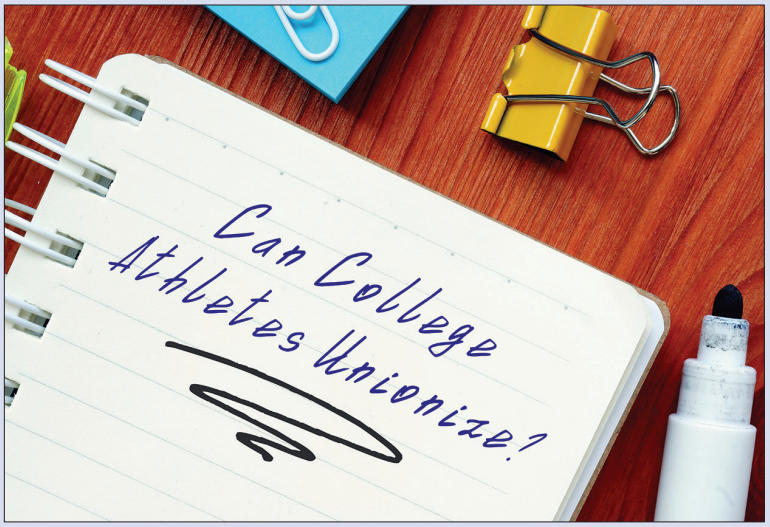
Organizing and the college athlete

A sign of the times …

Mark Gaston Pearce

Daphne Assimakopoulos



Here is Pearce and Assimakopoulos's basic argument:

- Big-time college athletics is in a time of flux given the contradictions between big money for athletics departments, coaches' salaries, and universities, and predominantly Black "student-athletes" and their "plantation dynamic."
- For the last year student athletes have been allowed to make money on their name-image-likeness, which, while nominally improving an athlete's lot, has opened the door to more inequities and is not an answer to an untenable status quo.
- "Current conditions are unsustainable and unjust."

Big-time college sports such as football and basketball generate massive revenues for universities, television networks, and the NCAA itself. Yet, since its creation in 1906, the NCAA has forbidden collegiate athletes from receiving compensation for their labor. Until recently, athletes were even barred from monetizing their name, image, and likeness (NIL) rights.

The National Labor Relations Board has, to this point, passed on the question of whether certain college athletes, based on their relationship with the universities they play for, can organize as employees. Despite the NCAA's decades of success maintaining this status quo, trends seem to be increasingly turning toward defining college athletes in a different way. From the Supreme Court's landmark *NCAA v. Alston* decision to NLRB General Counsel Jennifer Abruzzo's fall 2021 memo stating her prosecutorial position that athletes are employees, change appears imminent.

For decades the NCAA has justified its arrangement with athletes on the cornerstone concepts of "amateurism" and the "student-athlete." The NCAA argues that the unique appeal of college sports is driven by amateurism: audiences are drawn to athletes participating in elite athletics for the "love of the game" and a pure commitment to their sport untainted by financial reward.

The seemingly innocuous term "student-athlete" was coined by the NCAA's president and legal team in the 1950s as part of a legal strategy designed to avoid paying a worker's compensation claim to the widow of a football player who died after an injury sustained in a game.[1] The public relations angle was clear: if people thought of a collegiate athlete as a student first, how could they also be an employee?

Student-athletes or unpaid employees?

The NCAA has successfully utilized this legal strategy since. In 1974, a Texas Christian University football

