



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 54 | Number 3

Article 8

Spring 5-1-2021

SB 206: The Beginning of the End for Athletic Exploitation

Rachel Rosenblum

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Education Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Rachel Rosenblum, Note, *SB 206: The Beginning of the End for Athletic Exploitation*, 54 Loy. L.A. L. Rev. 985 (2021).

This Notes is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

SB 206: THE BEGINNING OF THE END FOR ATHLETIC EXPLOITATION

Rachel Rosenblum*

I. INTRODUCTION

College campuses are a mecca of unparalleled growth, education, sports, and excitement for students, alumni, and fans around the country. Millions of people gather around their televisions or stadiums to support their favorite collegiate team, garnering billions of dollars for their respective university and the National Collegiate Athletic Association (NCAA).¹ However, there is an insidious problem rearing its ugly head underneath the prestige and glory of idealized collegiate athletes and their highly competitive programs: athletic compensation.²

Scholarships provide a means to further the goals of amateurism: to uphold an athlete's education, shield them from exploitation, and protect against an unprofessional athletic environment.³ Today's athletic climate, however, is cluttered with big business. It is an industry, littered with the controlling mark of large-scale commercial

* Rachel Rosenblum, J.D. Candidate 2021, Loyola Marymount University, Loyola Law School, Los Angeles; B.A., Political Science, Strategic Communication with honors, magna cum laude, Elon University, - May 2018. Special thanks to Dean Waterstone who sponsored this Note.

1. Steve Cameron, *The NCAA Brings in \$1 Billion a Year—Here's Why It Refuses to Pay Its College Athletes*, BUS. INSIDER (Mar. 26, 2019, 7:14 AM), <https://www.businessinsider.com/ncaa-college-athletes-march-madness-basketball-football-sports-not-paid-2019-3>.

2. See generally Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865 (2016) (arguing a regulated form of compensation in college athletics does not diminish the student-athletes' amateurism).

3. *Id.* at 871 (NCAA bylaws state college athletics are "designed to be an integral part of the educational program." "In line with these values, the NCAA prohibits student-athletes from receiving compensation in order to protect them from 'exploitation by professional and commercial enterprises.'" (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, 2013-14 NCAA DIVISION I MANUAL 4, 57 (2013), <http://fordhamsports.com/custompages/compliance/forms/CoachCompliance/2013-14%20NCAA%20Manual.pdf> [<http://perma.cc/HT58-V46E>])). See generally Caitlin D. Buckstaff, Note, *Covering the Spread: An Assessment of Amateurism and Vulnerability of Student-Athletes in an Emerging Culture of Sports Wagering*, 16 VAND. J. ENT. & TECH. L. 133 (2013) (arguing that applying a definition of amateurism premised on the prohibition of compensation harms rather than protects student-athletes).

corruption, that generates a significant amount of monetary compensation for the university and its associated entities.⁴ Amateurism may in fact be noble, but it does not result in fair revenue sharing, especially for those individuals most responsible for the profits.⁵ The universities, NCAA, and other marketing conglomerates generate significant capital through the exploitation of collegiate “amateur athletes.”⁶ This unethical profiteering transpires under the veil of a system designed to prevent exactly those actions.

“The typical Division I college football player devotes 43.3 hours per week to his sport—3.3 more hours than the typical American work week.”⁷ The top twenty-four Division I schools make more than \$100 million annually, with Texas A&M totaling \$192.6 million in revenue.⁸ Additionally, the NCAA annually makes \$1 billion.⁹ This massive profit is built off of the hours and hours of sweat and work college athletes are giving to their school.¹⁰ The NCAA and individual universities plaster images of their athletes all over campuses, social media, and virtually all media outlets.¹¹ In return, athletes receive only an education, an education in which they may miss more than a quarter of their classes and are effectively unable to work part-time.¹²

4. Brittany Jacobs, *College Athletic Departments: The Business Behind It All*, BLEACHER REPORT (Nov. 12, 2009), <https://bleacherreport.com/articles/289199-college-athletic-departments-the-business-behind-it-all>.

5. See generally Craig Garthwaite et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 27734, 2020) (finding collegiate athletics largely bar student-athletes from sharing in revenues generated by their participation and create substantial economic rents for the universities).

6. See generally Andy Schwarz, *Mo’ne Davis and Exploiting Exploitation*, VICE (Oct. 24, 2014, 4:19 AM), https://www.vice.com/en_us/article/pg54p8/mone-davis-and-exploiting-exploitation (arguing the NCAA’s prohibition on compensating student-athletes is “antiquated” and cheats young athletes “out of the four best athletic earning years of their lives”).

7. Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), <https://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize>.

8. *NCAA Finances: 2018–19 Finances*, USA TODAY, <https://sports.usatoday.com/ncaa/finances> (last visited Apr. 11, 2021); Steve Berkowitz, *Texas A&M’s \$192.6 Million in Revenue Puts It in College Sports Elite*, USA TODAY (Jan. 30, 2016, 2:22 PM), <https://www.usatoday.com/story/sports/college/2016/01/30/texas-a-m-joins-college-sports-financial-elite/79567194/>.

9. Cameron, *supra* note 1.

10. See Sheetz, *supra* note 2, at 865–66.

11. See *id.* at 891.

12. Edelman, *supra* note 7; Jon Solomon, *10 Ways College Athletes Can Get Paid and Remain Eligible for Their Sport*, CBS SPORTS (June 21, 2016, 5:20 PM), <https://www.cbssports.com/college-football/news/10-ways-college-athletes-can-get-paid-and-remain-eligible-for-their-sport/> (“The NCAA allows players to have paying jobs. They may rarely have the time to do so, but it is

This idea of a subpar education as compensation for excessive work hours is one of the past. California citizens have voted in support of Senate Bill 206 (“SB 206”), which gives college athletes the right to their name and likeness.¹³ While a small step, it is one that represents a drastic change in public policy and the public’s outlook on amateurism and employment law. SB 206 is intended as the first step towards compensation for the employment-like conditions of high-performing college athletes.¹⁴ While it does not go far enough, nor does it protect the students from other potential exploitation, it is a step in the right direction to remedy employment issues of high-level athletes.

II. HISTORICAL AND LEGAL BACKGROUND OF COLLEGE ATHLETICS

To understand the issues surrounding SB 206’s conception and its continued problems, the history of the NCAA, Scholarships, and amateurism must be understood and explored. The NCAA and affiliate organizations have created a world where athletes dedicate themselves to an amateur career void of compensation.¹⁵ Compensation, as referred to for collegiate athletes, is an intricate term with debatable meaning. Amateurism has incorrectly labelled “compensation” as a dirty word.¹⁶ The landscape is simple—scholarships are coveted by young athletes and the NCAA and universities use them as a guise of protection.¹⁷ In reality, those in charge are seeing extreme profit, while those they pretend to protect, student athletes, are exploited.¹⁸ This section highlights the NCAA’s massive control over young athletes, along with the actual meaning, both socially and legally, behind college scholarships and athletic compensation.

