precision or certainty" of judicial opinions, Hall and Wright (2008) noted that systematic content analysis should complement other forms of interpretive legal analysis and does not displace them (pp. 82–83). They stated, "[q]uantitative description can tell us the what of case law; other methods may be better suited to understanding the why and wherefore. Neither type of scholarship is as strong as the different types combined" (p. 83). Thus, this study used traditional interpretive legal analysis to reflect on the meaning of the decision and how the factors used and weighed to determine the outcome of student-athlete employment claims might affect potential future risks of student-athlete employment claims.

Limitations

As mentioned, I limited the case law to cases from the U.S. Supreme Court, Federal Courts of Appeals (also referred to as Circuit Courts), U.S. District Courts, state courts of last resort, state appeals courts, and the NLRB from 1950–2024. I also included cases that are post complaint but not yet fully adjudicated. Due to the potential impact of new cases, it is crucial to understand any new legal theories or arguments advanced by plaintiffs in student-athlete employment claim cases. This study only included cases in which student-athlete employment

claims were or are brought under state workers' compensation laws, the FLSA, and the NLRA, as these are the primary areas of student-athlete employment claim litigation.

The study does not include other federal and state employment laws, rules, or regulations. This study also included a decision rule to determine which cases to include (i.e., only cases that discuss whether the student-athlete employee claim is a material issue in the case were included in the case selection and coding). Additionally, generalizing trends in legal cases can be challenging, as some cases are not publicly available. Shepardizing the cases, using a secondary legal researcher, and reviewing secondary sources helped mitigate this limitation. Finally, the subjective nature of coding legal cases is a limitation. Although the peer debriefing process was designed to limit subjectivity, the process was restricted by the debriefer's verifying codes rather than starting independently.

Conclusion

Legal research methods, including Cohen et al.'s (1989) five-step model and Hall and Wright's (2008) three-step legal content analysis method, were used to answer the research questions comprehensively. I undertook a systemic legal research process, which includes framing the research; obtaining an overview of student-athlete employment claim literature and case law; searching, reading, and evaluating legal authority; selecting cases that met the search criteria; coding the cases via several categories; and verifying the accuracy of the data set and codes. In the next chapter, I introduce the data by providing information about the selected cases, followed by summaries of each case. The cases are organized by the type of legal claim: workers' compensation cases, FLSA cases, and NLRA cases.

CHAPTER FOUR: DATA AND RESULTS

Introduction to the Data

This study examines relevant case law to trace the development and judicial treatment of collegiate student-athlete employment claims in a legal-historical context. The dataset includes published and unpublished cases that meet the following criteria: the cases involve claims for employment status and/or benefits by or on behalf of collegiate student-athletes. These cases have been or are being adjudicated in the U.S. Supreme Court, Federal Courts of Appeals (also known as Circuit Courts), U.S. District Courts, state courts of last resort, state appeals courts, or the National Labor Relations Board (NLRB) from 1950–2024 (see Appendix 3). Additionally, the study includes cases that are post-complaint but not yet fully adjudicated. The selection criteria are intentionally broad to capture all case law that illustrates potential collegiate student-athlete employment scenarios and the application of laws to these patterns.

This chapter presents the findings by detailing the number, frequency, geographic, and jurisdictional distribution of cases identified in the dataset. After presenting this preliminary information for additional context, this chapter summarizes each case opinion that meets the study's criteria. Chapter Five will provide an in-depth analysis of these findings.

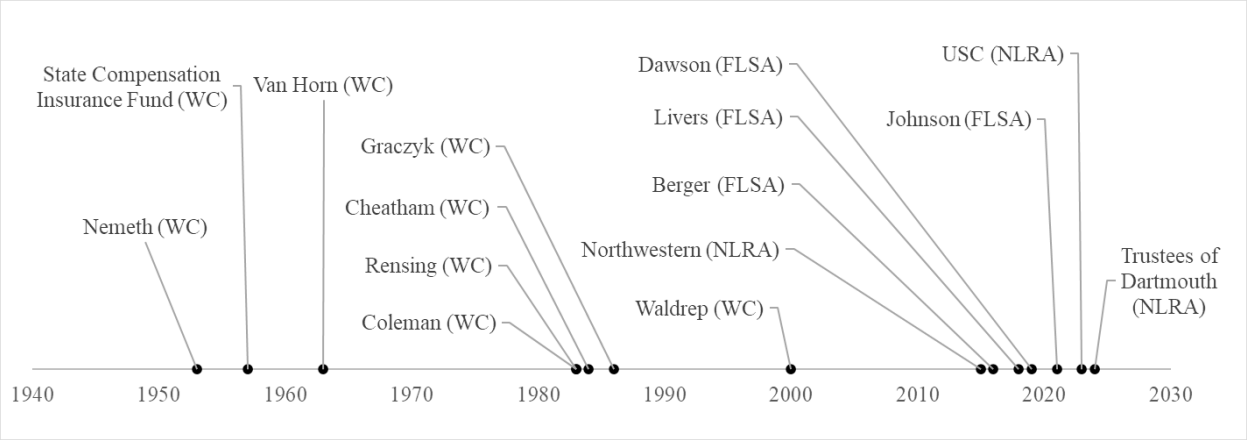
Broad Overview of the Cases: Number, Frequency, and Character of Cases

Fifteen cases met the specified criteria and have been or are being adjudicated. The earliest case opinion was in 1953 in Colorado, and the most recent opinion was issued in 2024 in Massachusetts. In detail, the case opinions were rendered as follows: one in 1953, one in 1957, one in 1963, two in 1983, one in 1984, one in 1986, one in 2000, one in 2015, one in 2016, one in 2018, one in 2019, one case is under appeal, one case is currently at trial, and one case is in the pre-trial stage of litigation (see Figure 13). These 15 cases span a period of 71 years. There

were no cases in the 1970s and 1990s. The decades with the most cases filed were from 1980–1989 and 2010–2019, with four cases adjudicated in each decade (see Figure 14).

Figure 13

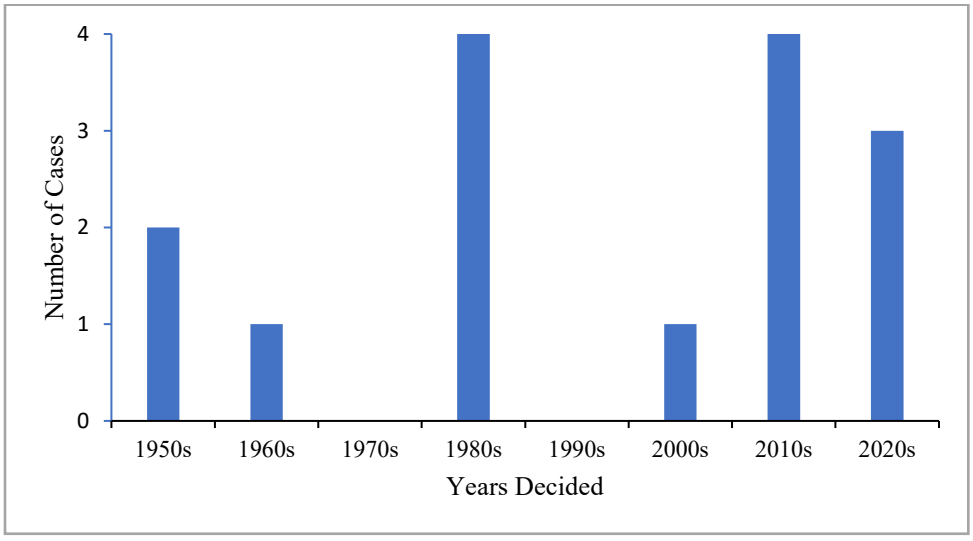
Timeline of Student-Athlete Employment Cases



Note. WC = workers' compensation; FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

Figure 14

Number of Cases per Decade



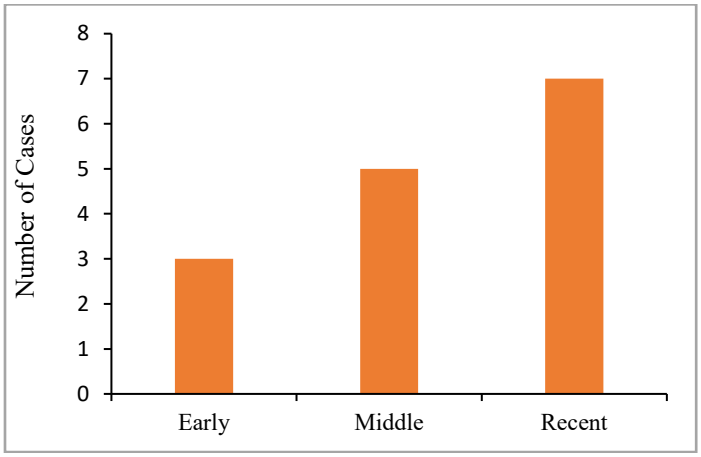
Note. $N = 15$.

The Number of Cases Has Increased Over Time

Dividing the 71-year case history into thirds, 1953 through 1977 are considered the "early period," 1978 through 2002 the "middle period," and 2003 through 2024 the "recent period." The early period saw the fewest cases, 3 (20%), the middle period had the second highest number of cases, 5 (33%), and the recent period had the highest number of cases, 7 (47%; see Figure 15).

Figure 15

Distribution of Cases in Three Periods



Note. $N = 15$.

The Majority of the Cases Filed Have Been Workers' Compensation Cases

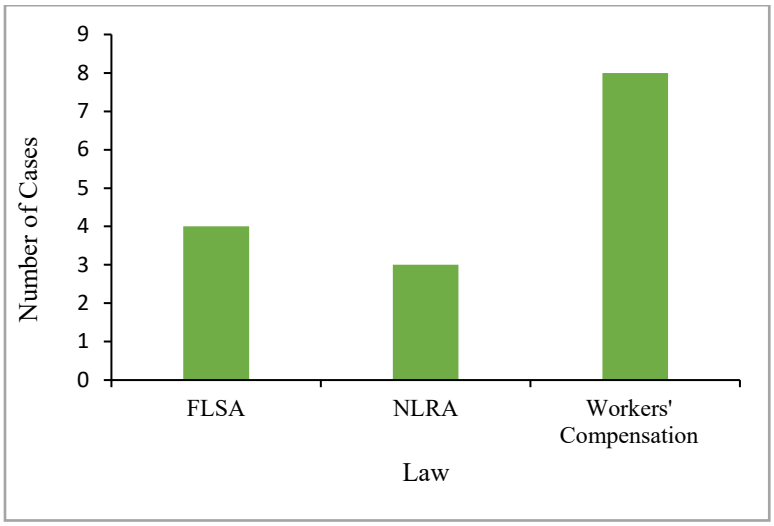
The cases can also be categorized by the type of legal claim brought. There were eight 53%) workers' compensation cases, four (27%) FLSA cases, and three (20%) NLRA cases (see Figure 16).

The Most Recent Cases Were FLSA or NLRA Cases

Combining the type of legal claim filed with the number of cases per decade reveals that all the cases adjudicated in the early and middle periods were workers' compensation cases 8 (53%), while 4 (27%) cases from the recent period were a combination of FLSA cases and 3 (20%) NLRA cases and no workers' compensation cases (see Figure 17).

Figure 16

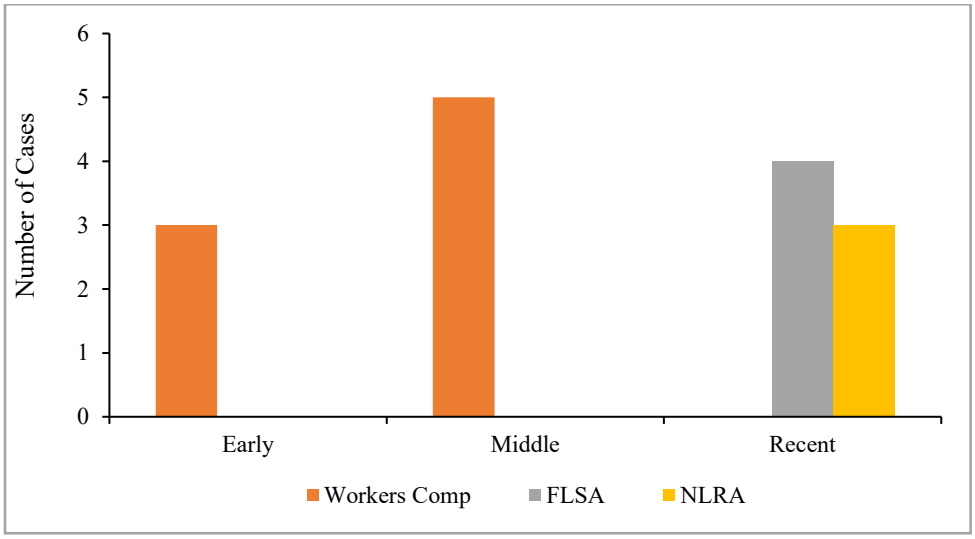
Distribution of Cases by Type of Legal Claim



Note. $N = 15$. FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

Figure 17

Number of Cases by Type of Legal Claim and Distribution Period



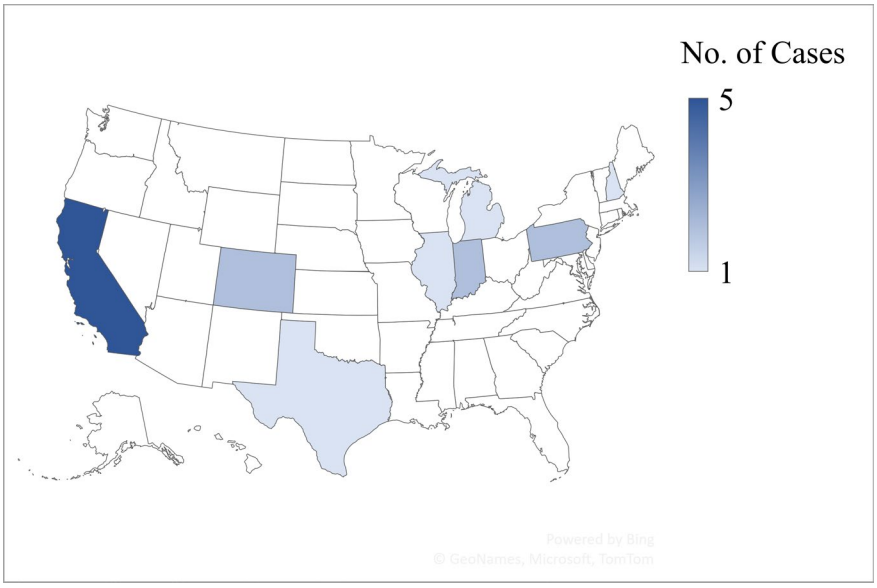
Note. $N = 15$. FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

The Issues Leading to Litigation Arose in Several States

The 15 cases were filed in eight states. Illinois, Michigan, New Hampshire, and Texas each had one (7%) case opinion. Colorado, Indiana, and Pennsylvania each generated two cases (13%). California had the most cases filed, with five (33%; see Figure 18).

Figure 18

Geographic Distribution



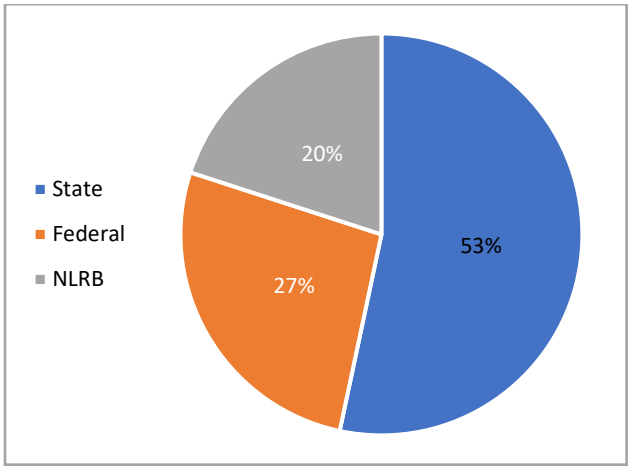
Note. $N = 15$.

The Majority of Litigation Was Filed in State Court

The 15 cases were filed in federal court, state court, or with the NLRB. Eight out of the 15 cases (53%) were filed in state court. Four out of the 15 cases were filed in federal court (27%). Three out of the 15 cases were filed with the NLRB (20%; see Figure 19). When separated into periods, four out of the seven (57%) recent cases were filed in federal court, and three of the seven (43%) recent cases were filed with the NLRB. Whereas all five (100%) middle period cases were filed in state court, and all three (100%) early cases were filed in state court.

Figure 19

Jurisdiction



Note. NLRB = National Labor Relations Board.

Case Findings

The 15 cases identified for the study include three types of legal cases: (1) Workers' Compensation, (2) the Fair Labor Standards Act (FLSA), and (3) the National Labor Relations Act (NLRA), spanning from 1953 to 2024. Twelve cases have reached a verdict, while three are in currently in the trial or appeal stages of litigation. This section summarizes each case, employing a modified legal case analysis method adapted from Statsky and Wernet's (1995) approach in "*Case Analysis and Fundamentals of Legal Writing*." The adapted analysis method includes (1) case citation, (2) key facts of the case, (3) issues or legal questions presented, (4) the court's holding, (5) the reasoning of the court's decision, and (6) the case's disposition or final outcome. Additionally, each analysis features a "notes" section highlighting contextually significant reference notes. The categorization of case analysis categories aligns with the thumbnail or shorthand brief method presented by Statsky and Wernet (1995) and is included in the codebook. Cases are organized by legal case type and listed chronologically within each

category. I examined each case individually to identify the primary legal issues associated with college student-athlete employment claims and understand the courts' treatment of these issues (Research Question 1). In this analysis, I also aimed to understand the factors courts consider when evaluating whether college student-athletes qualify as employees (Research Question 2) and to explore additional legal theories that plaintiffs might advance in these cases (Research Question 3).

Workers' Compensation

***University of Denver v. Nemeth* (1953).** This subsection addresses *University of Denver v. Nemeth* (1953).

Citation. *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (Colo. 1953).

Key Facts. Ernest Nemeth, a university football player, received meals and a job as part of his participation on the team. Trial evidence showed that Nemeth's participation in football practice led to his receiving these benefits. Witnesses at the trial stated, "If you worked hard, you got a meal ticket," and that performance in football correlated with receiving meals and a job. Nemeth earned $50.00 monthly for maintaining the university tennis courts, received free campus housing, and $10 was deducted for three meals per day. Nemeth took on responsibilities for the furnace and cleaning the university sidewalks as a substitute for paying rent. His tenure on the football team ended following an injury sustained during spring football practice. Consequently, as per the football coach's testimony, his termination from the team led to the cessation of his meals and job.

Issue. Was the student-athlete an employee of the university, and were his accidental injuries sustained while performing his duties compensable under workers' compensation laws?

Holding. The Supreme Court of Colorado affirmed that Nemeth held the status of a university employee, sustained an injury in the scope of his employment, and was consequently eligible for workmen's compensation benefits.

Reasoning. The court ascertained that Nemeth's compensation, including benefits, related to his football participation and, as stipulated in his university contract, was tied to his role on the football team. The loss of his job and benefits upon ceasing to play football signified that such participation was an integral part of his employment with the university. Additionally, the court recognized that Nemeth's injury, sustained during football-related activities, emerged out of his employment duties.

Disposition. The Supreme Court of Colorado affirmed the district court decision, upholding the Industrial Commission's finding that Nemeth was entitled to workmen's compensation benefits. A motion for rehearing was denied.

Notes. Nemeth qualified for workers' compensation benefits because he was an employee engaged in activities within the scope of his employment agreement when injured. The court reinforced the employer-employee relationship under the *Workmen's Compensation Statute* Section 287 (b), Chapter 97, 35 C.S.A., and Amended Section 288. Although the specific statute could not be located, the court's reference to a "contractual" relationship was significant. This is emphasized in the 2022 Colorado Code, Title 8—Labor and Industry, which refers to "contract for hire" in its definition of "employee" (Colorado Revised Statutes, 2022). Notably, *Nemeth's* case influenced legislative changes in the state labor code following *Van Horn v. Industrial Accident Commission* (1963), as seen in *Berger v. NCAA* (2016).

State Compensation Insurance Fund v. Industrial Commission of Colorado et al. **(1957).** This subsection addresses *State Comp. Ins. Fund v. Indus. Comm'n of Colo. et al*. (1957).

Citation. *State Fund v. Indus. Comm'n*, 135 Colo. 570, 314 P.2d 288 (Colo. 1957).

Key Facts. Ray Dennison, who worked at a gas station, was recruited by Fort Lewis A&M College's student affairs head and football coach to join their football team. They promised to secure a job for him that would pay at least as much as his current job. After enrolling in the college, Dennison joined the football team and received an athletic scholarship, employment in the student lounge, work at the college farm, and benefits from the G. I. Bill.

During a football game against Trinidad State Junior College, Dennison suffered a fatal head injury. His widow filed for death benefits, which were granted by the Industrial Commission of the State of Colorado and affirmed by the district court, city, and county of Denver. The State Compensation Insurance Fund sought review of the decision.

Issue. Whether the decedent was an employee under a contract of hire to play football for the college and if his injuries were a consequence of or caused by his employment at the college.

Holding. The court ruled that no contractual obligation existed to play football; therefore, no employee-employer contractual relationship was established between the student and the university.

Reasoning. The benefits Dennison received were not deemed compensation for playing football, as there was no evidence of a contract for hire between him and the college. The court made a distinction from *Nemeth's* case, where benefits ceased after Nemeth stopped playing football. No evidence suggested that Dennison's job and benefits were conditional upon his football participation. Additionally, the court determined that the university did not financially benefit from the student's participation in football, and the state institution was not in a position to operate a football team for profit-making purposes. The court noted that in the *Nemeth* case,

his right to compensation stemmed from his contract with the university, which included responsibilities and obligations related to his football involvement.

The court reasoned that Nemeth's compensation and benefits were explicitly linked to his participation in football. It established that his employment and associated benefits were contingent upon his participation in the sport; thus, football was deemed an integral part of his duties at the university. Consequently, Nemeth's football-related injury was determined to be an occupational injury, arising from his employment with the university.

Disposition. The Colorado Supreme Court reversed the district court's judgment and remanded the case with instructions to dismiss the workers' compensation claim. A petition for a rehearing was denied on September 3, 1957.

Notes. The absence of evidence for a contractual obligation to play football meant that an employer-employee relationship did not exist, negating any basis for a compensation claim under the Workmen's Compensation Act. After reviewing the decisions, the NCAA leadership considered the possibility of football being a profitable enterprise at some institutions (Byers, 1995). Despite the result, the significant impact on the NCAA led to the creation of the term "student-athlete," now used in all NCAA regulations and interpretations (Kennebrew, 2022). This move aimed to firmly establish that no employee-employer relationship exists between student-athletes and their universities.

