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Geoffrey J. Rosenthal

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COLLEGE PLAY AND THE FLSA: WHY STUDENT-ATHLETES SHOULD BE  
CLASSIFIED AS “EMPLOYEES” UNDER THE FAIR LABOR STANDARDS  
ACT

*Geoffrey J. Rosenthal\**

I. INTRODUCTION

Over the course of the 2014-15 academic year, twenty-four National Collegiate Athletic Association (“NCAA”) Division I<sup>1</sup> public athletic programs each generated revenue in excess of \$100 million.<sup>2</sup> Texas A&M University led the way with the third-highest recorded single-year operating revenue ever, with roughly one-quarter of its \$192.6 million coming from ticket sales to various athletic events.<sup>3</sup> Further down the list—but hardly struggling—was the University of Oklahoma, which took in just over \$134 million in total revenue, with the bulk coming from rights and licensing fees, along with ticket sales and contributions.<sup>4</sup> Oklahoma is likely to improve these numbers in 2017,<sup>5</sup> as its football team was a title contender and boasted a Heisman<sup>6</sup> Trophy winner, quarterback Baker Mayfield.<sup>7</sup> But Mayfield, despite

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\* J.D. 2017, University of Virginia School of Law; B.S. 2014, Cornell University. I am very appreciative of my family’s support and willingness to take late-night phone calls while I completed this Article during my 3L year at the University of Virginia. I would also like to thank Professor George Rutherglen for his guidance during the writing process. Thanks also to the editors of the *Hofstra Labor and Employment Law Journal* for their careful and diligent review.

1. “Division I” consists of nearly 350 public and private colleges and universities, which together support more than 6,000 athletic teams and encompass more than 170,000 student-athletes. *About Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Oct. 21, 2017). Division I is further subdivided based on football sponsorship, with the most competitive 128 teams belonging to the Football Bowl Subdivision (FBS). *See id.*

2. Steve Berkowitz et al., *NCAA Finances: 2014-15*, USA TODAY <http://sports.usatoday.com/ncaa/finances> (last visited Oct. 21, 2017). Financial data for private institutions is incomplete or unavailable.

3. *Id.*

4. *Id.*

5. In 2016, Oklahoma’s total athletic revenues ballooned to over \$150 million, due largely in part to private contributions.

6. The Heisman is given out to the nation’s top men’s football player each year.

7. Keith Sargeant, *Oklahoma’s Baker Mayfield wins Heisman*, NJ.COM, [http://www.nj.com/rutgersfootball/index.ssf/2017/12/heisman\\_ballot\\_oklahomas\\_baker\\_mayfield.html](http://www.nj.com/rutgersfootball/index.ssf/2017/12/heisman_ballot_oklahomas_baker_mayfield.html) (last visited Jan. 15, 2018).

having his #6 jersey featured prominently on Oklahoma's "Official Online Store,"<sup>8</sup> will not earn a single cent for his efforts.<sup>9</sup> Nor will any of the "student-athletes" that make up the Texas A&M program or any of the other student-athletes that compete for an NCAA Division I school.<sup>10</sup> Citing a desire to "[m]aintain amateurism," the NCAA prohibits its member schools from paying a "salary" to an athlete for participating in athletics.<sup>11</sup> And despite the inordinate amount of success of its member programs, along with the nearly \$1 billion in revenue that the NCAA itself generated during the 2014 fiscal year,<sup>12</sup> this "no pay for play" standard is perfectly legal because student-athletes are not recognized as "employees" by any federal or state law and are therefore not entitled to the benefits or any protections that those laws afford.<sup>13</sup>

Though there have been efforts to fight for the rights of student-athletes, those attempts have thus far failed. In *NLRB v. Northwestern University*, for example, the National Labor Relations Board ("NLRB") dismissed a petition by Northwestern University football players by denying jurisdiction, thus refuting the notion that student-athletes are employees.<sup>14</sup> Likewise, in a 2015 antitrust case, the Ninth Circuit vacated the lower court's decision to allow schools to pay student-athletes up to \$5,000 per year in deferred compensation because "offering [student-athletes] cash sums untethered to educational expenses" would effectively turn the NCAA into a professional minor league and would not allow the NCAA to maintain its "tradition of

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8. *Oklahoma Sooners Jerseys*, OFFICIAL ONLINE STORE OF THE SOONERS, [http://shop.soonersports.com/College\\_Oklahoma\\_Sooners](http://shop.soonersports.com/College_Oklahoma_Sooners) (last visited Oct. 21, 2017).

9. Darren Rovell, *NCAA President: No Pay For Players on Jersey Sales*, CNBC (Dec. 22, 2011, 4:21 PM), <https://www.cnn.com/id/45768248>; see also *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 21, 2017).

10. See Darren Rovell, *NCAA President: No Pay For Players on Jersey Sales*, CNBC (Dec. 22, 2011, 3:51 PM), <https://www.cnn.com/id/45768248>.

11. *Id.*

12. See Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015, 3:42 PM), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386>. Much of this success is due to a \$700 million broadcasting deal with CBS and Turner Broadcasting for the rights to the NCAA Division I men's basketball tournament in March. See *id.*

13. See, e.g., *Berger v. NCAA*, 162 F. Supp. 3d 845, 857 (S.D. Ind. 2016).

14. See *NLRB v. Northwestern Univ.*, 362 N.L.R.B. No. 167, slip op. at 6-7 (Aug. 17, 2015); see also Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <http://www.nytimes.com/2015/08/18/sports/ncaaf/football/nlr-b-says-northwestern-football-players-cannot-unionize.html> (noting that *Northwestern University* "effectively deni[ed] their claim that they are university employees [under the National Labor Relations Act] and should be allowed to collectively bargain").

amateurism.”<sup>15</sup>

Despite a rash of media attention focused on the aforementioned *Northwestern* and *O’Bannon v. NCAA* cases, student-athletes hoping to one day be paid for the services they provide their schools might be best served by pursuing their goal under a different federal statute. The Fair Labor Standards Act (“FLSA” or the “Act”), passed in 1938, is “the bedrock of employment law.”<sup>16</sup> The FLSA requires that every employer pay to each of his employees at least a statutorily defined minimum wage.<sup>17</sup> The statute also forbids employers from employing any of their employees for longer than forty hours per week unless the employee is compensated with overtime pay (time and one-half).<sup>18</sup> Unlike the National Labor Relations Act (“NLRA”), which applies only to private employers, the FLSA applies to all employees, in both the private and public sector, whose work regularly involves interstate commerce.<sup>19</sup> Though the FLSA’s definitions section tends to be unhelpful in determining who counts as an “employee,”<sup>20</sup> the Supreme Court has consistently found that the Act’s definitions should be read broadly and “comprehensive[ly] enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.”<sup>21</sup> In addition, the Department of Labor (“DOL”) supports the idea that “[t]he FLSA’s definition of employ . . . and the later developed ‘economic realities test’ provide a broader scope of employment than the common law control test. . . . [The FLSA’s definition of ‘employ’] clearly covers more workers as employees.”<sup>22</sup> Yet, despite the FLSA’s apparent structural

15. See *O’Bannon v. NCAA*, 802 F.3d 1049, 1078-79 (9th Cir. 2015) (requiring the NCAA to permit its schools to provide up to the cost of attendance to their student athletes).

16. D. Aaron Lacy, *The Disenfranchisement of the Federal Employee: Why the Federal Government Does Not Follow the Fair Labor Standards Act*, 15 ST. THOMAS L. REV. 403, 404 (2002).

17. 29 U.S.C. § 206 (2012).

18. *Id.* § 207(a).

19. U.S. DEP’T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA), <https://www.dol.gov/whd/regs/compliance/whdfs14.pdf> (last updated July 2009).

20. The FLSA unhelpfully defines the term “employee” as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1) (2014). The term “employ” means “to suffer or permit to work.” *Id.* § 203(g). “Work” is not defined by the statute. See 29 C.F.R. §§ 785.6-785.7 (documenting the Supreme Court’s formulation of what it means to “work” under the FLSA).

21. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

22. U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2015-1 (July 15, 2015), [https://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](https://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf) (addressing the identification of employees who are misclassified as independent contractors).

advantages over the NLRA, just one federal court has had the opportunity to address the question of whether the Act's protections should be extended to student-athletes.

This Article argues that student-athletes should be classified as "employees" under the Fair Labor Standards Act and should therefore be entitled to the federally mandated minimum wage, as well as the Act's full protections. Part II of this Article explains the Southern District of Indiana's decision in *Berger v. NCAA*, where it ruled that members of the University of Pennsylvania track and field team were not "employees" and therefore not entitled to the FLSA's protections.<sup>23</sup> Part II also introduces the economic realities test, the primary test utilized by courts to determine whether a worker should be deemed an "employee" under the FLSA. Part III dissects and refutes the court's reasoning in *Berger* and makes the case that student-athletes are both economically dependent on their universities and subject to an extensive amount of control, both of which are indicative of employee status. Finally, Part IV addresses potential paths forward for the courts and focuses on the practical realities of a legal framework that allows student-athletes to be paid under the FLSA.

## II. *BERGER* AND THE ECONOMIC REALITIES TEST

### A. *Berger: An Issue of First Impression*

In *Berger v. NCAA*, a federal court decided for the first time the question of whether student-athletes are "employees" under the FLSA, ultimately finding that the named plaintiffs were not.<sup>24</sup> The plaintiffs—current and former members of the University of Pennsylvania's track and field team—sued the NCAA and 123 member schools on behalf of themselves and all current and former NCAA Division I students from 2012–13 to the present.<sup>25</sup> The plaintiffs alleged that, "by virtue of their participation on the team," they were entitled to be paid at least the minimum wage for the work that they performed as student-athletes.<sup>26</sup>

In their Amended Complaint, the plaintiffs primarily focused on the argument that, as student-athletes, they are comparable to federal work-study participants, who are both recognized and paid as employees under

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23. See *Berger v. NCAA*, 162 F. Supp. 3d 845 (S.D. Ind. 2016).

24. *Id.* at 857.

25. *Id.* at 846–47. As an initial matter, the court ruled that all of the defendants, other than the University of Pennsylvania, were to be dismissed for lack of jurisdiction. *Id.* at 849.

26. *Id.* at 847.

the FLSA.<sup>27</sup> Specifically, the plaintiffs argued, student-athletes perform non-academic work that is unrelated to any degree or academic program, and in exchange for which they receive no academic credit.<sup>28</sup> The Amended Complaint also alleged that, unlike work-study participants, student-athletes are "subject to stricter supervision by a full-time staff . . . hired expressly to supervise them," perform "rigorous" hours preparing for and participating in NCAA athletics, and confer many tangible and intangible benefits on NCAA Division I Member Schools.<sup>29</sup> Further, the plaintiffs argued that the scholarships granted by NCAA schools to some student-athletes are not compensation because, *inter alia*, those scholarships are "not treated as taxable income," are granted to ease "the academic cost of attendance and facilitate maintenance of academic eligibility," and are not offered to every student-athlete.<sup>30</sup> The plaintiffs also noted that scholarships granted to students participating in work-study programs do not allow the school to forego paying that student the minimum wage for his or her work-study participation.<sup>31</sup>

After first dismissing the plaintiffs' argument that the student-athletes' employment status should be determined by reference to the DOL "Intern Fact Sheet," the court articulated that it would have to examine the "economic reality" of the working relationship and take into account "the totality of the circumstances."<sup>32</sup> Ultimately, the Southern District of Indiana ruled, as a matter of law, that "the fact that the Plaintiffs participate in an NCAA athletic team at Penn does not make them employees of Penn for FLSA purposes."<sup>33</sup> Notably, the court decided to forego the use of a multifactor-driven economic realities test and decided instead to focus on the policy rationales that contributed to the "totality of the circumstances" of the employment relationship.<sup>34</sup>

The court essentially made two arguments. First, the court cited a 1984 Supreme Court case for the proposition that the United States has a "revered tradition of amateurism in college sports."<sup>35</sup> According to the

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27. Amended Complaint & Jury Demand at 5, *Berger et al. v. NCAA*, No. 1:14-cv-1710 (S.D. Ind. Mar. 18, 2015) (pointing out the irony that students who work at food service counters or sell programs at athletic events are typically paid but not the student-athletes themselves).