A comprehensive understanding of such topics is inherently necessary to understand the legal atmosphere of collegiate athletics. Without such background, it is impossible to understand the courts’

permitted if the work is performed at an amount comparable to the going rate in that area for similar services.”)

13. S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019).

14. CAL. S., HISTORY OF SENATE BILL NO. 206, 2019–2020 Reg. Sess. (Cal. 2019).

15. See generally Schwarz, *supra* note 6 (finding college athletes are being exploited because most athletes will not go on to make money playing sports after college).

16. David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 237 (2016).

17. *Id.*

18. *Id.*

rulings or lack thereof regarding amateurism laws, and the future direction they may take.

A. The National Collegiate Athletic Association (NCAA)

The NCAA website states, “the NCAA was founded in 1906 to protect young people from the dangerous and exploitive athletics practices of the time.”¹⁹ This statement, asserting a protective, almost parental NCAA, shows a noble organization. While the organization came into existence for seemingly important reasons, the statement also foreshadows the organization’s modern issues. Before the NCAA’s formation, schools wrestled with the same issues we face today.²⁰ Competitiveness, commercialization, and the need for safety mechanisms plagued college sports. “[T]he commercialization and propensity to seek unfair advantages existed virtually from the beginning of organized intercollegiate athletics in the United States. The problem of cheating, which was no doubt compounded by the increasing commercialization of sport, was a matter of concern.”²¹

The association was created during a dark time for college football as they faced abolition.²² During the 1905 season, eighteen amateur players died during games, causing public outcry for the implementation of safety procedures.²³ Luckily for the sport, then-President Theodore Roosevelt called together meetings at the White House to enact safety reform.²⁴ This movement would morph into the NCAA, and later a multi-billion-dollar industry.²⁵ It resulted in an organization intent on keeping young athletes safe with a heavy hand of control.²⁶ Now, the NCAA does anything but protect students, and California lawmakers are looking towards a new reality with SB 206.

19. Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985 [https://web.archive.org/web/20200810230707/https://www.huffpost.com/entry/johnny-manziel-ncaa-eligibility_b_3020985].

20. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 11 (2000).

21. *Id.*

22. *Id.* at 12.

23. *Id.*

24. Janie Harris, *President’s Day: A Look at U.S. Presidents in College Sports*, NCAA (Feb. 20, 2017), <https://www.ncaa.com/news/ncaa/article/2017-02-20/presidents-day-look-us-presidents-college-sports>.

25. *See id.*

26. *See What Is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Feb. 21, 2021).

Today, the NCAA acts as a private, nonprofit, unincorporated association with 1,100 member institutions separated into three divisions (Division I, Division II, and Division III).²⁷ The association votes on new rules and regulations drafted yearly.²⁸ The NCAA “prides itself on promotion of collegiate athletics and has a primary goal of promoting amateurism.”²⁹ This association was created on what some may think are noble values, with an idea of upholding sport and competition in a safe environment. But the present-day NCAA and athletic world is still dealing with the initial problem plaguing its conception: exploitation.³⁰

This generational issue of the exploitation of athletes is compounded by the big business of sports. To clarify, sports has become a “big business” in its profitable expertise and its economic make-up.³¹ The NCAA and its university affiliates are essentially an “economic group consisting of large profit-making corporations.”³² They exert power and influence over social and political policy.

According to the association’s audited financial statement, the NCAA had close to \$1.1 billion in annual revenue during its 2017 fiscal year.³³ Seventy-five percent of the NCAA’s annual revenue, nearly one billion dollars, comes from March Madness.³⁴ “In 2010[,] the NCAA signed a fourteen-year, \$10.8 billion contract with CBS Sports and Turner Broadcasting. . . . The deal was extended in April 2016 for . . . [an additional] \$8.8 billion that will keep the tournament on the[] networks until 2032.”³⁵ Approximately 96 percent of the

27. See *Our Three Divisions*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> (last visited Feb. 21, 2021).

28. Zachary Bock, *Student-Athletes as Employees: Unmasking Athletic Scholarships*, 36 N. ILL. U. L. REV. 131, 136–37 (2016).

29. *Id.* at 137.

30. See Schwarz, *supra* note 6.

31. *Big Business*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/big%20business> (last updated Jan. 7, 2021) (“[A]n economic group consisting of large profit-making corporations especially with regard to their influence on social or political policy.”).

32. *Id.*

33. Cameron, *supra* note 1.

34. *Id.*; Darren Rovell, *NCAA Tops \$1 Billion in Revenue During 2016–17 School Year*, ESPN (Mar. 7, 2018), https://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first.

35. Jim Smith, *March Madness: An “Experiential Commodity” with Money for the Men, Only Fame for the Women, and an Illusion for the Fans*, HUM. SCI. INST. (Mar. 24, 2019), <https://humanscienceinstitute.org/blog/march-madness-an-experiential-commodity-with-money-for-the-men-only-fame-for-the-women-and-an-illusion-for-the-fans/>; Roger Sherman, *The NCAA’s New March Madness TV Deal Will Make Them a Billion Dollars a Year*, SBINATION

money the NCAA collects flows to the Division I membership immediately.³⁶ “It’s the only system in place that assigns a monetary value based on athletic performance”; despite that, none of the money is paid to the athletes participating.³⁷

Additionally, “NCAA executives profit greatly” as “the President of the NCAA reportedly made \$1.9 million in 2014, and a number of other NCAA executives reportedly made over \$4 million each.”³⁸ These exuberant numbers “would not arise without the labor provided by college athletes.”³⁹

This notion of collecting billions of dollars from Division I membership and reallocating it to sources irrelevant to such members is a policy cornerstone driving SB 206. The NCAA sees massive profits, while the young students driving such profits receive compensation only in the form of college scholarship.

B. Amateurism

The NCAA protects and upholds an ideal that separates the college athlete from that of a professional: amateurism. The hotly debated notion is the basis for how student athletes are regulated and educated.

The NCAA provides a platform for member institutions to design their athletic programs to be an integral part of the educational program. Further, the NCAA establishes that it is necessary to have a clear line of demarcation between college athletes and professional sports in order to preserve the student in the student-athlete.⁴⁰

At its roots, amateurism was created to protect young, unprofessional athletes.⁴¹ However, politicians and athletes debate that while noble and necessary, its practices no longer accomplish such

(Apr. 12, 2016, 5:06 PM), <https://www.sbnation.com/college-basketball/2016/4/12/11415764/ncaa-tournament-tv-broadcast-rights-money-payout-cbs-turner>.

36. Tim Parker, *How Much Does the NCAA Make off March Madness?*, INVESTOPEDIA (Oct. 31, 2019), <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp>; *Finances of Intercollegiate Athletics*, NCAA, <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics> (last visited Feb. 21, 2021).

