

REMOVING THE CLOAK OF AMATEURISM: EMPLOYING COLLEGE ATHLETES AND CREATING OPTIONAL EDUCATION

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National Collegiate Athletic Association (“NCAA”) grant-in-aid athletes are not currently considered employees. As such, they are not presently afforded protection under worker’s compensation laws and cannot leverage their full bargaining power to protect their economic interests. However, the relationship between student-athletes and their universities clearly meets the requirements of both common law and statutory law tests for an employment relationship. Consequently, Congress should recognize student-athletes as employees under the Fair Labor Standards Act, and the NCAA should adopt a new model that includes an athlete compensation plan and optional educational activities. This model will result in athletes who are not only fairly compensated for the risks inherent in their participation in collegiate athletics but also better prepared for their chosen career paths. This model will also allow universities’ resources to be allocated more efficiently in pursuit of the institutions’ core educational purpose. The “cloak of amateurism” must be removed in order for both athletes and universities to most efficiently pursue their interests.

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I. INTRODUCTION

Imagine if LeBron James attended college: a star basketball player, enrolled in classes simply to remain eligible, as mandated by the National Collegiate Athletic Association (“NCAA”).¹ Each day James attends class, but only physically; mentally he is focused on basketball and on his dreams of being a professional athlete. He overcomes his struggle to maintain the minimum academic requirements with the help of tutors, university academic support, and boosters, who, like James, care most about his contributions on the court. James flourishes on the basketball court during his first year of college.² Soon after, James is selected as the first pick in the NBA draft, a position that he had dreamed of for years, and one that had always overshadowed receiving a college degree. Although James exhausts many institutional resources during his one-year stint, he more than repays the university by bringing in millions of dollars in revenue. The university is satisfied, despite James’s early departure, as it extracted great value from contracting with him. As such, it remains willing to engage in this low risk venture of enrolling potentially underqualified student-athletes in the name of making money. The university reaps the benefits from its commercial activity without paying for it.³

The question that this situation raises is whether both universities and athletes would benefit from removing athletes from the classroom and compensating them as legal employees, allowing athletes to fully commit to athletic performance and allowing universities to effectively utilize their resources toward students actively pursuing a degree.

1. LeBron James did not attend college, as he was drafted into the National Basketball Association (“NBA”) from high school. Because most professional players do come from college athletics, and because LeBron James is a household name, his name is used in this fictional story to highlight some of the issues present in amateur athletics. I have the most profound respect for Mr. James, and his name is used only for anecdotal purposes and not to defame or speak negatively of Mr. James.

2. After players’ first year of collegiate participation, they are eligible for the NBA draft and can leave college athletics. Joseph A. Litman, *Tremendous Upside Potential: How a High-School Basketball Player Might Challenge the National Basketball Association’s Eligibility Requirements*, 88 WASH. U. L. REV. 261, 263 (2010) (“These rules, commonly known as the ‘age requirement,’ stipulate that no player is eligible to participate in the League unless he will be nineteen years old during the calendar year of the draft and at least one NBA season will have been completed since his high-school class graduated.”).

3. See Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1081.

Currently, the NCAA mandates that universities operate under the amateur athletics model,⁴ meaning student-athletes must pursue a degree to participate in athletics.⁵ Additionally, student-athletes cannot receive any financial benefits beyond a scholarship covering the full cost of attendance.⁶ The problem with this model is four-fold: (1) student-athletes are undercompensated, (2) student-athletes lack the bargaining power to protect their well being, (3) many student-athletes are students (or amateurs, for that matter) in name only, and (4) universities expend scarce resources to accommodate student-athletes that do not necessarily desire to receive an education. This Note argues that athletes that participate in intercollegiate athletics and receive athletic scholarships should be employed by universities and should not be forced to enroll in courses because “the myth of amateurism provides unwarranted and improper exemption from the law at the expense of the athletes, the public, and justice itself.”⁷ Most unfortunately, the ones most adversely affected by the “veil of amateurism”⁸ are the student-athletes themselves.

Part II of this Note reviews the development of the NCAA, the industry of intercollegiate athletics, and how student-athletes are defined as amateur athletes. Part III details the relationship between student-athletes and employees, analyzes why student-athletes are generally not considered legal employees, and describes why student-athletes should be considered legal employees at all levels. Part III also analyzes the implications of employing athletes. Part IV recommends that Congress recognize student-athletes as employees under the Fair Labor Standards Act (“FLSA”) and proposes that the NCAA adopt an employable-athlete model that includes an athlete compensation plan and creates optional education for athletes. Part IV also evaluates the consequences of adopting this model.

4. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984); David Berri, *What Sports Illustrated Didn't Tell You About Paying College Athletes*, HUFF. POST SPORTS (Jan. 11, 2012, 5:12 AM), http://www.huffingtonpost.com/david-berri/paying-college-athletes_b_1089102.html.

5. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2012-13 NCAA DIVISION I MANUAL art. 14.4 (2012), available at http://grfx.cstv.com/photos/schools/geot/genrel/auto_pdf/2012-13/misc_non_event/12-13-ncaa-manual.pdf [hereinafter DIV. I MANUAL] (stating the process toward degree requirements).

6. NAT'L COLLEGIATE ATHLETIC ASS'N, NAT'L COLLEGIATE ATHLETIC ASS'N CONST. (2012), reprinted in DIV. I MANUAL art. 2.13 [hereinafter NCAA CONST.] (“A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.”).

7. See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008). Further, some have claimed that the system perpetuates inequality. See generally John N. Singer, *Understanding Racism Through the Eyes of African American Male Student-Athletes*, 8 RACE ETHNICITY & EDUC. 365, 365 (2005).

8. McCormick & McCormick, *supra* note 7, at 497.

II. BACKGROUND

This Part describes the industry of intercollegiate athletics. Section A provides an overview of the NCAA and how it operates. Section B illustrates the growth of intercollegiate athletics in recent decades and how that growth has translated into extraordinary revenues. Section B also examines how intercollegiate athletic revenues are allocated to the major players in the industry.

A. *The National Collegiate Athletic Association*

The NCAA is the governing institution of intercollegiate athletics.⁹ It was founded in 1906 to protect young people from the exploitive practices of the time.¹⁰ The NCAA views intercollegiate athletics as a key component to the institution and the athlete as an “integral part of the student body.”¹¹ As such, its goal is to maintain college athletics as a part of the college experience.¹²

The NCAA states that it works toward this end by enhancing athletic programs and by promoting and developing academic excellence and athletics “as a recreational pursuit.”¹³ The Supreme Court formally confirmed the NCAA’s role and mission in 1984 when it recognized the NCAA as the guardian of intercollegiate amateur athletics.¹⁴ The NCAA

9. See NCAA CONST., *supra* note 6, at art. 1.3. The U.S. Supreme Court described the NCAA as

an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members’ participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities.

Bd. of Regents, 468 U.S. at 120–21 (White, J., dissenting).

10. Brett McClain Epstein, Note, *Should the Crime Determine the Extent of Due Process?: The National Collegiate Athletic Association Followed Such Logic During the Penn State Scandal*, 21 SPORTS LAW. J. 169, 172 (2014). As identified in a study conducted by Huma and Staurowsky, Jay Bilas, attorney and ESPN analyst, explains that

[a]n athlete is not exploited when he is fairly compensated in a business transaction outside of the institution. To the contrary, one could more persuasively argue that an athlete is exploited when he is expressly disallowed from realizing his value while his reputation and skill are being used to realize a profit for others.

Ramogi Huma & Ellen J. Staurowsky, *Study: “The Price of Poverty in Big Time College Sport,”* NAT’L C. PLAYERS ASS’N 10, available at <http://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

11. NCAA CONST., *supra* note 6, art. 1.3.1.

12. *Id.*

13. *Id.* at art. 1.2. As I will demonstrate, NCAA athletics are not just “recreational pursuit”; NCAA athletics is a business.

14. See *Bd. of Regents*, 468 U.S. at 88–89 (“Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, swimming, basketball, wrestling, and track, it has sponsored and conducted national tournaments.”); James Arico, *NCAA v. Board of Regents of the University of Oklahoma: Has the Supreme Court Abrogated the Per Se Rule of Antitrust Analysis?*, 19 LOY. L.A. L. REV. 437, 467 (1986) (“The

has developed into one of the largest nonprofit organizations in the United States, currently providing opportunities for more than 460,000 student-athletes annually.¹⁵

In 2012, 126,000 student-athletes were awarded over \$2 billion in athletic scholarships for their participation in intercollegiate athletics.¹⁶ Although NCAA member institutions award athletic scholarships, or compensation, to student-athletes for participating in athletics, the NCAA mandates that student-athletes are not employees. This means students have little bargaining power and are at the service of their universities.¹⁷ Since the NCAA implemented the term “student-athlete,” most courts have agreed with the NCAA’s distinction that athletes are not employees.¹⁸ Thus, student-athletes are generally not covered under state workers’ compensation statutes and lack the bargaining power to challenge the NCAA’s practices that interfere with their well being.¹⁹