28. *Id.*

29. *Id.*

30. *Id.* at 6.

31. *Id.* at 7.

32. *Berger v. NCAA*, 162 F. Supp. 3d 845, 850-51, 855 (S.D. Ind. 2016) (finding that the case required a "flexible approach").

33. *Id.* at 857.

34. *Id.* at 856 ("[T]he factors . . . fail to capture the nature of the relationship between the Plaintiffs, as student athletes, and Penn.").

35. *Id.* (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

court, this tradition was an “essential part” of the economic reality of the relationship between the student-athletes and the University of Pennsylvania because “generations of Penn students had vied for the opportunity to be part of that revered tradition with no thought of any compensation.”<sup>36</sup> Second, the court emphasized that, despite the obvious existence of thousands of unpaid student-athletes on college campuses, the Department of Labor has not taken any action to apply the FLSA to student-athletes.<sup>37</sup>

Despite the court’s resistance to classify student-athletes as employees, *Berger* suggests that the arguments for maintaining the current regime are primarily normative in nature.<sup>38</sup> Though the court qualified its decision as not “expressing any opinion regarding the broader question about whether, as a matter of philosophical principle or general fairness, college athletes in general, or particular groups of college athletes whose teams generate substantial revenue, should be compensated in some way,”<sup>39</sup> its reasoning appears to almost exclusively engage in the policy rationale behind the NCAA’s refusal to allow its members to compensate student-athletes.<sup>40</sup> Indeed, had the court chosen to actually examine the economic reality of the relationship between student-athletes and their universities and the NCAA—as this Article will do in Part III—instead of reducing the plaintiffs’ argument down to being about mere “fairness,”<sup>41</sup> perhaps a different decision could have been reached.<sup>42</sup>

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36. *Id.* (finding that this “demonstrates unequivocally” that students who participate in NCAA athletics do so because they view it as beneficial to them).

37. *Id.* (finding that the DOL has taken the position that “activities of students in such programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution”—such as intramural and interscholastic athletics—are not “work”). The plaintiffs’ argument, that section 10b03(e) of the DOL Wage and Hour Division Field Operations Handbook (in which this position is contained) was not intended to apply to NCAA-regulated athletics, was rejected by the court. *Id.* at 857. This Article does not explicitly address the court’s reliance on the DOL’s inaction or the administrative law issues that disregarding its view may implicate. There have been plenty of instances where a federal court has chosen to disregard the DOL’s viewpoint as to what constitutes an employee-employer relationship. *See, e.g.*, *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 376, 383 (2d Cir. 2015) (rejecting DOL-articulated factors for determining the circumstances under which internships must be compensated and instead centering the inquiry on whether the intern or the employee was the “primary beneficiary of the relationship”), *amended and superseded by Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 535 (2d Cir. 2016).

38. *Berger*, 162 F. Supp. 3d at 856.

39. *Id.* at 849-50 n.5.

40. *Id.* at 855 (finding that the classification of student-athletes as “employees” should not be subject to a bright line rule, but rather to a “totality of the circumstances” analysis).

41. *See id.* at 849 n.5.

42. In their appeal to the Seventh Circuit, the plaintiffs argued that the district court

Of course, for those who argue that student-athletes should be classified as employees, *Berger* might have just not presented the right circumstances. The University of Pennsylvania, as a member of the Ivy League, awards neither academic nor athletic scholarships.<sup>43</sup> Further, members of the Ivy League generally have stricter rules—with respect to recruiting, game and practice schedules, and academic eligibility—than do other schools, especially those that compete in Division I across all sports.<sup>44</sup> Thus, some have suggested that a much stronger (and maybe successful) case could be made by a plaintiff who has participated in a profitable or high-revenue generating sport at a school with a prominent athletics program.<sup>45</sup> Regardless, and at a minimum, the *Berger* case<sup>46</sup> failed to adequately articulate a meaningful economic realities test and subsequently failed to thoroughly examine the notion of “amateurism” in the modern world and the relationship that student-athletes have with their schools and the NCAA. These matters are explored in Section B and Part III respectively.

### B. FLSA's Economic Realities Test

The “economic realities test” is the primary test utilized by courts when seeking to determine whether a worker should be classified as an “employee” under the FLSA.<sup>47</sup> It has been described as “the default test under federal protective legislation when the statute gives little guidance with respect to the appropriate test of employee status. . . .”<sup>48</sup> The origin

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improperly examined the “purported ‘economic reality’ of NCAA defined-amateurism.” See Matthew Perlman, *Ex-NCAA Athletes Tell 7th Circ. FLSA Suit Wrongly Tossed*, LAW360 (Mar. 17, 2016, 5:10 PM), <http://www.law360.com/articles/772651/ex-ncaa-athletes-tell-7th-circ-flsa-suit-wrongly-tossed>.

43. *Paying for a Penn Education*, PENN STUDENT REGISTRATION & FINANCIAL SERVICES, <http://www.srfs.upenn.edu/paying/paying-grants-scholarships.htm> (last visited Jan. 25, 2017).

44. See Joon Lee, *How the Ivy League is Forcing Out Student-Athletes*, CORNELL DAILY SUN (Sept. 30, 2015), <http://cornellsun.com/2015/09/30/how-the-ivy-league-is-forcing-out-student-athletes>; see also Bill Pennington, *Before Recruiting in Ivy League, Applying Some Math*, N.Y. TIMES (Dec. 24, 2011), <http://www.nytimes.com/2011/12/25/sports/before-athletic-recruiting-in-the-ivy-league-some-math.html>.

45. See Edward Nassar, *College Athletes' Next Play*, ONLABOR BLOG (May 2, 2016), <https://onlabor.org/2016/05/02/college-athletes-next-play>.

46. See *Berger v. NCAA*, 162 F. Supp. 3d 845, 856 (S.D. Ind. 2016).

47. See J. Dalton Person, *Exotic Dancers & FLSA: Are Strippers Employees?*, 59 ARK. L. REV. 173, 181 (2016); Jamie Nicole Johnson, *Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education*, 2015 U. ILL. L. REV. 959, 978-79 (2015). The Supreme Court has not explicitly adopted any one formulation of the economic realities test.

48. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee*



of the economic realities test can be traced back to the Supreme Court's decision in *Rutherford Food Corp. v. McComb*, where the issue was whether an employer had misclassified his workers as "independent contractors" instead of as "employees" under the FLSA.<sup>49</sup> The Court endorsed the lower court's view that the proper classification was to be determined, at least in part, on the "underlying economic realities" of the working relationship.<sup>50</sup> The Supreme Court built on this view more explicitly when it found that the "test of employment" under the FLSA for a cooperative and its workers was "the 'economic reality' rather than [the] 'technical concepts'" of the working relationship.<sup>51</sup> The Department of Labor's Wage and Hour Administrator has also recognized the economic realities test as the key tool for interpreting coverage under the FLSA.<sup>52</sup>

Notably, no single or uniform formulation of the economic realities test has been adopted across the courts.<sup>53</sup> Even within circuits, courts have tended to consider the facts, as well as the nature of the purported employment relationship at issue (e.g., whether they are examining a joint employment issue, an independent contractor issue, or something else), and only then do they typically announce the various factors that will guide them to a decision.<sup>54</sup> Further, nearly every formulation of the test comes with the caveat that "no one factor is dispositive" or that the court will have to consider the "totality of the circumstances."<sup>55</sup> At its core, however, the economic realities test—in whichever iteration it is

*Relationship*, 14 U. PA. J. BUS. L. 605, 626 (2012).

49. *See id.* at 726.

50. *See id.* at 726-27.

51. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) ("The test of employment under the Act is one of 'economic reality.'").

52. *See* U.S. DEP'T OF LABOR, *supra* note 19 (noting the test's prominence for determining issues related to independent contractor status); U.S. DEP'T OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2014), <https://www.dol.gov/whd/regs/compliance/whdfs13.pdf>.

53. *See* U.S. DEP'T OF LABOR, *supra* note 19.

54. *See, e.g., Brown v. New York City Dep't of Educ.*, 755 F.3d 154, 167-69 (2d Cir. 2014) (citing *Velez v. Sanchez*, 693 F.3d 308, 329-31 (2d Cir. 2012); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988)) (recognizing that the Second Circuit has "applied several variations of economic reality tests as best suited to particular situations," including for determining employer status, distinguishing between employees and independent contractors, and distinguishing between a domestic service worker and a household member).

55. *See, e.g., supra* notes 50-52; *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 418 (3d Cir. 2012) ("[W]hether a person functions as an employer depends on the totality of the circumstances rather than on technical concepts of the employment relationship."); *Barlow v. C.R. Eng'g, Inc.*, 703 F.3d 497, 506 (10th Cir. 2012) ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.").

presented—focuses on the “financial reality accompanying the work” and on “whether the individual is *economically dependent* on the business to which he renders service. . . .”<sup>56</sup>

Tests inquiring into the economic realities of alleged independent contractors or joint employers are common.<sup>57</sup> Independent contractor and joint employee tests have been outlined by the DOL, including detailed factors to consider, which are generally followed and adopted by the courts.<sup>58</sup> These factors tend to include the extent to which the work performed is an integral part of the employer’s business, the nature and degree of employer control, the permanence of the working relationship, the workers’ opportunities for profit or loss, and the degree of control exercised by the employer over the workers.<sup>59</sup> Other factors that a court may consider (in the joint employment context, for example) focus more on the employer’s control over the worker, including the employer’s ability to hire and fire the individual, the method of recruitment or solicitation, the degree to which the worker is supervised, the expectations of compensation, and the employer’s ability to control the terms and conditions of employment.<sup>60</sup> Still, no matter how many factors a court articulates, it will almost always add the caveat that none is dispositive and the totality of the circumstances must be considered.<sup>61</sup>

Employment relationships that do not fit into one of those two boxes, however, can present trickier situations for the courts.<sup>62</sup> In these

56. Person, *supra* note 47, at 181, 184; Emily Bodtke, *When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act to Distinguish Employees from Volunteers*, 99 MINN. L. REV. 1113, 1119 (2015); Griffin Toronjo Pivateau, *Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment*, 34 N. ILL. U. L. REV. 67, 90 (2013); Rubinstein, *supra* note 46, at 625.