37. Parker, *supra* note 36.

38. Grenardo, *supra* note 16, at 237.

39. *Id.*

40. Bock, *supra* note 28, at 159.

41. Sheetz, *supra* note 2, at 871.

goals.⁴² “The Oxford English Dictionary defines amateur as ‘one who cultivates anything as a pastime, as distinguished from one who prosecutes it professionally.’”⁴³

The Olympics were once an amateur event, wholly dedicated to the idea of “no-pay-for-play,” as today’s NCAA. Many historians theorize amateurism was intended to keep poor classes from interfering with wealthy sportsmanship.⁴⁴ “Sports historian Allen Guttman explains that in its earliest institution, rules of amateurism were invented by the Victorian middle and upper classes to exclude the ‘lower orders’ from the play of the leisure class.”⁴⁵ “Classism ruled the sports and athletic activities practiced by the gentry, not only to prevent the mingling of the higher echelons with the common masses, but because many of the elite insisted that the ‘plebeians’ had no concept of sportsmanship and fair play.”⁴⁶ The classic notion of amateurism is deeply rooted in limiting participation to those “who did not receive any financial compensation for his or her athletic endeavors.”⁴⁷ The conglomeration of personal wealth kept amateurism alive.⁴⁸ This begs the question: How is a system, deeply rooted in wealth discrimination, alive and well today?

The answer to that question is found in the world of college athletes. Centuries later, financially poor athletes are prohibited from earning wealth off their talent. The Olympics remedied this issue in 1960 when the International Olympic Committee pushed to include professional athletes in the game.⁴⁹ Critics believed that including professional athletes would sink the entirety of the Olympic games.⁵⁰ Simply, society proffered the end of amateurism as the end of competitive spirit and Olympic viewership. Somehow, critics equated amateurism with Olympic viewership and sportsmanship.

42. *See id.* at 873.

43. L.A. Jennings, *For Love or for Money: A History of Amateurism in the Olympic Games*, VICE (June 7, 2016, 11:25 AM), <https://www.vice.com/en/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games>.

44. *See id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See id.*

49. *See* Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/>.

50. *Id.*

Even Avery Brundage, the International Olympic Committee president from 1952–1972 and a staunch supporter of preserving amateurism in the Olympics, said in 1955: “We can only rely on the support of those who believe in the principles of fair play and sportsmanship embodied in the amateur code in our efforts to prevent the games from being used by individuals, organizations or nations for ulterior motives.”⁵¹

Despite the critics, the exact opposite occurred, and the naysayers were silenced as viewership increased and the masses gathered to watch sport.⁵² There was an “influx of individual trust funds to help support amateur athlete competitors in non-traditional sports such as skiing. It opened the door for runners and others to accept prize money, sponsorships and endorsements to fund their training.”⁵³ Athletes earned money, while viewers tuned in at much higher rates to watch their favorite professionals.⁵⁴ It even led to incredibly “impactful sports moments and teams, such as the fabled USA’s men’s basketball ‘Dream Team’ in 1992.”⁵⁵

C. Scholarships and the Life of Athletes

1. The Guise of an NCAA Scholarship

Student athlete scholarships are the bread and butter to the NCAA and its associated universities’ promotion of amateurism. According to the NCAA, full grant-in-aid or scholarships is “financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance” set to a limit by the association.⁵⁶ On the surface, a student-athlete scholarship provides aid and opportunity to those who have honed their sport to a collegiate level. A simple look at the NCAA’s description of scholarship reveals a seemingly altruistic and beneficial practice. They boast:

51. Ross Andrews, *Push to Allow Professional Athletes Took Hold in 1968 Olympic Games*, GLOB. SPORT MATTERS (Oct. 15, 2018), <https://globalsportmatters.com/mexico/2018/10/15/professional-athletes-1968-olympic-games>.

52. *See id.*

53. *Id.*

54. *See id.*

55. *Id.*

56. Bock, *supra* note 28, at 140.

NCAA Divisions I and II schools provide more than \$3.6 billion in athletics scholarships annually to more than 180,000 student-athletes. . . . Full scholarships cover tuition and fees, room, board and course-related books. Most student-athletes who receive athletics scholarships receive an amount covering a portion of these costs. Many student-athletes also benefit from academic scholarships, NCAA financial aid programs such as the NCAA Division I Student-Athlete Opportunity Fund and need-based aid such as Federal Pell Grants.⁵⁷

Other entities describe scholarships similarly. Most common, definitions circle around the idea of helping student-athletes. Merriam-Webster's Learner's Dictionary defines scholarship as "an amount of money that is given by a school, an organization, etc., to a student to help pay for the student's education."⁵⁸ The Oxford Dictionary defines scholarship as "a grant or payment made to support a student's education, awarded on the basis of academic or other achievement."⁵⁹ Moreover, the Cambridge Dictionary defines scholarship as "an amount of money given by a school, college, university, or other organization to pay for the studies of a person with great ability but little money."⁶⁰

These definitions and the NCAA promote a "a college education" above wealth acquisition and sport.⁶¹ It is purported to be "the most rewarding benefit of the student-athlete experience."⁶² The ideals behind this notion are obvious: scholarships intend to benefit a student "(whether an undergraduate or a graduate) at an educational institution to aid in the pursuit of his or her studies."⁶³

Notably, a large amount of NCAA "distributions are made based on athletic success; they are not typically provided based on

57. *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> (last visited Feb. 21, 2021).

58. *Scholarship*, MERRIAM-WEBSTER'S LEARNER'S DICTIONARY, <https://www.learnersdictionary.com/definition/scholarship> (last visited Feb. 21, 2021).

59. *Scholarship*, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/scholarship (last visited Feb. 21, 2021).

60. *Scholarship*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/scholarship> (last visited Feb. 21, 2021).

61. *See Scholarships*, *supra* note 57.

62. *Id.*

63. *Publication 970 (2019), Tax Benefits for Education*, IRS, <https://www.irs.gov/publications/p970/ch01.html> (last updated Jan. 22, 2020).

graduation rates or on academic performance of the schools and their athletes. This seems counterintuitive given the NCAA's purported primary goal of education for its athletes."⁶⁴ If this weren't enough to show the NCAA's and affiliate universities' disinterest with academic support, games are frequently on weekdays, a seemingly counterproductive notion if universities want their students to attend class prepared.⁶⁵

By definition, athletes should be receiving fair compensation in the form of education. But, in reality, we find that students are often left desolate, their talent and energy wasted on four grueling years. During these four years, high-level athletes receive very little education and absolutely no profit.

2. The Life of a College Athlete

The above section outlined factual examples of what a student-athlete scholarship is intended to accomplish. By definition, the studies of a college athlete come first, and their educational "compensation" would provide them with the means to adequately live and learn. This means that academic compensation fairly provides for the requisite athletic performance given by these athletes to their schools. Scholarships are considered payment for such performance.⁶⁶ However, the pursuit of academia while under scholarship does not always play out as intended. This section highlights the oxymoron of athletic compensation. Many students receive an academic scholarship that provides them with very little time for academics and very few resources to pursue academics.⁶⁷

The root problem behind athletic compensation is highlighted by both the lifestyle of a collegiate athlete and the monetary value behind their play. Students on collegiate teams must remain amateurs, prohibited from receiving outside compensation for their athleticism.⁶⁸ This poses a huge issue for every type of Division I athlete, those with and without full scholarships.