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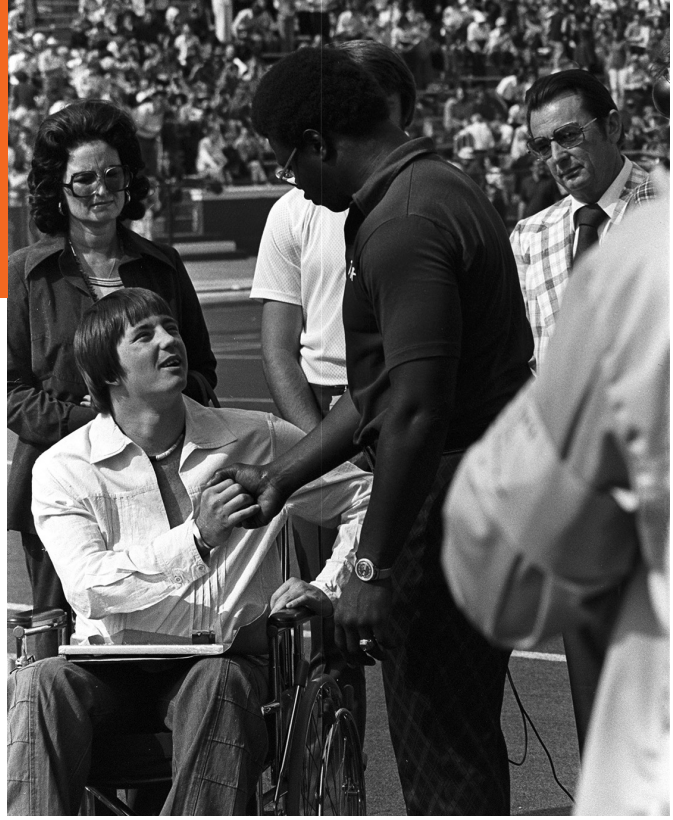

Credit: Paul W. Bryant Museum at The University of Alabama

Kent Waldrep and Sylvester Croom

player named Kent Waldrep was paralyzed after an onfield injury.[2] Throughout the 1990s he filed suits seeking worker's compensation until an appeals court finally ruled he was not an employee because, among other bases, he could have kept his financial aid even if he had quit football and that the school had recruited him as a student, not an athlete. Similar framing persists in NCAA and universities' legal strategies to this day.

The rosy picture that the NCAA paints of "student-athletes" benefiting from their years in the university setting, all while pursuing their elite-level sports for the love of the game, is far from reality. College sports are a multibillion-dollar business, but athletes are cut out of the benefits. While some may receive large scholarships, many struggle to scrape by. A 2019 survey found that nearly a quarter of Division I college athletes experienced food insecurity in the last 30 days, and almost 14 percent experienced homelessness in the previous year.[3]

For decades, the NCAA and collegiate sports have ignored a perception of the industry prevalent in many communities of color — a "plantation dynamic," in which predominantly white institutions extract value from Black athletes to pad their own pockets. Kaiya McCullough, a former UCLA and professional soccer player, and co-founder of the United College Athlete Association, says: "Ultimately, until we address the fact that coaches are signing multimillion-dollar contracts to control a largely Black labor force while that same labor force is denied adequate compensation, prohibited from unionizing, and literally killed from a lack of safety guarantees, plantation dynamics are here to stay."[4]

[A] "plantation dynamic" [exists when] predominantly white institutions extract value from Black athletes to pad their own pockets.

Credit: Saman Assefi

UCLA soccer player Kaiya McCullough

The most recent push to classify collegiate athletes as employees and upend the NCAA's system came in 2014, when Northwestern football players attempted to form a union. Peter Ohr, then regional director of Region 13 of the NLRB based in Chicago, reasoned that the players were employees and thus were entitled to a union election.[5] Northwestern sought review of Ohr's decision with the NLRB, which ultimately declined jurisdiction over the election in a highly publicized 5–0 decision that effectively stopped organizing in its tracks.[6] The board stated that asserting jurisdiction would not serve the act's goal of promoting stability in labor relations, primarily because of challenging questions regarding coverage of public sector universities. The board lacked jurisdictional authority over state-run colleges and universities that make up the majority of teams in NCAA Division I football, and in particular within Northwestern's Big Ten conference.

Although a joint-employer theory could have been posed against the NCAA to bring more athletes under the act's coverage, *Northwestern* was a case of first impression that was issued in the same month that a divided board-issued *Browning Ferris Industries*, a decision that expanded the joint-employer standard[7] and is still the subject of much controversy.[8] Perhaps the board was not yet ready to apply this standard in the university context, especially considering that the *Columbia University* decision defining the status of graduate students as employees would not be decided for another year.[9]

A new ballgame?