57. Bodtke, *supra* note 56, at 1119-20.

58. See U.S. DEP’T OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (setting out six factors to consider for determining independent contractor status); U.S. DEP’T OF LABOR, ADMINISTRATOR’S INTERPRETATION NO. 2016-1, at 11-13 (2016), [https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.pdf](https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf) (articulating seven factors to consider for determining joint employment status).

59. See, e.g., *Brock*, 840 F.2d at 1058–59 (distinguishing between an “employee” and an “independent contractor”).

60. See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #35: JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT (FLSA) AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) (2016), <https://www.dol.gov/whd/regs/compliance/whdfs35.pdf>; see, e.g., *Velez v. Sanchez* 693 F.3d 308, 330 (2d Cir. 2012) (determining whether the worker was subject to joint employment).

61. See, e.g., *Velez*, 693 F.3d at 326.

62. See, e.g., *Villarreal v. Woodman*, 113 F.3d 202, 205 (11th Cir. 1997) (applying a four-factor economic realities test to determine whether pre-trial detainees were “employees” of the correction officers or of the correctional facility).

cases, the court may forego articulating factors and instead rely solely on the nebulous “totality of the circumstances” analysis.<sup>63</sup> For example, in a case where college resident assistants argued that they were employees under the FLSA, the Tenth Circuit agreed that the economic realities test was controlling, but it failed to articulate any of the factors that guided its analysis.<sup>64</sup> Rather, it merely held that the resident assistants were not employees within the meaning of the FLSA based on the “totality of the circumstances.”<sup>65</sup> Likewise, in deciding whether purportedly volunteer city firefighters were “employees” or “volunteers” under the FLSA, the Sixth Circuit noted that “[t]he issue of the employment relationship does not lend itself to a precise test, but is to be determined on a case-by-case basis upon the circumstances of the whole business activity.”<sup>66</sup>

Thus, it should be of no surprise that an economic realities test seeking to determine the employment relationship between a student-athlete and his school and/or the NCAA may be difficult for a court to conceive. Because *Berger* was the first case to decide the question of whether student-athletes are employees under the FLSA, there have been few opportunities for the courts to fashion a determinative test and little reason for the DOL to notice.<sup>67</sup> In fact, at the time *Berger* was decided, there had been only one other case—state or federal—where a court has purported to apply an economic realities test to student-athletes.<sup>68</sup> In *Coleman v. Western Michigan Univ.*, a Michigan court ruled that the student-athlete plaintiff was not an employee within the meaning of the state’s workers’ compensation law.<sup>69</sup> In its analysis, the court examined:

(1) the proposed employer’s right to control or dictate the activities of the proposed employee; (2) the proposed employer’s right to discipline or fire the proposed employee; (3) the payment of wages and . . . the extent to which the proposed employee is dependent upon the payment of wages . . . for his daily living expenses; and (4) whether the task performed by the

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63. See *Velez*, 693 F.3d at 331.

64. *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981).

65. *Id.*

66. *Mendel v. City of Gibraltar*, 727 F.3d 565, 569, 571 (6th Cir. 2013) (internal citations and quotation marks omitted) (finding that the firefighters were “employees” under the Act because they were paid hourly wages and, per Supreme Court precedent, “those who work in contemplation of compensation are employees within the meaning of the FLSA”).

67. See *Berger v. NCAA*, 162 F. Supp. 3d 845, 851 (S.D. Ind. 2016).

68. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 225 (Mich. 1983).

69. *Id.* at 228.

proposed employee was an integral part of the proposed employer's business.<sup>70</sup>

The court concluded that the student-athlete at issue was not an employee because, even though he received compensation in the form of grant-in-aid scholarship payments that he was dependent on for living expenses, the student-athlete's task of playing football was not an integral part of the university's "business" (*i.e.*, education), and the student himself admitted that his purpose at the university was to further his education, not to play football.<sup>71</sup> In Part III, I will work to debunk some of the conclusions and assumptions made by the *Coleman* court.

In *Berger* itself, the court decided to rely solely on the "totality of the circumstances."<sup>72</sup> It followed the Seventh Circuit's ruling in *Vanskike v. Peters*<sup>73</sup> that the Ninth Circuit's four-factor economic realities test did not capture the nature of the employment relationship at hand.<sup>74</sup> In *Vanskike*, the Seventh Circuit concluded that a group of prisoners were not employees under the FLSA of either the Department of Corrections or the State of Illinois.<sup>75</sup> Citing *Goldberg, Rutherford*, and other precedent, the Seventh Circuit ruled that the relevant inquiry was of the "totality of the circumstances" and the "economic reality of the working relationship."<sup>76</sup> The court, however, declined to apply the four-factor standard from the Ninth Circuit that had been used in prior prisoner cases in the Second, Fifth, and Ninth Circuits.<sup>77</sup> Whereas those cases had involved prisoners performing work for private, outside employers on a voluntary basis (rather than by forced assignment)<sup>78</sup>, the prisoner in *Vanskike* alleged that his labor constituted forced labor, and the dispute thus centered on whether the prisoner could "plausibly be said to be 'employed in the relevant sense at all[.]'"<sup>79</sup> The court stated

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70. *Id.* at 225-26.

71. *See id.* at 226-27. For a more complete discussion of *Coleman*, see Johnson, *supra* note 47, at 978.

72. *Berger v. NCAA*, 162 F. Supp. 3d 856, 855 (S.D. Ind. 2016).

73. *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

74. *Berger*, 162 F. Supp. 3d at 856.

75. *Vanskike*, 974 F.2d at 807, 813.

76. *Id.* at 808 (internal citations and quotation marks omitted). The Ninth Circuit's factors take into consideration "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment." *Id.* (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

77. *Id.* at 808 (internal citations omitted).

78. *Id.* at 808-09.

79. *Id.*

that “the [Ninth Circuit’s] factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation. Put simply, the DOC’s ‘control’ over Vanskike does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself.”<sup>80</sup> Thus, because the case in *Vanskike* was distinguishable from the situation dealt with by the Ninth Circuit and other courts considering this issue, the Seventh Circuit relied on the employee’s status as a prisoner, along with the notion that conferring employee status in this case would not further the underlying purposes of the FLSA, to support its conclusion that no employee status should be conferred.<sup>81</sup>

*Berger*, of course, dealt with student-athletes, not prisoners,<sup>82</sup> but the Southern District of Indiana likened its conundrum to that in *Vanskike*.<sup>83</sup> Because there had been no established factors with which to conduct an economic realities test for determining the employment relationship between student-athletes and their schools, the court in *Berger* essentially engaged in an open analysis, inquiring only into the “totality of the circumstances” of the relationship.<sup>84</sup> But in the process, the court did not appear to focus on anything connected to the “economics” or to the “reality” of the relationship.<sup>85</sup> Rather, hiding behind the veil of the “totality of the circumstances,” the court focused on two policy rationales that seemingly did not relate to the student-athletes’ economic dependency or to the control that the NCAA and its member schools exercise.<sup>86</sup> In its sole allusion to the student-athletes’ economic dependency, the court found that because “generations of Penn students have vied for the opportunity to be part of that revered tradition with no thought of any compensation,” it demonstrated “unequivocally that the students at Penn who chose to participate in sports . . . as part of their educational experience do so because they view it as beneficial to them.”<sup>87</sup> Of course, an alleged employee’s “expectation of compensation” is supposed to just be one factor in the court’s reasoning, and here it seemingly served as the one and only

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80. *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992) (further noting that “[p]risoners are essentially taken out of the national economy upon incarceration. When they are assigned to work within the prison . . . they have not contracted with the government to become its employees”).

81. *See id.* at 810 n.5.

82. Though some college students would likely argue that the two are indistinguishable.

83. *See Berger*, 162 F. Supp. 2d at 855-56.

84. *See id.* at 855.

85. *See id.* at 855-57.

86. *See id.* at 856.

87. *Id.*

factor<sup>88</sup> that was tied directly to the student-athletes' economic reality. It was this reasoning,<sup>89</sup> along with the court's nod to the NCAA's commitment to amateurism and the DOL's inaction, that sealed the student-athletes' fate.

Overall, there is no overarching agreement as to what factors (if any) are relevant to an analysis under the economic realities test. Regardless of which factors a court chooses, it will usually consider the totality of the circumstances before making its decision. In Part III, I argue that the court in *Berger*—having passed on the opportunity to articulate a clear set of factors—ultimately failed to take the totality of the student-athletes' economic circumstances into account.

### III. DEBUNKING *BERGER*: THE LANDSCAPE OF COLLEGE ATHLETICS

This Part will repudiate the main policy rationales used to justify the decision in *Berger* and will set out to prove that if a court were to truly apply an objective economic realities test, then the legal conclusion that student-athletes are deserving of "employee" status is difficult to ignore. This Part begins by rebuffing the notion that there exists a "revered tradition of amateurism in the NCAA."<sup>90</sup> I then outline the various ways in which student-athletes are controlled by their schools, as well as the ways in which they are economically dependent on their schools and the NCAA. Finally, this Part establishes that college athletics is a big business and certainly an industry whose primary purpose could be considered something other than "education."

#### *A. The Myths of Amateurism and the "Revered Tradition"*

The NCAA claims that "[a]mateur competition is a bedrock principle of college athletics and the NCAA."<sup>91</sup> This notion appears prominently in NCAA literature and has been repeated by the NCAA's president, Mark Emmert.<sup>92</sup> As a result, "[a]ll incoming student-athletes must be certified as amateurs . . . [and] are required to adhere to NCAA

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88. *Id.* at 854, 856.

89. *See id.* at 854, 856-57.

90. *See id.* at 856 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 129 (1984)).

91. *NCAA Amateurism*, *supra* note 7.

92. *See, e.g.*, Gary Brown, *Emmert Urges Values Based Approach in Speech*, NCAA (Jan. 17, 2013), <http://www.ncaa.org/about/resources/media-center/news/emmert-urges-values-based-approach-speech>.

amateurism requirements in order to remain eligible for intercollegiate competition.”<sup>93</sup> The NCAA has adopted these rules in order “to ensure the students’ priority remains on obtaining a quality educational experience and that all of student-athletes are competing equitably.”<sup>94</sup> The rules are strict,<sup>95</sup> and violations can destroy a student-athlete’s eligibility and athletic career.<sup>96</sup> Even the Supreme Court has recognized that there exists in this country a “revered tradition of amateurism in college sports.”<sup>97</sup> Indeed, the court in *Berger* pointed to the Supreme Court’s emphasis on amateurism as some evidence that student-athletes should not be paid under the FLSA.<sup>98</sup> But a closer look at the United States’ history of amateur competition, including the development of the NCAA’s conception of amateurism and the term “student-athlete,” casts doubt on just how “revered” this tradition really is.

The notion that there is a “revered tradition of amateurism in college sports” in the United States stems from the 1984 Supreme Court case, *NCAA v. Board of Regents*, in which the University of Oklahoma and the University of Georgia argued that the NCAA had unreasonably restrained trade by placing restrictions on the televising of college football games.<sup>99</sup> Affirming the lower court’s decision that the NCAA had violated the Sherman Act, the Court noted that:

[t]he NCAA plays a critical role in the maintenance of a *revered tradition of amateurism* in college sports. There

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93. *Id.* (stating that these amateurism requirements do not allow student-athletes to, *inter alia*, enter into contracts with professional teams, accept a salary for participating in athletics, accept prize money above actual and necessary expenses, or to receive benefits from an agent or prospective agent).