Young, aspiring athletes typically fantasize about joining the ranks of these collegiate athletes. Scholarship opportunities are the

64. Grenardo, *supra* note 16.

65. *See id.*

66. *See id.*

67. *See id.*

68. *See infra* Section III.B, on how this has changed due to SB 206.

goal for many. However, the glamorous façade circling college student-athletes is starkly different from the reality.⁶⁹ Issues quickly arise as the cost of living exceeds expectations, schoolwork overloads, and work opportunities are absent.⁷⁰ Nicole Sung-Jereczek, a University of California, Los Angeles (UCLA) rower spoke out regarding the formidable commitment of college sports.⁷¹ She said that she “didn’t expect or anticipate the amount of time that [she] would have to devote to it”⁷² and was shocked on the limits her commitment imposed.⁷³ She was not able to get a part-time job or internship.⁷⁴ Sung-Jereczak’s issue with college sports is just the tip of the iceberg and does not represent a minority.⁷⁵

An “NCAA survey found that a typical NCAA athlete in-season spends 39 hours a week on academics—and 33 hours a week on sports.”⁷⁶ Many student athletes describe their time representing a university as all-consuming.⁷⁷ The numbers circling the life of a college athlete take ambiguity away from the problem of amateurism. In fact, they highlight exactly why it is a failing system.

Roughly “70,000 student-athletes . . . attend[] a university or college without paying for the cost of attendance. Still, the NCAA reported that there was approximately 173,500 student-athletes that participated in Division I athletics.”⁷⁸ That totals an “astonishing 103,500 student-athletes who . . . pay[] . . . a portion of their [tuition] at an NCAA member institution.”⁷⁹ This number should surprise many, as these students must pay the incredibly high cost of attendance, while unable to make money. In a 2015 study, the average annual cost of attendance (not including personal costs or transportation) for a full-time enrollment at a four-year degree institution was \$34,031 out-of-state and \$19,548 in-state.⁸⁰ That

69. See Kelley Holland, *Think Athletic Scholarships Are a ‘Holy Grail’? Think Again*, CNBC (Oct. 13, 2014, 6:02 AM), <https://www.cnbc.com/2014/10/13/think-athletic-scholarships-are-a-holy-grail-think-again.html>.

70. *See id.*

71. *See id.*

72. *Id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *Id.*

77. *See id.*

78. Bock, *supra* note 28, at 142.

79. *Id.*

80. *Id.* at 144 (including the cost of “tuition, fees, and room and board”).

means that 103,500 students are paying tens of thousands of dollars to essentially work full time at universities.

Even those who receive a full-scholarship for tuition, room, board, and books must pay “generally between \$2000 and \$5000 per year more than the value of respective school’s athletic scholarship.”⁸¹ The full cost of attendance fees “include[] a tuition fee, miscellaneous personal expenses, transportation, loan origination fee and administrative fees.”⁸² These extra fees can be so crippling to students that they go hungry. For example, in 2014, a basketball player from Connecticut told the media that he often went to bed hungry.⁸³

In actuality, a total of seventy-two hours dedicated to sports and practice is well over a full-time job. One might ask: Why would an eighteen-year-old dedicate such extreme hours? If the answer is to obtain a scholarship to play at a university, the numbers do not correlate with the time commitment.

III. EXISTING LAW

Recently, critics of amateurism have gained attention, prevailing in a decades long fight within the California legislature. SB 206 passed in California, giving student-athletes the right to profit on their name and likeness.⁸⁴ This bill starkly contrasts with the pre-existing landscape of college sports, disallowing any monetary gain for collegiate athletes. Despite the groundbreaking nature of this bill, steep impediments remain to the financial freedom of student-athletes. This section details California employment law, relevant Ninth Circuit cases, and the details of SB 206, the Fair Pay to Play Act.

A. Employment Law

To decide if someone is an employee, common law applies a “right to control” test, which asks whether the person to whom service is rendered has the “right to control the manner and means of accomplishing the result desire.”⁸⁵ Additionally, courts consider nine factors when deciding whether an individual is an employee in the eyes of the law: (1) “right to discharge at will, without cause”; (2)

81. Grenardo, *supra* note 16, at 244.

82. *Id.* (alteration in original).

83. *Id.* at 228.

84. See S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019).

85. S.G. Borello & Sons v. Dep’t of Indus. Rels., 769 P.2d 399, 404 (Cal. 1989).

“whether the one performing [the] services is engaged in a distinct occupation or business”; (3) “the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision”; (4) “the skill required in the particular occupation”; (5) “whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work”; (6) “the length of time for which the services are to be performed”; (7) “method of payment, whether by the time or by the job”; (8) “whether” or not the work is part of the regular business of the principal”; and (9) “whether or not the parties believe they are creating the relationship of employer-employee.”⁸⁶ These individual factors “cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.”⁸⁷ However, this test does not apply when determining employment status for the purpose of compliance with California wage orders.⁸⁸

In California, the plain language of the California Labor Code § 3351 codifies the test set forth in *S.G. Borello & Sons v. Department of Industrial Relations*.⁸⁹ Section 3351 states that an “[e]mployee” means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.⁹⁰ There are a number of exceptions to section 3351 of California Labor Code.⁹¹ Of note, California Labor Code § 3352(a)(7) exempts student-athletes from this definition of an employee and the corresponding protections that come with it.⁹² California Labor Code § 3352(a)(7) excludes from the category of employee, “[a] person . . . participating in sports or athletics who does not receive compensation for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto.”⁹³

This exception is the crux of inequitable treatment for athletes. Federal courts have incorrectly failed to apply the meaning of an

86. *Id.*

87. *Id.* (quoting *Germann v. Workers’ Comp. Appeals Bd.*, 176 Cal. Rptr. 868, 871 (1981)).

88. *See Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 35 (Cal. 2018).

89. 769 P.2d 399, 404 (Cal. 1989).

90. CAL. LAB. CODE § 3351 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

91. *See, e.g., id.* § 3352(a)(7).

92. *See id.*

93. *Id.*

employee to athletes by pin-pointing their behavior under an exception to the statute. Yet, the true nature of their activity exactly tracks the conduct described in the statute. In reality, an exemption applies to uphold amateurism and to keep academic compensation alive. This Note dives into the court's incorrect application, and how SB 206 turns this exception on its head.