The topic of collegiate athlete classification remained somewhat dormant in legal circles — despite ongoing activism by players pushing for their rights[10] — until the Supreme Court decided *NCAA v. Alston* in the summer of 2021. *Alston* held that the NCAA's rules restricting certain education-related benefits (like laptops or scholarships) for student-athletes violate federal antitrust laws. The decision leaves the NCAA's core argument for its existence — the concept of "amateurism" — on shaky ground. Justice Kavanaugh wrote that "there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny," noting that the NCAA's model would be clearly illegal in any other industry.[11]

Then, as if channeling Norma Ray, he explicitly writes "colleges and student-athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student-athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues." This endorsement of collective bargaining among college athletes from the highest court in the land was unprecedented, and it prompted great excitement from players and labor advocates alike.

Building on this momentum, in October 2021 NLRB General Counsel Jennifer Abruzzo issued GC 18-02 stating her prosecutorial position that certain NCAA athletes are employees under the National Labor Relations Act. Her reasoning is that athletes meet the common law standard for employees: they perform a service for the university and NCAA through onfield play, generating massive profits; athletes receive compensation, including tuition, fees, room, board, and travel expenses; and the NCAA controls the terms and conditions of employment, including practice hours, restrictions on benefits, and minimum GPA.[12]

In tandem with these federal developments, legislation has proliferated at the state level affecting how NCAA athletes can profit from their NIL rights.[13] These laws allow college athletes to secure endorsements and scholarships without losing scholarship eligibility and largely provide control over the use of NIL rights. As of February 2022, twenty-eight states have passed similar legislation, ranging in breadth of coverage and effective date. In response to the changing state laws and ongoing athlete activism, the NCAA took action to update their draconian NIL rules. Starting July 1, 2021, college athletes were allowed to make money from their NIL without losing eligibility.

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This change in its NIL policy marked the first time the NCAA has had to adjust its business model that has for so long denied even the smallest amounts of cash to the players at the heart of this multibillion-dollar industry. While such change certainly marks progress, it seems poised to disproportionately benefit white, conventionally attractive, politically neutral athletes — the ideal social media "influencers" corporations find appealing. HypeAuditor, an AI-powered Instagram platform that checks account authenticity, analyzed NIL deals and Instagram profiles of the 10 most prominent college basketball players. On the women's side in particular, Black players earned less than their white counterparts despite comparable on-court success.[14]

The topic of college-athlete classification is particularly pressing because many of today's most acute labor issues are at play in this area. First, as presented in the *Northwestern* case, both the NCAA and the university regulate the terms and conditions of college athletes who may be considered employees. While the NLRB has no jurisdiction over the vast number of state-school members of the NCAA, it might pursue a broad joint-employer theory against the organization. Under a joint-employment theory, more than one entity can be a worker's employer. Where one of the joint employers is a private sector employer subject to the jurisdiction of the NLRB, the terms and conditions of its employees would likewise be subject to the provisions of the NLRA. Expanding joint-employer coverage is another priority for General Counsel Abruzzo, and her pursuit of such an expansion to include public sector universities would be a bold position. Collegiate athletes have already experienced success putting forth a joint-employer argument. In *Johnson v. NCAA*, Judge John Padova sided with players' joint-employer argument in a Fair Labor Standards Act suit against their universities.[15]

Next is the issue of worker misclassification. An unfair labor practice charge related to collegiate athletes could present an appropriate vehicle for the NLRB to overrule *Velox Express, Inc.*, a Trump board decision refusing to find a violation of the NLRA where an employer misclassified drivers as independent contractors,[16] which denies workers access to benefits and the protections of major labor and employment statutes. It also deprives the government of payroll taxes. The National Employment Law Project (NELP) estimates that at least 10 percent to 30 percent of employers misclassify their employees as independent contractors.[17] Misclassification is common in many industries, including home care, janitorial, trucking, delivery, construction, and restaurants. It is also a major issue within the app-based gig economy. Misclassification can be a means of racial injustice as well. Low-income workers are disproportionately represented in these industries. Overturning *Velox Express* is a priority for General Counsel Abruzzo.

Religious objections?