94. *Id.*

95. See Ben Cohen, *The Case for Paying College Athletes*, WALL ST. J. (Sept. 16, 2011), <http://www.wsj.com/articles/SB10001424053111904060604576572752351110850> (“NCAA athletes are held to what is, essentially, the strictest code of amateurism in sports. It’s not just that the rules prevent them from driving a booster’s Ferrari to Las Vegas for the weekend. The rules can make them think twice before bumming a ride to the mall.”).

96. Take the case of Silas Nacita, a walk-on Baylor University football player who was homeless when he began school in 2014. See, e.g., Maxwell Strachan, *Baylor Rules Former Homeless Football Player is Permanently Ineligible for Accepting Food, Housing*, HUFFINGTON POST (Apr. 8, 2015), [http://www.huffingtonpost.com/2015/04/08/silas-nacita-ncaa-permanently-ineligible-\\_n\\_7028230.html](http://www.huffingtonpost.com/2015/04/08/silas-nacita-ncaa-permanently-ineligible-_n_7028230.html). A few months later, Nacita was forced to leave the team after being ruled permanently ineligible because he had accepted an acquaintance’s offer to pay for his housing and food. *Id.*

97. *NCAA v. Bd. of Regents of the Univ. of Okla.* [hereinafter *Bd. of Regents*], 468 U.S. 85, 120 (1984).

98. *Berger v. NCAA*, 162 F. Supp. 3d 856 (S.D. Ind. 2016).

99. *Bd. of Regents*, 468 U.S. at 88, 120.

can be no question . . . that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics . . . .<sup>100</sup>

As a consequence of the case, major colleges and conferences were able to sign their own television contracts, independent of the NCAA.<sup>101</sup> This freedom, along with the growth of cable television, led to a significant increase in the number of televised college sporting events in the 1980s and 1990s.<sup>102</sup> Ironically, then, the Supreme Court’s decision—in the very same case where it emphasized the importance and purity of amateurism—actually increased the public’s exposure to college sports and allowed for the “infusion of commercialization through increased media exposure and media-generated revenues.”<sup>103</sup> The rise of college sports as a significant and commercially driven business over the past thirty years is examined further in Part III.C.

Putting aside whether the so-called tradition of amateurism has continued in the thirty years since *Board of Regents*, it is questionable whether there was even a tradition in the first place. According to sports historian Dr. Ronald Smith, “[a]mateurism certainly did not exist in the big-time institutions as the 20th century came into being[.] . . . Amateurism in American colleges is an anachronism.”<sup>104</sup> Smith argues that American universities have used the term ‘amateur’ but have developed a professional model.<sup>105</sup> Though college and university athletic programs described themselves as amateur, “the result was a highly professional model emphasizing excellence and winning.”<sup>106</sup> This “professional model” is most obviously demonstrated by the way in

100. *Id.* at 120 (emphasis added).

101. See RONALD A. SMITH, INTERCOLLEGIATE ATHLETIC ASSOCIATIONS AND CONFERENCES, IN *SPORTS IN AMERICA: FROM COLONIAL TIMES TO THE TWENTY FIRST CENTURY* 490 (Steven A. Riess ed., 2015).

102. *Id.*

103. Thomas A. Baker & Natasha T. Brison, *From Board of Regents to O’Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 344 (2016).

104. Ronald A. Smith, *History of Amateurism in Men’s Intercollegiate Athletics: The Continuance of a 19th Century Anachronism in America*, 45 QUEST J. 430, 431 (1993); see also Lawrence M. Kahn, *Cartel Behavior and Amateurism in College Sports*, 121 J. OF ECON. PERSPECTIVES 209, 211 (2007) (noting that, as football revenues rose, “numerous instances of payments to athletes were observed in the 1940s”).

105. Smith, *supra* note 104, at 433, 435.

106. *Id.* at 443 (highlighting the early and widespread practice of hiring professional coaches, allowing students to play summer baseball for pay while still maintaining amateur status, and using monetary scholarships to lure athletes).



which schools recruit their student-athletes: grant-in-aid scholarships that allow for student-athletes to technically be “compensated” in exchange for their athletic services.<sup>107</sup> The use of athletic scholarships dates back to at least the 1880s, when “it was the general practice among the Ivy League schools [to recruit and pay athletes to attend college].”<sup>108</sup> Today, the NCAA highlights that 56 percent of Division I student-athletes receive some level of athletics-based financial aid.<sup>109</sup> Though grant-in-aid is not counted as “compensation” for the purposes of the FLSA (nor does the NCAA itself consider it “compensation”)<sup>110</sup>, the practice has become “obviously compensatory” over the years, as NCAA rules allow for grant-in-aid scholarships to be terminated on a year-to-year basis.<sup>111</sup>

Despite the inconsistency that reveals itself when schools entice student-athletes to play an “amateur” sport with scholarships based solely on athletic ability, the NCAA was unsuccessful in its early attempts to eradicate the practice. For example, even after the NCAA in 1905 adopted a constitution that called for institutions to adopt “high standards of amateurism,” the practice of recruiting athletes and awarding them scholarships continued.<sup>112</sup> According to Smith, “[by] the 1920s, granting scholarships to athletes, while commonly condemned by institutions, conferences, and the NCAA, was an accepted practice in reality.”<sup>113</sup> In an attempt to get serious about amateurism, the “Graham Plan” was introduced in 1935.<sup>114</sup> The Graham Plan called for no compensation—including scholarships—to be awarded on the basis of

107. *See id.* at 435.

108. *Id.* at 438.

109. NCAA, *Recruiting Facts*, NCAA, <http://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> (last visited Oct. 21, 2016).

110. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 112-13 (2006).

111. *Id.* at 113; *see also*, NCAA DIVISION I MANUAL, § 15.3.3.1 (2016-17), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

112. Smith, *supra* note 104, at 439.

113. *Id.* at 439 (highlighting the 1929 Carnegie Report that found “over 70% of the 112 colleges studied had some form of athletic subsidization” and concluded that “if colleges and universities had sincerely accepted the definition of amateurs . . . the abuses of recruiting, proselytizing, and subsidizing would have disappeared overnight”); *see also* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643> (“In 1939, freshman players at the University of Pittsburgh went on strike because they were getting paid less than their upperclassman teammates.”).

114. Smith, *supra* note 104, at 440.

athletic ability by any individual or group.<sup>115</sup> Adopted by a single athletic conference, the Graham Plan was eventually voted out of existence after a "storm of protest from alumni groups."<sup>116</sup>

The NCAA took greater steps toward affirming its commitment to amateurism when in 1948 it adopted the "Sanity Code," which mandated "that any scholarship [granted] to an athlete must be based upon financial need and limited to tuition and incidental institutional fees."<sup>117</sup> The Code also prohibited the withdrawal of scholarships, "even if the student later decided not to participate in intercollegiate athletics at all."<sup>118</sup> The Sanity Code was consistently "ignored or violated,"<sup>119</sup> and when the NCAA moved to expel the Code's violators, a vote of the entire membership failed to yield the two-thirds majority necessary to do so.<sup>120</sup> Finally, a little over twenty years after the Graham Plan was first introduced, "the NCAA amended its rules and allowed athletes to receive scholarships based on their athletic ability, and schools were allowed to give awards that covered tuition and fees, as well as a living stipend."<sup>121</sup>

Interestingly, the NCAA's endorsement of grant-in-aid scholarships came just three years after it created the term "student-athlete," a phrase that has less to do with amateurism and more to do with avoiding legal liability. The NCAA "adopted and mandated the term 'student-athlete' purposely to buttress the notion that such individuals should be considered students rather than employees."<sup>122</sup> Specifically, the NCAA coined the term "student-athlete" after the Colorado Supreme Court's decision in *University of Denver v. Nemeth*,<sup>123</sup> where the court ruled that a University of Denver football player was an "employee" under Colorado's workers' compensation statute and was therefore entitled to compensation for his football injuries.<sup>124</sup> In response, the NCAA embedded the term "student-athletes" into all of its rules and

115. *Id.*

116. *Id.* (noting that athletic grants-in-aid continued, and not in the spirit of amateurism).

117. *Id.* at 441.

118. McCormick, *supra* note 110, at 111.

119. Smith, *supra* note 104, at 441 (noting that the University of Virginia, for example, "voted unanimously to oppose the NCAA Code and to offer full athletic scholarships through its alumni associations").

120. *Id.*

121. Kahn, *supra* note 104, at 211.

122. McCormick, *supra* note 110, at 84, 86 (arguing that the term "student-athlete" was created solely to "obscure the reality of the university-athlete employment relationship and to avoid universities' legal responsibilities as employers").

123. *Id.* at 83-84.

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

interpretations because it feared that “NCAA athletes could be identified as employees by state industrial commissions and courts.”<sup>125</sup>

Allowing grant-in-aid scholarships only serves to increase the degree to which student-athletes are economically dependent on their schools.<sup>126</sup> Similar to the NCAA’s manipulation of language in the student-athlete context, it apparently was also concerned that these grant-in-aid scholarships could be viewed as a form of compensation in exchange for athletic services.<sup>127</sup> The NCAA “responded by encouraging its members to use [certain] language in their athletic grant-in-aid forms.”<sup>128</sup> But no matter what language the NCAA uses, student-athletes who receive grant-in-aid scholarships and other forms of financial assistance are, as a matter of basic common sense, economically dependent on their schools.<sup>129</sup> Though the NCAA recently changed its rules to allow schools to provide cash stipends that would help “close the gap between scholarship money and what it actually costs to attend school,”<sup>130</sup> this change merely highlights the NCAA’s recognition that student-athletes depend on this financial assistance.<sup>131</sup> This notion is supported by the NCAA’s most recent study of Division I student-athletes, in which one-third of Division I student-athletes reported having concerns about how their finances would impact their ability to complete their degree, and an even greater percentage said that “quitting their sport would make staying at their current college a

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125. McCormick, *supra* note 110, at 84 (quoting then-NCAA Executive Director Walter Byers); see also WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69-70 (1995).

126. The degree to which grant-in-aid scholarships allow colleges and universities to exercise control over their student-athletes is discussed in Part II.A and Part III.B. See discussion *infra* Parts II.A, II.B.

127. McCormick, *supra* note 110, at 75 n.12.

128. *Id.* at 85-86 (“This award is made in accordance with the provisions of the Constitution of the [NCAA] pertaining to the *principles of amateurism*, sound academic standards, and financial aid to student athletes. . . . Your acceptance of the award means that you agree with these principles and are bound by them.”). It is debatable whether this concern was warranted. In the *O’Bannon* decision, the Ninth Circuit distinguished grant-in-aid scholarships from the compensation that student-athletes might receive by being able to market their names, images, and likenesses. See *O’Bannon v. NCAA*, 802 F.3d 1049, 1078 (9th Cir. 2015) (“The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.”).

129. McCormick, *supra* note 110, at 117 (“Grant-in-aid athletes at Division I NCAA institutions are deeply economically dependent upon their universities.”).

130. Chris Isidore, *College Athletes Finally Getting Some Cash*, CNN MONEY (Sept. 4, 2015), <http://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes>.