B. SB 206

Prior to the passing of SB 206, the

Student Athlete Bill of Rights, require[d] intercollegiate athletic programs at [four]-year private universities or campuses of the University of California or the California State University that receive, as an average, \$10,000,000 or more in annual revenue derived from media rights for intercollegiate athletics to comply with prescribed requirements relating to student athlete rights.⁹⁴

This Bill of Rights sets forth provisions that ensure coaches are well-trained in safety and health care, that student athletes have a safe playing environment, and that emergency action plans are in place.⁹⁵ Such plans and requirements provide that

California's Pac-12 colleges, which are flush with new TV revenue, . . . provide continuing education for players on teams with graduation rates below 60%, pay for sports-related medical expenses, cover medical coverage premiums for low income student-athletes, improve workout safety to avoid preventable deaths, provide financial and life skills workshops, and guarantee student-athletes the same due process rights that are given to regular students.⁹⁶

The Bill of Rights states that post-secondary student-athletes have the right to "receive an equivalent scholarship" from the university if they lose their athletic scholarship due to injury, attend a "financial and life skills workshop" in their first and third years, and have "the

94. S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019).

95. See *California Governor Signs NCPA Student-Athletes Bill of Rights!*, NAT'L COLL. PLAYERS ASS'N (Sept. 27, 2012), <https://www.ncpanow.org/news/releases-advisories/california-governor-signs-ncpa-student-athletes-bill-of-rights>.

96. *Id.*

same rights as other students with regard to any and all matters related to possible adverse or disciplinary actions.”⁹⁷

UCLA football players submitted a signed letter of support for SB 1525.⁹⁸ UCLA football player Jeff Locke stated,

The passing of the California Student-Athletes Bill of Rights into law is a huge step in the right direction for securing basic protections for college athletes in California. Along with the work of Senator Padilla, his staff, and the NCPA, support among current student-athletes at UCLA was key to gaining support for this bill. I hope that college athletes and lawmakers in other states become aware of the protections that were secured for student-athletes by this bill, and they take the steps necessary to get a similar bill passed in their state.⁹⁹

While these protections go far to protect basic rights of students, Californians did not think they went far enough. The existing law failed to account for the exuberant profit of schools off of their athletes and the corresponding monetary needs of these athletes. The law helped to keep athletes physically healthy and guarantee them basic rights. But it barely touched on most basic rights, leaving athletes without the means to provide for themselves. Simply, “NCAA rules strictly prohibit athletes from profiting in any way from their sports.”¹⁰⁰

In February of 2019, California state senators Nancy Skinny and Steven Bradford took on a question that has so obviously plagued sports for decades. Skinny and Bradford “unveiled SB 206,” which was aimed “to aid the majority of full-scholarship college athletes, lift[] them out of poverty, provide support in managing academic course load[,] and incentiviz[e] student-athletes to complete their

97. S.B. 1525, 2011–2012 Reg. Sess. (Cal. 2012) (codified at CAL. EDUC. CODE § 67452 (Deering 2021)).

98. See *California Governor Signs NCPA Student-Athletes Bill of Rights!*, *supra* note 95.

99. *Id.*

100. *A Quick Snapshot of 3 Things that California SB 206 Does*, L.A. TIMES (Sept. 30, 2019, 9:18 AM), <https://www.latimes.com/california/story/2019-09-30/la-me-college-athletes-pay-sb-206-newsom-text-bill>.

undergraduate degrees before transitioning to professional leagues.”¹⁰¹ SB 206 is also known as The Fair Pay to Play Act.¹⁰²

The support for The Fair Pay to Play Act skyrocketed as it gained massive social media attention.¹⁰³ The Act garnered bipartisan support and was approved in the California Senate on a thirty-one to four vote.¹⁰⁴ Later, the Act was “unanimously approved by the state Assembly by a 72-0 vote.”¹⁰⁵

The landmark bill “will prohibit the NCAA from barring a university from competition if its athletes are compensated for the use of their name, image or likeness beginning in 2023.”¹⁰⁶ The legislature wrote:

[SB 206 prohibits] California postsecondary educational institutions except community colleges, and every athletic association, conference, or other group or organization with authority over intercollegiate athletics, from providing a prospective intercollegiate student athlete with compensation in relation to the athlete’s name, image, or likeness, or preventing a student participating in intercollegiate athletics from earning compensation as a result of the use of the student’s name, image, or likeness or obtaining professional representation relating to the student’s participation in intercollegiate athletics.¹⁰⁷

In addition to allowing student-athletes to control and the ability to gain revenue for their own name, likeness, and image, the bill allows professional representation for student athletes. This representation, often an agent or lawyer, must be “from persons licensed by the

101. Veronica Fernandez De Soto, *A Breakdown of SB 206, Which Allows Student-Athletes to Monetize Their Likenesses*, DAILY BRUIN: THE QUAD (Oct. 16, 2019, 6:25 PM), <https://dailybruin.com/2019/10/16/the-quad-a-breakdown-of-sb-206-which-allows-student-athletes-to-monetize-their-likenesses>; Press Release, Nancy Skinner, State Senator of California, Senator Nancy Skinner Announces “The Fair Pay to Play Act” (Feb. 5, 2019), <https://sd09.senate.ca.gov/news/20190205-senator-nancy-skinner-announces-“-fair-pay-play-act”>.

102. *LeBron Rallies Support for Fair Pay to Play Bill*, ESPN (Sept. 5, 2019), https://www.espn.com/college-sports/story/_/id/27543413/lebron-rallies-support-fair-pay-play-bill.

103. *Id.* (referencing a tweet from LeBron James advocating for SB 206 that received over 100,000 likes).

104. Fernandez De Soto, *supra* note 101.

105. *Id.*

106. *A Quick Snapshot of 3 Things That California SB 206 Does*, *supra* note 100.

107. S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019).

state.”¹⁰⁸ Athletic agents must comply with federal law when working with student athletes.

Further, SB 206 prohibits post-secondary schools from revoking a student’s athletic scholarship as a result of him or her earning compensation or obtaining legal representation. Nevertheless, the bill prohibits a student athlete from entering into compensation contracts that include provisions that are in conflict with any provision of the athlete’s team contract.¹⁰⁹ Additionally, the bill provides that a team contract cannot prevent the commercialized purpose of a student athlete’s name, image, or likeness when they are not engaged in official team activities.¹¹⁰

When SB 206 becomes operative, a student’s scholarship cannot be revoked because they choose to seek compensation for use of their name, image, or likeness. However, a student-athlete will be prohibited from receiving compensation if their contract for compensation conflicts with a provision of an athlete’s contract with the athletic team. In accordance with the legislative purpose of the bill, SB 206 states that a team contract cannot prevent a student athlete from receiving compensation for their name, image, or likeness for a commercial activity unrelated to official team activities.¹¹¹

SB 206 and its provisions become operative on January 1, 2023 for California student-athletes.¹¹² The bill requires “the Chancellor of the California Community Colleges to convene a community college athlete name, image, and likeness working group composed of individuals appointed on or before July 1, 2020.”¹¹³ Additionally, this working group must

review various athletic association bylaws and state and federal laws regarding a college athlete’s use of the athlete’s name, image, and likeness for compensation . . . [and] submit to the Legislature and the California Community College Athletic Association a report containing its findings and policy recommendations in connection with this review¹¹⁴

108. CAL. EDUC. CODE § 67456(c)(2) (Deering 2021) (effective Jan. 1, 2023).

109. *Id.* § 67456(e)(1).