***Van Horn v. Industrial Acci. Com* (1963).** This subsection addresses *Van Horn v. Industrial Accident Commission* (1963).

Citation. *Van Horn v. Industrial Accident Commission* ., 219 Cal. App. (1963).

Key Facts. Gary Van Horn, a college football player, received a scholarship to play for California State Polytechnic College. In addition to the scholarship, Van Horn received $50 at

the beginning of each school quarter and $75 in rent money during the 1958 football season, paid "directly from the football coach drawn on an account in the coach's name, identified as 'Special Account — Cal Poly Athletics Dept'" (*Van Horn v. Industrial Accident Commission*., 1963, p. 3). Tragically, on October 29, 1960, Van Horn died in an airplane crash while returning from a football game. His family pursued death benefits from the university under the Workmen's Compensation Act, asserting that Van Horn was under a contract of employment with the university.

***Issue*(s)**. The central question was whether the decedent, Gary Van Horn, qualified as an employee under the California Workmen's Compensation Act, thereby obligating the state to provide death benefits to his dependents.

Holding. The Court of Appeal of California, Second District, found that the decedent, Van Horn, had participated in the football program under a contract of employment with the university. Consequently, he was recognized as an employee under the California Workmen's Compensation Act, entitling his widow and minor children to death benefits under the Act.

Reasoning. The court reasoned that Van Horn rendered services to the college in exchange for compensation, implying that without such compensation, he would not have joined the football team. The relevance of Van Horn receiving academic credit for his football participation was deemed insignificant, citing earlier cases where student nurses and student teachers were considered employees. Furthermore, the court highlighted the football coach's testimony, which did not refute the existence of a contract, was notable. The court distinguished the present case from *Gale v. Industrial Accident Commission* . Case, (*Gale v. Industrial Accident Commission . Com*., 211 Cal. 137, 141 [294 P. 391]), where the benefits claim was rejected because witnesses contested the existence of a contractual agreement. The commission's

decision in Gale was upheld because "the court had no authority to overrule the decision of the commission made on conflicting facts" (*Gale v. Indus. Acc. Com.*, 211 Cal. 137, 141 [294 P. 391]).

Disposition. The California Court of Appeals, Second District, annulled the Industrial Accident Commission's decision that had denied the workers' compensation claim. The court determined that the Van Horn family had successfully demonstrated an employment relationship between Gary Van Horn and the university through evidence of a contract. The court remanded the case to the commission for further review. A petition for rehearing and for a hearing by the California Supreme Court was denied in 1963.

Notes. The California Court of Appeals, Second District, recognized a contractual employment relationship between Gary Van Horn and the college, thereby classifying him as an employee under the Workmen's Compensation Act. However, the court further stated that not all student-athletes receiving scholarships for intercollegiate athletics qualify as employees—only those with explicit employment contracts do. Two years after the *Van Horn* ruling, the California legislature amended the workers' compensation statute in a manner that excluded student-athletes receiving no compensation beyond uniforms, equipment, meals, lodging, etcetera, from being defined as employees under the statute (*Graczyk v. Workers' Comp. Appeals Bd.*, 1986). Consequently, the NCAA recommended that its member institutions review and possibly adjust the language in their grant-in-aid document to avoid worker's compensation statutes (Sack & Staurowsky, 1998).

***Rensing v. Indiana State University Board of Trustees* (1983).** This subsection addresses *Rensing v. Ind. State Univ. Bd. of Trs.* (1983).

Citation. *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983).

Key Facts. *Rensing v. Ind. State Univ. Bd. of Trs.* (1983) highlighted the contractual relationship between student-athletes and universities. Fred Rensing, a varsity football player for Indiana State University, was severely injured during spring practice in 1976, resulting in quadriplegia. Rensing filed a claim with the Industrial Board of Indiana (Industrial Board) seeking workers' compensation for his permanent disability and related medical expenses incurred. The Industrial Board rejected his claim because there was no existing employer-employee relationship with the Trustees, disqualifying him from receiving benefits. Contrarily, the state court of appeals reversed the Industrial Board's ruling, recognizing Rensing as an "employee" eligible for compensation under the law, thus affirming his employment status under the Trustees' coverage. The Board of Trustees appealed.

***Issue*(s)**. The case questioned whether Rensing and the Trustees met the definitions of "employee" and "employer" criteria as defined by the Indiana Workmen's Compensation statute, Ind. Code § 22-3- 6-1 (Justia, 2022). Specifically, it explored whether an employer-employee relationship existed between Rensing and the Trustees to warrant his eligibility under Indiana's Workmen's Compensation Act.

Holding. The court held that no employer-employee relationship existed between the student and the university, primarily because the student's receipt of a scholarship for playing football did not qualify as compensation for employment, rendering the student ineligible for workers' compensation benefits.

Reasoning. The court highlighted the complexity of establishing an employee-employer relationship, emphasizing the necessity for a mutual acknowledgment of such a relationship. It noted that Rensing and his parents had signed the financial aid agreements, which explicitly prohibited compensation for athletic participation. The NCAA's constitution and bylaws, which

are integrated into these scholarship agreements, also prohibit compensating students for athletic participation.

Furthermore, the court noted that Rensing did not treat his scholarship as taxable income, which is in line with the Internal Revenue Service's stance that scholarship funds are not subject to tax. Consequently, Rensing, not being a paid athlete and not engaged in any employment with the university apart from his scholarship, was found not to be an employee.

Disposition. The Supreme Court of Indiana reversed the state court of appeals decision, reinstating the Industrial Board's ruling.

Notes. The Supreme Court of Indiana determined that no contractual relationship existed between Rensing and the university trustees, indicating no expectation of such a relationship. The scholarship was not deemed compensation by Rensing, as evidenced by his tax filings.

The definition of employer and employee, as per Indiana Workmen's Compensation statute (Ind. Code § 22-3- 6-1), is defined as follows:

> (a) "Employer" includes the state and any political subdivision, any municipal corporation within the state, any individual, firm, association or corporation or the receiver or trustee of the same, or the legal representatives of a deceased person, using the services of another for pay.
>
> (b) The term "employee" means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer. (*Rensing v. Ind. State Univ. Bd. of Trs.*, 1983, p. 1172)

This suggests a broader interpretation that includes various entities and individuals under contractual agreements for services in exchange for payment. This statute's interpretation did not apply to Rensing's case.

Significantly, two years post-Rensing, the U.S. Supreme Court's *Alamo Foundation v. Sec'y of Labor* (1985) reduced the effects of *Rensing* (Tiscione, 2007). The Court determined that providing "food, shelter, clothing, transportation and medical benefits" instead of wages establishes an employer-employee relationship under the Fair Labor Standards Act (Tiscione, 2007). Additionally, the IRS now recognizes scholarships, including grants of room and board, as taxable income (Tiscione, 2007).

***Coleman v. Western Michigan University* (1983).** This subsection addresses *Coleman v. W. Mich. Univ.* (1983).

Citation. *Coleman v. W. Mich. Univ.*, 125 Mich. App. 35, 1983.

Key Facts. Willie Coleman was granted a renewable annual scholarship to play football for Western Michigan University. After playing for two years, he sustained an injury that left him unable to play. Subsequently, due to university budget cuts and his inability to participate, Coleman's scholarship was reduced. This financial setback led Coleman to withdraw from the university. Coleman filed for worker's compensation benefits but was denied by a hearing referee who determined that Coleman was not a university employee but a scholarship student-athlete. The Michigan Worker's Compensation Appeals Board affirmed the decision based on the "economic reality" test, as defined by the *Supreme Court of Michigan in Askew v. Macomber* (1976). Coleman appealed, but the First District Court of Appeals affirmed the original judgment.

***Issue*(s)**. The case questioned whether Coleman qualified as an employee of the university under the Michigan Worker's Disability Compensation Act.

Holding. The Court of Appeals of Michigan concluded that Coleman did not meet the criteria to be considered an employee under the Michigan Worker's Disability Compensation Act.

Reasoning. The court's reasoning was anchored on the economic realities test as defined in *Askew v. Macomber* (1976). This test considered several factors to ascertain an employment relationship: (1) control of a worker's duties, (2) payment of wages, (3) authority to hire, fire, and discipline, and (4) the role of the worker's duties in achieving the employer's organizational goals (*Askew v. Macomber*, 398 Mich. 212 Pg 217-218, 1976). The Court of Appeals of Michigan emphasized that these factors are not conclusive individually but must be assessed collectively to determine an employment relationship (*Coleman v. W. Mich. Univ.*, 1983).

In applying this test, the court acknowledged the university exercised control over Coleman's football-related activities and had some disciplinary power, However, it noted that the university could not cancel Coleman's scholarship and that its control over his academic pursuits was no different than that over any other student. While the scholarship was akin to wages, suggesting an employment relationship, the court determined that playing football was not a core part of the university's main mission, education. Considering these points, the court concluded that Coleman and the university had no employment relationship.

Disposition. The Court of Appeals of Michigan affirmed the Michigan Worker's Compensation Appeals Board's decision, concluding that Coleman did not qualify as an "employee" under Michigan's Worker's Disability Compensation Act.

Notes. The Court of Appeals of Michigan applied the economic reality test to determine whether there was an employment relationship between Coleman and the university. In the court's analysis, three out of the four criteria favored the university, indicating no employment relationship existed, with the exception of the wages factor, which weighed in favor of Coleman. The Court made distinctions between this case and others, such as Van Horn, noting that, unlike Van Horn, Coleman did not work a part-time job for the athletic department nor received an hourly wage or fixed fee. Furthermore, the court observed differences in the state laws, highlighting that California's statutes require the defendant to prove the absence of an employment relationship, a burden not present in Michigan's legislation. The court praised the Indiana Supreme Court's decision in *Rensing v. Ind. State Univ. Bd. of Trs.*, affirming the notion that student-athletes receiving financial aid are primarily students. While acknowledging that football participation does benefit the university broadly, it concluded that this does not equate to the athlete rendering services to the University in an employment capacity. Notably, the *Coleman* court utilized the economic realities test, which has been traditionally used in FLSA cases.

***Cheatham v. Workers' Compensation Appeals Board of the State of California*, *California Polytechnic State University et al*. (1984).** This subsection addresses *Cheatham v. Workers' Comp. Appeals Bd. of the State of Cal.*, *Cal. Polytechnic State Univ. et al*. (1984).

Citation. *Cheatham v. Workers Comp. Appeals Bd. of Cal.*, 49 Cal. Comp. Cases 54 (Cal. App. 3d Dist. January 17, 1984).

Key Facts. James Cheatham, a state high school wrestling champion, was recruited to join the California Polytechnic State University wrestling team. Cheatham was awarded an athletic scholarship upon agreeing to enroll and participate, including a $50 quarterly book allowance paid directly to him and his registration fee coverage, ranging from $70–$80 per

quarter. During a practice session, Cheatham sustained an injury that prevented further participation. Cheatham filed a workers' compensation claim in November 1980.

A workers' compensation judge initially determined Cheatham to be an employee, citing *Van Horn v. Industrial Acc. Com.* (1963). However, the State Compensation Insurance Fund requested a review following a Labor Code amendment that excluded student-athletes from the "employee" category, effective April 18, 1981. The Worker's Compensation Appeals Board determined Cheatham did not qualify as an employee under the precedent of *Van Horn v. Industrial Acc. Com.* (1963) without addressing the amendment's constitutionality. Cheatham appealed, seeking to overturn the Board's ruling.

***Issue*(s)**. The question was whether a college wrestler, who was on an athletic scholarship and sustained injuries while part of the team, could be considered an employee.

Holding. The Court of Appeal of California, Third Appellate District, held that Cheatham did not qualify as an employee under the precedent established by *Van Horn v. Industrial Acc. Com.* (1963).

Reasoning. The court reasoned that Cheatham's participation did not equate to rendering services to the university, nor did it economically benefit the university. It was noted that wrestling, considered a "minor" sport compared to football or basketball, did not generate substantial gate receipts or confer measurable economic advantages to the university. The court referenced "The Money Game: Financing Collegiate Athletics" by Atwell, Grimes, and Lopiano to emphasize that unlike highly competitive sports, which might bring in substantial revenues through television or other means, wrestling did not generate enough economic benefit to establish an employer-employee relationship (Atwell et al., 1980). The court observed that

Cheatham was the primary beneficiary of the relationship, akin to recipients of academic scholarships.

Disposition. The Court of Appeal of California, Third Appellate District, affirmed the Workers' Compensation Appeals Board's ruling.

Notes. Despite having an athletic grant-in-aid agreement and being injured during team activities, James Cheatham was not considered an employee of the university. His participation in athletics was not deemed a service to the college. This case remains an unpublished opinion.

***Graczyk v. Workers' Compensation Appeals Board* (1986).** This subsection addresses *Graczyk v. Workers' Comp. Appeals Bd.* (1986).

Citation. *Graczyk v. Workers' Comp. Appeals Bd.*, 184 Cal. App. 3d 997, 229 Cal. Rptr. 494 (1986).

Key Facts. In the fall of 1977, Ricky Graczyk began his studies at California State University – Fullerton (CSUF), where he was recruited to play football. During the first year, he participated in the football program without an athletic scholarship. In his second year, Graczyk was awarded an athletic scholarship totaling $1,600 and financial aid based on financial need and academic performance. Graczyk alleged he sustained multiple injuries to his head, neck, and spine while playing football from August 1997 until November 1978. Graczyk filed for workers' compensation benefits and was initially deemed an employee under the precedent set by *Van Horn*, according to the decision of the workers' compensation administrative judge. CSUF appealed the decision requesting reconsideration, leading to the Workers' Compensation Appeals Board's reconsideration and subsequent 2–1 decision to reverse the administrative judge's ruling. The Workers' Compensation Appeals Board determined that Graczyk did not meet the definition

of an employee under California Labor Code § 3351 and § 3352 (2011). Graczyk contested this outcome.

***Issue*(s)**. The case focused on whether Ricky Graczyk, a former college student-athlete, qualified as an employee of the university according to the California Labor Code § 3351 and § 3352 (2011).

Holding. The Court of Appeal of California, Second Appellate District, Division Seven held that Graczyk was not an employee of the university as defined by the California Labor Code § 3351 and § 3352.

Reasoning. The court determined Graczyk was not an employee as defined by the California Labor Code § 3351 and § 3352, citing the Legislature's 1981 amendment that explicitly excluded student-athletes from the "employee" classification. The amendment allowed for its retroactive application, thus excluding *Graczyk* and similar cases from being considered employees. The court highlighted the Legislature's efforts to refine the definition of an employee in response to previous rulings, noting a 1965 amendment following the Van Horn decision, which aimed to exclude participants in sports or athletics who received no compensation beyond support for their athletic involvement. That amendment read as follows:

> "Employee" excludes . . . [a]ny person, other than a regular employee, participating in sports or athletics who receives no compensation for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto (*Graczyk v. Workers' Comp. Appeals Bd.*, 1986, p. 1005).

The 1981 amendment further specified the exclusion:

> "Employee" excludes . . . [a]ny student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university, or

> school, who receives no remuneration for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto (*Graczyk v. Workers' Comp. Appeals Bd.*, 1986, p. 1005).

Additionally, the Legislature declared the act to be "an urgency statute" deemed crucial for the immediate preservation of the public peace, health, or safety as per Article IV of the Constitution. This designation was pivotal in addressing the dissenting Board Panel member's argument that Graczyk had a "vested right" to employee status, which the Legislature could not annul retroactively. The court refuted this by noting the fluid nature of laws regarding employee status and clarified that Graczyk's entitlement to benefits was based on statutory rights without a definitive judgment before the 1981 amendment, which clarified the employee status of student-athletes. Ultimately, the court determined that the state's significant and perhaps compelling interest in delineating employer-employee relationships justified the retrospective enforcement of the statute, aligning with a critical state interest.

Disposition. The Court of Appeal of California, Second Appellate District, Division Seven, upheld the Workers' Compensation Appeals Board's ruling. Justices J. Thompson and J. Johnson agreed with the decision. The petitioner's request for a Supreme Court review was denied on October 23, 1986.

Notes. The court concluded that Graczyk did not possess a "vested right" to be considered an employee under the law, affirming the status authority to apply the Legislature's amendment to the California Labor Code § 3351 and § 3352 retroactivity. This amendment effectively removes student-athletes from the "employee" category.

***Waldrep v. Texas Employers Insurance Association* (2000).** This subsection addresses *Waldrep v. Tex. Emp'rs Ins. Assoc'n* (2000).

Citation. *Waldrep v. Tex. Emp'rs Ins. Assoc'n* , 21 S.W.3d 692 (Texas App. 2000).

Key Facts. In August 1972 Alvis Kent Waldrep enrolled at Texas Christian University (TCU) and joined the football team. Waldrep was on an athletic scholarship covering his room, board, and tuition, and received $10 monthly as "laundry money" for incidentals. In 1974, during a game against the University of Alabama, Waldrep sustained a severe spinal cord injury, resulting in paralysis below his chest. In 1991, Waldrep filed for workers' compensation benefits and was initially granted benefits by the Workers' Compensation Commission. However, the Texas Employers Insurance Association and the Texas Property and Casualty Insurance Guaranty Association contested this award. A jury trial concluded that Waldrep did not establish his status as an employee of TCU, leading the district court to decide against his eligibility for workers' compensation benefits. Waldrep challenged this decision.

***Issue*(s)**. The case centered on whether Waldrep, a student-athlete under an athletic scholarship, was considered an employee of the university at the time of his injury while playing football. Additionally, the appropriateness of the evidentiary ruling made by the district court was questioned.

Holding. The Court of Appeals of Texas, Third District, held that the trial record contained sufficient evidence to uphold the jury's verdict, which concluded that Waldrep was not an employee of TCU. Additionally, the court noted that Waldrep failed to meet the conventional definition of an employee, as he could not demonstrate the existence of a contract of hire or show that the university possessed the right to control all aspects of his activities.

Reasoning. The court clarified that Waldrep, who sought to challenge the legal sufficiency of a jury verdict, bore the burden of proof to overturn it. The court referenced the *Sterner* two-prong test for appellate courts to apply when evaluating a legal sufficiency challenge against a jury's finding. According to this test, the court must first look for evidence supporting the jury's verdict, considering only evidence and inferences favorable to that finding and ignoring evidence to the contrary. Absent supportive evidence, the court should examine the entire record to determine if the opposing argument is conclusively proven by law (*Waldrep v. Tex. Emp'rs Ins. Assoc'n* , 2000, p. 697).

In assessing Waldrep's status as an employee of TCU, the court turned to the definition of "employee" as someone serving another under any form of a contract of hire, where the employer controls not just the outcomes but also the methods and details of the work. (*Waldrep v. Tex. Emp'rs Ins. Assoc'n* , 2000, p. 698). The court concluded that a contract of hire did not exist between Waldrep and TCU for several reasons: (1) no evidence suggested Waldrep and TCU intended to establish an employment relationship; (2) Waldrep's NLI commitment made it clear he was bound by NCAA regulations, which prohibit compensation for play; and (3) Waldrep did not report the scholarship as income, indicating no taxes or social security deductions were associated with the scholarship. Lastly, maintaining academic standards was a requirement for keeping his scholarship, and he understood that injury would not result in the loss of his scholarship or dismissal from the team.

The court further examined the second aspect of the jury's definition of "employee," focusing on the "right to direct or control or means of the employee's work." The court determined the university lacked control over Waldrep's academic activities, the primary reason for attending the university. Additionally, the court noted the university could not arbitrarily

revoke Waldrep's scholarship based on his athletic performance, his contribution to the team, or even if he chose to quit in certain circumstances. Consequently, the court concluded the university did not possess the right to control the majority of Waldrep's activities.

Disposition. The Court of Appeals of Texas, Third District, upheld the district court's ruling. A request for a rehearing was denied on July 27, 2000, and a petition for review was declined on November 16, 2000.

Notes. The court found that Waldrep did not meet the traditional definition of employee, as he could not prove the existence of a contract of hire, nor could it be shown that the university had control over all aspects of his work. The ruling underscored that receiving benefits in exchange for services does not automatically establish an employment relationship. The court acknowledged the significant changes in college athletics since Waldrep's injury nearly 26 years earlier, stating that its decision was based on the facts and circumstances of that time. The court expressly withheld an opinion on how a similar case might be judged under current conditions, cautioning against overextending the scope of their decision. With all issues addressed, the district court's judgment was confirmed.

Fair Labor Standards Act (FLSA)

***Berger v. National Collegiate Athletics Association* (2016).** This subsection addresses *Berger v. NCAA* (2016).

Citation. *Berger v. NCAA*, 843 F.3d 285 7th Cir. (2016).

Key Facts. In a landmark case involving the Fair Labor Standards (FLSA), several former student-athletes from the University of Pennsylvania's (Penn) women's track and field team initiated a lawsuit against the NCAA and over 120 higher education institutions. They contended they were university employees due to their participation on the track and field team

and, as such, were entitled to minimum wage compensation. The district court dismissed the claim, concluding that the student-athletes (1) lacked standing to sue any of the defendants other than Penn and (2) did not qualify as employees under the FLSA with respect to Penn. The plaintiffs then appealed the decision.

***Issue*(s)**. 1. Whether the student-athletes had the standing to sue institutions other than the University of Pennsylvania 2. Whether the student-athletes were considered employees of the university under the FLSA?

Holding. The Seventh Circuit Court of Appeals determined that student-athletes did not have standing to sue any parties other than the University of Pennsylvania. Furthermore, it held that they were not Penn employees under the FLSA and, therefore, not entitled to coverage under the Act.

Reasoning. In addressing the issue of standing, the Seventh Circuit Court of Appeals concluded that the student-athlete's connection to the NCAA and other universities was insufficiently direct to establish an employee relationship. It was determined the athletes had not demonstrated any injury that could be attributed to or remedied by any party other than Penn.

In addressing the claim against Penn, the court declined to apply the *Glatt* multifactor test proposed by the appellants, opting instead for a more adaptable method to assess whether student-athletes qualify as employees under the FLSA. The court found that the appellants' multifactor test did not accurately reflect the relationship between student-athletes and their schools. Referencing *Vanskike* (1992), the court emphasized that determining employee status requires an examination of the entire context of the relationship, focusing on the "economic reality" of the interaction between the supposed employer and employee. The court highlighted

that the economic essence of the student-athletes' relationship with the university is defined by the principle of amateurism, upheld by NCAA regulations.

The court also considered guidance from the Department of Labor's (DOL) Field Operation Handbook (FOH), which stated that college students engaged in extracurricular activities, including glee clubs, bands, choirs, debate teams, and *interscholastic athletics*, do not constitute employees. The FOH elaborates that such activities are designed to enhance students' education "as a part of the educational opportunities provided to the students by the school or institution are not work of the kind contemplated by [the FLSA]" (*Berger v. NCAA*, 2016, p. 293).