131. *Id.*

problem financially.”<sup>132</sup>

Though “amateurism” is commonly viewed as a “revered tradition” in college athletics, much of this tradition is superficial. It has been perpetuated by the NCAA primarily to avoid the dreaded possibility of being viewed (or having one of its members be viewed) as an employer, and the concept has been eroded by its members as much as possible in order to achieve the greatest degree of competitive success. This history of professional-like practices in the NCAA should also put to rest the point made in *Berger* that “generations of students” have participated in college athletics with no thought of compensation.<sup>133</sup> On the contrary, student-athletes of past generations always fought for and desired compensation of some kind. And as demonstrated in Part III.B below, today’s student-athletes have the same desire for compensation, but they face severe consequences if they pursue such benefits.

### *B. Students in Name Only: Institutional Control and Student-Athlete Economic Dependence*

All college students are subject to their institution’s rules and policies. For example, students at most universities may have to enroll in a certain number of credits each semester or earn a certain minimum GPA in order to maintain full-time residency status and/or receive financial aid and scholarships. These “burdens” are all consistent with these students’ roles as students, regardless of the extracurricular activities in which they may participate. Student-athletes, however, are subject to an exceptionally higher level of control by their schools, which are in turn held accountable by the NCAA for violations of NCAA rules and principles. Ultimately, the responsibilities placed on student-athletes, and the time that is demanded of them, are more akin to that of professional athletes than it is ordinary college students.

The NCAA’s Division I manual delineates, in copious detail, the various rules, bylaws, and governing principles that both schools and students must abide by if they are to remain members in good standing.<sup>134</sup> For violations of any of its rules, the NCAA can impose sanctions, “which range from a temporary reduction in scholarships, to

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132. NCAA, *GOALS Study of the Student Athlete Experience: Initial Summary of Findings* [hereinafter *GOALS Study*], NCAA, 3 (Jan. 2016), [https://www.ncaa.org/sites/default/files/GOALS\\_2015\\_summary\\_jan2016\\_final\\_20160627.pdf](https://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf).

133. *Berger v. NCAA*, 162 F. Supp. 3d 845, 856 (S.D. Ind. 2016).

134. See NCAA DIVISION I MANUAL (2016-17), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

suspension of a program from postseason play, all the way up to the requirement that a school eliminate a certain team and . . . measures that indirectly threaten the school's academic accreditation."<sup>135</sup> If a student-athlete violates a bylaw, he may face extreme consequences. For example, the NCAA ruled a University of Minnesota wrestler to be ineligible after he made available for download an original song because he performed under his own name and identified himself as a Minnesota wrestler.<sup>136</sup> The NCAA was well within its rights, pursuant to a rule that prohibits student-athletes from using their name, image, or status to promote the sale of a commercial product, to take such action. But it remains unclear why student-athletes—if they really are “students first” and are to be treated as “amateurs”—should not be allowed to pursue the same goals and the same activities as any other college student. If an ordinary student, who was not a member of Minnesota's wrestling team, decided to try his luck at selling original music, he would likely be hailed for his entrepreneurial spirit, and not potentially have his scholarship revoked.

Student-athletes are restricted in several other ways that normal college students (and indeed, other students on scholarships) are not. For instance, when a student-athlete transfers from one NCAA school to another, he is not eligible to play in any Division I competition until he has attended his new institution for at least two full semesters.<sup>137</sup> Student-athletes who signed “National Letters of Intent” while in high school may not transfer during the initial year of competition without losing an entire season of eligibility.<sup>138</sup> Student-athletes who receive grant-in-aid scholarships are also at the mercy of their schools. Depending on various circumstances, a school can choose to reduce or cancel a student-athlete's scholarship at the end of each period of the award.<sup>139</sup> Despite new legislation passed in 2015 that prohibits most Division I schools from canceling scholarships for athletic reasons,<sup>140</sup>

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135. Kahn, *supra* note 104, at 211.

136. Pat Borzi, *Minnesota Wrestler Loses His Eligibility by Selling a Song*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html>.

137. NCAA DIVISION I MANUAL, *supra* note 134, § 14.5.5.1.

138. *About the National Letter of Intent*, NAT'L LETTER OF INTENT, <http://www.nationalletter.org/aboutTheNLI/index.html> (last visited Oct. 21, 2017).

139. *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa#schola> (last visited Oct. 21, 2017). The school also may cancel the scholarship during the period of the award if the student-athlete becomes ineligible, has been found to commit a fraud, engages in misconduct, or quits the team. *Id.*

140. Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY

the majority of Division I schools still do not offer four-year scholarships.<sup>141</sup> This means that student-athletes may still find themselves in situations where they lose their financial means for attending school based solely on the subjective criteria and decision making of their institution.

Division I student-athletes also devote a significant amount of time to their sports. In a 2015 NCAA survey of 7,252 Division I student-athletes, representing 180 Division I schools, student-athletes reported spending a median of thirty-four hours per week on athletics, with football players reporting an in-season time commitment of forty-two hours per week and baseball players reporting a forty-hour per week commitment.<sup>142</sup> These numbers appear to be a far cry from the NCAA's bylaw that limits "athletically related activities" to a maximum of four hours per day and twenty hours per week.<sup>143</sup> Of course, the NCAA has built in several ways in which a school might skirt these limits. For example, under another bylaw provision (of which the FLSA most certainly would not approve), "[a]ll competition and any associated athletically related activities on the day of competition shall count as three hours regardless of the actual duration of these activities."<sup>144</sup> Likewise, the bylaws allow for unlimited "voluntary" athletically related activity, so long as certain requirements are met.<sup>145</sup> The numerous exceptions provided for in the bylaws have the potential to result in a situation where student-athletes spend more time being "athletes" than they do "students."<sup>146</sup> In fact, "[t]wo-thirds of Division I and II student-athletes . . . said that they spent as much time or more on athletics during the off-season as during the competitive season."<sup>147</sup> Forget potential, college athletics is a full-time job for many student-athletes.

Given the hours that student-athletes devote to their sports, they must often forego other opportunities that would otherwise have been available. Besides the obvious financial opportunities student-athletes

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(Jan. 17, 2015, 4:31 PM), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073>.

141. Joe Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, But Many Don't*, CBS SPORTS (Sept. 16, 2014), <http://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont>.

142. *GOALS Study*, *supra* note 132, at 2 (also indicating that the median time devoted to academics for a Division I athlete was thirty-eight and a half hours per week).

143. NCAA DIVISION I MANUAL, *supra* note 134, § 17.1.7.1.

144. *Id.* § 17.1.7.3.2.

145. *Id.* § 17.02.18.

146. *See id.*

147. *GOALS Study*, *supra* note 132, at 2.

are barred from pursuing, only about one-third of the Division I student-athletes involved in baseball, basketball, and football completed or expected to undertake an internship during college.<sup>148</sup> Student-athletes have also reported that their participation in athletics prevented them from taking certain classes, and only 60% of Division I athletes reported “feeling positive about their ability to keep up with their classes while in-season.”<sup>149</sup> In response, student-athletes tend to be “clustered” into majors that are less rigorous or demanding (thereby allowing the student-athlete to devote more time to his or her sport).<sup>150</sup>

As the plaintiffs alluded to in *Berger*, it is unclear why other students who receive scholarships or who participate in extracurricular activities do not face the same restrictions as NCAA student-athletes.<sup>151</sup> Emmert has acknowledged that the NCAA aspires to provide students with professional coaches, trainers, support staff, and facilities.<sup>152</sup> If student-athletes are being given professional resources, expected to behave like professionals, and are controlled in a stricter manner than ordinary college students, then it is hard to see what makes them “amateurs” besides mere rhetoric.<sup>153</sup>

### C. The NCAA and College Athletics: Big Business

Commercialism drives the NCAA and its members. Regardless of whether schools are profiting from their athletic programs (and many are), the most essential point—for purposes of coverage under the FLSA and application of the economic realities test—is that they generate extraordinary revenue as a direct result of their student-athletes’ work and participation. Because revenue has increased exponentially over the

148. *Id.* at 5.

149. *Id.* at 3. However, the trends in these areas have been improving. Thanks, in part, to the ability of online classes, student-athletes are increasingly able to take the classes they want, and the majority do not regret their academic choices. *See id.*

150. *See* Doug Lederman, *Concerns About Clustering*, INSIDE HIGHER ED. (Nov. 20, 2008, 9:00 AM), <https://www.insidehighered.com/news/2008/11/20/cluster> (noting that the NCAA’s academic policies may be “driving athletes” or “prompting colleges to push athletes into majors that are perceived as being easier”).

151. *See* *Berger v. NCAA*, 162 F. Supp. 3d 845, 849, 856-57 (S.D. Ind. 2016).

152. Interview with Mark Emmert, President, NCAA, PBS (Feb. 14, 2011), <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html>.

153. *See generally* Josh Freedman, *Beyond Northwestern: Should Non-Football College Athletes Be Able To Unionize*, FORBES (Apr. 8, 2014), <https://www.forbes.com/sites/joshfreedman/2014/04/08/beyond-northwestern-should-non-football-college-athletes-be-able-to-unionize/#6e1928c51801>.

last several decades, athletic programs are now run like stand-alone organizations and have been taken over, in part, by television executives and other corporate entities. For major programs, it is clear that the schools derive a huge benefit from athletics.

There is little controversy over the statement that college athletics has turned into an enormous business. From 2004 through 2014, the median generated revenues of schools that are members of the "Football Bowl Subdivision" ("FBS") have increased by 94.4%.<sup>154</sup> The median total generated revenue for an FBS school in 2014 was \$44,455,000, which was up over 6% from the previous year.<sup>155</sup> During the 2014–2015 school year, at least fifty-six public schools exceeded the \$50 million mark.<sup>156</sup> The dollars come from multiple sources, but television rights deals make up the majority of the earnings.<sup>157</sup> At the NCAA level, "CBS paid about \$800 million to . . . televise the three-week 2014 men's basketball tournament."<sup>158</sup> ESPN received a slight discount from the NCAA and is paying a mere \$610 million per year over the next twelve years to broadcast three Division I football playoff games.<sup>159</sup>

Given these numbers, it is hard to believe the NCAA's claims that "[o]nly 24 FBS schools generated more revenue than they spent in 2014, and that many athletic programs needed their colleges and universities to cover their expenses."<sup>160</sup> Perhaps unsurprisingly, there is reason for disbelief. Some argue that the failure to turn a profit is "the result of an athletic director's decision to outspend income."<sup>161</sup> And one wonders

154. *2004-2014 Revenues & Expenses, Division I Intercollegiate Athletics Program Report Division I Report* [hereinafter "*NCAA Revenue*"], NCAA, 12 (2014), <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf>. Generated revenues include revenues that are produced by each school's athletics department, including "ticket sales, radio and television receipts, alumni contributions, guarantees, [and] royalties." *Id.* at 9. The FBS refers to "those institutions that play at least 60 percent of their regular-season football games against other FBS institutions, [as well as all but four basketball games] . . . There are also requirements for attendance, scheduling and financial aid." *Id.* at 106; see also *About Division I* *supra* note 1.

155. *NCAA Revenue, supra* note 154, at 17. Median total revenue in 2014 was \$62,275,000, up 0.6 percent from the year before. *Id.*

156. See Berkowitz, *supra* note 2.

157. Branch, *supra* note 113.

158. Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSPECTIVES 115, 120 (2015).

159. *Id.*

160. Brian Burns, *Athletic Departments That Make More Than They Spend Still a Minority*, NCAA (Sept. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/athletics-departments-make-more-they-spend-still-minority>.

161. Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills>.



why—if colleges and universities are toeing the budgetary line when it comes to their athletics programs—the schools continue to sustain such robust programs. For example, economists Allen R. Sanderson and John J. Siegfried point out that when universities incur financial losses, they “double down” and spend “even greater amounts on salaries for coaches and improving physical facilities rather than interpreting losses as a signal to redeploy assets elsewhere.”<sup>162</sup> This was certainly the case at Florida State, which in the face of a \$2 million budget deficit managed to raise salaries for non-coaching administrators from \$7.7 million to \$15 million.<sup>163</sup> Likewise the University of Auburn, apparently unencumbered by its \$17 million budget deficit, decided to buy a new \$13.9 million scoreboard for its football stadium, along with two private jets valued at over \$14 million total.<sup>164</sup> As opposed to demanding accountability, “[c]olleges generally treat athletic departments as stand-alone organizations, free to spend every dollar they earn. Colleges also rarely prevent athletic directors from outspending their earnings, often allowing them to charge mandatory student fees and take university money away from other departments to cover costs.”<sup>165</sup>

Moreover, college athletic departments have seemingly been taken over by this move toward commercialism. A 2008 strategic plan for Duke University Athletics revealed that it has become “increasingly difficult” to “remain competitive at the Division I level without acquiescing to some level of commercialism.”<sup>166</sup> According to the report:

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162. Sanderson & Siegfried, *supra* note 158, at 121 (identifying six potential rationales for this behavior); see Maxwell Strachan, *NCAA Schools Can Absolutely Afford to Pay College Athletes, Economists Say*, HUFF. POST (Mar. 27, 2015), [http://www.huffingtonpost.com/2015/03/27/ncaa-pay-student-athletes\\_n\\_6940836.html](http://www.huffingtonpost.com/2015/03/27/ncaa-pay-student-athletes_n_6940836.html) (quoting David Berri, a professor of economics at Southern Utah University) (“They’re nonprofits, and their incentive is to spend every cent that comes in. That doesn’t mean they aren’t making money. That just means they spent all of it.”).

163. Sally Jenkins, *College Athletic Departments are Paying Themselves to Lose Money*, WASH. POST (Nov. 25, 2015), [https://www.washingtonpost.com/sports/colleges/flagrant-foul-college-sports-bosses-cry-poor-while-spending-lavishly/2015/11/25/f2d6d130-937d-11e5-b5e4-279b4501e8a6\\_story.html](https://www.washingtonpost.com/sports/colleges/flagrant-foul-college-sports-bosses-cry-poor-while-spending-lavishly/2015/11/25/f2d6d130-937d-11e5-b5e4-279b4501e8a6_story.html). Though the athletic departments in the top five college athletic conferences earns a median of \$93.1 million in revenue, pay for administrators has risen by \$300 million in the last decade. *Id.*

164. *Id.*; Hobson & Rich, *supra* note 161.

165. Hobson & Rich, *supra* note 161.

166. *Unrivaled Ambition: A Strategic Plan for Duke Athletics*, DUKE ATHLETICS 11 (Apr. 26, 2008), [http://www.goduke.com/pdf2/127971.pdf?DB\\_OEM\\_ID=4200](http://www.goduke.com/pdf2/127971.pdf?DB_OEM_ID=4200) (“[T]he revenue from advertisers and corporate sponsors has become a very important supplement to long established revenue streams but that means that each year our amateur student-athletes take the field with a corporate logo displayed on their uniform beside Duke.”).

We no longer determine at what time we will play our games, because they are scheduled by TV executives. This is particularly troubling for basketball, which may be required to play weeknight games away from home at 9:00 p.m. The potential impact on academic work is obvious, as students are required to board a flight at 2:00 a.m., arriving back at their dorms at 4:00 or 5:00 a.m., and then are expected to go to class, study, and otherwise act as if it were a normal school-day. In return for large television contracts, we have surrendered control over a function that can profoundly influence the experience of our students.<sup>167</sup>

Though it may be tidy and logical for a court to default to the notion that a school's core mission is "academics" and not "athletics," an institution's priorities should be questioned when the spending on athletics dwarfs what is spent on academics, and when the average salary for football coaches increases at a faster pace than it does for professors or university presidents.<sup>168</sup>

This overwhelming focus on athletics is also illustrated by recruiting practices, as competitive programs engage in what amounts to an arms race to secure verbal commitments from high school athletes before they have even taken the SAT.<sup>169</sup> Then, once students arrive, the emphasis on academic eligibility has caused several schools to engage in certain practices (or, at least, to look the other way in the face of such practices) that no rational observer could construe as being in an ordinary student's best interest.<sup>170</sup> At the University of North Carolina,

167. *Id.*

168. See Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html> ("[B]etween 1985 and 2010, average salaries at public universities rose thirty-two percent for full professors, 90 percent for presidents and 650 percent for football coaches."). See also *id.* (noting that "[s]pending on high-profile sports grew at double to triple the pace of that on academics").

169. See *Recruiting*, NCAA, <http://www.ncaa.org/student-athletes/future/recruiting> (last visited Oct. 21, 2017).

170. See, e.g., Paul M. Barrett, *In Fake Classes Scandal UNC Fails Its Athletes and Whistle-Blower*, BLOOMBERG (Feb. 27, 2014, 7:35 PM), <http://www.bloomberg.com/news/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower> (highlighting the academic scandal at the University of North Carolina); *Special Report on Oklahoma State Football: Part 2-The Academics*, SPORTS ILLUSTRATED (Sept. 11, 2013), <http://www.si.com/college-football/2013/09/11/oklahoma-state-part-2-academics> (detailing numerous examples of Oklahoma State's student-athletes receiving improper assistance with academic papers, exams, and grades from counselors, tutors, and professors).

for instance, many student-athletes who lacked even “basic literacy skills” were herded by their academic advisors into “no-show” lecture classes that never met, a practice that lasted for at least two decades through 2011.<sup>171</sup> Likewise, the widespread practice of “redshirting”<sup>172</sup> incoming student-athletes might help win national championships (by giving the student-athlete more time to hone his skills and physically develop), but it is not necessarily in a student-athlete’s best academic interests to remain in school—where, as this paper continues to point out, his earnings are restricted—for longer than he needs to complete his academic degree.

Further, many Division I athletes, especially those in high-profile sports, clearly do not view their athletic careers as mere supplements to their educational experience. For example, according to the NCAA, “about 40% of [the Division I men’s basketball] players who enter Division I directly out of high school depart their initial school by the end of their sophomore year.”<sup>173</sup> Though this percentage is not too far out of line with the transfer rates of college students generally,<sup>174</sup> around 90% of the men’s basketball transfers said they were transferring for “athletic reasons.”<sup>175</sup> Due to poor academic planning, these transfers often wind up losing academic credits and, in turn, registering lower graduation rates than non-transfers.<sup>176</sup>

Though the NCAA’s rules and regulations and formal practices appear to prioritize academics, its member schools and the NCAA itself are doubtlessly motivated by revenue. Cathedrals (passing for stadiums) are erected, humongous television deals are signed, and the fiction of amateurism continues to persist. Some, if not most, student-athletes almost certainly benefit from their participation in college athletics. After all, many of them are given scholarships and living stipends that help ease what would otherwise be a much larger financial burden to

171. See Barrett, *supra* note 170.

172. *NCAA Transfer Terms*, <http://www.ncaa.org/student-athletes/current/transfer-terms> (last visited Oct. 21, 2017) (“[R]edshirting refers to someone who is enrolled full-time at a school, but does not play for an academic year for the sole purpose of saving a season of competition.”).

173. *Tracking Transfer in Division I Men’s Basketball* [hereinafter “*Tracking Transfer*”] (June 28, 2017, 10:43 AM), <http://www.ncaa.org/about/resources/research/tracking-transfer-division-i-men-s-basketball>.

174. Roughly thirty-seven percent of college students transfer at least once. See *Transfer & Mobility: A National View of Student Movement in Postsecondary Institutions, Fall 2008 Cohort*, NAT’L STUDENT CLEARINGHOUSE RESEARCH CENTER 8 (July 2015).

175. *Tracking Transfer*, *supra* note 173. According to the NCAA’s GOALS study, “[m]en’s and women’s basketball stands out as a sport where the decision to enroll or to transfer . . . often depends on the coach at that college.” *GOALS Study*, *supra* note 133, at 2.

176. *Tracking Transfer*, *supra* note 173.

attend school. However, student-athletes also make serious tradeoffs that are not necessarily optimal for student-athletes who are supposed to be "students" first. The dedication that it takes to be a Division I athlete, along with the financial and academic opportunities that must be passed over in order to remain NCAA compliant and academically eligible, creates a burden that is not there for other students.

With commercialism at its core, the least the NCAA and its members could do is to make sure that its student-athletes are getting a fair piece of the pie. In the absence of such a gesture, any federal court that is undertaking a realistic economic realities test should look to the NCAA's spurious ideal of "amateurism," its unrelenting drive for revenue, and the extent to which student-athletes are dependent (economically and otherwise) on their schools.

#### IV. COLLEGE PLAY FOR PAY: MOVING FORWARD

This Part first addresses the relatively benign consequences that would likely result from a court's decision to compel the NCAA, or one of its member institutions, to leave its outdated notion of "amateurism" behind. Second, this Part briefly outlines some of the alternative proposals that a court or legislative body may consider in lieu of granting student-athletes "employee" status under the FLSA.

##### *A. The Consequences of Forsaking "Amateurism"*

The consequences of forsaking the amateur model of athletics would likely not be too severe for the NCAA. Some, such as NCAA President Mark Emmert, have argued that "if amateurism goes away, so will the games as we know them now."<sup>177</sup> He believes that allowing student-athletes to be paid would "change what college sports is all about."<sup>178</sup> This Section, however, argues that Emmert (and others who make similar arguments) overestimate the extent to which paying student-athletes would affect college sports' place in our society.

"College sports are deeply inscribed in the culture of our nation."<sup>179</sup> This Article has already established that the NCAA and its members have secured billions of dollars through ticket sales, media rights deals, and other revenue streams. Major college sporting events, such as the

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177. Sara Ganim, *Paying College Athletes Would Hurt Traditions, NCAA Chief Emmert Testifies*, CNN (June 19, 2014), <http://www.cnn.com/2014/06/19/us/ncaa-obannon-lawsuit-trial>.

178. *Id.*

179. Branch, *supra* note 113.

March Madness Basketball Tournament, are comparable to the Super Bowl in terms of the television ad revenue generated and the attention given by national and local sports media.<sup>180</sup> In 2005, ESPN even created a dedicated network for college sports, which offers “year-round insight on basketball and football recruiting.”<sup>181</sup>

Thus, the argument that conferring employee status on student-athletes would somehow jolt the nation out of its craze for college sports is spurious at best. Commercialization and the infusion of capital into college athletics have allowed college sports fans to satiate their appetites for more games and more coverage.<sup>182</sup> Schools have built-in fan bases (i.e., current students and alumni) that already spend money to purchase expensive season tickets and cable packages.<sup>183</sup> These same fans have also spent years becoming desensitized to the corporate culture that has gripped college sports.<sup>184</sup> It is possible that eliminating “amateurism” in college athletics would actually work in the NCAA’s favor because “hypocrisy and corruption will no longer be core components [of supporting the NCAA].”<sup>185</sup>

Fortunately, the NCAA would not be wading into uncharted territory if it were to decide (or if a court were to decide) that the principles of “amateurism” should be heavily relaxed to accommodate student pay. The Olympics, which originally embraced “the most stringent definition of amateurism,” decided to allow professionals to compete in its competitions in the mid-1990s.<sup>186</sup> Like the NCAA, the

180. See, e.g., Christina Austin, *The Major League Money Behind March Madness, the Super Bowl, and the World Cup*, FORTUNE (Apr. 3, 2015), <http://fortune.com/march-madness-super-bowl-world-cup-revenue>.