110. *Id.* § 67456(f).

111. *Id.*

112. *Id.* § 67456.

113. S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019).

114. *Id.*

SB 206 represents a massive shift in California public policy from strict amateurism to a sort of gray area, calling for a fairer, compensated athletic environment. This gray area surfaces as the oxymoron of a student-athlete is brought to light: they are not considered employees but now have the opportunity to make money in a small sector of their livelihood. The exploitation by schools remains, but now student-athletes can find compensation from outside their university. Additionally, this gray area rears its head when prior case law is highlighted. This bill, in essence, supersedes prior case law that affirmed the nonexistent rights of collegiate athletes. This bill turns our understanding of traditional amateurism on its head, shifting California public policy. In turn, the courts must shift their rulings and develop a new outlook on past California cases.

C. Case Law

Case law surrounding the issue of student-athlete compensation is sparse but insightful as to public policy before SB 206 was enacted. According to the Fair Labor Standards Act, the NCAA is a regulatory body and does not act as an employer within the meaning of 29 U.S.C. § 203. In *Dawson v. National Collegiate Athletic Association*,¹¹⁵ the court held that the former college football player failed to state a claim for relief against the NCAA or the conference for violations of the Fair Labor Standards Act (FLSA).¹¹⁶ The court relied on the “California Legislature’s decision to except student-athletes from workers compensation benefits and decisions of the California Courts of Appeal that interpret the student-athlete exception.”¹¹⁷

The *Dawson* plaintiff had very little room for argument as California law, prior to Senate Bill 2076, was fairly specific as to the role of employers in collegiate athletics.¹¹⁸ They upheld the district court, finding that the Division I college football player was not an employee of the NCAA and the PAC-12 Conference within the meaning of the FLSA, 29 U.S.C. § 203(e)(1), because “the NCAA and PAC-12 were regulatory bodies, not employers, of student-athletes under the FLSA,” as NCAA regulations limiting scholarships did not create any expectation of compensation, neither the NCAA nor the

115. 932 F.3d 905 (9th Cir. 2019).

116. *Id.* at 912.

117. *Id.*

118. *Id.* at 911.

PAC-12 had the power to fire or hire the player, and there was no evidence that the NCAA rules were conceived or carried out to evade the law, and further, the revenue generated by college sports did not convert the relationship between student-athletes and the NCAA into an employment relationship.¹¹⁹ Additionally, “[t]he player’s California law claims were properly dismissed because under the California Labor Code, student-athletes were not employees of the NCAA/PAC-12.”¹²⁰

This inability to bring a lawsuit for employee status within the Ninth Circuit inhibits the rights of student athletes. Recently, in *Berger v. NCAA*,¹²¹ a former soccer player Samantha Sackos filed a complaint against the NCAA and its member schools alleging violations of the FLSA because the NCAA failed to pay college athletes for hours worked while practicing and playing college sports.¹²² Though this case was heard in the Southern District of Indiana, it gives insight as to the possibility of allowing standing for student-athletes.¹²³ Following holdings of courts nationwide, the *Berger* court held that the student-athletes failed to state a claim because student athletes are not employees according to the law.¹²⁴ Additionally, the court found that the student-athletes did not have standing to sue the NCAA, but they did have standing to sue the individual university in question.¹²⁵

The court noted that the “students at Penn who choose to participate in sports—whether NCAA sports, club sports, or intramural sports—as part of their educational experience do so because they view it as beneficial to them,” and that “the existence of thousands of unpaid college athletes on college campuses each year is not a secret and yet the Department of Labor has not taken any action to apply the FLSA to them.” As a result[,] the court found that “the fact that the Plaintiffs

119. *Id.* at 909–11.

120. MICHAEL J. KILLEEN, *EMPLOYMENT IN WASHINGTON: A GUIDE TO EMPLOYMENT LAWS, REGULATIONS, AND PRACTICES* § 8-3[a] (4th ed. 2020).

121. 843 F.3d 285, 289 (7th Cir. 2016).

122. *Id.* at 289; Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 296–97 (2016) (explaining that Samantha Sackos initiated the lawsuit but withdrew from the case, making Gillian Berger, Lauren Anderson, and Taylor Hennig the new named plaintiffs).

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

124. *Id.*

125. *Id.*

participate in an NCAA athletic team at Penn does not make them employees of Penn for FLSA purposes.”¹²⁶

This reasoning is one that is also shared by the California Courts. There is no way to uphold amateurism if we deem student-athletes as employees. However, as will be later detailed, this is an outdated way of classification, expressly tied to a dying principle SB 206 overrules. SB 206 could represent a legislative change in policy that may proliferate future remedies for this California hurdle.

Similar issues in the courts are impacted by SB 206. In 2009, athletes garnered a modest victory in response to the NCAA’s “unwillingness to share revenue with . . . student-athlete[s].”¹²⁷ This case does not directly concern the FLSA, but it alludes to the impact by SB 206 and payment to student-athletes.

In that 2009 case, Ed O’Bannon, a former basketball player, found a digital version of himself on a video game and sued the NCAA.¹²⁸ O’Bannon never received compensation for the video game representation and argued in his lawsuit that the NCAA violated federal antitrust law by not allowing student-athletes to profit from their likeness in broadcasts and video games.¹²⁹

The California district court ruled that the NCAA violated the Sherman Act by “not allowing the student-athletes to share in the revenue generated from their names, images, and likenesses.”¹³⁰ However, the ruling was partially overturned on appeal as the Ninth Circuit agreed with the Sherman Act violation but found issue with athletic compensation. This notion of payment, and a lack thereof, is what keeps student-athletes amateurs.

The Ninth Circuit echoed the Supreme Court’s language that it “must afford the NCAA ‘ample latitude’ to superintend college athletics.” Moreover, the Ninth Circuit reveled on the importance of amateurism in NCAA history and found there to be a quantum leap between offering student-athletes education-related compensation and offering deferred cash

126. Epstein & Anderson, *supra* note 122, at 297 (quoting *Berger v. Nat’l Collegiate Athletic Ass’n*, 162 F. Supp. 3d 845, 857 (S.D. Ind. 2016)).

127. Bock, *supra* note 28, at 161.

128. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 963, 970 (N.D. Cal. 2014), *aff’d in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

129. *Id.* at 963.