Lastly, the court noted that because of the tradition of amateurism in NCAA college athletics, student-athletes have been participating for a century without any expectation of compensation. This tradition further supported the conclusion that student-athletes do not hold an employment relationship with their universities under the FLSA.

Disposition. The Seventh Circuit Court of Appeals affirmed the district court's ruling, concluding that the appellant student-athletes did not qualify as employees under the Fair Labor Standards Act (FLSA) and were not entitled to its protections.

Notes. In the *Berger* case, the court did not apply the *Glatt* multifactor test, which other jurisdictions have used to evaluate the presence of an employment relationship. Instead, it emphasized the concept of amateurism to define the economic reality of the student-athletes and the university. In a concurring opinion, Circuit Judge Hamilton offered a cautionary perspective, highlighting that the plaintiffs were non-scholarship track team members participating in a nonrevenue-generating sport. Judge Hamilton suggested the verdict could vary for scholarship student-athletes in major revenue-generating sports, contributing billions to colleges and

university finances. Judge Hamilton concluded: “With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes” (*Berger v. NCAA*, 2016, p. 294).

***Livers v. National Collegiate Athletics Association* (2018).** This subsection addresses *Livers v. NCAA* (2018).

Citation. *Livers v. NCAA*, 2018 U.S. Dist. LEXIS 124780; 2018 WL 3609839.

Key Facts. Two years after the *Berger* decision in 2016, a court was tasked with reviewing another case involving student-athlete employment claims under the FLSA. Lawrence “Poppy” Livers, a former Villanova University football player, initiated legal action against the NCAA, Villanova, and various other higher education institutions. He claimed the defendants violated his rights to receive minimum wage compensation under the FLSA. Livers sought to represent a putative class of “all recipients of athletic scholarships under Athletic Financial Aid Agreements that require participation in NCAA athletics at NCAA Division I member schools” (*Livers v. NCAA*, 2018, p. 3).

In an initial ruling, the court determined Livers did not have the standing to pursue legal action against any defendants apart from the NCAA and Villanova University. Additionally, the court found that Livers did not present sufficient factual allegations to support the existence of an employer-employee relationship, either with the NCAA or Villanova University. The court allowed Livers to amend and refile his petition. Livers refiled his complaint on May 30, 2018.

In his amended complaint, Livers introduced new allegations not present in the original complaint. He argued that scholarship student-athletes, like himself, are economically dependent on the university for receiving tuition, fees, books, and other noncash benefits, highlighting their

economic relationship with the institution. Additionally, Livers contended that the university had never invoked the Department of Labor's Field Operation Handbook (FOH) as justification for denying student-athletes compensation. Moreover, Livers asserted that the Defendants willfully violated the FLSA by failing to treat student-athletes similarly to work-study students, despite knowing they should. In response, Villanova University and the NCAA moved to dismiss the complaint.

***Issue*(s)**. The central issue in the amended complaint was whether Livers provided sufficient evidence to plausibly assert that he was an employee under the FLSA and that the defendants had willfully violated the Act.

Holding. The court determined Livers had indeed alleged sufficient facts to plausibly claim relief under the FLSA.

Reasoning. The court found that the amended complaint contained additional facts supporting Liver's argument concerning the economic reality of his relationship with the university, particularly highlighting the financial benefits he received and his reliance on them. Furthermore, Livers effectively argued that the defendant's refusal to equate student-athletes with work-study students, despite apparent similarities, constituted a willful violation of FLSA. This new evidence, absent in the original complaint filling, was crucial in supporting Livers' claim that he qualified as an employee under FLSA. Notably, for Livers' claim to proceed, he needed to demonstrate a willful violation of FLSA, as his original petition was filed outside the standard 2-year statute of limitations. A finding of willful violations of the FLSA could extend the statute of limitations by an additional year.

Disposition. With Livers' amended complaint filed on May 30, 2018, the court denied the defendants' motion to dismiss, directing the parties to commence with the exchange of written discovery within 60 days.

Notes. The issues in the original *Livers* case were: (1) whether Livers had the legal standing to sue entities besides the NCAA and Villanova University and (2) whether Livers could present a viable claim that warranted relief. Essentially, the court needed to determine if Livers was an employee under the FLSA.

In addressing the standing issue, the court found that Livers was unable to prove joint employment with Villanova, the NCAA, and other institutions he had not attended. The court referenced the criteria set forth by the Third Circuit Court of Appeals in, *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462 (3d Cir. 2012), which established that determining joint employment hinges on the employer's "significant control" over the employee. According to the Third Circuit, evaluating the employer-employee relationship for joint employment involves four factors: (1) "The alleged employer's authority to hire and fire the relevant employees; (2) The alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; (3) The alleged employer's involvement in day-to-day employee supervision, including employee discipline; and (4) The alleged employer's actual control of employee records, such as payroll, insurance, or taxes" (*Faush v. Tuesday Morning*, *Inc*, 2015).

In the original case, the court found that Livers was unable to present facts demonstrating that schools he did not attend exerted significant control over him, such as hiring or firing authority, day-to-day supervision, or maintaining records related to his participation in Villanova

University's football team. Consequently, he failed to establish a basis for joint employment with these institutions.

In the initial case, the plaintiffs contended that Livers had not provided sufficient evidence of an employer-employee relationship between himself and the defendants. Additionally, they noted that Livers filed the lawsuit beyond the FLSA's 2-year statute of limitations, necessitating proof of the defendant's willful violation of the FLSA to extend this period by an additional year. Since Livers concluded his playing career on December 13, 2014, and initiated the lawsuit on September 26, 2017, he was required to demonstrate that the defendants deliberately contravened the FLSA. The court found that the Department of Labor's Field Operations Handbook (FOH) explicitly states that students engaged in intercollegiate athletics do not qualify as employees, and Livers had not contested this guideline effectively. Although the court dismissed the complaint, it permitted Livers the opportunity to revise it to include facts that would challenge the FOH stipulations or reference other legislation to argue for a deliberate violation of the FLSA.

In the *Livers* cases, the court noted the precedents set in *Berger* and *Dawson*, which moved away from a rigid multifactor analysis to adopt a broader "economic reality" test. In *Berger*, the Seventh Circuit found that the economic reality of the relationship between student-athletes and universities is grounded in the "tradition of amateurism."

***Dawson v. National Collegiate Athletics Association* (2019).** This subsection addresses *Dawson v. NCAA* (2019).

Citation. *Dawson v. NCAA*, 932 F.3d 905, 910 (9th Cir. 2019).

Key Facts. Lamar Dawson, a Division I football player at the University of California (USC), filed suit against the NCAA and the Pac-12 Conference. He claimed they were joint

employers who did not compensate him and other class members for their labor, contrary to the FLSA and California state labor laws.

Issue(s). The core question was whether a student-athlete, Lamar Dawson, and other Division I FBS football players were employees of the NCAA and the Pac-12 Conference within the meaning of the FLSA or California state labor laws.

Holding. The Ninth Circuit concluded that Dawson and his fellow Division I FBS football student-athletes did not qualify as employees of the NCAA or the Pac-12 Conference under the FLSA or California state labor laws.

Reasoning. The court stated that the determination of employment under the FLSA hinges on the economic reality, which encompasses the entire relationship. Utilizing a multifactor test established by the U.S. Supreme Court in *Walling v. Portland Terminal Co*., 330 U.S. 148 (1947), and *Goldberg v. Whitaker House Coop*, 366 U.S. 28 (1961), the court assessed employment claims under FLSA based on three criteria: (1) the expectation of compensation, (2) the alleged employer's authority to hire or fire the individual, and (3) the level of control the alleged employer exercises. In evaluating these factors, the court found that "the economic reality of the relationship between the NCAA/Pac-12 and student-athletes does not reflect an employment relationship" (*Dawson v. NCAA*, 932 F.3d 905, 909 (9th Cir. 2019). Despite Dawson receiving a scholarship from USC, the court found no expectation of compensation from either the NCAA or the Pac-12. Regarding the authority to hire or fire, the court observed that the complaint lacked allegations of such rights held by the NCAA or Pac-12, nor did these entities select team members or oversee their performance directly. Additionally, no evidence suggested that the NCAA or Pac-12 had established rules to circumvent legal obligations. In examining the economic reality further, the court cited various tests, including the *Bonnette* and *Benjamin*

multifactor tests applied by the U.S. Supreme Court in different contexts. Ultimately, the court determined that Dawson did not have an employment relationship with either the NCAA or Pac-12 Conference.

Regarding the claim of employment status under California state labor laws, the court noted the amendments to the Workmen's Compensation Act in 1965 and 1981 that explicitly excluded student-athletes from being classified as "employees." Lawson argued this exclusion was intended solely for the workmen's compensation context, but the court found this argument unconvincing. It cited cases such as *Townsend v. State of Cal.*, 191 Cal. App. 3d 1530, 237 Cal.Rptr. 146 and *Shephard v. Loyola Marymount Univ.*, 102 Cal. ^{Ap}p. 4th 837, 842–44, 125 Cal.Rptr.2d 829 (2002), where the exclusion of student-athletes from employee status was applied beyond workers' compensation. Furthermore, the court observed that the enactment of the Student-Athlete Bill of Rights (Cal. Educ. Code §§ 67450 – 67453), reinforced the legislature's stance that student-athletes should not be treated as employees under California labor laws. Despite recognizing student-athletes' significant time commitment and revenue generation, as well as their need for medical care due to sports-related injuries, the Legislature chose not to afford them employment protections.

Disposition. The Ninth Circuit affirmed the district court's decision to dismiss the plaintiff's claims under the FLSA and California Labor Law against the NCAA and Pac-12.

Notes. The court did not view the revenue generated by some student-athletes as a crucial factor in determining employment status. The court referenced the U.S. Supreme Court's *Alamo* decision, which recognized volunteers of a nonprofit religious organization as employees *(Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985). The court also looked to its ruling in *Benjamin v. B&H Educ., Inc.* (2017), where the court found that cosmetology students

were not considered employees entitled to minimum wage, even though they performed services to paying customers in school-operated salons. The plaintiffs' decision to exclude USC from the lawsuit was noted as potentially problematic, given that USC was responsible for providing scholarships (seen as compensation) and had the power to exercise significant control over the plaintiff.

***Johnson v. NCAA* (2021).** This subsection addresses *Johnson v. NCAA* (2021).

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

Key Facts. In *Johnson*, student-athletes from several states have initiated legal action against the NCAA and its member institutions, accusing them of multiple violations of the FLSA, along with state labor laws and regulations. These student-athletes, who were part of different collegiate athletic teams across various universities from 2013 to 2018 argue they should receive compensation as university employees for their participation in intercollegiate athletics. They seek remuneration including unpaid wages, liquidated damages, attorney's fees, other costs, and benefits they claim were unjustly withheld by the defendants.

The NCAA's request to dismiss these claims was not granted, and the case is currently under review in the Third Circuit Court of Appeals (Auerbach, 2023a).

***Issue*(s)**. The central question is whether the student-athletes have presented a plausible argument, based on facts, that they qualify as employees of the defendants under the FLSA.

Holding. The court determined that the complaint plausibly alleged facts that the plaintiffs are employees of the defendants in the context of the FLSA.

Reasoning. In evaluating a motion to dismiss for failure to state a claim warranting relief, the court assumes all presented facts are accurate and views them in the light most favorable to the plaintiff, as highlighted in the precedent: "We take the factual allegations of the complaint as

true and 'construe the complaint in the light most favorable to the plaintiff'" (*DelRio-Mocci v. Connolly Props*., *Inc*., 672 F.3d 241, 245 (3d Cir. 2012). The plaintiff must demonstrate the plausibility or possibility of the defendant's unlawful actions. In *Johnson*, the plaintiffs needed to provide evidence supporting their status as employees of the defendants under the FLSA. The defendants argued against employee status by citing: (1) the amateur status of student-athletes as outlined in *Berger*; (2) the Department of Labor's (DOL) Field Operation Handbook § 10b0I) (FOH) indicating college student-athletes are not considered employees under FLSA, and (3) the plaintiffs' failure to assert their employee status through a multi-factor test commonly applied under the FLSA to determine such status.

The court in *Berger* (2016) concluded there was no employment relationship between student-athletes and universities, framing the relationship within the tradition of amateurism. However, the court in *Johnson* rejected this by referencing the U.S. Supreme Court's decision in *Alston*, which critiqued the NCAA's emphasis on amateurism, as previously noted in *Board of Regents*, and clarified that such remakes do not preclude all challenges to the NCAA's compensation restrictions.

> *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. However, these remarks do not suggest that courts must reflexively reject all challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. (*Johnson v. NCAA*, 2021, p. 10)

Next, the court in *Johnson* addressed the defendant's claim that the DOL's guidance prohibited college student-athletes from being considered employees under the FLSA. The court in *Johnson* concluded that the guidance in FOH § 10b03(e) did not mandate a finding that

plaintiffs could not be deemed employees of the defendants. The court went further, determining that college athletics, particularly at the NCAA DI level, primarily benefit the NCAA and its member institutions financially rather than the student-athletes. It was found that NCAA DI athletics do not constitute a part of the educational opportunities provided to students; they detract from students' ability to fully engage with their educational pursuits. Additionally, the court stated that NCAA DI athletics are not the type of activities envisioned by FOH § 10b03(e) as excluding a student from employee classification under the FLSA.

Regarding the defendant's contention that the plaintiffs failed to articulate a specific multifactor test for determining FLSA employee status, the court highlighted that various multifactor tests have been developed for this purpose. The court reiterated the importance of considering the "economic realities of the relationship" when determining FLSA employee status. Specifically, the court referenced the *Glatt* test from the Second Circuit, which assesses whether an unpaid intern is to be deemed an employee under the FLSA, focusing on who benefits more from the relationship, the alleged employee or employer. Furthermore, the court noted the Ninth Circuit's view in *Benjamin* (2017), that the "primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA."

The *Glatt* test consists of seven factors (U.S. Department of Labor, n.d.-b):

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship. (*Johnson v. NCAA*, 2021, pp. 509–510).

In applying the *Glatt* factors in *Johnson*, the district court determined the first *Glatt* factor indicated the plaintiffs were not employees, given there was no expectation of payment. The court reasoned that student-athletes cannot negotiate wages, as schools have collectively agreed to neither offer nor allow compensation for athletic participation.

The court deemed the second and fifth *Glatt* factors as neutral; the complaint did not specify whether athletics offered an educational experience akin to a traditional educational environment or if the duration of sports participation provided beneficial educational opportunities. The third factor suggested the plaintiffs were employees, as athletics are not part of the academic curriculum, and student-athletes do not earn academic credit for participation in

athletics. The fourth factor also supported employee status, given evidence in the complaint that NCAA athletics could disrupt the plaintiff's academic pursuits (U.S. Department of Labor, n.d.-b).

Regarding the sixth *Glatt* factor, the court found no indication that student-athletes displace paid employees; however, their participation in NCAA DI athletics did not yield significant educational benefits. The complaint highlighted substantial time commitments to athletics, conflicts between class schedules and athletic obligations, and the lack of integration of sports participation within the academic curriculum, including the absence of academic credit for athletic involvement (U.S. Department of Labor, n.d.-b).

Finally, the court observed no expectation among student-athletes of paid employment after their college sports careers, leading to the conclusion under the seventh factor that the plaintiffs were not considered employees of the defendants.

In summary, the district court found that factors three, four, and six supported the argument that the plaintiffs were employees, while factors two and five were deemed neutral. Factors one and seven were found to favor the conclusion that the plaintiffs were not employees of the defendants. For these reasons, the district court concluded that the plaintiffs had presented plausible facts sufficient to claim employee status under the FLSA.

Disposition. The United States District Court for the Eastern District of Pennsylvania rejected the defendant's motion to dismiss. In a subsequent motion, the Defendants sought to have the order certified for interlocutory review. The request was granted.

Notes. The case is presently under consideration by the Third Circuit Court of Appeals following the defendants' successful request for an interlocutory appeal.

> The decision to certify an order for interlocutory review is only appropriate in exceptional circumstances, and courts should be mindful of the strong policy against piecemeal appeals when exercising their discretion. The Third Circuit has held that certification is to be used in exceptional cases where an immediate appeal would avoid protracted and expensive litigation. The party seeking interlocutory review has the burden of persuading the district court that exceptional circumstances exist that justify a departure from the basic policy of postponing appellate review until after the entry of final judgment. (*Johnson v. NCAA*, 2021, p. 8)

In examining the economic reality of the employment relationship, this case employs a multi-factor test.

National Labor Relations Act

***Northwestern University and College Athletes Players Association* (CAPA; 2015).** This subsection addresses *Northwestern University and CAPA* (2015).

Citation. National Labor Relations Board. (n.d.-f). *Northwestern University*. https://www.nlrb.gov/case/13-RC-121359

Key Facts. On January 28, 2014, scholarship football players at Northwestern University initiated a petition asserting their status as employees of Northwestern University, thereby claiming the right to decide on representation for collective bargaining purposes. In an initial ruling, the NLRB Regional Director (RD) held that the scholarship football players at Northwestern did meet the criteria to be considered employees under Section 2(3) of the NLRA and ordered immediate elections. The university appealed the decision to the NLRB.

***Issue*(s)**. The central question upon appeal was whether the NLRB had jurisdiction or authority to decide the case.

Holding. The NLRB decided not to exert jurisdiction over the case, stating that doing so would not advance labor relations' stability. This decision was specific to the scholarship football players mentioned in the petition. The NLRB did not address the RD's decision that held that the scholarship football players were employees.

Reasoning. The NLRB's rationale was that Northwestern is a private institution, while most NCAA Division I FBS programs are public institutions, falling outside of its jurisdiction. The Board emphasized the unprecedented nature of allowing a single team to engage in collective bargaining in a landscape where its competitors could not. Furthermore, the NLRB acknowledged recent improvements in conditions for student-athletes, including the provision of multiyear scholarships. Consequently, the NLRB chose not to assert jurisdiction and dismissed the petition.

Disposition. The NLRB dismissed the petition.

Notes. In the initial ruling, the Regional Director (RD) held that the scholarship football players at Northwestern did meet the criteria to be considered employees under Section 2(3) of the NLRA. The RD found that the NLRB's previous ruling in the *Brown* case did not apply here for several reasons: (1) football student-athletes were not primarily students, as they dedicated 40–60 hours per week to football activities; (2) their involvement in football was not integral to their degree programs; (3) the academic faculty did not supervise the football players during their football-related activities; and (4) the scholarship awarded to football players was contingent upon their agreement to play football, with the possibility of revocation should they cease participation in the sport.

The RD found that the scholarship football players at Northwestern provided services that benefited the university and received compensation for their services. Highlighting the

significant revenue generated by the football program, approximately $235 million from 2003 to 2012. The RD pointed out that players were compensated with scholarships valued up to $76,000 annually. It was noted that the players were under strict control by Northwestern, evident from mandatory training camp attendance, daily schedules by their coaches, and extensive time commitments to football activities: 50–60 hours per week during training camp and 40–50 hours once classes begin.

Further, the RD remarked on the extensive control coaches had over players' private lives, requiring players to obtain permission for various personal actions: (1) "make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling" (*Northwestern University*, 2015, p. 1364). The RD concluded that non-scholarship football players did not qualify as employees due to the lack of compensation and more flexible schedules.

The RD also determined that the football players did not qualify as temporary employees, considering their potential involvement with the team for 4–5 years, a duration deemed substantial.

***Trustees of Dartmouth College* (2024).** This subsection addresses *Trs. of Dartmouth Coll.* (2024).

Citation. National Labor Relations Board. (n.d.-e). *Trs. of Dartmouth Coll.* https://www.nlrb.gov/case/01-RC-325633

Key Facts. The Service Employees International Union, Local 560, filed a petition seeking to represent a bargaining unit for the student-athletes on the Dartmouth men's varsity basketball team.

Issue(s). The issues were whether the Dartmouth men's varsity basketball team players were considered employees of Dartmouth under Section 2(3) of the NLRA and whether the NLRB should decline to assert jurisdiction over the employment status of Dartmouth's men's varsity basketball teams.

Holding. The RD concluded the Dartmouth men's varsity basketball team players were employees of Dartmouth under Section 2(3) of the NLRA and ordered an immediate election. Further, in contrast to the decision by the NLRB in *Northwestern*, the RD held that the NLRB should assert jurisdiction in the present case because "asserting jurisdiction would not create instability in labor relations" (*Trs. of Dartmouth Coll.*, 2023 p. 2).

Reasoning. The RD noted the broad definition of an "employee" within Section 2(3) of the NLRA, pointing out the narrow scope of exclusions. The absence of a specific exclusion for students or student-athletes was cited as "strong evidence of statutory inclusion" (Columbia University, 2016). The RD determined Dartmouth possessed control over the work conducted by the team members and that these players engaged in work in return for various forms of compensation. It was observed that the team's activities fostered alumni engagement, facilitated financial donations, and enhanced the university's public image. In exchange, the athletes were provided with several benefits, including preferential consideration during admissions ("early read"), athletic apparel, game tickets, accommodation, meals, and additional perks like academic support and performance training. The RD acknowledged the compensation received by the players deviated from traditional forms due to NCAA restrictions on direct monetary compensation.

The RD also found that Dartmouth exercised "significant control" over players and their activities. This control was manifested through adherence to the student-athlete handbook and by

dictating participation in team and alumni engagement activities. When traveling to away games, Dartmouth's authority extended to scheduling travel, meals, and even personal appointments, such as haircuts.

In establishing the employment status of Dartmouth's men's varsity basketball players, the RD made a clear distinction from the *Northwestern* case, where the NLRB chose not to exercise jurisdiction. The decision in *Northwestern* was influenced by the fact that Northwestern competes in the Big 10 conference, which is comprised of mostly public institutions, which are beyond the NLRB's jurisdiction. (*Northwestern University v. College Athletes Players Association*, 2014). In contrast, Dartmouth competes in the Ivy League, consisting entirely of private institutions, thus falling within the NLRB's jurisdiction. This distinction underscores the RD's rationale for treating Dartmouth's players as employees eligible for collective bargaining under the NLRA.

Disposition. The RD reaffirmed that the Dartmouth men's varsity basketball team players were employees under Section 2(3) of the NLRA and mandated an immediate election.

Notes. The case is under appeal.

University of Southern California; ***Pac-12 Conference***; ***NCAA*** **(Ongoing).** This subsection addresses *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*.