181. Press Release, Derek Volner, ESPNU Celebrates Its 10th Anniversary Today, ESPN MEDIAZONE (Mar. 4, 2015), <http://espnmediazone.com/us/press-releases/2015/03/espnu-celebrates-10th-anniversary-today>.

182. See generally Pappano, *supra* note 168 (highlighting that the “explosion in televised games has spread sports fever well beyond traditional hotbeds” and that campus life at many schools “revolves around not just going to games but lining up and camping out to get into them”).

183. See Earl Smith, SOCIOLOGY OF SPORT AND SOCIAL THEORY 69 (2009) (arguing that college sports fans “may have little interest in examining . . . the extent to which the NCAA . . . achieves its stated purpose of retaining ‘a clear line of demarcation between intercollegiate athletics and professional sports’”).

184. See *id.* at 69-70.

185. Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275> (arguing that the appeal of college athletics is “tribal”).

186. See *id.* Even athletes who merely “decided” to go pro were banned from Olympic competition. *Id.* The original Olympic Charter allowed only amateurs to compete in the Olympic Games. The Charter defined “amateur” as “one who participates and always has participated in sport as an avocation without material gain of any kind.” *Eligibility Rules of the International*

International Olympic Committee ("IOC") had strict rules against commercialization, and it doled out strict sanctions for athletes that broke its rules.<sup>187</sup> For decades, Avery Brundage, president of the IOC from 1952 to 1972, maintained that amateurism had to be preserved in order to ensure the Olympics' success.<sup>188</sup> But over the past several decades, the Olympics has become a completely commercialized entity.<sup>189</sup> The IOC actually "expunged the word amateur from its charter in 1986," and professional athletes now dominate the competition.<sup>190</sup> The loss of amateurism and so-called "purity of sport" turned out not to be the destructive force that many thought it would be.<sup>191</sup> At least, it hasn't hurt the bottom line. In 2011, for example, Comcast paid \$4.38 billion for exclusive media rights to the Olympics from 2014 to 2020.<sup>192</sup> Meanwhile, the 2016 Summer Olympics saw Comcast secure a record \$1.2 billion in advertising sales.<sup>193</sup>

The NCAA has already taken steps to allow some of its student-athletes who compete in the Olympics and other world competitions to be compensated for their efforts. Under its bylaws, student-athletes are permitted to accept cash for winning medals, stipends to cover training expenses, and sponsored apparel, all while maintaining college eligibility.<sup>194</sup> Such exceptions, seemingly inconsistent with the NCAA's

*Olympic Committee* (1964), [https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic\\_Charter\\_through\\_time/1964-Olympic\\_Charter\\_Eligibility\\_Rules\\_of\\_the\\_IOC.pdf](https://stillmed.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1964-Olympic_Charter_Eligibility_Rules_of_the_IOC.pdf). Athletes who received or had received pay for participation in sport were not eligible to compete. *Id.*

187. See Bob Greene, *What Changed the Olympics Forever*, CNN, <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs> (last updated July 23, 2012, 11:43 AM).

188. See *id.*

189. See Hruby, *supra* note 185 (comparing the \$30 million in sponsorship revenue generated by the 1980 amateur games in Lake Placid to the \$840 million in sponsorship revenue generated by the 2002 professional games in Salt Lake City).

190. See Branch, *supra* note 113.

191. See Hruby, *supra* note 185 ("People's love of competition trumps anybody's love of athlete poverty.").

192. Richard Sandomir, *NBC Wins U.S. Television Rights to Four More Olympics*, N.Y. TIMES (June 7, 2011), <http://www.nytimes.com/2011/06/08/sports/nbc-wins-tv-rights-to-next-four-olympics.html>.

193. Jason Lynch, *\$1.2 Billion and Counting: How NBCUniversal Secured Its Biggest Olympics Advertising Windfall Ever*, ADWEEK (Aug. 4, 2016), <http://www.adweek.com/news/television/12-billion-and-counting-how-nbcuniversal-secured-its-biggest-olympics-advertising-windfall-ever-172697>. One executive remarked that this figure surpassed what was once thought to be an "unobtainable threshold." *Id.*

194. See Steve Berkowitz, *Olympics Offer Rare Chance for NCAA Athletes to be Paid*, USA TODAY, <http://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/02/paying-ncaa-college-athletes-at-rio-olympics-kyle-snyder-katie-ledecky/87709714> (last updated Aug. 2, 2016, 7:10 PM). For example, USA Wrestling paid Kyle Snyder, a national champion for the Ohio State University

other strict prohibitions, at least work to incentivize high-performing student-athletes to stay in school while they compete on the world stage.

On the other hand, the NCAA's amateurism principles penalize would-be student-athletes who participate in sports where the decision to turn professional must be made earlier than college. This was the case for Jordyn Wieber, a member of the 2012 U.S. Olympic gold medal gymnastics team. Wieber turned professional before traveling to the Olympics so that she could take advantage of the financial benefits that Olympic sponsorships could offer; however, this meant that she had to forego collegiate competition altogether.<sup>195</sup> It seems illogical to declare that Wieber should be ineligible to compete in college because she accepted endorsement deals prior to the enrollment, but her Olympic teammates—who may be able to accept greater Olympic bonuses depending on individual achievements—are able to maintain their eligibility. The NCAA's rigid adherence to "amateurism" makes little sense in this context. If anything, these types of rules misalign incentives, as top student-athletes may have more to gain by trying to turn professional as soon as possible.

There is also little reason to think that paying student-athletes would undermine education. Schools already employ and pay students for working in the dining halls, campus resource centers, and yes, school athletic events. Just as students working in the dining halls do not abandon their studies in order to make sandwiches, student-athletes would not abandon their education in the face of just compensation (nor would they be able to given the NCAA's academic eligibility requirements).

And it is not as though the refusal to pay student-athletes appears to benefit the students themselves. NCAA Division I football players and men's and women's basketball players tend to graduate at rates less than other full-time students.<sup>196</sup> Further, the NCAA has recognized that an

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Buckeyes, \$250,000 after Snyder won the gold medal at the 2016 Olympics. *Id.* Snyder has continued to compete for Ohio State since the Olympics. *Id.*

195. *Gymnasts Face Complicated Choice: Olympic Endorsements or College Careers*, ASSOCIATED PRESS, [http://www.nbcbayarea.com/news/sports/Gymnasts\\_face\\_complicated\\_choice\\_Olympic\\_endorsements\\_or\\_college\\_careers-387664081.html](http://www.nbcbayarea.com/news/sports/Gymnasts_face_complicated_choice_Olympic_endorsements_or_college_careers-387664081.html) (last updated July 26, 2017, 8:52 AM).

196. *2016 Adjusted Graduation Gap Report: NCAA FBS Football*, COLL. SPORT RESEARCH INST. 1-2 (Oct. 19, 2016), [http://csri-sc.org/wp-content/uploads/2016/10/2016-Football-AGG-Report\\_Publish\\_Final\\_10-19-2016.pdf](http://csri-sc.org/wp-content/uploads/2016/10/2016-Football-AGG-Report_Publish_Final_10-19-2016.pdf); *2016 Adjusted Graduation Gap Report: NCAA Division-I Basketball*, COLL. SPORT RESEARCH INST. 2, 5 (Apr. 6, 2016), [http://csri-sc.org/wp-content/uploads/2013/09/2016-Basketball-AGG-Report\\_Final.pdf](http://csri-sc.org/wp-content/uploads/2013/09/2016-Basketball-AGG-Report_Final.pdf). The NCAA disputes these numbers. See Paul Steinbach, *Record NCAA Graduation Rates Don't Tell The Whole Story*, ATHLETIC BUSINESS (Dec. 2011), <http://www.athleticbusiness.com/Governing-Bodies/record-ncaa>

overwhelming percentage of student-athletes in basketball and football operate under the false belief that they are going to turn professional.<sup>197</sup> But in reality, only about 1.6% of college football players and 1.1% of collegiate male basketball players will end up joining a professional league after leaving school.<sup>198</sup> The failure to compensate student-athletes does little to serve their academic and professional interests.

### *B. Alternatives to FLSA Recognition*

There have been several proposals put forward for how the NCAA and/or its members might "compensate" student-athletes outside of FLSA recognition. This Section describes three of those alternatives.

#### 1. Optional Education

Jamie Nicole Johnson argues that universities and student-athletes "would benefit from the legal recognition of college athletes as employees, removing athletes from the classroom, and from compensating them as legal employees."<sup>199</sup> She advocates for what she calls the "Employable Athlete Model," which would allow student-athletes the *option* to enroll in courses and to receive a capped salary from the college or university.<sup>200</sup> Johnson believes that this model will allow athletes to better prepare for their career goals and will give universities the freedom to reallocate the resources previously provided to grant-in-aid student athletes.<sup>201</sup>

Though Johnson's idea is not without merit, adoption of such a model would be a step in the wrong direction. Whereas compensating student-athletes under a statute like the FLSA would serve as recognition that student-athletes are similar to other student employees,<sup>202</sup> removing

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graduation-rates-don-t-tell-the-whole-story.html (accounting for the discrepancies that tend to arise between these numbers and those promulgated by the NCAA).

197. Mark Emmert, 2015 *NCAA State of the Association*, NCAA, <http://www.ncaa.org/about/resources/media-center/2015-ncaa-state-association> (last visited Oct. 21, 2017) (noting that 75 percent of Division I men's basketball players believe that they will play professionally).

198. *Estimated Probability of Competing in Pro Athletics*, NCAA (Mar. 10, 2017), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

199. Johnson, *supra* note 47, at 999 ("These reforms will allow athletes to fully commit to athletic performance and earn protection under state workers' compensation laws.").

200. *Id.* at 1003. This salary would replace the student-athlete's grant-in-aid scholarship. *Id.*

201. *See id.* at 1004, 1007.

202. Amended Complaint and Demand for Jury Trial at 5, *Berger v. NCAA*, No. 1:14-cv-1710



student-athletes from the classroom altogether would turn colleges and universities into a de facto minor professional league with the sole goal of breeding athletes (no longer “student”-athletes) for the professional game. In contrast, what this Article advocates—extension of the FLSA to cover student-athletes—does not take the “student” out of student-athlete. Rather, FLSA extension serves to compensate student-athletes for work performed while still preserving the academic obligations that are currently in place.