130. Bock, *supra* note 28, at 161 (citing *O’Bannon*, 7 F. Supp. 3d at 1007).

payments that were not, in any way, connected to educational expenses.¹³¹

This ruling theorizes there would be “no basis for returning to a rule of amateurism and no defined stopping point,” if the NCAA paid athletes for expenses unrelated to their academic pursuits.¹³²

The key in this case was the difference between sport and education-related compensation and offering deferred cash payments that are unconnected to educational expenses. As a result of this ruling, NCAA member schools are now allowed to offer stipends to cover the full cost of attendance.¹³³ However, that number “is capped at \$500 a month, which some argue is a meager sum.”¹³⁴

Courts outside of California have ruled on the workers compensation as related to athletics. The California courts are not the only court to rule in favor of upholding amateurism despite the difficulties student athletes at top schools face. Three other well-known and more recent football related decisions from Michigan, Indiana, and Texas secure that student-athletes were not entitled to worker’s compensation.

In *Rensing*, the Indiana Supreme Court found no evidence of an employer-employee relationship. In *Coleman*, the Michigan Court of Appeals opined that there was no employment contract between the university and the student-athlete. Finally, in *Waldrep*, the Texas Court of Appeals emphasized that there . . . was no intent on the part of Texas Christian University (TCU) or football player Kent Waldrep that his scholarship should constitute payment for his football services, thereby not creating an employer-employee relationship that would fall under worker’s compensation statutes.¹³⁵

These cases represent a line of thought paralleling a pre-SB 206 landscape. The court essentially feared a world without amateurism,

131. *Id.* at 161–62.

132. O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1078 (9th Cir. 2015).

133. Mario Koran, ‘Game Changer’: Inside the Fight to End Exploitation of Athletes at US Colleges, THE GUARDIAN (Oct. 5, 2019 1:00 AM), <https://www.theguardian.com/sport/2019/oct/04/ncaa-california-law-pay-student-athletes-colleges>.

134. *Id.*

135. Epstein & Anderson, *supra* note 122, at 294; *Rensing v. Ind. St. Univ. Bd. of Trs.*, 444 N.E. 2d 1170 (Ind. 1983); *Coleman v. Western Mich. Univ.*, 336 N.W. 2d 224, 228 (Mich. Ct. App. 1983); *Waldrep v. Tex. Emps. Ins. Ass’n*, 21 S.W.3d 692 (Tex. App. 2000).

as those did prior to the 1960 Olympic Conferences. All of these cases stem from a time before SB 206. The bill represents a drastic shift from case law that obviously overrides the past California case law inhibiting student athletic compensation for their name and likeness. The bill takes a large step in allowing third parties to pay athletes; however, it is silent on the NCAA and member schools payment in situations similar to *Dawson* and *O'Bannon*.

IV. CRITIQUE OF EXISTING LAW: THREE ISSUES PLAGUE CALIFORNIA LABOR LAW IN A FAIR PAY TO PLAY ERA

California Labor Law and its underlying dependence on amateurism faces many issues with the passing of SB 206. This Note highlights three problems among many: (1) the current California labor exception for athletes directly contradicts public policy behind SB 206, and additionally, highlights why student athletes meet a common law definition of employees; (2) the promotion of amateurism is outdated and does not align with the actual life of Division I student athletes; and (3) most student athletes do not have the ability to play professional sports, thus the NCAA takes away their only opportunity to capitalize on their own publicity.

A. *SB 206 Public Policy Directly Contradicts California Labor Law and a True Analysis of the "Right to Control" Test for Student Athletes*

This issue is two-fold. First, SB 206 dramatically changed the landscape for student-athletes.¹³⁶ It did not simply give them publicity rights independent from their university, but it additionally proves Californians do not believe in the age-old adage of amateurism.¹³⁷ This policy shift, from strict amateurism to compensation, requires California legislators and courts to take a new look at section 3352(a)(7) of the California Labor Law.¹³⁸ SB 206 establishes new policy ideals rendering the existing employment law exception for

136. See generally S.B. 206, 2019–2020 Reg. Sess. (Cal. 2019) (SB 206 changes the environment for college athletes in 2023 as the first opportunity they have had to receive compensation).

137. Michael McCann, *Could 'Fair Pay to Play Act' Pave Way Toward End of Amateurism in Collegiate Athletics?*, SPORTS ILLUSTRATED (May 25, 2019), <https://www.si.com/college/2019/05/25/california-fair-pay-play-act-end-ncaa-amateurism>.

138. CAL. LAB. CODE § 3352(a)(7) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

college athletes as outdated and plainly unfair. It directly contradicts with our existing view of amateurism.¹³⁹

This passing of SB 206 made apparent: Californians believe athletes deserve more. This idea of athletics evolving from traditional amateurism follows the same storyline as the 1960 Olympics. Legislatures no longer believe there should be a hard and fast line restricting payment for student-athletes. The California Labor Code exception for athletes follows old ideals that now represent unfair treatment.¹⁴⁰

Second, these same policy concerns that necessitate the court to reevaluate the Labor Laws also necessitate a reevaluation of the definition of an employee under common law. The “right of control” test would ask whether the universities have the right to control the manner and means of their athletic teams.¹⁴¹ The answer is an overwhelming yes. The universities hand-pick every detail of their athlete’s life. Everything from their schedule, clothes, food, payment, strength, training, coaches, tutors, classes, living arrangement, equipment, breaks, and sick days are controlled by the university.¹⁴² Under common law, there should be no question an arrangement such as this qualifies as employment.

B. *The Outdated Promotion of Amateurism Does Not Align with the Life of Student Athletes*

The life of a student athlete differs greatly from their non-athletic peers. In reality, many student-athletes have analogized themselves as slaves to their schools. Seen within their extreme hours, poor educational compensation, and difficulty staying afloat while balancing such a lifestyle, amateurism is failing students.¹⁴³

Most Division I (DI) athletes work extreme hours, much longer than most employees. It is not uncommon for an athlete to spend well over forty hours a week training and up to eighty hours.¹⁴⁴ Further,

139. See generally *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Feb. 21, 2021) (explaining different situations which might affect a college athlete’s amateur status).

140. See CAL. LAB. CODE § 3352(a)(7).

141. See *Brassinga v. City of Mountain View*, 77 Cal. Rptr. 2d 660, 672 (1998).

142. Bock, *supra* note 28, at 137; NAT’L COLLEGIATE ATHLETE ASS’N, GOALS STUDY OF THE STUDENT ATHLETE EXPERIENCE INITIAL SUMMARY OF FINDINGS 2–5 (2016), https://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf.

143. See Bock, *supra* note 28, at 162.

144. *Id.* at 158 n.167; see Holland, *supra* note 69.

these long hours are not rewarded with adequate educational compensation. Athletes frequently miss class for sporting events and travel. They are not allowed to attend classes that conflict with their season games and trainings and are additionally left with very little time after practice to learn new material. It is a known phenomenon that athletes are put in easier classes so they can get passing grades with their busy schedules. They are forced to miss most holidays and family events. For example, most DI Women's Basketball players do not get Thanksgiving breaks like the rest of their peers as they must play in tournaments.¹⁴⁵

It is obvious that amateurism is no longer doing its job. Students are exploited daily. They work grueling hours but receive no compensation. SB 206 gives them some means to remedy this exploitation. It allows athletes to make additional money from outside sources. This will be the first time they have the ability to buy food, clothes, and necessities outside of what the school supplies. However, the bill does nothing to remedy the true offenders of student exploitation.