Citation. National Labor Relations Board. (n.d.-d). *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*. https://www.nlrb.gov/case/31-CA-290326

Key Facts. On February 11, 2022, the National College Players Association, an organization advocating for student-athlete rights, filed an unfair labor practice complaint against the NCAA, the University of California of Los Angeles (UCLA), the Pac-12 conference, and the

University of Southern California (USC). The case against UCLA was later retracted, acknowledging that the NLRB's jurisdiction extends only to private academic institutions, as UCLA is a public entity (NLRA Office of Public Affairs, 2021; Schad, 2022).

In December 2022, an NLRB regional director found that the unfair labor practice charge had merit, identifying USC, the Pac-12 conference, and the NCAA as "joint employers" of football, as well as men's and women's basketball players. Shortly thereafter, General Counsel Abruzzo commented that "the regional director's determination signals that USC basketball and football players have been unlawfully misclassified" as student-athletes rather than "employees entitled to protections under our law" and that "this kind of misclassification deprives these players of their statutory right to organize and to join together to improve their working/playing conditions if they wish to do so" (Nakos, 2022, para. 5).

On May 18, 2023, the NLRB initiated legal action against USC, the Pac-12 conference, and the NCAA. The complaint accused these entities of acting as joint employers, unlawfully categorizing athletes as nonemployees, thereby stripping them of their rights as employees.

The General Counsel's demands within the complaint included:

1. a confirmation that the "Players" are indeed employees as defined by Section 2(3) of the NLRA,
2. an injunction requiring the alleged joint employers to stop referring to the Players as non-employee "student-athletes,"
3. a mandate to reclassify the Players as employees rather than as "student-athletes" in all official documents, handbooks, and regulations and to inform all current Players of this charge and additional appropriate remedies.

***Issue*(s)**. The question revolves around whether student-athletes qualify as employees under Section 2(3) of the NLRA.

Holding. NA.

Reasoning. NA.

Disposition. Unadjudicated. In the trial stage.

Notes. In September 2021, the NLRB General Counsel, Jennifer Abruzzo issued a memorandum providing updated guidance on her stance that student-athletes should be recognized as employees under the National Labor Relations Act (NLRA; NLRA Office of Public Affairs, 2021). According to the NLRA Office of Public Affairs (2021), Abruzzo stated her intent in issuing the memo was to "help educate the public, especially players at academic institutions, colleges and universities, athletic conferences, and the NCAA, about the legal position that I will be taking regarding employment status and misclassification in appropriate cases" (para. 3).

Conclusion

This chapter provided a detailed summary of each case. To provide additional context about the dataset, this chapter included data regarding the cases' number, frequency, geographic location, and jurisdictional distribution. The 15 cases span from 1953–2024. The early cases involve workers' compensation cases, while the most recent ones pertain to the FLSA and NLRA. These cases were filed in eight states, with California being the jurisdiction for five of the 15 cases. Filed in state and federal courts, as well as with the NLRB, these cases offer an analysis that will assist in answering the research questions. Chapter Five reviews and analyzes these findings, answers the research questions, provides recommendations, and suggests future areas of research.

CHAPTER FIVE: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

Introduction

This study examines legal claims regarding student-athlete employment under the FLSA, NLRA, and workers' compensation statutes from 1950–2024. It analyzes judicial considerations on whether student-athletes qualify as employees, providing insights for higher education administrators to assess and mitigate risks associated with student-athlete employment. Chapter 4 detailed research findings, while Chapter 5 applies these findings to address the following research questions:

1. What primary legal issues have arisen in college student-athlete employment claims, and what have been the judicial responses to those claims?
2. What does the case law analysis suggest are the primary factors that courts consider when evaluating whether college student-athletes qualify as employees under workers' compensation statutes, the FLSA, and the NLRA?
3. Are there other legal theories or arguments advanced by plaintiffs in collegiate student-athlete employment cases that have yet to be fully adjudicated?

This chapter concludes with a theoretical framework review, stakeholder recommendations, and future research suggestions.

Applying the Analysis to the Research Questions

Incorporating Cohen et al.'s (1989) legal research methods, Hall and Wright's (2008) legal content analysis, and Statsky and Wernet's (1995) case analysis techniques, this chapter uses research findings to address the three research questions. It explores legal issues in student-athlete employment claims, factors considered by courts in determining employment status, and unadjudicated legal theories or arguments. The comprehensive dataset includes 15 relevant cases

adjudicated in the Federal and State Courts and the National Labor Relations Board (NLRB) from 1953 to 2024.

Overview of Key Findings

The data showed a limited number of student-athlete employment claim cases. Fifteen cases met the study criteria. In addressing the primary legal issues in collegiate student-athlete employment cases and the court's treatment of these cases, my analysis began with cases that met the study criteria. The cases involve workers' compensation claims, the FLSA, or the NLRA. Initially, the cases focused on workers' compensation. There were extended periods with no cases, notably in the 1970s and 1990s. The first case was a workers' compensation case, *Univ. of Denver v. Nemeth* (1953), and three cases are currently either unadjudicated or under appeal (*Johnson v. NCAA*, 2021; NLRB, n.d.-e-f; *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*; *Trs. of Dartmouth*, 2023). Although *Nemeth* succeeded, subsequent data on student-athlete employment claim cases show that student-athletes have generally been unsuccessful. Courts at various levels, including lower courts, state courts of last resort, appellate courts, or the NLRB, have largely been resistant to recognizing student-athletes as employees (*Berger v. NCAA*, 2016; *Dawson v. NCAA*, 2019; *Rensing v. Ind. State Univ. Bd. of Trs.*, 1983). In nine out of 15 cases, the opposing entities, such as the NCAA, universities, or state bodies responsible for workers' compensation claims, prevailed.

Additionally, the cases raised several issues: the determination of employee status for student-athletes, the question of standing, whether injuries were employment-related, the court's jurisdiction, whether the opposing parties were joint employers and evidentiary concerns. The question of whether student-athletes are considered employees was central in 14 out of the 15 cases.

To address the question of what factors courts consider in determining whether student-athletes are employees, it is important to note that student-athlete employment claims can fall under state workers' compensation laws, the FLSA, and the NLRA. Courts employ a variety of tests to determine if student-athletes fulfill the criteria of an employee under the relevant legislation. These tests evaluate multiple elements or factors, underlining that no single factor is decisive in most cases. Rather, a comprehensive assessment of all factors is necessary to understand the full scope of the relationship between the alleged employee and employer (*Bartels v. Birmingham*, 1947; *Goldberg v. Whitaker House Cooperative, Inc.*, 1961; *Schultz v. Cap. Int'l Sec., Inc.*, 2006; *Sec'y of Labor v. Tony Susan Alamo*, 1991).

Interestingly, the application of these tests varies across courts, even with the same framework. For instance, in *Berger v. NCAA* (2016), the court opted not to apply the *Glatt* multifactor test, which other jurisdictions utilize to evaluate the existence of an employment relationship. The *Glatt* test, adopted by the Second Circuit, introduces a seven-factor framework initially designed to evaluate whether student interns qualify as employees (*Johnson v. NCAA*, 2021). Instead of using the *Glatt* multifactor test, the *Berger* court focused on the principle of amateurism as a means to define the economic reality of the student-athletes and the university (*Berger v. NCAA*, 2016).

One consequence of the limited number of student-athlete employment claim cases is the scarcity of binding precedents for courts to follow. As a result, courts often turn to opinions issued or tests used in other jurisdictions, which may have persuasive value. Courts also use analogous cases or devise their own tests to assess whether student-athletes are employees. This leads to divergent opinions with different outcomes, which enables groups dissatisfied with the current framework to engage in venue shopping, seeking courts that might view their case more

favorably (Jones et al., 1993). Such strategic litigation can facilitate efforts to transform the policy image and challenge the established policies of dominant entities (Jolicouer, 2018). This approach has the potential to change the policy image and contribute to the efforts aimed at disrupting the policies maintained by powerful monopolies.

The factors considered in workers' compensation, FLSA, and NLRA cases vary, but there are notable overlaps. Common overlaps include the right to control the employee's actions, the nature of compensation, and identifying the primary beneficiary of the relationship, all of which are pertinent in workers' compensation, FLSA, and NLRA cases. Unique to workers' compensation cases is the emphasis on whether a contract for hire exists. Adding to this, the concept of providing or rendering services for another could further clarify the evaluation process across these legal frameworks.

To address the third research question regarding the presence of new legal theories or arguments in collegiate student-athlete employment cases that remain adjudicated, I examined two unresolved cases, *Johnson v. NCAA* (2021) and the NLRB (n.d.-d) case involving the *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*; and one under appeal, *Trs. of Dartmouth* (2023). My analysis aimed to identify whether these cases introduced new legal theories, reiterated existing arguments, or signaled a shift due to the historical lack of success in student-athlete employment claims.

I found two novel arguments. The National Labor Relations Board. (n.d.-d) case posits that the NCAA, USC, and PAC12 are joint employers, a theory that, if accepted, could extend its impact on student-athletes at private and public institutions (S. Berkowitz, 2023). In *Johnson*, the court applied the *Glatt* test and found that most of the *Glatt* factors favored the student-athletes, suggesting plausible evidence of their employment status under FLSA.

Furthermore, while many arguments in student-athlete employment claims remain consistent, the changing societal practices might shift more factors in favor of the student-athlete, finding that they are employees. The shift is notable in the evaluation of "expectation of compensation" and "primary beneficiary of the relationship," which traditionally favored institutions and the NCAA in previous cases (*Cheatham v. Workers Comp. Appeals Bd. of Cal.*, 1984; *Dawson v. NCAA*, 2019; *State Fund v. Indus. Comm'n.*, 1957).

By introducing student-athlete's ability to profit from their NIL, it could be argued that many now expect compensation for participation in collegiate athletics. This expectation of NIL compensation presents a significant departure from the historical stance that student-athletes do not play for income, as highlighted in *Berger*. Additionally, the considerable revenue growth within the major athletic conferences (A5 conferences) emphasizes that the university may now be the primary beneficiary of the relationship, especially in lucrative sports like football, suggesting a shift in the economic reality that could favor recognizing student-athletes as employees.

Research Question One: Pertinent Legal Precedents

To identify the legal issues in collegiate student-athlete employment claim cases, I utilized Stasky and Wernet's (1995) case analysis method. This method defines a legal issue as a question of law or a disputable element, including the law's definition, fitting facts to the law, consistent application of the law, or a combination of issues.

Legal Issues. In the study, 14 of the 15 cases explored the employment status of student-athletes. *Northwestern's* case was unique as the NLRB declined to assert jurisdiction, avoiding potential labor relations instability due to its participation in the Big Ten conference, which mostly comprises public institutions. Conversely, in the *Dartmouth* case, the NLRB asserted

jurisdiction, noting that Dartmouth, unlike Northwestern, competes in the Ivy League Conference, which consists entirely of private institutions where the NLRB does have jurisdiction (NLRB, n.d.-e; *Trs. of Dartmouth Coll.*). Two cases explored if injuries were work-related, with other legal issues including the joint-employer theory, standing, and evidentiary errors, thus not posing a threat to labor relations stability (see Figure 20).

The legal issues across the cases varied by type of legal claim (see Figure 21). There were eight workers' compensation cases, four under the FLSA and three related to the NLRA, all examining whether student-athletes qualify as employees. In particular, two workers' compensation cases, *Univ. of Denver v. Nemeth* and *State Comp. Ins. Fund v. Indus. Comm'n of Colo. et al*., focused on whether injuries are work-related. In a notable FLSA case, the Seventh Circuit examined student-athlete's standing to sue, significantly affecting their legal position in employment claims.

Figure 20

The Number and Type of Legal Issues Presented

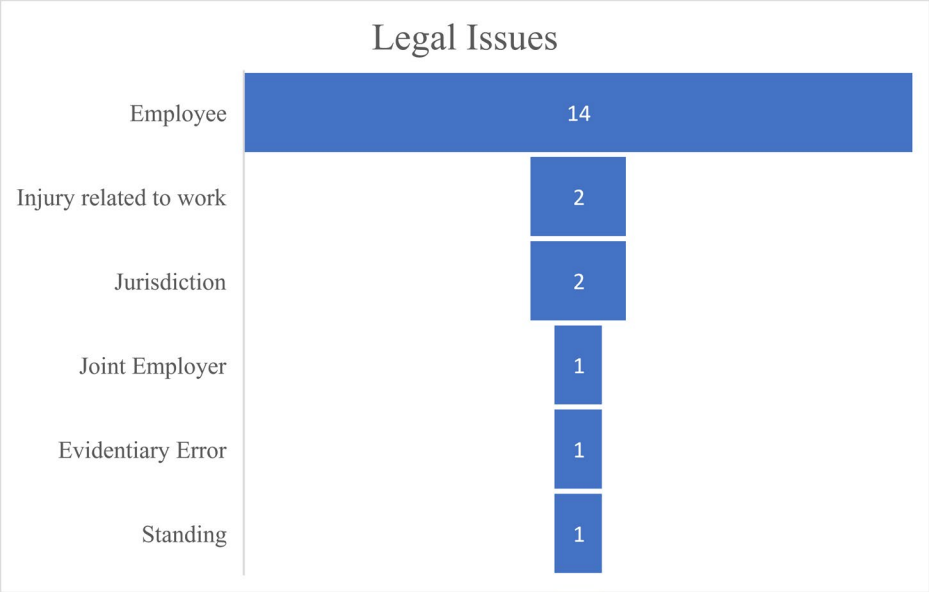
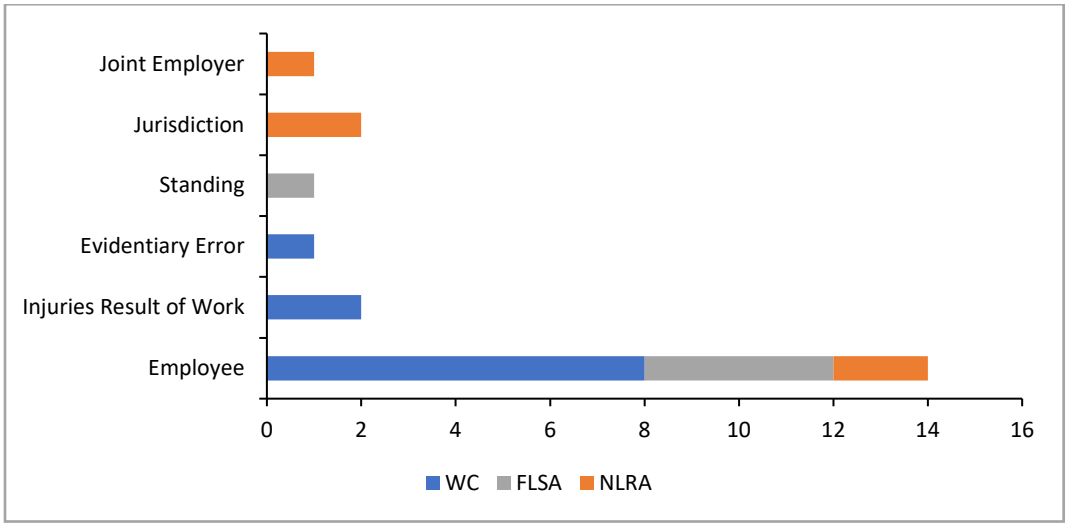


Figure 21

Legal Issues by Type of Legal Claim



Note. WC = workers' compensation; FLSA = Fair Labor Standards Act; NLRA = National Labor Relations Act.

How Court's Treated Student-Athlete Employment Claims. To examine the judicial approach to collegiate student-athlete employment claims, I reviewed the disposition of each case. The outcome, or disposition, refers to the final judgment rendered by the court (Garner, 2019). For this study, the disposition is categorized into two parts: (1) the court's action and (2) the party in whose favor the court ruled. In lower court rulings, typical actions include dismissing the case, granting or denying motions, or ruling in favor of one of the parties. Appellate courts typically affirm, reverse, remand, or modify the decisions made by lower courts (Statsky & Wernet, 1995).

Type of Court Action. In this study, which includes fifteen cases, the courts affirmed lower courts' decisions in eight instances. In two cases, the appellate court reversed the decision of the lower court. Two cases, *Johnson v. NCAA* (2021) and NLRB (n.d.-d) *Univ. of S. Cal.*, *Pac-12 Conference*, *NCAA* remain unadjudicated. In the *Trs. of Dartmouth* (2023) cases, the NLRB

Regional Director (acting as the lower court) ruled in favor of the student-athletes, though this decision is currently under interlocutory appeal. In the *Northwestern Univ.* case, despite the Regional Director initially determining that student-athletes were employees, the NLRB later dismissed the petition without addressing the employment status decision. The NLRB reasoned that exerting jurisdiction would not promote labor relations' stability in college athletics since most of Northwestern's competitors were public institutions, and the NLRB lacks authority regarding student-athlete employment status. The last case, *Livers v. NCAA*, was voluntarily dismissed by *Livers* following an order for discovery (see Figure 22).

Overall Outcome. Out of the 15 cases reviewed, nine were decisively ruled in favor of the opposing entities, such as the NCAA, university, workers' compensation appeals boards, or their state equivalents. Two cases concluded favorably for the student-athletes. The *Trs. of Dartmouth* case ended with an inconclusive outcome for the student-athlete, which is presently under appeal. In *Livers v. NCAA* (2018), the student-athlete chose to voluntarily dismiss the lawsuit. The final two cases, *Johnson v. NCAA* (2021) and NLRB (n.d.-d) *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*, are still pending resolution (see Figure 23).

Figure 22

Final Disposition—Court Action

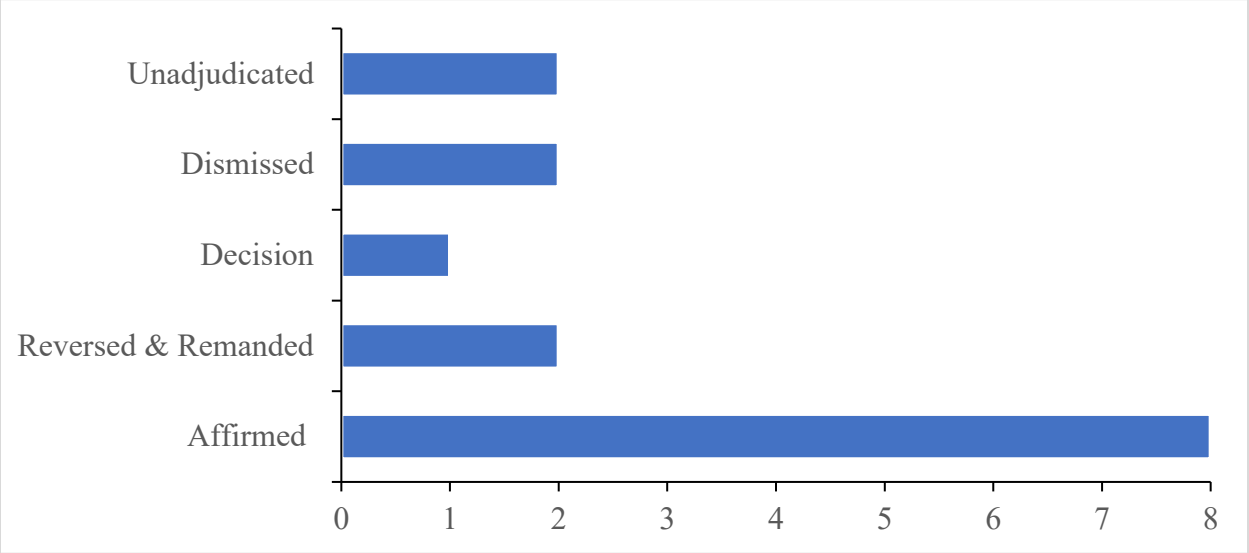
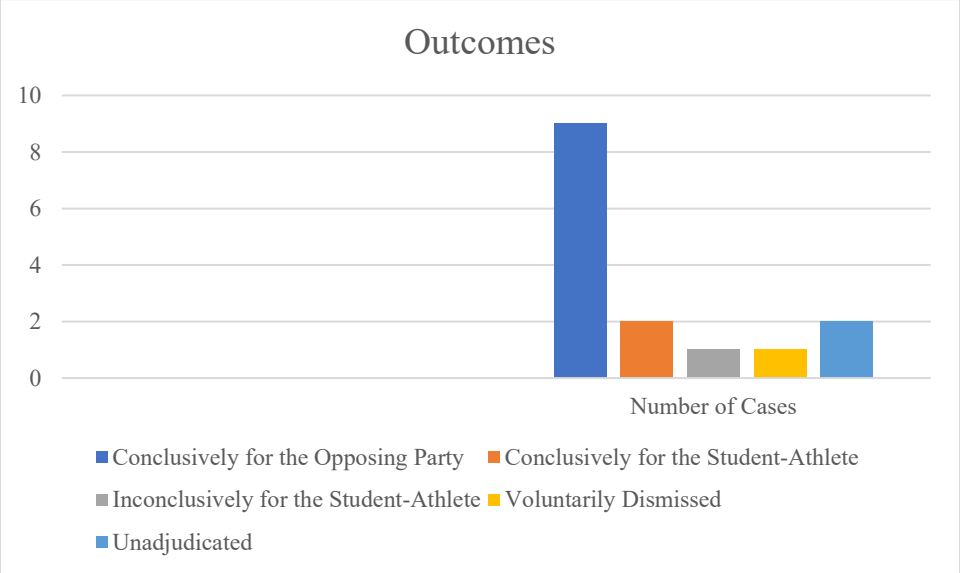


Figure 23

Outcome of Student-Employment Claim Cases

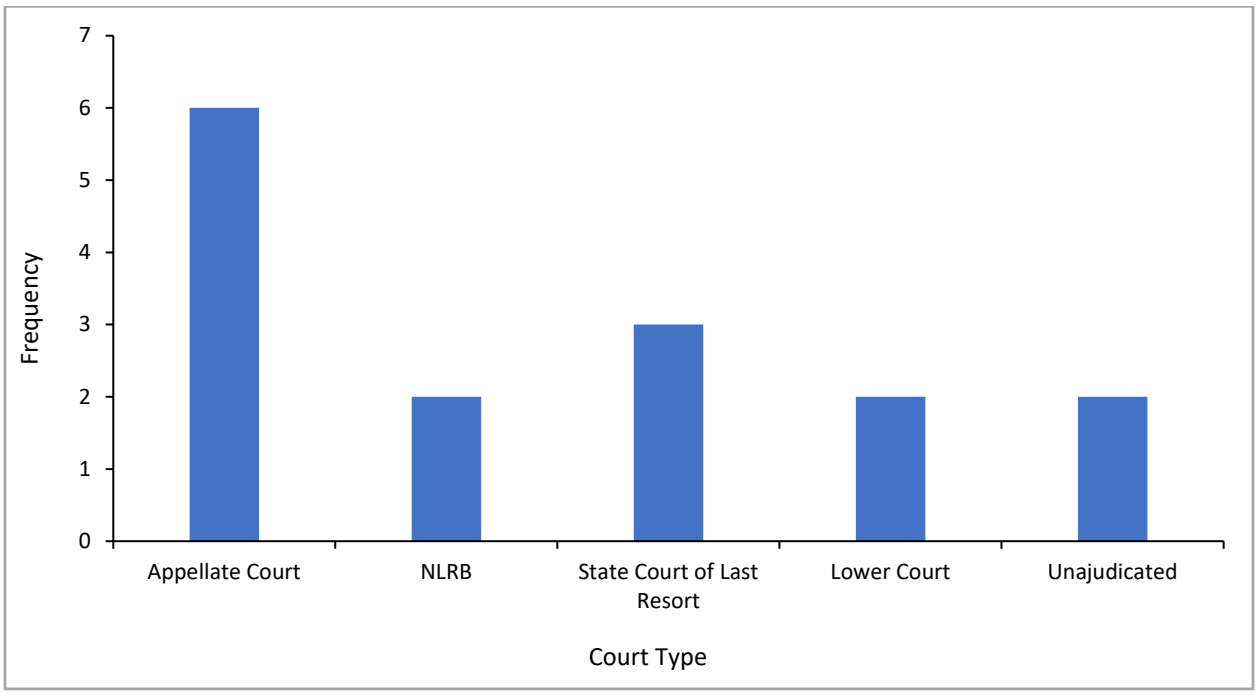


Six out of the 15 cases analyzed in this study were rulings from appellate courts, three cases from state courts of the last resort, two from the NLRB, two from lower courts, and two

cases unadjudicated. The court of last resort represents the highest judicial authority within a state (see Figure 24; Administrative Office of the U.S. Courts, n.d.).