## 2. Academic Credit

As opposed to making education optional, others argue that student-athletes should be provided with academic credit (in lieu of compensation) for their participation in college athletics.<sup>203</sup> M. Tyler Brown notes that “[p]roviding academic credit to college athletes simply for academic participation [in athletic courses such as Football] would violate NCAA policies against providing special benefits to athletes based on athlete status.”<sup>204</sup> But according to Brown, schools could circumvent this rule by creating an “internship seminar class, in which all students of the general student body participating in internships must enroll.”<sup>205</sup> These classes, says Brown, would teach “valuable topics generally applicable to all types of work . . . [and] function as a practical work-skills course sponsored by the school.”<sup>206</sup> Brown compares this type of class to those that provide credit for other extracurricular activities and majors, such as music or drama.<sup>207</sup>

Some non-Division I athletic programs do currently allow their athletes to receive academic credit for playing a varsity sport. At Ithaca College (a Division III program), for example, students may receive 0.5 credits simply by signing up for the sport and notifying a coach that he or she wishes to receive credit.<sup>208</sup> Further, Vassar College (also Division III) allows students to earn up to two credits—satisfying Vassar’s two-credit physical education requirement—for their participation on a

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(S.D. Ind. Mar. 18, 2015).

203. M. Tyler Brown, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855, 1855 (2014).

204. *Id.* at 1895.

205. *Id.*

206. *Id.*

207. *Id.* at 1897.

208. *Student-Athlete Academic and Eligibility Guidelines*, ITHACA C., <http://www.ithaca.edu/policies/vol7/athletics/070602> (last updated Aug. 1, 2017).

varsity sports team.<sup>209</sup>

It makes sense to allow students who are participating in varsity sports to receive physical education credits for doing so. But it makes less sense to set up whole classes, such as those advocated for by Brown, which would only serve to take up even more of a student-athlete’s time in the name of college athletics. These classes would not change the basic premise that student-athletes are substantially controlled by and economically dependent on their schools and should be entitled to the basic protections that the FLSA provides. If anything, these classes would impose additional burdens and time constraints on student-athletes, potentially precluding them from other classes or opportunities they wish to pursue.

### 3. Outside Profit

Perhaps the most interesting suggestion for allowing athletes to be “compensated” comes from Andrew Zimbalist, an economist and sports industry consultant. He argues that the NCAA should re-define “amateur” as “one who is not paid a salary for his or her sport.”<sup>210</sup> This would allow student-athletes to earn outside income, secure an agent, enter a professional sports draft, “and not become ineligible to play college sports until they sign their first professional contract.”<sup>211</sup> Patrick Hruby likens this to the model utilized by the Olympics, which “doesn’t pay participants [but] . . . simply allows them to get paid.”<sup>212</sup> Hruby argues that allowing student-athletes to appear in commercials or to otherwise profit from their name, image, and likeness would “help grow and share [the NCAA’s] wealth”<sup>213</sup> and “bring the underground college sports economy into the light.”<sup>214</sup>

This proposal actually brings the NCAA’s concept of the “student-athlete” into focus by allowing student-athletes to make money through

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209. See *PHED 320 – Varsity Athletics*, VASSAR COLL. COURSE CATALOG, [http://catalog.vassar.edu/preview\\_course\\_nopop.php?catoid=7&coid=62111](http://catalog.vassar.edu/preview_course_nopop.php?catoid=7&coid=62111) (last visited Oct. 21, 2017).

210. Andrew Zimbalist, *Paying College Athletes*, HUFFINGTON POST (Mar. 28, 2015, 12:17 PM), [http://www.huffingtonpost.com/andrew-zimbalist/paying-college-athletes-take-two\\_b\\_6961314.html](http://www.huffingtonpost.com/andrew-zimbalist/paying-college-athletes-take-two_b_6961314.html).

211. *Id.*

212. Hruby, *supra* note 185.

213. *Id.*

214. Patrick Hruby, *Should College Athletes Get Paid? Ending the Debate, Once and for All*, ATLANTIC (Apr. 6, 2011), <http://www.theatlantic.com/entertainment/archive/2011/04/should-college-athletes-get-paid-ending-the-debate-once-and-for-all/236809>.

outside endeavors just as every other college student is able to do. The problem with this model is that it heavily favors only a select few athletes who play for the top programs in the highest revenue-generating sports. National advertisers would certainly clamor to sign the star quarterback at the University of Alabama and the dominant point guard at the University of Kentucky. Other, less-visible members of these same teams (as well as student-athletes who compete for less renowned programs or in less popular sports) would be unlikely to receive the same interest, despite being just as economically dependent on the institution as their peers. FLSA extension would not discriminate against these or other student-athletes and would ensure that all student-athletes are compensated for the revenue they help produce and the control to which they are subjected.

### *C. The Response to FLSA Recognition*

If a court were to eventually extend coverage of the FLSA to student-athletes, the DOL (no matter its position) and Congress would have to figure out how a “pay for play” regime could be put into place. The most direct response would be for Congress to include student-athletes as one of the “exemptions” to the FLSA’s minimum wage and maximum hours requirements.<sup>215</sup> Under Section 213, if certain conditions are met, various classes of employees do not need to be paid the mandated minimum wage.<sup>216</sup> For example, certain “computer employees” are exempt from the FLSA’s minimum wage so long as they are compensated at a minimum rate of \$455 per week or \$27.65 per hour.<sup>217</sup> Further, the FLSA exempts employees who are employed by an “amusement or recreational establishment, organized camp, or religious or non-profit educational conference center” if the operation does not run for more than seven months in any calendar year or if a certain revenue threshold is not met.<sup>218</sup>

These same principles could be applied to student-athletes by exempting them from the FLSA’s minimum wage requirements, so long as they are paid a certain salary. This would help avoid the

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215. 29 U.S.C. § 213.

216. *See id.* § 213(a)(1)(17).

217. U.S. DEP’T OF LABOR, FACT SHEET #17(A): EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), [https://www.dol.gov/whd/overtime/fs17a\\_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf) (last updated July 2008).

218. *See* 29 U.S.C. § 213(a)(3) (2012).

administrative headaches that would come from school officials having to account for the FLSA's maximum hours and overtime provisions. Basing a student-athlete's pay on the revenue generated by his or her university, or even the revenue that is attributable to his or her team would also be an interesting tack, though the details of such a system may be too convoluted to be put into action.

## V. CONCLUSION

Advocates for student-athlete pay under the FLSA should not be disheartened by the court's ruling in *Berger*. Every employer-employee relationship under the FLSA is premised on the economic dependency of the purported employee on the purported employer. Instead of truly analyzing the economic and functional relationship of student-athletes with their schools, the Southern District of Indiana justified its decision not to extend the FLSA based on questionable policy rationales, including the NCAA's tradition of amateurism and the apparent inaction of the DOL to press for student-athlete compensation. The court did not grapple with the reality that student-athletes are controlled by their schools in ways that ordinary students are not, devote an extensive amount of time to activities that produce a significant stream of revenue for the institution, and are sometimes forced to forego academic opportunities if they wish to maintain their scholarships. It is time to recognize college play in the FLSA.

## VI. POSTSCRIPT

On December 5, 2015, the Seventh Circuit Court of Appeals affirmed the Southern District of Indiana's ruling that student-athletes, as a matter of law, are not employees under the FLSA.<sup>219</sup> The Seventh Circuit's analysis of the plaintiffs' claims largely mirrored that of the district court's. After declining to adopt a multifactor economic realities test, the court once again focused on the "revered tradition of amateurism in college sports"<sup>220</sup> According to the court, this "long-standing tradition defines the economic reality of the relationship between student athletes and their schools."<sup>221</sup> The court also relied on the DOL's failure to intervene on behalf of student-athletes, rejected the

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219. *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016).

220. *Id.* at 291 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984)).

221. *Id.*

argument that student-athletes are comparable to work-study participants, and highlighted a multitude of other reasons why students decide to participate in college athletics.<sup>222</sup>

However, Judge David Hamilton, in a concurring opinion, emphasized the fact that the University of Pennsylvania plaintiffs were not offered athletic scholarships and did not participate in a revenue-generating sport.<sup>223</sup> He suggested, therefore, that the Seventh Circuit's reasoning might not apply as strongly "to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football."<sup>224</sup> Judge Hamilton stated:

In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. 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.<sup>225</sup>

Judge Hamilton's concurrence was disregarded, however, in *Dawson v. NCAA*, where the Northern District of California dismissed a former Division I football player's FLSA claim that the NCAA and the PAC-12 Conference ("PAC-12") were the joint employers of student-athletes playing Division I FBS football in the PAC-12.<sup>226</sup> The court framed the ultimate question as "whether student athletes can be considered 'employees'" and noted that the Bonnette multifactor test was not well-suited for this inquiry.<sup>227</sup> Instead, the court analyzed the "true nature of the relationship" and the "circumstances of the whole activity."<sup>228</sup> The court concluded that there was "no legal basis for finding" that student-athletes were "employees" under the FLSA,<sup>229</sup> and

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222. *See id.* at 292-93.

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

224. *Id.*

225. *Id.*

226. *Dawson v. NCAA*, 250 F. Supp. 3d 401, 408 (N.D. Cal. 2017). As a result, the plaintiff alleged, the defendants violated the FLSA by failing to pay these student-athletes the minimum wage for all hours worked, including overtime. *Id.* at 403.

227. *Id.* at 405.

228. *Id.*

229. *Id.* at 408. In so ruling, the court rejected the plaintiff's argument that *Berger* was

it placed no weight on Judge Hamilton's concurrence, instead noting that "he did not consider, much less find, that the football players are 'employees' under FLSA."<sup>230</sup> However, the court failed to engage in a substantive examination of the benefits that student-athletes confer on their schools. Relying once again on the notion that there is a "long tradition of amateurism in college sports," the court merely concluded that football programs, unlike work-study programs, "exist for the benefit of students and, in some limited circumstances, also benefit the school."<sup>231</sup> The actual extent to which these programs benefit the school, the court did not care to inquire.

Despite the apparent setback in Dawson, student-athletes have refused to end the fight. On September 26, 2017, Lawrence "Poppy" Livers filed suit in the Eastern District of Pennsylvania against the NCAA and twenty Division I Member Schools, arguing that student-athletes receiving athletic scholarships and who are therefore required "to participate in NCAA athletics under daily supervision of full-time coaching and training staff" are employees entitled to the FLSA's protections.<sup>232</sup> The Complaint distinguishes itself from Berger and Dawson and seeks, among other remedies, any unpaid wages that are owed by the defendants under the FLSA.<sup>233</sup>

Judge Hamilton's concurrence in Berger and Livers' Complaint in the Eastern District of Pennsylvania demonstrate that there are still arguments to be made under the FLSA for student-athlete recognition and that "college play for pay" is not dead.

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distinguishable because it involved student-athletes who did not earn the kind of "massive revenue" that is earned by Division I football players. *Id.* at 405–06. It found instead that "the premise that revenue generation is determinative of employment status is not supported by the case law." *Id.* at 406.

230. *Id.* at 406.

231. *Id.* at 407.

232. Complaint at 1, Livers v. NCAA et al., Case No. 2:17-CV-04271 (E.D. Pa. Sept. 26, 2017).

233. *Id.* at 3. Plaintiff is arguing that the plaintiffs in *Berger* were students of the University of Pennsylvania, which does not enter into scholarship agreements with student-athletes. *Id.* at 2. Further, the plaintiffs distinguished *Dawson* by noting that the plaintiff in *Dawson* sued only an NCAA member conference (the PAC-12) and failed to sue any NCAA member schools. *Id.*