The universities are the true offenders. They have left students in an unfair position. Millions of videos, pictures, and advertisements are sent out to the world using the likeness of college athletes. The NCAA and universities make substantial revenue off this media. SB 206 only addresses the name and likeness from outside sources. While the universities get rich, the athletes get a subpar education for their hard work.

C. Most Student Athletes Do Not Have the Opportunity to Capitalize on Their One Chance for Publicity

Many proponents for amateurism and the small scope of SB 206 call on an athlete's ability to make massive profits after graduation. While this is very true for some athletes, it is true for only a small fraction of athletes. Fewer than 2 percent of college athletes make professional leagues after graduation.¹⁴⁶ Thus, for 98 percent of

145. See, e.g., Mitchell Northam, *Viewer's Guide to Thanksgiving Week in Women's College Basketball*, NCAA (Nov. 28, 2019), <https://www.ncaa.com/news/basketball-women/article/2019-11-26/viewers-guide-thanksgiving-week-womens-college-basketball>.

146. Angela Farmer, *Let's Get Real with College Athletes About Their Chances of Going Pro*, THE CONVERSATION (Apr. 24, 2019, 6:47 AM), <https://theconversation.com/lets-get-real-with-college-athletes-about-their-chances-of-going-pro-110837>.

college athletes, they have one chance to capitalize on publicity and athletics.¹⁴⁷ Universities take this chance away.

V. PROPOSAL

The age-old adage of mandatory amateurism does not compliment the lifestyle of modern collegiate athletes. SB 206 makes a small, important, yet flawed change to the system. Its passing represents a massive shift in public policy that must be reflected in California law. Where employment law exempts college athletes from employment, it simultaneously exempts them from vital labor protections.¹⁴⁸

There are numerous, palatable changes to legislation that can help protect the mass-exploited collegiate athletes. This Note proposes two. First, SB 206 should be expanded to allow universities to pay their athletes for their name and likeness. This would provide all levels of athletes the ability to support themselves, save, and capitalize on their college opportunity. A change such as this would allow both universities and athletes to benefit.

The key to dissuading critics of integrating a salary and publicity rights into the life of collegiate athletes rests in election—it would not be mandatory. Salary and payment, unless work hours exceeds that of their scholarship, would be up to the discretion of the university. This dissuades what the *Atlantic* noted as a main critique of collegiate athlete payment:

Supporters of college sports amateurism often claim that scrapping the system would be like giving all Americans equal access to health care: a nice idea, but a legal and fiscal impossibility. After all, letting student-athletes earn money means paying them a market wage. Which in turn means axing currently subsidized campus sports like tennis and volleyball; fending off inevitable Title IX lawsuits; dealing with a probable athlete union; possibly saying goodbye to the NCAA's all-important federal tax-exempt status.¹⁴⁹

The court incorrectly shared a similar view, “the market for college football is distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league

147. *See id.*

148. *See* CAL. LAB. CODE § 3352(a)(7) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

149. Hruby, *supra* note 49.

[football].”¹⁵⁰ What critics fail to see is that amateurism has already failed. It has failed to such a degree that universities are the ones now exploiting their athletes. Fixing this flaw would not create more “minors” as the court proffered, but it would enable the collegiality and protection of students.

The Olympics doesn’t pay participants. It simply allows them to get paid. There’s a difference. A difference college sports should welcome with open arms. . . . [L]et [college athletes] be like Phelps, appearing in commercials and on the cover of video games, profiting off their fame and image like everyone else in America. Including their coaches. Doing so won’t cost the current college sports industrial complex a penny of the billions it receives for men’s football and basketball broadcast rights; if anything, it will help grow and share the wealth without having to share *too much* of said wealth. [Caitlyn] Jenner’s iconic paid appearance on a Wheaties box was good for the former decathlete and good for [her] sport; if Brundage’s ghost shed a single Iron Eyes Cody tear at the rank commercialism of it all, well, boo-hoo. “Players already endorse products. . . . They already serve as billboards for the shoe companies. They’re used in video games. They’re used in lots of way. Schools have fundraisers where they sign autographs and gear on behalf of the school.”¹⁵¹

An expansion of SB 206 would simply allow students to reap the fruits of their labor for activities in which they already participate.

Second, the California Labor Code should simultaneously be amended to provide student-athletes with the protections of employees. This does not mean to completely make collegiate athletes the employees of their universities, but it does require they receive some benefit for dedicating their time and energy in a manner similar to an employee. This is not a foreign concept for universities. Currently, part-time student jobs at university recreational centers, libraries, and administration are common. This proposal does not even amount to such a degree.

150. O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1076 (9th Cir. 2015) (alterations in original) (quoting Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101–02 (1984)).

151. Hruby, *supra* note 49.

The California Labor Code exception should be amended to allow student-athletes to be paid more proportionally for their time. Potential pay under an employment scheme should be linked to the universities' overall athletics profits. The DI schools bringing in extreme sums would have a greater, more stringent payment plan. This would allow protection for the athletes in more intensive programs, versus the students who need less protection in lower divisions.

There are many avenues available to determine compensation where scholarships are involved. Potential determination could include compensation and protection based on total hours surpassing the amount of scholarship received. Scholarships amount to a full-time student athlete, typically twenty-five to forty hours per week of school and athletics. So, time put in greater than such should be compensated.

Collegiate athletes are the celebrities of their campus, yet there is a dark underbelly of exploitation and control that few outsiders witness. SB 206 must be expanded to allow both universities and the NCAA to pay their athletes for their name and likeness. Additionally, this clearly dictates a change in public policy calling for a corresponding change to amateurism. The California Labor Code must be amended to require high profiting schools with rigorous programs to compensate and protect their athletes like employees.

VI. CONCLUSION

SB 206 reveals decades of deep-rooted dissent among critics of academic compensation. Many believe the end of amateurism would bring about the exploitation of young athletes. But they fail to acknowledge that young athletes are already facing such exploitation. They are plagued with an inability to financially support themselves while playing high-level collegiate sports. Under this rule of law, the California courts and legislature have always upheld the big business of collegiate sports above the rights of student-athletes. The NCAA and their bottomless resources have dominated in numerous cases, subjugating their athletes as amateurs. SB 206 makes a necessary change to this traditional view of amateurism, but it does not go far enough.

With the passing of SB 206, problems remain: the current California labor exception directly contradicts public policy while promoting an outdated view of student athletes and undermining their only opportunity to capitalize on their publicity. This massive shift in

California public policy must be reflected in other areas of the law, outside of SB 206. Employment law shields college athletes from a hope of protection. This Note purports a two-fold solution: SB 206 should be expanded to allow universities to pay their athletes for their name and likeness and the California Labor Code should allow student-athletes employee protections. California must protect this class of young, hardworking, and incredibly talented citizens.