Figure 24

Court Decision by Court Type



Note. NLRB = National Labor Relations Board.

Summary. This section consolidates findings related to the primary legal issues in collegiate athlete employment claim cases and articulates the judicial responses to these claims. Throughout the study, we have observed that the judicial landscape is significantly influenced by the nature of the institution (public vs. private) and the applicable legal framework (workers' compensation, FLSA, NLRA). For instance, the NLRB's jurisdictional decisions in the *Northwestern* and *Dartmouth* cases illustrate how public and private distinctions can dictate legal outcomes. Moreover, the diverse judicial actions—ranging from affirmations of lower court

decisions to reversals or remands—highlight the complex interplay of legal principles at work. The courts have generally shown a trend towards ruling in favor of opposing entities, such as the NCAA or universities, especially in contexts where the definition of "employee" under various laws is contested. However, there have been notable exceptions where student-athletes have found legal standing, as evidenced in the initial ruling in the *Dartmouth* case, which is currently under appeal.

By closely examining these outcomes, this study provides a thorough understanding of how legal precedents and judicial reasoning have shaped the resolution of student-athlete employment claims. This study not only addresses the revised research question effectively but also offers a comprehensive snapshot of the current judicial stance on a complex and evolving issue.

Legal Issues. The analysis highlighted six main legal issues: the employment status of student-athletes, whether injuries sustained were related to their athletic participation, the presence of evidentiary challenges, the standing of student-athletes to initiate legal action, the applicability of the joint employer doctrine to the NCAA and Pac-12, and the jurisdiction of the court over the cases. Whether student-athletes are considered employees was a central issue in fourteen of the fifteen cases. The nature of the legal issues varied depending on the type of legal claim. Workers' compensation cases primarily addressed employee status, work-related injuries, and evidentiary legal issues. Fair Labor Standards Act-related cases raised questions about employee status and the standing of the claimants. NLRA cases delved into issues of employment status, jurisdiction, and the joint employer doctrine.

Court Treatment. Eight of the 15 cases analyzed have had courts affirm the rulings of lower courts. The final verdicts in student-athlete employment cases have emerged from various

judicial levels. Nine cases have been decided by appellate courts and state courts of last resort. Additionally, the *Trs. of Dartmouth* case is currently under appeal, illustrating that parties often appeal lower court decisions, potentially leading to prolonged and expensive litigation.

The judicial system has predominantly sided with the opposing entities: the NCAA, university, or state workers' compensation appeal boards. While student-athletes secured victories in early workers' compensation cases, such as *Univ. v. Denver* (1953) and *Van Horn v. Indus. Accident Comm'n and Cal. Polytechnic Coll.* (1963), they have yet to achieve conclusive wins in FLSA or NLRA cases. Although there was an initial victory for student-athletes in the *Trs. of Dartmouth* case, this decision will likely be contested through appeals for years to come. In the cases, the prevailing policy image favored the arguments of amateurism, as evidenced by rulings like *Berger v. NCAA*, 2016, and *Dawson v. NCAA*, 2019. As Jones et al. (1993) pointed out, challenging the established policies of a powerful monopoly is very difficult. The following section will explore the second research question, exploring the criteria courts consider when determining the employment status of student-athletes.

Research Question Two: Factors Weighed by the Courts

To address the second research question, I analyzed the legal case decisions. This approach assisted in identifying the criteria that the courts consider when determining the employment status of collegiate student-athletes.

Workers' Compensation Case Factors. The existing literature on student-athlete workers' compensation led me to anticipate that courts would determine employment status based on the presence of an express or implied contract for hire and a quid pro quo relationship with the university (Roberts, 1996; Yasser, 1984). Additionally, I expected a focus on the contractual intent between the parties. This hypothesis was validated, as courts indeed examine

the existence of a contractual relationship between student-athletes and universities in their assessments of employment status.

My analysis identified seven distinct factors that the courts considered across the dataset's eight workers' compensation cases. These factors are (1) compensation, (2) contract, (3) economic benefit, (4) intent, (5) rendering service, (6) the right to control or discipline, and (7) statutory exclusion (see Figure 25). I observed that courts frequently evaluated multiple factors to conclude whether student-athletes qualify as employees. The minimum number of factors assessed in a single case was one. For instance, in *Graczyk v. Workers' Comp. Appeals Bd.* (1986), the California Court of Appeal, Second Appellate District determined the California Workers' Compensation Act does not classify student-athletes as employees. Similarly, in *State Fund v. Indus. Comm'n*. (1957), the court concluded there was no contractual obligation to play football, negating an employer-employee relationship.

On average, the cases involved the consideration of 2.5 factors (see Figure 26). In *Coleman v. W. Mich. Univ.* (1983), the court applied a multifactor test with four criteria to ascertain if student-athletes were employees.

Figure 25

Total Occurrences of Factors in Workers' Compensation Cases

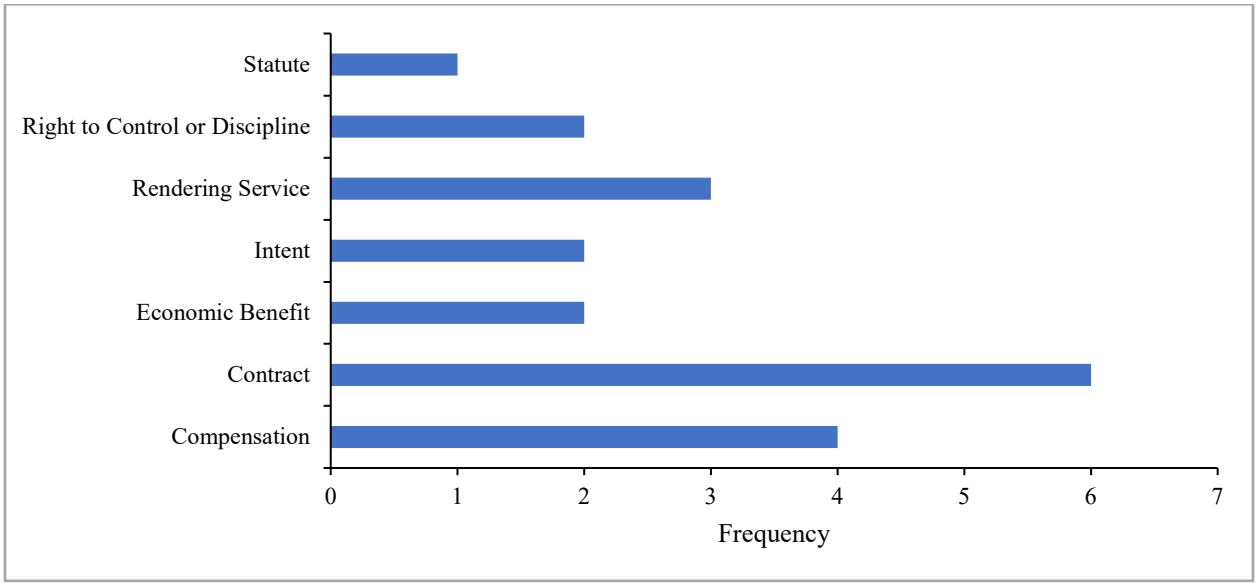
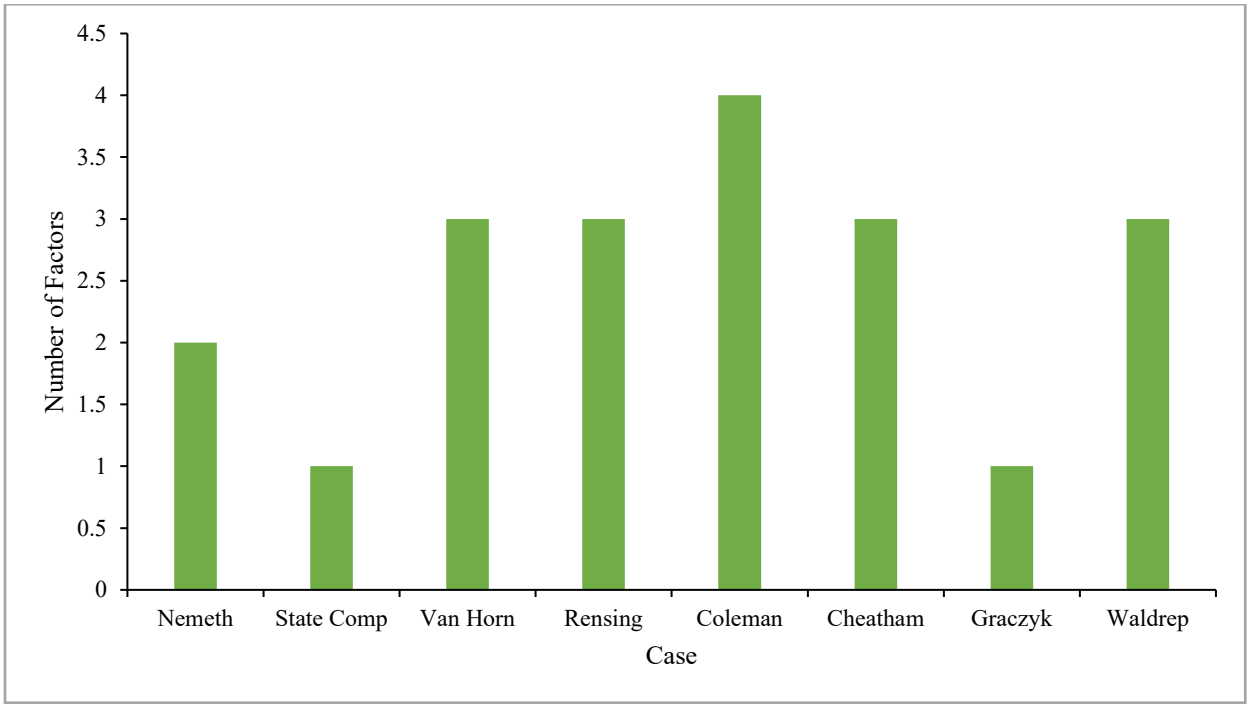


Figure 26

Number of Factors in Each Workers' Compensation Case



Workers' Compensation Case Factors Are Primarily Contractual in Nature. In the analysis of workers' compensation cases, the element termed "contract" emerged in six out of eight instances. "Contract" refers to how courts examine statutory definitions within workers' compensation legislation. An example of this is found in the *Van Horn* case, where the court looked at the definition of an employee as outlined in the California Labor Code, § 3351: "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed" (CA Labor Code § 3351; California Department of Industrial Relations, n.d.). Although courts often referenced statutory definitions that incorporate language about a "contract for hire," their analysis typically extended beyond this to include other factors.

For instance, in *Coleman v. W. Mich. Univ.* (1983), acknowledging the statutory language regarding a "contract for hire," the court applied a four-factor test to ascertain if an employer-employee relationship existed between the student-athlete and the university. In *Rensing v. NCAA* (1983), reference was made to Indiana's Workers' Compensation statutory definition, which includes a "contract for hire." Yet, the court placed greater emphasis on the "intent" to form a contract. Similarly, in *Waldrep v. Tex. Empl'rs Ins. Assoc.* (Texas App., 2000), despite considering the presence of a contract, the court focused more on the "intent" of the involved parties. *Waldrep* also examined the university's right to control or discipline the student-athlete (Texas App., 2000). In *Cheatham v. Workers Comp. Appeals Bd. of Cal.* (1984), the analysis centered on the economic benefits derived by the parties from one another.

The concept of compensation was considered in four cases, where courts examined it as a form of consideration or the exchange of promises, as seen in *Univ. of Denver v. Nemeth* (1957), *Van Horn v. Indus. Accident Comm'n* (1963), and *Rensing v. NCAA* (1983). The approach to

compensation took a slightly different angle in *Coleman v. W. Mich. Univ.* (1983), where the Michigan Court of Appeals assessed compensation in terms of how much the employee depended on these wages for daily living expenses. The factor of the right to control or discipline encompasses whether the employer has the authority over the employee's actions, job, payment method, the right to terminate or discipline, and whether the employer supplies the employee with work equipment (Roberts, 1996; Tiscione, 2007).

This factor was scrutinized in *Coleman v. W. Mich. Univ.* (1983) and *Waldrep v. Tex. Emp'rs Ins. Assoc'n* (Texas App., 2000). In *Coleman*, the court implemented a four-factor test that distinctly considered the right to control and the right to discipline. By applying this test and evaluating this factor, the court recognized that the university did maintain control over Coleman's football-related activities and possessed some disciplinary authority. However, it was noted that the university could not revoke Coleman's scholarship, and its control over his academic pursuits was similar to that of other students (1983).

Graczyk v. Workers' Comp. Appeals Bd. (1986) stands out as the case in which the court concluded that the student-athlete did not meet the definition of an employee under the California Labor Code, following a 1981 amendment by the California Legislature to explicitly exclude student-athletes from the "employee" category. This instance illustrates the "Statutory Exclusion" factor.

In *Univ. of Denver v. Nemeth* (1957), the court found that the student-athlete had provided services to the university by participating on the football team. This concept was reiterated in *Van Horn v. Indus. Accident Comm'n* (1963), where the court ruled Van Horn qualified as an employee under the statutory definition, which necessitates "rendering services for another." In *Van Horn*, the court determined that the student-athlete's participation on the

football team, along with maintaining a 2.2 grade point average to retain his scholarship, constituted rendering services to the university.

Conversely, the court in *Cheatham v. Workers Comp. Appeals Bd. of Cal.* (1984) did not regard participation on the football team as providing services to the university. Instead, in *Cheatham*, the court viewed the university as providing a service to the student-athlete by offering educational opportunities for his benefit. The court noted,

> "In the instant case, the record contains no evidence that petitioner's wrestling activities were of economic benefit to Cal Poly. Indeed, the record contains no indication that any fee was charged for admission to wrestling matches. So far as the record discloses, the only benefit received by Cal Poly from petitioners' wrestling activities was an inferential increase in the reputation of Cal Poly's wrestling program due to petitioner's status as a former state champion" (*Cheatham v. Workers Comp. Appeals Bd. of Cal.*, 1984, p. 60).

In this case, the absence of direct economic benefit from the student-athlete's participation distinguished it from *Van Horn*.

The notion of economic benefit was also scrutinized in *Coleman v. W. Mich. Univ.* (1983). The court concluded that playing football did not align with the university's primary educational mission. Although the university broadly benefited from football participation, the court emphasized that the "Defendant is not a commercial venture benefiting financially from its football team any more than it has a pecuniary interest in the accomplishments of its other scholarship program recipients" (*Coleman v. W. Mich. Univ.*, 1983, p. 42).

Summary. Workers' compensation cases involve many factors that courts assess to ascertain the presence of an employment relationship. A fundamental factor often scrutinized is the existence of a contractual relationship between the student-athlete and the university. Despite

the successes in early cases like *Nemeth* and *Van Horn*, victories for student-athletes have been elusive since 1963. The jurisdiction for all workers' compensation cases discussed has been state courts, with *Waldrep* in 2000 being the last adjudicated case. Given these developments, it is plausible to suggest that workers' compensation cases might hold limited precedential value in future deliberations.

The concept of economic benefit, highlighted in *Coleman*, shares similarities with the primary beneficiary principle observed in *Johnson*, a more recent and ongoing FLSA student-athlete employment case. Both approaches interrogate which party, either the purported employee or employer, derives greater advantage from the relationship. The forthcoming section will explore the considerations courts employ to determine if student-athletes qualify as employees under the FLSA.

FLSA Case Factors. This study examines four student-athlete employment FLSA cases: *Berger v. NCAA* (2016), *Livers v. NCAA* (2018), *Dawson v. NCAA* (2019), and *Johnson v. NCAA* (2021). This section will discuss only three of these cases. The *Johnson* case remains unadjudicated and will be explored in the next section of the dissertation, which addresses whether plaintiffs in cases that have not been fully adjudicated raise other legal theories or arguments.

Recent literature on student-athlete employment claims under the FLSA is extensive (Corrada, 2020; Gordon, 2023; Kennebrew, 2022; Rosenthal, 2017; Shults, 2022). Drawing from this literature, I anticipated that courts would apply various "economic reality" tests to determine whether student-athletes are employees under the FLSA. The concept of economic reality involves assessing whether the worker is economically dependent on the employer or is

essentially in business for themselves (Department of Labor, 2024; *Livers v. NCAA*, 2018). Citing *Vanskike* (1992), the *Berger* Court emphasized,

> Because status as an "employee" for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the "economic reality" of the working relationship between the alleged employee and the alleged employer to decide whether Congress intended the FLSA to apply to that specific relationship. To guide this inquiry, courts have developed a variety of multifactor tests. (*Berger v. NCAA*, 2016, p. 290)

None of the FLSA Cases Use the Same Legal Test. The data from the study revealed that none of the three cases discussed use the same analysis to determine whether collegiate student-athletes are employees under the FLSA. Courts sometimes adopt a holistic approach to ascertain the economic reality or the extent to which the employee economically depends on the employer (*Livers v. NCAA*, 2018; *Tony & Susan Alamo Found.*, 1985). In *Livers*, the court considered whether the Donovan multifactor test might be suitable for evaluating collegiate student-athlete employment claims under the FLSA, though it ultimately did not apply this test initially, choosing instead to compare the plaintiffs in *Livers* to those in *Tony & Susan Alamo Found. v. Sec'y of Labor* (*Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 1985). In that precedent, the U.S. Supreme Court determined:

> that individuals engaged in the ordinary commercial activities of a religious foundation, including staffing retail clothing and grocery outlets, roofing and electrical construction companies, and a motel, were "employees" that under the FLSA and therefore entitled to its protections, despite the fact that they received no cash salaries and did not consider

themselves to be employees, but rather volunteers working for religious reasons. (pp. 293–303)

The court in *Tony & Susan Alamo Found. v. Sec'y of Labor* (1985) reasoned that the workers were economically dependent on the employer even though they did not receive cash payments. The court further determined that there was implied compensation, as the workers received food, shelter, and clothing from the foundation. The court also noted the duration of the employment during this period of economic dependency. Based on these factors, the court ultimately found that the workers were employees as a matter of economic reality. The *Livers* court drew parallels between these workers and student-athletes, who also receive noncash benefits and could be argued to be economically dependent on their universities for extended periods. This case highlighted three discernible factors that could assist in evaluating collegiate student-athlete employment claims under the FLSA. Moreover, the *Livers* court addressed the FOH § 10b03, which excludes student-athletes from the definition of employee under the FLSA, as a factor in its analysis (*Livers v. NCAA*, 2018).

The *Dawson* court applied the multifactor test articulated by the U.S. Supreme Court in *Walling v. Portland Terminal Co*. (1947) and *Goldberg v. Whitaker House Cooperative*, *Inc*. (1961), which listed three factors in its analysis (*Dawson v. NCAA*, 2019). These factors included the expectation of compensation, the right to control or discipline, and whether the rules were designed to evade the law. The court found that student-athletes were not employees of the NCAA and Pac-12, as these entities had no authority to hire or fire them or control their schedules. Regarding the expectation of compensation, the court noted that there could be no such expectation from the NCAA and Pac-12, as neither was responsible for compensating the

student-athletes. Furthermore, the court found no evidence that NCAA rules, which have been in place since the early twentieth century, were intended to circumvent the law.

The *Berger* court declined to use a multifactor test and opted for a more flexible approach to determine the "true nature of the relationship" between student-athletes and the university and NCAA (*Berger v. NCAA*, 2016, p. 291). The court relied on the Department of Labor's (DOL) Field Operation Handbook (FOH), particularly Section 10b03, which excludes student-athletes from the definition of employee under the FLSA, as persuasive authority. The court in *Berger* also found that student-athletes participated in intercollegiate athletics for many years without any expectation of compensation and that the "revered tradition of amateurism" defined the economic reality of their relationship with the university and NCAA (p. 291).

Upon reviewing *Berger*, *Livers*, and *Dawson*, I determined that the courts considered six factors when deciding whether student-athletes were employees. These factors include (1) the expectation of compensation, (2) the duration of the working relationship, (3) the right to control and discipline, (4) whether the rules were conceived to evade the law, (5) whether there was a statutory exclusion, and (6) whether the employee was economically dependent on the employer (see Figures 27–28).

Summary. There are very few student-athlete employment claims under the FLSA. The cases are relatively recent, with the first case, *Berger*, decided in 2016 (*Berger v. NCAA*, 2016). Given the limited case history and binding authority, courts utilize multifactor tests or legal theories from non-student-athlete FLSA cases. Each of the three cases I reviewed employs a different multifactor test or no test at all to determine whether collegiate student-athletes are employees under the FLSA. Student-athletes have not been successful in their litigation to be recognized as employees under the FLSA. In *Berger* and *Dawson*, the courts concluded that

student-athletes were not employees (*Berger v. NCAA*, 2016; *Dawson v. NCAA*, 2017). In *Livers*, although the student-athlete's amended complaint survived a motion to dismiss, the case was voluntarily dismissed by the student-athlete after the judge ordered discovery (*Livers v. NCAA*, 2018).