Finally, there is the question of whether and to what extent the NLRA applies to workers, including the student-athletes, in colleges and universities established by religious institutions. The seminal Supreme Court case *NLRB v. Catholic Bishop of Chicago* held that lay teachers at a secondary school operated by the Roman Catholic Church are excluded from NLRA coverage because of conflict with the First Amendment religion clauses.[18] In *Great Falls* (2000), the board asserted jurisdiction over a school that it found did not have a substantial religious character and thus did not present risk of First Amendment infringement.[19]

The United States Court of Appeals for the D.C. Circuit rejected this conclusion and analysis, instead proposing and applying its own three-part test. The NLRB neither adopted nor rejected this test. Instead, in 2014, the Obama board decided *Pacific Lutheran* and created a new test to assess the appropriateness of jurisdiction under *Catholic Bishop*. Under the new test, a university must first demonstrate that it holds itself out as providing a religious educational environment. Then, it will show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining a religious educational environment.

Taking a step back, the board, in its analysis of *Pacific Lutheran*, compared two groups of employees: faculty at religious institutions and faculty at nonreligious institutions. If the employees in each group are performing the same nonreligious instruction, and are

hired, fired, and evaluated under criteria that do not implicate religion, then there is no meaningful difference between the two groups regarding their status as employees. To hold otherwise arbitrarily erases the rights available to large groups of employees who are otherwise indistinguishable from those at secular institutions. Applied to the athletic context, could a university escape coverage because of the institution's religious character, despite athletes' recruitment and work having nothing to do with religion? It is evident that the Obama board was of the view that religious freedom, while a constitutional right, ought not be used as a shield from NLRA coverage where such freedom is not implicated by the statute.

Pacific Lutheran sought to strike the balance by allowing workers to realize their rights under the NLRA while not infringing upon their First Amendment freedoms. This standard was, however, rejected by the D.C. Circuit in *Duquesne University of the Holy Spirit v. NLRB*, where the court once again applied the *Great Falls* test.[20] The Trump board subsequently decided *Bethany College* in 2020, adopting the *Great Falls* test for the NLRB.[21] The Trump board wrote that the test best protected religious freedoms under the First Amendment. This issue has widespread implications, as more than 7,000 colleges and universities report a religious affiliation.[22]

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A future in flux

The future of college athletics, the NCAA, and amateurism remains in flux, and many questions remain. Will NCAA rules and regulations become subject to collective bargaining? If so, what types of issues would be eligible for bargaining? While compensation and work schedules are likely subjects, what about performance-related issues? Will players, dissatisfied with the opportunities they are receiving on the field, utilize grievance procedures under negotiated collective bargaining agreements? Which sports would be included? How should circumstances differ between revenue-producing and non-revenue-producing sports? What about larger versus smaller schools? Even among individual teams, how could a potential compensation scheme differ, for example, between a high-profile starting quarterback and a backup lineman? Questions in this regard are numerous, and difficult to answer.

Professional sports bargaining agreements provide some points of comparison. For example, the Major League Baseball Players Association has issued grievances against Major League Baseball for manipulating players' service time at the major league level. In the National Football League, players have used grievances procedures to challenge issues ranging from the national anthem policy to the league's helmet requirements. An analysis of the scope of professional sports leagues' collective bargaining agreements might be instructive in determining the contours of an agreement at the college level. Many of the concerns raised by the NCAA have been addressed in a professional context and could serve as a guide for how to handle similar matters in the collegiate setting.

Although the path forward is unclear and the challenges significant, the status quo simply cannot persist. Current conditions are unsustainable and unjust. It is worth considering the ideal process through which to address the challenges facing college athletics. A collective bargaining relationship could be the most effective means. As opposed to an adversarial litigious approach, collective bargaining ensures that athletes have a seat at the table during the development of a new institutional structure for college athletics. We are now witnessing a change from public acceptance of the historical practice by the NCAA and universities of unilaterally deciding the outcomes for these crucial issues. Rather, law, policy, and public sentiment are trending toward athletes having an opportunity to flex their collective power and have a say in their compensation and working conditions. As Justice Kavanaugh alluded to in his *Alston* concurrence, this approach has promise in creating a more just and workable outcome for all parties involved. ■

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Mark Gaston Pearce is a visiting professor and executive director of the Workers' Rights Institute at the Georgetown University Law Center. He is a former board member and chairman of the National Labor Relations Board, serving by appointment of President Barack Obama for two terms, concluding in August 2018.

Daphne Assimakopoulos is a research assistant at the Workers' Rights Institute at the Georgetown University Law Center (J.D. expected 2023). She graduated magna cum laude in 2017 from Hamilton College with a bachelor's degree in government.

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