Figure 27

Total Occurrences of Factors in the Fair Labor Standards Act Category

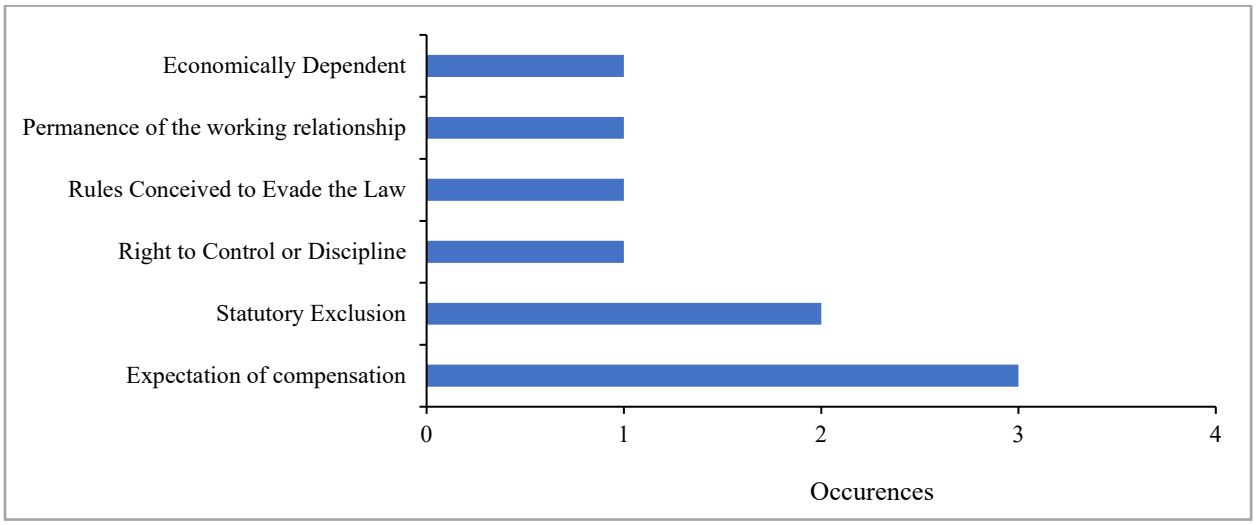
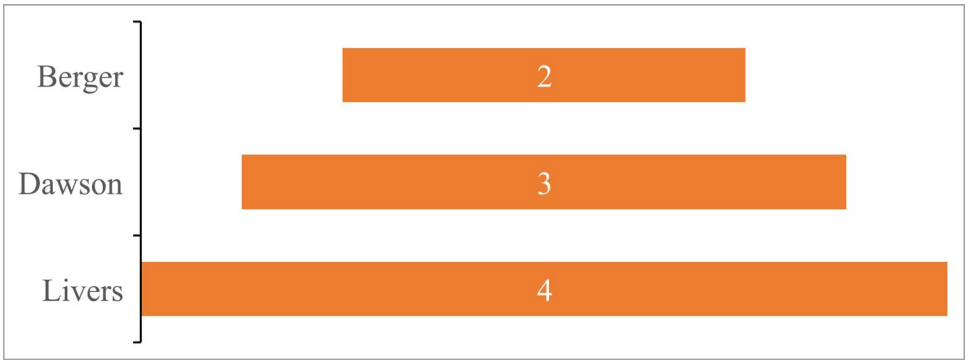


Figure 28

Number of Factors in Each Fair Labor Standards Act Case



The factors evaluated in FLSA cases share similarities with those in workers' compensation cases. These include the right to control or discipline, the concept of who benefits from the relationship, the use of statutory exclusions, the expectation of compensation, and the notion of rendering service to an employer. However, FLSA cases typically omit some of the contractual factors present in workers' compensation cases. Furthermore, as each Circuit court employs different multifactor tests or eschews them entirely, parties may engage in venue shopping to find courts more sympathetic to their cause, aiming to challenge the policy image of amateurism and influence the policies of the NCAA.

Another significant implication of courts using different tests in similar cases is the potential for varying outcomes in Circuit courts regarding student-athlete employment claims, which could lead to a Circuit split and prompt the U.S. Supreme Court to ultimately resolve the issue. This scenario may not be favorable for the NCAA, universities, and athletic conferences, especially considering the Supreme Court's stance in *NCAA v. Alston* (2021). In *Alston*, Justice Kavanaugh, in his concurring opinion, strongly criticized the NCAA's non-compensation model, stating:

> The NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student-athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. B176ndianastudent-athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. (*NCAA v. Alston*, 2021, p. 2168)

To continue exploring question two, the next section will review the factors that courts consider when determining whether student-athletes are employees under the NLRA.

NLRA Case Factors. In preparing this section of the dissertation, I anticipated finding three cases or complaints based on previous research and my review of the literature regarding student-athlete employment claims under the NLRA. My research confirmed the existence of three pertinent cases: National Labor Relations Board (n.d.-f); *Northwestern Univ.*; NLRB (n.d.-e); *Trs. of Dartmouth Coll.*; NLRB (n.d.-d) *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*. I will discuss the *Northwestern* and *Trs. of Dartmouth* cases in this section. The *NLRB v. USC* case remains unadjudicated and will be addressed in the subsequent section of the dissertation, which explores whether plaintiffs in cases that have not been fully adjudicated raise other legal theories or arguments.

All NLRA complaints and cases fall under the jurisdiction of the NLRB. The National Labor Relations Board is tasked with enforcing the provisions of the NLRA, which include arbitrating deadlocked labor-management disputes, ensuring democratic union elections, and penalizing employers for unfair labor practices (NLRB, n.d.-h). Additionally, the NLRB is tasked with identifying appropriate bargaining units, overseeing elections for union representation, and investigating allegations of unfair labor practices committed by employers (NLRA, n.d.).

Upon reviewing and analyzing the cases, I found that the *Northwestern* and *Trs. of Dartmouth* cases begin their examination of student-athlete employment claims under the NLRA by referencing the legal standard and definition of an employee as outlined in Section 2(3) of the NLRA (NLRB, n.d.-h). This section defines an "employee" to include any employee and is not limited to employees of a particular employer unless the Act explicitly states otherwise. It

encompasses individuals whose work has ceased due to a labor dispute or an unfair labor practice and who have not found substantially equivalent regular employment. It excludes agricultural laborers, domestic workers in private homes, individuals employed by their parents or spouses, independent contractors, supervisors, and individuals covered under the Railway Labor Act, as well as employees not defined by the employer (NLRB, n.d.-h).

The U.S. Supreme Court has interpreted this broad definition to include consideration of the common law definition of an employee, which is defined as a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment (*NLRB v. Town & Country Electric*, 516 U.S. at 94). The National Labor Relations Board utilizes this common law test to determine who qualifies as employees under the NLRA (*Brown University*, 342 NLRB 483, 2004).

NLRA Cases Use the Same Legal Standards and Factors. The analysis indicates that student-athlete employment cases under the NLRA consistently apply the same legal standard and factors to determine whether student-athletes qualify as employees under the NLRA. These factors originate from the common law definition of an employee, which includes (1) one who renders service for another, (2) under a contract for hire, (3) under the control of the employer, and (4) in exchange for compensation (see Figures 29–30). Both the *Northwestern* and *Trs. of Dartmouth* cases incorporate these factors in their evaluations.

Although the Northwestern petition was subsequently dismissed by the NLRB as they declined to assert jurisdiction so as not to destabilize labor relations, the NLRB did not address the Regional Director's (RD) finding that the scholarship athletes were employees under the NLRA (NLRB, n.d.-f; *Northwestern University*). For this reason, I included the RD's analysis of student-athlete employment under the NLRA.

Figure 29

Number of Occurrences in Each National Labor Relations Act Case

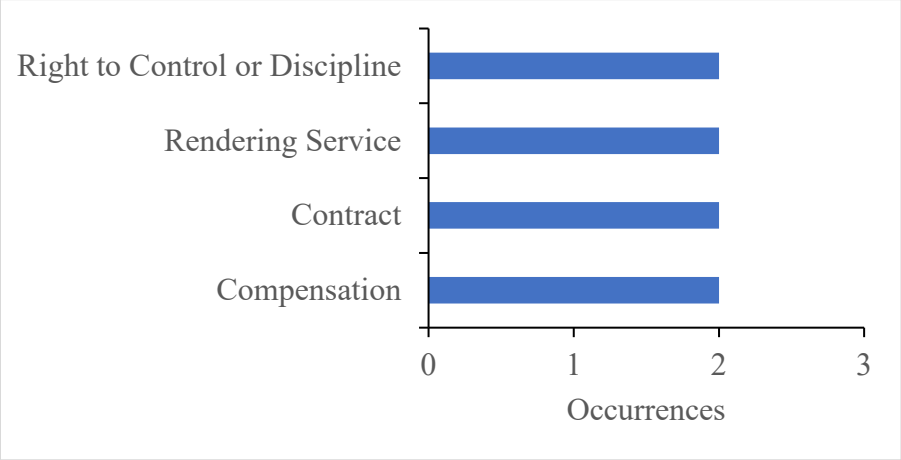
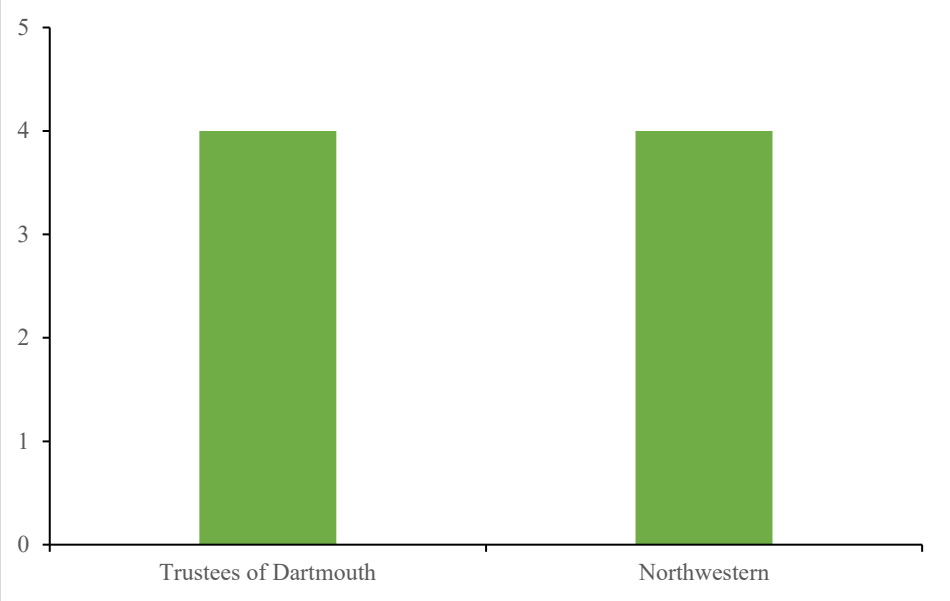


Figure 30

Number of Factors in Each National Labor Relations Act Case



The Regional Director in the *Northwestern* and *Trs. of Dartmouth* cases held that student-athletes rendered service to their respective universities under a contract for hire were under the control of their respective universities and received compensation for their services.

In *Northwestern*, the RD found that the scholarship football players provided services that benefited the university and received compensation for their services. Highlighting the significant revenue generated by the football program—approximately $235 million from 2003 to 2012—the RD pointed out that players were compensated with scholarships valued at up to $76,000 annually. It was noted that the players were under strict control by Northwestern, evident from mandatory training camp attendance, daily schedules set by their coaches, and extensive time commitments to football activities—50–60 hours per week during training camp and 40–50 hours once classes began.

Further, the RD remarked on the extensive control coaches had over players' private lives, requiring players to obtain permission to: "(1) make their living arrangements; (2) apply for outside employment; (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling" (*Northwestern University*, 2015, p. 1364). However, the RD concluded that non-scholarship football players did not qualify as employees due to the lack of compensation and more flexible schedules.

In *Trs. of Dartmouth*, the RD held that the Dartmouth men's varsity basketball team members were employees under the NLRA. The regional director found that by participating on the basketball team, the student-athletes rendered service to the university by facilitating donations, engaging alumni, and enhancing the college's image. The Regional Director also found that the student-athletes received compensation in the form of preferential consideration during admissions ("early read"), athletic apparel, game tickets, accommodation, meals, and additional perks such as academic support and performance training (*Trs. of Dartmouth Coll.*, 2021).

The Regional Director cited evidence that Dartmouth required student-athletes to adhere to the student-athlete handbook and participate in team and alumni engagement activities, demonstrating the university's significant control over the student-athletes. Additionally, the RD noted that Dartmouth controlled the travel schedule, meals, and even personal haircut appointments when traveling to away games (*Trs. of Dartmouth Coll.*, 2021).

Summary. Student-athlete employment claims under the NLRA are evaluated based on the common law definition of an employee. The factors considered to determine whether student-athletes are employees include (1) rendering service for another, (2) under a contract for hire, (3) under the control of the employer, and (4) in exchange for compensation.

Although the Regional Directors in the *Dartmouth* and *Northwestern* cases reached the same conclusion that student-athletes can be employees, the fact situations differed, leading to some distinctions in their analyses. In *Northwestern*, the RD included only scholarship student-athletes in the decision, reasoning that non-scholarship student-athletes who did not receive compensation and were under less university control with more schedule freedom did not meet the definition of an employee. Conversely, at Dartmouth, where no student-athletes receive athletic scholarships, the RD found that all student-athletes received noncash compensation such as "early read" by admissions, apparel, equipment, lodging, and meals. These benefits and additional perks like career and academic services and free tickets were deemed sufficient compensation. This decision was supported by the precedent set in *Seattle Opera*, where the NLRB found that a nominal payment of less than $300 to auxiliary performers was enough to establish employee status (*Seattle Opera v. N.L.R.B*, 292 F.3d 757 D.C. Cir. 2002).

A notable distinction between the *Northwestern* and *Trustees* cases was the economic impact of the teams. Unlike Northwestern's football program, which generated substantial

revenue, Dartmouth's men's basketball team did not bring in significant funds. However, the RD noted that the Dartmouth athletes still rendered a service to the university by contributing to fundraising and nominal basketball revenue. They also participated in alumni events, enhancing the university's image, which in turn increased interest and applications to the university (*The Trs. of Dartmouth Coll.*, 2021).

As we transition to discussing ongoing student-athlete employment cases in the next section, it is crucial to understand the evolving landscape of student-athlete litigation, which has grown significantly over recent years. The next section will explore the third research question: Are there other legal theories or arguments advanced by plaintiffs in collegiate student-athlete employment cases that have not been fully adjudicated? This question will explore the legal strategies and theories still under consideration in ongoing cases.

Research Question Three: Unadjudicated Cases

To address the third research question, which explores whether there are other legal theories or arguments advanced by plaintiffs in unadjudicated student-athlete employment cases, I initially reviewed secondary materials such as news articles and legal websites like law360.com to gather information on recent student-athlete litigation efforts. As Senior Vice President of the NCAA, I also attend weekly briefings on ongoing legal issues. My research revealed two unadjudicated student-athlete employment cases: *Johnson v. NCAA* (E.D. Pa. 2021), and National Labor Relations Board (n.d.-d) *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*.

In *Johnson v. NCAA* (E.D. Pa. 2021), student-athletes from various universities and states are suing the NCAA and its member institutions for multiple violations of the FLSA. The *Johnson* case is currently under review in the Third Circuit Court of Appeals on an interlocutory appeal (Auerbach, 2023b). In National Labor Relations Board (n.d.-d) *Univ. of S. Cal.*; *Pac-12*

Conference; *NCAA*, the NLRB General Counsel filed a complaint against USC, the NCAA, and the Pac-12 Conference, accusing these institutions of jointly acting as employers who unlawfully categorize student-athletes as non-employees, thereby denying them their rights as employees.

Upon reviewing these cases, I identified a new legal argument in the *Johnson* case and another in the *NLRB—USC* case. In rejecting the defendant's motion to dismiss, the *Johnson* court applied the *Glatt* multifactor test to analyze whether the student-athletes had presented a plausible argument, based on the facts, that they qualified as employees under the FLSA. This marked the first application of the *Glatt* multifactor test in a student-athlete employment claim under the FLSA.

In the *NLRB—USC* case, the NLRB General Counsel alleged the defendants acted jointly to misclassify student-athletes as non-employees, thereby depriving them of their employment rights under the NLRA (n.d.-d; *Univ. of S. Cal.*; *Pac-12 Conference*; *National Collegiate Athletics Association*). If the defendants are found to be joint employers, this NLRB case could have broad implications, as the NLRB traditionally oversees only private institutions (S. Berkowitz, 2023).

***Glatt* Multifactor Test.** Although the *Berger* court declined to use the *Glatt* multifactor test, the court in *Johnson* did not follow this precedent. The *Johnson* court disagreed with the *Berger* court's view that the revered tradition of amateurism accurately reflects the economic realities of the relationship between student-athletes and universities (*Johnson v*. *NCAA*., 2021). Instead, the *Johnson* court referred to the Ninth Circuit's opinion in Benjamin (2017), stating that the "primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA" (*Johnson v*. *NCAA*, 2021, p. 509). The court

in *Johnson* adopted the *Glatt* test developed by the Second Circuit. In *Glatt*, the Second Circuit developed this multifactor test to assess whether an intern or the employer was the primary beneficiary of the relationship (*Glatt v. Fox Searchlight Pictures, Inc.*, 2015).

In applying the *Glatt* factors in *Johnson*, the district court determined that the first *Glatt* factor indicated the plaintiffs were not employees, given there was no expectation of payment. The court reasoned that student-athletes cannot negotiate wages, as schools have collectively agreed to neither offer nor allow compensation for athletic participation.

The court deemed the second and fifth *Glatt* factors as neutral; the complaint did not specify whether athletics offered an educational experience akin to a traditional educational environment or if the duration of sports participation provided beneficial educational opportunities. The third factor suggested the plaintiffs were employees, as athletics are not part of the academic curriculum, and student-athletes do not earn academic credit for participation in athletics. The fourth factor also supported employee status, given evidence in the complaint that NCAA athletics could disrupt the plaintiffs' academic pursuits (U.S. Department of Labor, n.d.-b).

Regarding the sixth *Glatt* factor, the court found no indication that student-athletes displace paid employees; however, their participation in NCAA Division I athletics did not yield significant educational benefits. The complaint highlighted substantial time commitments to athletics, conflicts between class schedules and athletic obligations, and the lack of integration of sports participation within the academic curriculum, including the absence of academic credit for athletic involvement (U.S. Department of Labor, n.d.-b).

Lastly, the court observed no expectation among student-athletes of paid employment after their college sports careers, leading to the conclusion under the seventh factor that the plaintiffs were not considered employees of the defendants.

In summary, the district court found that factors three, four, and six supported the argument that the plaintiffs were employees, while factors two and five were deemed neutral. Factors one and seven were found to favor the conclusion that the plaintiffs were not employees of the defendants. For these reasons, the district court concluded that the plaintiffs had presented plausible facts sufficient to claim employee status under the FLSA.

Should student-athletes prevail in *Johnson*, it could lead to all student-athletes being declared employees under the FLSA, which would have broad implications for intercollegiate athletics. Another case with potential wide-reaching effects on college athletics is NLRB (n.d.-d; *Univ. of S. Cal.*; *Pac-12 Conference*; *NCAA*). The impact of a decision in favor of the NLRB and student-athletes would be magnified if the NLRB's joint employer theory is successful. Next, we will discuss the NLRB's joint employer theory.

Joint Employer Rule. Signed into law in 1935, the NLRA was created to guarantee workers' rights to collectively bargain for better working conditions without fear of retaliation (NLRB, n.d.-k). Section 2(2) of the NLRA defines an employer as:

> any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (NLRB, n.d.-h)

Should an employer fail to abide by the NLRA's provisions, they could be charged with unfair labor practices and become liable for damages and other remedies (Lian et al., 2024).

Although the NLRA does not specifically codify the joint employer doctrine, the term generally refers to a situation where two or more employers jointly possess the authority to control or exercise the power to control the terms and conditions of employment for one set of employees (Orekondy, 2016). The joint employer doctrine has its roots in common law agency principles but has been interpreted differently by courts, and the NLRB has issued new rules on several occasions to either widen or lessen the scope of who is considered a joint employer (NLRB, n.d.-k).

Greyhound Corporation (1965) is considered one of the earliest NLRB cases that provided clarification of the joint employer doctrine (Orekondy, 2016). In *Greyhound*, the NLRB held that Greyhound and Floors, a subcontractor contracted to assist with janitorial services, were joint employers of Floor's contracted staff. The National Labor Relations Board based its finding on their review of the contractual agreements between Greyhound and Floors and on the NLRB's finding that both companies exercised substantial control of the working conditions, such as the number of hours worked, when the work was to be completed, and how the work was to be completed (Orekondy, 2016; *NLRB v. Greyhound Corp*., 1966). The NLRB ordered an election, and the union was eventually certified after a lengthy legal battle that went to the U.S. Supreme Court (*NLRB v. Greyhound Corp*., 1966). After the union was certified, the NLRB ordered Greyhound and Floors to bargain with the employees, but both companies refused. The Fifth Circuit eventually upheld the NLRB's order that the companies bargain with the employees.

The National Labor Relations Board cases turn on the definition of who has and who exercises control over the employees. The standard has been inconsistently applied until the Third Circuit, in the landmark case *NLRB v. Browning-Ferris Indus.*, *Inc*. (1982) adopted the *Greyhound* position that a joint employer "share[s] or co-determine[s] those matters governing essential terms and conditions of employment" (p. 6) The National Labor Relations Board formally adopted this standard in two 1984 decisions (H. Jenkins, 2015; Orekondy, 2016).

The National Labor Relations Board's element of control in the joint employer rule narrowed over time and shifted away from indirect control as an element to more meaningful control (Orekondy, 2016). From 1982 until 2015, the standard to be considered as a joint employer required the employer to exercise direct meaningful control over an employee's actions (*Browning-Ferris Indus*., *2015*; Lebowitz, 2024; Orekondy, 2016).

In *Browning-Ferris* (2015), the NLRB held that joint employment would exist if an employer had the right to control, even if that control was not exercised. The National Labor Relations Board widened the scope of the rule to include indirect control once again as an element of joint employment (*Browning-Ferris Indus*., 362 N.L.R.B., Aug. 27, 2015).

In 2020, the NLRB issued a new rule on joint employment, returning the focus of the inquiry to whether the potential joint employer exercised direct and meaningful control over essential terms and conditions of employment (Lebowitz, 2024). In 2023, the NLRB adopted a new rule stating, "The 2023 rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect" (NLRB, n.d.-k). To the NLRB's dismay, on March 8, 2024, the U.S. District Court for the Eastern District of Texas struck down the new rule (Paretti et al., 2024).

Until the litigation is resolved, ongoing cases will be decided under the 2020 rule, which could favor the defendants (NLRB, n.d.-k). *University of S. Cal.*; *Pac-12 Conference*; *NCAA* case. The bar will be much higher to prove joint employment between USC, the Pac-12, and the NCAA. The National Labor Relations Board would need to prove that the Defendants had direct control over the terms and working conditions of student-athletes and that they exercised that control.

As discussed in the literature review, the NLRB's decisions and interpretations of the NLRA's provisions can change with each new presidential administration. The President has the authority to appoint the five members of the NLRB, and although the appointments are staggered, the board composition can change quickly (W. B. Gould, 2014).

Summary. Should student-athletes prevail in *Johnson*, the decision could have broad implications for intercollegiate athletics, potentially establishing a precedent that influences the continued tradition of using different tests to assess employment status. This outcome could stimulate continued positive feedback from those advocating for student-athlete rights, significantly impacting the existing structures and expectations within NCAA sports.

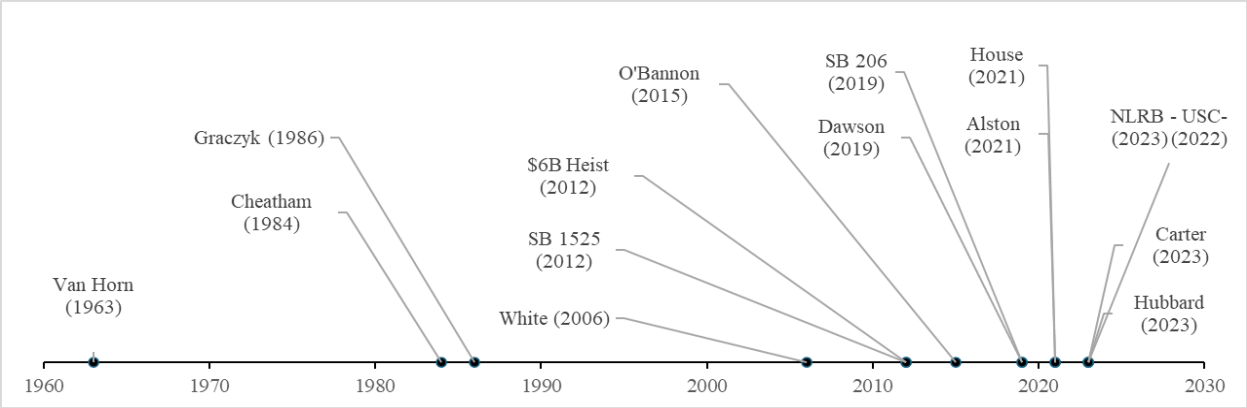
Regarding the Joint Employer rule, its broad impact on collegiate athletics cannot be understated. However, this rule was recently struck down *in U.S. Chamber of Commerce et al. v. NLRB et al*. (2024), which might temporarily stall some of the anticipated changes in how athletes are viewed within the NCAA framework. Despite this setback, the legal battles and discussions surrounding this issue persist, indicating the dialogue on student-athlete employment rights is far from over.

Findings Through the Lens of the Theoretical Framework

Recall that Jones et al. (1993) and Jolicoeur (2017) explained that a policy's punctuation is likely when discontented groups expand the conflict by recruiting allies, transforming the policy's image, and diversifying the decision-making venues. Leveraging support within California, student-athletes have successfully broadened their base, reshaped the narrative around amateurism, and diversified the arenas where student-athlete rights, benefits, and freedoms are adjudicated (see Figure 31). These actions have significantly disrupted the NCAA's dominance in college sports. The victories in securing greater rights, benefits, and freedoms for student-athletes are noteworthy. However, it is crucial to recognize the pivotal contributions of various Californian stakeholders, including advocates, legislators, the Governor, and the judiciary, whose collective efforts have left a mark on college athletics.

Figure 31

California Cases



Note. SB = Senate bill; NLRB = National Labor Relations Board; USC = University of Southern California.

Advocates. Over time, a broad coalition has rallied alongside student-athletes in their quest for increased rights, benefits, and freedoms, yet no advocate has proven as pivotal and impactful as Ramogi Huma. As a former UCLA football player, Huma founded a student advocacy group during his tenure at UCLA, motivated by witnessing a teammate's suspension from athletics for accepting groceries left at his doorstep. This incident and learning about NCAA regulations prohibiting medical coverage for injuries incurred during summer workouts spurred Huma to action (Gregory, 2024).

Huma's student advocacy group evolved into the National College Players Association (NCPA), an organization dedicated to "provide the means for college athletes to voice their concerns and change NCAA rules" and to "protect, future, current and former college athletes" (NCPA: About Us. National College Players Association, n.d.). In alignment with the principles of punctuated equilibrium theory—to broaden the conflict—Huma garnered support from the United Steel Workers Union and collaborated with Dr. Ellen Staurowsky, a Sport Management professor at Drexel University (NCPA: About Us. National College Players Association, n.d.).

Huma and Staurowsky (2012) published a pivotal report, *The $6 Billion Heist: Robbing College Athletes under the Guise of Amateurism*. This report uncovered significant disparities, including (1) the average shortfall of $3,285 in out-of-pocket expenses for NCAA Division I Football Bowl Subdivision (FBS) athletes who were ineligible for cost-of-attendance financial aid, (2) the valuation of average football and basketball players at $137,357 and $289,031 respectively, and (3) the alarming statistics that 82% of the full scholarship athletes living on campus and 90% living off campus were below the federal poverty level. The report urged the U.S. Justice Department to initiate antitrust proceedings against the NCAA and called for Congress to diminish the NCAA regulations. Recommendations from the report included: (1)

provision cost-of-attendance financial assistance to student-athletes, (2) permission for student-athletes to benefit financially from their NIL, (3) allocation of a share of new revenues to student-athletes in profit-generating sports, to be deposited into an educational trust for degree completion assistance, and 4) the use of TV revenues by universities to ensure female student-athletes receive equitable benefits, in adherence to Title IX (Huma et al., 2020).

Huma et al. (2020) further contributed to the dialogue with the publication of *How the NCAA's empire robs predominantly Black athletes of billions in generational wealth*. This work sheds light on the racial disparities existing between the predominantly White NCAA and higher education leadership and the racial demographics of NCAA Division I football and basketball players (NCPA: About Us. National College Players Association, n.d.). Huma et al. argued that while racial minorities constitute the majority in revenue-generating sports, they also face significantly lower graduation rates compared to their peers. These reports exemplify strategic mobilization, as seen through collaboration with Dr. Staurowsky and leveraging media to alter public perception of policy.

Huma and the NCPA have been vocal about their successes in championing the benefits and rights for student-athletes. Their efforts have notably included supporting litigation and collaborating with state legislatures to enact laws enhancing the rights and benefits for student-athletes (NCPA: About Us. National College Players Association, n.d.).

Student-athletes, with the support of Ramogi Huma, the NCPA, and additional advocates such as antitrust lawyer Jeffrey Kessler, have effectively challenged the NCAA's stronghold by redefining the narrative around amateurism as exploitative and diversifying the platforms for discussing amateurism, student-athlete compensation, and employment rights (Branch, 2011; Dellenger, 2024b).

Policy Image. Beyond Ramogi Huma's contributions, student-athletes have garnered support from the media and academia to transform public perception of NCAA policies. Noteworthy contributions include Taylor Branch's (2011) article, "*The Shame of College Sports*" and the books by Ben Strauss and Joe Nocera, *Indentured: The inside story of the rebellion against the NCAA* (2016), and their subsequent work, *Indentured: The battle to end the exploitation of college athletes* (2018), which further exposed and critiqued the NCAA's practices.

These publications critique the NCAA's monopolistic actions and the unfairness of failing to adequately compensate student-athletes who generate substantial revenue for the college sports industry (Branch, 2011). This critique is reinforced by evidence of soaring revenues, escalating coaches' salaries, and contract buyouts, which in 2023 alone were estimated to exceed $200 million, juxtaposed against the relatively minimal scholarships awarded to student-athletes (S. Berkowitz, 2024). Additionally, the bulk of academic literature on student-athlete employment reviewed in this dissertation advocates for recognizing student-athletes as employees entitled to corresponding benefits. Notably, public opinion on compensating student-athletes has significantly evolved. A Washington Post and ABC News poll indicated only 33% support for compensating student-athletes beyond scholarships (Leigh, 2014). In contrast, a Sportico and Harris Poll revealed a 67% approval rate for universities directly compensating student-athletes, with 64% endorsing the idea of granting student-athletes employee status and 59% backing their right to unionize (Libit & Akabas, 2023). This substantial shift in public sentiment poses a challenge to the NCAA's dominance. Jones et al. (1993) highlighted that mobilizing public opinion is a potent force that can precipitate the decline of a policy monopoly.

Policy Venue. Alongside Huma and the NCPA's efforts, student-athletes and their supporters have engaged in venue shopping to disrupt the power monopoly (Jolicoeur, 2017). Venue shopping occurs when groups search for a more sympathetic setting for their policy perspective (Adebisi et al., 2023).

Faced with stagnation at the NCAA level, Huma and allies turned to state legislatures to enact favorable laws on student-athlete benefits. In September 2019, California's Governor Gavin Newsom enacted the pioneering NIL law, SB 206, The Fair Play Act (CA.gov, 2019). The legislation permits California students to monetize their NIL. Governor Newsom remarked, "California led the charge against the unjust power imbalance in college sports, launching a national movement and spurring long-overdue changes in this multibillion-dollar enterprise," and "Colleges and universities reap billions from these student athletes' sacrifices and success but block them from earning a single dollar. That's a bankrupt model—one that puts institutions ahead of the students they are supposed to serve" (CA.gov, 2019, para. 5). Notably, Governor Newsom signed the bill in the presence of the bill's co-sponsor, Senator Nancy Skinner, and notable athletes including Ed O'Bannon, LeBron James, and Diana Taurasi, among others (CA.gov, 2019). Following California, numerous states enacted NIL laws, allowing college student-athletes to receive compensation for their NIL (Dalimonte, 2023). In June 2021, the NCAA passed legislation permitting student-athletes to profit from their NIL (Brutlag Hosick, 2021).

Another significant policy venue for student-athlete advocacy has been the U.S. District Court, Northern District of California, under Senior Judge Claudia Wilken. Judge Wilken presided over the landmark *O'Bannon* and *Alston* cases, issuing judgments that markedly increased educational benefits for student-athletes (*Alston*) and awarded $60 million in damages

for the use of their NIL (*O'Bannon*). The *Alston* ruling is credited as a pivotal reason for the NCAA's eventual enactment of NIL legislation in June 2021 (Dalimonte, 2023).

Judge Wilken is also overseeing the ongoing *House v. NCAA* (2021) case, a class action lawsuit contesting the NCAA and A5 conferences' compensation restrictions. In November 2023, Judge Wilken granted class certification, potentially including over 10,000 student-athletes in the damages class (Lederman, 2023), with estimated damages in antitrust class actions ranging between $1.4 billion to $4 billion (Clifton & Stylianou, 2023). Her influential role underscores her significance in challenging the NCAA's control of intercollegiate athletics.

Plaintiffs continue to approach the Northern District Court of California for litigation against the NCAA. The recent *Carter et al. v. NCAA et al.* (2023) filed in the court is another antitrust challenge against the NCAA's compensation policies. Should the *Carter* case receive class-action status, damages could reach billions of dollars (McCann, 2023a), with Judge Donna Ryu presiding. Furthermore, the *Hubbard v. NCAA* (2023) class-action lawsuit seeks compensation for educational benefits allegedly owed since the 2019–2020 academic year, with potential damages surpassing $900 million (S. Berkowitz & Gardner, 2024). Amidst this extensive litigation, the NCAA is deploying defensive strategies to maintain equilibrium within the system.

Policy Monopoly Defense Strategies. Upon facing challenges, power monopolies employ defense mechanisms aimed at reestablishing stability around the policy image and securing new, favorable policy venues (Jolicoeur, 2017). Despite significant challenges to its authority, the NCAA is ardently defending its position. Beyond rigorous legal defenses against lawsuits, the NCAA is proactively lobbying Congress for legislation to formally declare that student-athletes are not employees, coupled with a push for a limited antitrust exemption that

would shield the NCAA from legal actions (Nuckols, 2024). In 2023, the NCAA and A5 conferences invested close to $3 million in lobbying efforts (Nuckols, 2024).

To bolster the policy image, the NCAA also airs television advertisements during the annual March Madness basketball tournament, showcasing the positive impact it claims to have on student-athletes (NCAA Media Center, 2024).

Moreover, when a policy monopoly senses a threat, it might also initiate incremental changes aimed at system stabilization. Some analysts believe the NCAA's recent policy modifications, such as allowing student-athletes to profit from their NIL, alongside permitting institutions to cover the full cost of attendance and additional educational benefits, are attempts at such stabilization. Despite these attempts, ongoing litigation suggests these measures have yet to quell the challenges to the NCAA's dominance (Brutlag Hosick, 2015).

Negative Feedback. The NCAA's movement to allow student-athletes more economic benefits and more freedom to receive compensation are examples of negative feedback, while the overall goal is maintaining amateurism and the primary position of governing intercollegiate athletics. Another aspect of negative feedback can also include the rules and structure of the governing body (Baumgartner & Jones, 2002). Baumgartner and Jones (2002) noted that "powerful government institutions operating with autonomy and according to standard operating procedures that limit participation only to those granted authority can be a further source of the politics of negative feedback" (p. 15). The NCAA severely limits participation by discontented groups in the rule-making process. The association does have some student representation in its governing process, but the majority of representatives are not in revenue-producing sports and not the typical sources of discontent regarding student-athlete employment and compensation issues. Of the 30 Student-Athlete Advisory Committee (SAAC) representatives, only three are

football players, and none of those are from A5 conferences (Baumgartner & Jones, 2002). There are two men's basketball representatives, but none are from the A5 conferences where most of the student-athlete compensation issues are being debated (Baumgartner & Jones, 2002).

Positive Feedback. The discontented groups challenging the NCAA's amateurism and policy monopoly in intercollegiate athletics have successfully transformed the policy image of amateurism and shifted the venues where decisions on these issues are made. As evidenced by the dozens of lawsuits filed against the NCAA and A5 conferences, others are adopting this successful strategy. These actions have introduced positive feedback into the system, helping to punctuate NCAA policies regarding amateurism and compensation and to instigate changes in current policies.

Conclusion

The broader litigation efforts against the NCAA and A5 conferences have played a significant role in challenging the NCAA's amateurism policy. Student-athletes have gained more economic benefits, such as student-athlete assistance funds, cost-of-attendance adjustments, and educational benefit payments. They have also acquired the freedom to transfer to different institutions without penalty and more freedom to receive compensation for the use of their NIL, as seen in cases like *Alston*, *White*, *Jenkins*, the transfer portal, and *O'Bannon*. However, the litigation related to student-athlete employment seems to have had limited effect thus far. Only two of the 15 cases (13%) included in the dataset resulted in outcomes conclusively held in favor of the student-athletes or their family members. Two cases remain undetermined, and one case, categorized as inconclusive for the plaintiff, is in the appeals process. The last case that held student-athletes as employees was the *Van Horn* case in 1963 (*Van Horn v. Indus. Accident Comm'n*, 1963). Currently, the *Johnson* case appears favorable to

student-athletes as the court denied the NCAA's motion to dismiss, and in its analysis concluded that there was plausible evidence to show that student-athletes were employees (*Johnson v. NCAA*, 2021). Although the NLRB Regional Director ruled in favor of the student-athletes in the *Trustees of Dartmouth* case, it is under appeal (*Trs. of Dartmouth Coll.*, 2021). Additionally, the USC NLRB case is in the trial stage of litigation (*NCAA v. Univ. of S. Cal.*). It is still too early to determine whether these cases will further punctuate the NCAA's amateurism policy.

This section highlights the interconnectedness of legal, legislative, and advocacy efforts in challenging and reshaping the NCAA's policies on amateurism and student-athlete compensation. The principles of punctuated equilibrium theory provide a valuable framework for understanding these rapid changes, suggesting that sustained efforts by cohesive groups can indeed puncture long-standing policy monopolies. As the landscape of collegiate athletics continues to evolve, the dialogue on student-athlete rights and benefits is poised to remain at the forefront of legal, ethical, and policy discussions, heralding a new era in sports governance and athlete welfare.

Relationship to the Past Literature and Contribution to the Literature

In Chapter Two, I reviewed the literature concerning the evolution of student-athlete rights, which included the history of litigation that student-athletes or those on their behalf have initiated to secure more rights, benefits, and freedoms. The literature provided the foundation for understanding how student-athletes have been able to secure more financial and health benefits by litigating for changes to NCAA policies and for damages for the harm caused by NCAA policies. The initial review of the literature revealed that student-athletes began their fight for employee rights, benefits, and status over 70 years ago.

Two previous studies, one from 1980 and one from 2013, provided a limited overview of student-athlete employment issues. Stotlar (1980) focused on a broader overview of student-athlete litigation concerning the legal status of athletic scholarships, which primarily included contractual issues. Stotlar questioned whether a student-athlete's income qualified as income. Following Stotlar, Franey (2013) studied broad areas of student-athlete litigation from 1950–2012. Franey found that most of the cases in her study concerned civil/constitutional rights, antitrust issues, amateurism, recruiting, eligibility requirements, and NCAA enforcement issues. Franey reviewed limited student-athlete litigation, including three workers' compensation cases.

Recognizing the gap in the literature, I analyzed relevant case law to trace the development and judicial treatment of collegiate student-athlete employment claims in a legal-historical context. I discovered that 15 cases met the study criteria, including cases from the U.S. Supreme Court, Federal Courts of Appeals (also referred to as Circuit Courts), U.S. District Courts, state courts of last resort, state appeals courts, and the NLRB from 1950–2024. I found three types of student-athlete employment cases: workers' compensation, FLSA cases, and NLRA cases. I confirmed the three workmen's compensation cases included in Franey's (2013) study. My study built off Franey's (2013) and Stotlar's (1980) research by focusing specifically on student-athlete employment litigation from 1950–2012. Further, my study included a detailed and comprehensive analysis of the factors courts have considered when determining whether student-athletes are employees. The data shows that courts have considered seven factors in workers' compensation cases, six factors in FLSA cases and four factors in NLRA cases.

I reviewed additional literature regarding student-athlete employment litigation. The literature revealed and confirmed that student-athlete employment litigation included workers' compensation cases, FLSA cases, and NLRA cases. Some of the literature analyzed the court

decisions and the factors courts weighed when deciding student-athlete employment issues. I expanded this research by reviewing factors in all three types of student-athlete employment claims, including workers' compensation, FLSA, and NLRA cases. This broader understanding is necessary to assist universities and higher education administrators in evaluating their policies, procedures, and practices regarding student-athlete employment risks.

Lastly, I provided a lens through which to view the tremendous change intercollegiate athletics has undergone over the past several years. Through the theoretical framework of the punctuated equilibrium theory, I found that many in the state of California have had a profound effect on the changing landscape of intercollegiate athletics. Their efforts, along with many others, have helped to change the policy image of the NCAA's non-compensation and amateurism policies. They have also succeeded in changing the policy venues where authoritative decisions regarding these policies are made. These efforts have helped to punctuate the NCAA's policies, and while student-athlete employment cases have yet to play a major role in punctuating NCAA policies, they may yet put the final nail in the NCAA's amateurism and non-compensation policies.

Recommendations

Based on the preceding discussion of this study's results and the available literature described in Chapter Two, the following section contains recommendations for leaders in intercollegiate athletics and higher education administrators.

Recommendations for Intercollegiate Athletics Governing Bodies and Higher Education Institutions

The relationship between student-athletes and higher education institutions has undergone tremendous changes over the past several decades. Student-athletes have fought for

new rights, benefits, and freedoms and have successfully secured financial and health benefits, including the right to be compensated for their NIL. As a part of their struggle, student-athletes have been litigating for employment benefits and status for over 70 years.

Although the data shows that student-athletes have only won two employment cases, there are signs that this may soon change. Recently, in NLRB (n.d.-e), *Trustees of Dartmouth College*, the RD held that the student-athletes on Dartmouth's men's varsity basketball team are employees under the NLRA. In another ongoing case, *Johnson v. NCAA* (E.D. Pa. 2021), the lower court denied the NCAA's motion to dismiss, determining that the complaint plausibly alleged facts that the Plaintiffs are employees of the Defendants in the context of the FLSA. The case is currently under interlocutory appeal (*Johnson v. NCAA*, 2021).

Notably, other factors courts previously weighed against finding that student-athletes are employees are now shifting to favor the argument that student-athletes are employees. In *Berger v. NCAA*, (2016), the United States Court of Appeals for the Seventh Circuit noted in their decision against finding that student-athletes are employees that student-athletes do not have an expectation of payment. Similarly, in *Dawson v. NCAA*, the Ninth Circuit held that Dawson had no expectation of payment from the NCAA or the Pac-12. Dawson's strategy was flawed, as he did not include his university, the University of Southern California (USC). While this flaw was fatal to his case, it could be reasoned that Dawson had an expectation of payment from USC. Additionally, in *Johnson*, the unadjudicated *FLSA* case, the court held that there was no expectation of compensation, which weighed in favor of finding that the student-athletes were not employees. However, now that student-athletes can receive compensation for the use of their NIL, it could be argued that this factor would now shift to favor the student-athletes' position that they are employees under the FLSA.

Research suggests student-athletes are expecting payment prior to entering the university and are transferring to different universities with the expectation of payment from collectives or supporters of the university in return for their athletic services (Ellis, 2024; Goldberg, 2024; Jackson, 2023; Wetzel, 2024). With the expectation of NIL compensation, paid from entities closely related to or even endorsed by the higher education institution, it could be argued that the expectation of compensation factor found in many cases now weighs in the student-athlete's favor. This makes the student-athlete's case in *Johnson* much stronger as another factor would weigh in favor of finding that they are employees.

As mentioned in Chapter One, from 2014 to 2020, the NCAA spent $304 million on outside legal expenses (R. C. Berkowitz, 2022). The costs are increasing as estimated legal damages in ongoing litigation could exceed $5 billion (S. Berkowitz, 2024). In addition to legal costs, Poskanzer (2003) advised that because litigation disrupts the daily activities of colleges and universities, higher education administrators and faculty should understand the legal concepts and issues that impact higher education.

With the recent history of litigation against the NCAA and its member institutions, including high-profile cases, and the enormous financial burdens these legal battles entail, it seems increasingly likely that more courts will declare student-athletes as employees, similar to *Trustees of Dartmouth*. In anticipation of this shift, I recommend that the NCAA, intercollegiate athletic conferences and higher education institutions begin to take proactive measures to address student-athlete employment. Below, I outline targeted recommendations for policy updates and strategic planning to assist higher education governing bodies, institutions, and administrators in navigating this evolving landscape.

Integrate and Align Intercollegiate Athletics With the Academic Enterprise. I recommend that higher education institutions integrate and more closely align intercollegiate athletics with the academic enterprise. Specifically, integration and alignment should begin in two areas. First, higher education institutions should design curricula to teach and give student-athletes meaningful academic credit for participating in college athletics. Just as band, music, and theater students earn academic credit for participating in their activities, so should student-athletes. Second, higher education institutions should have direct oversight and be empowered to facilitate outside commercial opportunities for student-athletes. Although some changes are being debated, at this time, higher education institutions are limited by NCAA rules with regard to their ability to assist student-athletes with NIL opportunities, including directly paying for facilitating opportunities for the students (Christovich, 2024b).

Academic Credit. From personal experience, athletics was one of the first places I learned statistical probabilities, as we had to understand the likelihood of an opponent running certain plays in situations with many variables. The better you were at predicting what an opponent was going to do on a certain down and distance and in a particular formation, the more successful you would likely be in countering and stopping their plays. Athletics was also where you learned how to process large amounts of information (data) in a short amount of time and react based on the insights gleaned from that data. Mastering these skills required many hours of film work and study, which took years to develop and hone. Being adept in these areas has yielded tremendous benefits for me and other former student-athletes in the professional world.

In his paper, “Reimagining the role of intercollegiate sports in higher education,” Tulane Professor and Director of the Tulane Sports Law Program, Gable Feldman (2022), proposed a model for more closely aligning athletics with the educational mission of the university. Feldman

(2022) centered his model on "providing academic credit for athletic participation" and "creating a course of study centered on the literacy embedded in sports through plays and other sports 'texts'" (para. 3). Feldman (2022) posited that by integrating and aligning college athletics with the mission of higher education, we are better able to distinguish intercollegiate athletics from professional sports which is the central issue of ongoing litigation.

To support Feldman's (2022) reasoning, we recall that the *Glatt* multifactor test used by the court in *Johnson v. NCAA* (2021) identified two factors that currently weigh in favor of student-athletes being declared employees under the FLSA and one neutral factor that could shift to weigh in favor of higher education institutions and sport governing bodies should they act upon this recommendation. *Glatt* factors two, three, and six would likely be impacted should higher education institutions integrate and align intercollegiate athletics with the academic enterprise (U.S. Department of Labor, n.d.-b):

> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

Historically, some colleges and universities have offered minimal academic credit for participation in intercollegiate athletics (Schlabach, 2004). In 2004, a Washington Post survey of Division I football teams found that over thirty universities awarded academic credit for athletic participation (Schlabach, 2004). Although student-athletes may earn academic credits, in some

cases, the credits cannot be counted toward degree requirements (Schlabach, 2004). This would not seem to be the kind of academic integration and significant learning experience that is put forth in the Glatt factors that would benefit the NCAA and higher education institutions in proving that the student-athletes are not employees under the FLSA.

While the benefits of allowing student-athletes to earn academic credits for their participation in intercollegiate athletics are plentiful, we should be wary of and guard against abuse and fraud by requiring strict standards for the curriculum and by ensuring that student-athletes have real learning experiences (*Johnson v. NCAA*, 2021, pp. 509–510).

Oversight of Commercial Opportunities. In "Notre Dame's Mario Morris offers his take on where NIL could lead us in 2021," I recommended that higher education institutions should learn from existing university programs and policies that govern and regulate student commercial opportunities, such as intellectual property policies and process or business incubator programs. I also recommended that institutions be allowed to align university sponsorship deals with student-athlete sponsorship deals (Morris, 2021). This was months before the *Alston* decision and before the NCAA's decision to allow student-athletes to profit from the use of their NIL. I continue to believe this is the best approach, as we can model the system off of the technology transfer process that exists on many college campuses today.

Technology transfer refers to the process by which universities take inventions and ideas created by students, faculty, and staff and commercialize them for financial gain (Drummond, 2012). The revenues from the technology transfer process are shared among the inventors and higher education institutions (Drummond, 2012). Drummond (2012) argued that both the university's commercialization of inventions and the intercollegiate athletics are similar in that they are both billion-dollar university enterprises. Drummond countered critics' assertions that

both activities are outside the purpose of the university by arguing that both of these university activities “serve a social purpose, beyond financial gain for the institution” (para. 11). And that “Technology transfer allows for the broader dissemination and public use of inventions; college sports promote and help build community, beyond the walls of the institution. They also showcase achievement, overall excellence, and the spirit of teamwork and athletic competition, all of which are social positives” (para. 11).

Like Drummond (2012), I believe universities can manage student-athlete commercial activities by recognizing they are engaged in business and commercial opportunities and implementing sensible policies and guidelines similar to those of the university technology transfer process.

Giving our student-athletes the ability to earn additional money using their NIL was the right thing to do. Now, it is time to help them manage those commercial opportunities so they better align their athletic experiences with their educational journey and the institutional mission (Morris, 2021).

Allowing students to earn academic credit for their participation in intercollegiate athletics and allowing higher education institutions to manage and oversee NIL commercial opportunities, like the university technology transfer process, would help integrate and align intercollegiate athletics with the academic mission of higher education. We must ensure we are in alignment with our institutional missions while facing multiple challenges, including navigating the blurred lines of commercialism and capitalism (Morris, 2021).

Implement a Bifurcated Student-Athlete Employee Model. I recommend that the NCAA and higher education institutions continue to aggressively lobby Congress for a sensible solution to the student-athlete employment issue, which allows student-athletes to more equitably

share in the revenues they produce and allow them to collectively bargain for certain benefits. Should a Congressional solution not present itself, I recommend that colleges and universities create and implement a bifurcated model in which some student-athletes have an employment relationship with the higher education institution or the athletic conference while others do not. The factors found in this study suggest that courts may be moving towards finding that student-athletes are employees. The NCAA will need to remove the final restrictions on compensation for athletic participation to enable institutions to adopt this recommendation. In the literature review in Chapter Two, similar arguments for a bifurcated employee system were found, notably by Corrada (2020). Corrada strongly advocated that student-athletes in revenue-producing sports should be—and likely will be—declared employees. Corrada also referenced Judge Hamilton's concurring opinion in *Berger v. NCAA* (2016), where he suggested that the economic reality of the relationship between universities and student-athletes in Division I basketball and FBS football, which generate substantial revenue, might warrant different considerations.

The NCAA and its members can utilize the insights from this study to develop distinct policies, practices, and procedures for student-athlete employees and nonstudent-athlete employees.

While implementing a bifurcated student-athlete employment model, it is crucial the NCAA and its members adhere to Title IX requirements, ensuring equitable opportunities for male and female student-athletes. This issue is often cited by critics, such as Reinbrecht (2015), who argued against a student-athlete employment model. However, I align with Edelman (2014) and Trahan (2014) in viewing this as a red herring. Institutions can select a Title IX-compliant number of male and female student-athletes to which they can provide employment status, benefits, and rights.

Other critics, such as Nuckols (2024), have suggested that schools might abandon sports or reduce opportunities for athletes, particularly female student-athletes. This argument also lacks substance. Division I institutions have the capacity to invest more in athletic programs if they prioritize such initiatives on their campuses. I encourage college athletics leaders to be bold, creative, and innovative with innovative solutions for student-athlete employment.

Review Policies, Practices, and Procedures for Student-Athlete Employment Risks.

In the immediate future, I recommend that higher education institutions and athletic administrators review all policies, procedures, and practices governing the student-athlete-university relationship. Administrators should use the findings of this dissertation to understand the factors courts consider when determining whether student-athletes are employees. As described in Chapter Five, factors such as the expectation of compensation, contractual issues, the right to control and discipline, and the cash/noncash benefits provided by student-athletes figure prominently in student-athlete employment litigation.

It would also be worthwhile to review the seven factors included in the *Glatt* multifactor test developed by the Second Circuit. In *Johnson v. NCAA* (2021), the court utilized the *Glatt* test and determined that three of the seven factors weighed in favor of finding that Johnson was an employee under the FLSA, two factors were deemed neutral, and the remaining two factors weighed against such a finding. This analysis led the court to hold that Johnson had plausibly alleged facts that he was an employee under the FLSA. Johnson's case could potentially result in student-athletes being declared employees for the first time under the FLSA.

Higher Education administrators should begin their analysis by focusing on the policies, procedures, and practices related to the three factors that weighed in favor of the Plaintiff in *Glatt*, specifically factors three, four, and six.

> Factor 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> Factor 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> Factor 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. (*Johnson v. NCAA*, 2021, pp. 509–510)

By addressing these three factors, higher education institutions may be able to adjust their policies, practices, and procedures to (1) significantly integrate athletic participation into the academic curriculum and offer academic credit related to athletic participation, (2) ensure that participation in athletics does not interfere with the academic calendar or the student-athletes' academic commitments, and (3) ensure that student-athletes receive significant educational benefits from their participation in athletics. If successful, these measures could potentially mitigate student-athlete employment risks under a *Glatt* test analysis. The *Glatt* test seeks to determine who the primary beneficiary of the relationship is. In *Benjamin v. B & H Educ. Inc.*, (2017), the Ninth Circuit stated "that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA" (p. 1147). The primary beneficiary analysis has also been adopted by the Eleventh Circuit in *Schumann v. Collier Anesthesia, P.A.* (2015), and the Sixth Circuit in *Solis v. Laurelbrook Sanitarium & Sch. Inc.* (2011); both cases highlight its potential importance in future student-employee litigation under the FLSA.

Administrators should continue their analysis by examining student-athlete policies related to control, discipline, compensation, and benefits. Utilizing this research, higher education administrators can begin to identify which of their policies, practices, or procedures create student-athlete employment risks. After identifying these risks, they can start to address them. The next section of the dissertation will suggest an area for future research.

Recommendation for Future Research

Although this dissertation provided new insights into the student-athlete and university employment relationship, several other related questions arose while conducting this study. These related questions would be helpful avenues for future research; studies in these areas would also contribute to this emerging literature.

I recommend that the NCAA and its members initiate research into developing student-athlete employee models to fully understand student-athlete employment's implications, benefits, and consequences. This research should explore various aspects of employment, such as collective bargaining and revenue sharing. As highlighted in the literature review in Chapter Two, numerous scholars advocate for the right of student-athletes to collectively bargain (Bird, 2015; Corrada, 2020; Ensinger, 2022; Kennebrew, 2022; Leppler, 2014; LeRoy, 2014; Lofaso, 2016; Lonick, 2015; McCoy & Knox, 2002; Nocera & Strauss, 2016; Pego, 2018; Shults, 2022).

Prominent college athletics leaders, including Jack Swarbrick, the University of Notre Dame's athletic director, have recognized the need to "bargain collectively with athletes" (Dellenger, 2023a para. 2). Swarbrick suggested that student-athletes could negotiate overcompensation, benefits, and hours (Dellenger, 2023a). He noted, however, that bargaining at the institutional level might raise competitive equity issues.

Collective bargaining by students at higher education institutions is not unprecedented. In 2016, the NLRB ruled that graduate and undergraduate students at Columbia University working as teaching or research assistants were employees entitled to collectively bargain (NLRB, 2016). Following this precedent, California passed SB210 in 2017, reclassifying student-workers as employees, which led to the formation of more undergraduate and graduate unions (California State Legislature, 2018; Hunt, 2024). An article from the Chronicles of Higher Education published in March 2024 titled "Colleges Contend with a Tidal Wave of New Undergrad Unions" details the surge in union activities among graduate and undergraduate students since the Columbia ruling. It highlighted that, as of March 2024, over 20,000 students in the California State University system voted to unionize (Hunt, 2024). Furthermore, "The State of the Unions 2023," a report by Milman and Naald, reflects on the successful expansion of the student union movement, attributing its rise to increased support for organized labor among young people, the impact of COVID-19, growing backing from traditional industrial unions, and the resourcefulness of student workers, among other factors (Milkman & Van Der Naald, 2023).

These developments suggest college athletic leaders are likely encountering broader issues beyond student-athletes in the debate over collective bargaining and employee rights. Research into student employment and collective bargaining could provide critical insights. Utilizing this research, the NCAA, athletic conferences, and higher education institutions can begin to devise effective solutions to the student-athlete employment dilemma.

Conclusion

This study has filled gaps and expanded the existing literature on student-athlete employment litigation. By employing legal historical analysis, I traced the development and impact of student-athlete employment claims through relevant case law. The primary objectives

were to explore the prevailing legal issues in collegiate student-athlete employment claims, understand judicial approaches to these claims, identify factors considered by courts in assessing whether student-athletes qualify as employees under workers' compensation statutes, the FLSA, and the NLRA, and examine emerging legal theories in recent unadjudicated cases.

Findings indicated that student-athlete litigation cases are few and traditionally unsuccessful, resulting in a lack of binding precedents for the courts. This variability has potentially set the stage for a Circuit split that could escalate to the U.S. Supreme Court, which has recently questioned the legality of the NCAA's non-compensation policies (*NCAA v. Alston*., 2021). Notably, in March 2024, Dartmouth's men's basketball team was declared employees, marking a significant shift as they also voted to unionize (*Trs. of Dartmouth*, 2023). Although this case is under appeal, it represents a broader trend toward recognizing student-athletes as employees.

Traditionally, factors like the "expectation of compensation" have argued against student-athletes being considered employees. However, with the new allowances for earning compensation from their NIL, this factor increasingly supports the argument for student-athlete employment. This shift is supported by student-athletes' expectations of compensation from collectives and boosters in exchange for their athletic services (Wetzel, 2024).

Additionally, I reviewed the historical evolution of student-athlete rights, benefits, and freedoms, primarily secured through litigation and public pressure. Advocates, state legislatures, and influential political figures have played critical roles in this evolution. These efforts have not only challenged the traditional policy image of amateurism but have also shifted the venues for decision-making, aligning them with more sympathetic judicial bodies. Collectively, these

changes are punctuating the equilibrium of NCAA policies, reshaping the landscape of college athletics.

As student-athlete employment litigation continues to influence the governance of college athletics and the relationship between student-athletes and higher education institutions, this study's findings recommend that the NCAA, athletic conferences and higher education institutions begin by aligning intercollegiate athletics with the higher education mission by creating curriculum designed to recognize the academic value of competing in intercollegiate athletics and by allowing institutions to facilitate and pay student-athletes for NIL opportunities. I further recommend that should Congressional efforts fail, the NCAA, athletic conferences and higher education institutions should explore and potentially implement a bifurcated employment model, including collective bargaining and revenue sharing with student-athletes. This model would distinguish between student-athletes who are employees and those who are not, allowing for tailored policies, procedures, and practices that recognize the unique contributions and needs of student-athletes. Lastly, higher institutions and administrators should use the findings of this dissertation to understand the factors that courts consider when determining whether student-athletes are employees and review all policies, practices, and procedures to understand their student-athlete employment risks.

We are witnessing a generational shift in intercollegiate athletics, where the longstanding practice of profiting from the efforts of football and basketball student-athletes without adequate compensation is increasingly untenable. It is imperative that the NCAA, athletic conferences and higher education institutions embrace this transformative period. By being proactive and collaborative, they can forge sustainable solutions that honor the contributions of student-athletes rather than prolonging a contentious struggle. Embracing this change will not only address the

immediate challenges but also set a precedent for equitable treatment of student-athletes in the future.

APPENDICES

Appendix A: Legal Database Search Terms

This appendix provides a comprehensive list of the search terms and strategies employed in the LexisNexis and Westlaw databases.

LexisNexis Search Strategy

Search 1: Initial Broad Search
Terms: “student-athlete” AND “employment” OR “employee”
Date Range: Open
Courts: All federal and state cases, including both published and unpublished opinions

Search 2: Focused Search on Relevant Legislation
Terms: (college OR university W/10 athlete) AND FLSA OR “Fair Labor Standards Act” OR (worker W/2 comp!) OR NLRA OR “National Labor Relations Act”
Date Range: Open
Courts: All federal and state cases, including both published and unpublished opinions

Search 3: Refined Search for Workers’ Compensation and NLRA Cases
Terms: FLSA OR “Fair Labor Standards Act” OR (work! W/2 comp!) OR NLRA OR “National Labor Relations Act” AND student W/25 athlet! W/50 college OR university
Date Range: Open
Courts: All federal and state cases, including both published and unpublished opinions

Westlaw Search Strategy

Terms: FLSA “Fair Labor Standards Act” (work! /2 comp!) NLRA “National Labor Relations Act” & student /25 athlet! /50 college university
Date Range:Open
Courts: All federal and state cases, including both published and unpublished opinions
NLRA/NLRB Cases Search

Terms: “student-athlete” AND “employment” AND “NLRA”
Source: Secondary sources found in the LexisNexis database and Google Scholar, confirmed using the NLRB website.
Note: This search was specifically designed to locate cases involving the National Labor Relations Act as it applies to student-athletes.

Appendix B: List of Acronyms

A5 – Autonomy 5 Conferences

CCA – Collegiate Commissioners Association

CFA – College Football Association

CLC – Collegiate Licensing Company

CPSDA – Collegiate and Professional Sports Dieticians Association

CSUF – California State University, Fullerton

DOL – Department of Labor

E.A. Sports – Electronic Arts Sports

FBS – Football Bowl Subdivision

FLSA – Fair Labor Standards Act

FOH – Field Operations Handbook

NBC – National Broadcasting Company

NCAA – National Collegiate Athletic Association

NIL – Name, Image, and Likeness

NLI – National Letter of Intent

NLRA – National Labor Relations Act

NLRB – National Labor Relations Board

RD – Regional Director

SAAC – Student-Athlete Advisory Committee

SSA – Social Security Act

SEC – Southeastern Conference

SLAPP – Strategic Lawsuit Against Public Participation

TCU – Texas Christian University

TIDES – The Institute for Diversity and Equity in Sport

UCLA – University of California Los Angeles

UCONN – University of Connecticut

USC – University of Southern California

WCAB – Workers' Compensation Appeals Board

Appendix 3: Cases

Agnew v. NCAA, 1:11-cv-0293-JMS-MJD (2011). https://casetext.com/case/agnew-v-natl-collegiate-athletic-associa-tion

Bartels v. Birmingham, 332 U.S. 126. (1947). https://supreme.justia.com/cases/federal/us/332/126/

Benjamin v. B & H Education, Inc., 877 F.3d 1139, 2017 U.S. App. LEXIS 25672, 168 Lab. Cas. (CCH) P36,585, 27 Wage & Hour Cas. 2d (BNA) 961, 99 Fed. R. Serv. 3d (Callaghan) 585, 2017 WL 6460087

Berger v. NCAA, 843 F.3d [28]5 (7th Cir.). (2016). https://casetext.com/case/berger-v-natl-collegiate-athletic-assn-4

Bloom v. NCAA, 93 P.3d 621; 2004 Colo. App. LEXIS 781; 2004-1 Trade Cas. (CCH) P74,396

Browning-Ferris Industries of California, Inc.., 362 N.L.R.B. (Aug. 27, 2015)

Carter et al. v. NCAA et al.; US District Court for the Northern District of California (2023)

Cheatham v. Workers Compensation Appeals Board of California, 49 Cal. Comp. Cases 54 (Cal. App. 3d Dist. January 17, 1984).

Coleman v. Western Michigan University, 125 Mich. App. 35 (1983)

Columbia University, 364 NLRB 1080 (2016).

Dawson v. NCAA, 932 F.3d 905, [91]0 (9th Cir. 2019). https://casetext.com/case/dawson-v-natl-collegiate-athletic-assn-1

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Denny's Marina, Inc. v. Renfro Productions, 8 F.3d 1[21]7 (7th Cir. 1993). https://casetext.com/case/dennys-marina-inc-v-renfro-productions

Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376 (3d Cir.). (1985). https://casetext.com/case/donovan-v-dialamerica-marketing-inc

Fontenot v. NCAA, 1:2023cv03076, 2023

Gale v. Industrial Accident Company, 211 Cal. 137, 141 [294 P. 391].

Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 2015 U.S. App. LEXIS 22977, 25 Wage & Hour Cas. 2d (BNA) 1716

Goldberg v. Whitaker House Cooperative, 366 U.S. 28 (1961).

Graczyk v. Workers' Compensation Appeals Board, 184 Cal.App.3d 997, 229 Cal. Rptr. 494 (Cal. Ct. App. 1986).

Grant House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal.). (2021). https://casetext.com/case/grant-house-v-natl-collegiate-athletic-assn

House v. NCAA, 545 F. Supp. 3d 804, 808–10, N.D. Cal. (2021). https://casetext.com/case/grant-house-v-natl-collegiate-athletic-assn

Hubbard v. NCAA, 4:23-cv-01593, (N.D. Cal.) https://www.courtlistener.com/docket/67131731/hubbard-v-national-collegiate-athletic-association/

In re NCAA Student-Athlete Concussion Injury Litigation, 314 F.R.D. 580, 93 Fed. R. Serv. 3d 1050 (N.D. Ill. (2016). https://casetext.com/case/in-re-national-collegiate-athletic-association-student-athlete-concussion-injury-litig

In re NCAA Student-Athlete Concussion Injury Litigation, MDL No. 2492, (N.D. Ill. Aug. 12, 2019). https://casetext.com/case/in-re-natl-collegiate-athletic-assn-student-athlete-concussion-injury-litig-3

In re NCAA Ath. Grant-In-Aid Cap Antitrust Litigation (2017). https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/18/19-15566.pdf

In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 37 F. Supp. 3d 1126, 111 U.S.P.Q.2d (BNA) 1339 (N.D. Cal. 2014). https://casetext.com/case/in-re-ncaa-studentndashathlete-name-amp-likeness-licensing-litig

Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa.). (2021). https://casetext.com/case/johnson-v-natl-collegiate-athletic-assn

Keller v. NCAA, No. C 09-1967 CW (N.D. Cal. Dec. 15, 2015). https://casetext.com/case/keller-v-natl-collegiate-athletic-assn-4

Livers v. NCAA, U.S. Dist. LEXIS 124780, 2018 WL 3609839 (2018).

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NCAA v. Alston, 141 S. Ct. 2141, 210 L. Ed. 2d 314 (2021). https://casetext.com/case/natl-collegiate-athletic-assn-v-alston

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National Labor Relations Board. (n.d.-d). *University of California Los Angeles (UCLA), Pac-12 Conference, and The National Collegiate Athletics Association (NCAA), as joint employers*. https://www.nlrb.gov/case/31-CA-290328

National Labor Relations Board. (n.d.-d). *University of Southern California*; *Pac-12 Conference*; *National Collegiate Athletics Association*. https://www.nlrb.gov/case/31-CA-290326

National Labor Relations Board. (n.d.-e). *Trustees of Dartmouth College*. https://www.nlrb.gov/case/01-RC-325633

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