1. *The NCAA’s Definition of “Student-Athlete”*

The NCAA defines the term “student-athlete” as an “athlete . . . [that] participates in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom.”²⁰ The NCAA implemented the term “student-athlete,” stating that it wanted collegiate athletes to be considered amateur athletes.²¹ However, the term was introduced to insulate the NCAA from the legal implications of employing athletes.²²

In 1953, in *University of Denver v. Nemeth*, the court considered University of Denver football player Ernest Nemeth, an employee within the Colorado workers’ compensation statute.²³ Even though his employment was for maintaining certain facilities, the court reasoned that if

Ninth Circuit found that the NCAA’s important role, as guardian and protector of amateurism was not transferable . . .”).

15. *Investing Where It Matters*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/resources/media-center/investing-where-it-matters> (last visited Sept. 19, 2014).

16. NAT’L COLLEGIATE ATHLETIC ASS’N, BEHIND THE NCAA BLUE DISK: HOW DO ATHLETICS SCHOLARSHIPS WORK?, available at <http://www.ncaa.org/sites/default/files/NCAA%2BAthletics%2BScholarships.pdf>.

17. See *infra* Part II.A.1.

18. See *infra* Part II.A.

19. See *infra* Part III.A.4.

20. Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NAT’L COLLEGIATE ATHLETIC ASS’N NEWS ARCHIVE (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateuism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html>.

21. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 83 (2006) (“From the beginning, more than a half-century ago, the NCAA utilized the term ‘student-athlete’ to cloak the actual relationship between the parties. Indeed, the term itself was born of the NCAA’s swift and alarmed reaction to a judicial determination in 1953 that . . . certain college athletes were employees and entitled to statutory benefits under state law.”).

22. *Id.*

23. *Univ. of Denver v. Nemeth*, 257 P.2d 423, 430 (Colo. 1953) (en banc); McCormick & McCormick, *supra* note 21, at 83.

Nemeth did not participate in football, he would have lost his campus job because the employment was contingent on whether he played football.²⁴ The implication of the holding was that the University had to provide workers' compensation benefits for Nemeth's football injuries sustained during practice because of this connection.²⁵

In response to this ruling, the NCAA created the term "student-athlete."²⁶ Its aim was to evade workers' compensation laws.²⁷ Former NCAA Executive Director Walter Byers admitted:

[The] threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.

We crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of "college teams," not football or basketball "clubs," a word common to the pros.

I suppose none of us wanted to accept what was really happening. That was apparent in behind-the-scenes agonizing over the issue of workmen's compensation for players.²⁸

In the decades following *Nemeth*, the NCAA has maintained a clear line between what it calls amateur athletics and professional athletics.²⁹ Student-athletes must follow the regulations that the NCAA mandates in its annual manual to participate in intercollegiate athletics, namely maintaining amateur status and pursuing a degree.³⁰ The NCAA maintains this line by establishing rules and regulations that promote the idea of the student-athlete as an amateur athlete. As demonstrated below, these rules and regulations are merely a façade, resulting in the obstruction of legal remedies for student-athletes.³¹

24. *Nemeth*, 257 P.2d at 424–25, 428 (stating that "those students who qualified on account of athlete prowess were paid on a monthly basis" and that "by not participating in football," Nemeth would have lost his part-time job); see also WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 70–71 (1995) (stating that the "university benefited from Nemeth's football activities since the college was "in the football business," rather than just recreational sport) [hereinafter BYERS & HAMMER].

25. See *Nemeth*, 257 P.2d at 427; BYERS & HAMMER, *supra* note 24, at 70 (citation omitted); McCormick & McCormick, *supra* note 21, at 83–84 (citation omitted).

26. McCormick & McCormick, *supra* note 21, at 84.

27. *Id.* at 84 ("By emphasizing the identity of athletes as 'students,' the NCAA endeavored to diminish any tendency to characterize them as 'employees.'").

28. BYERS & HAMMER, *supra* note 24, at 69; see also, McCormick & McCormick, *supra* note 21, at 84; Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60. BUFFALO L. REV. 1003, 1015 (2012).

29. See DIV. I MANUAL, *supra* note 5, at art. 12.01.2.

30. See *id.* at art. 12.1.1, 14.01.2.

31. See McCormick & McCormick, *supra* note 21, at 74 ("[The] characterization—that athletes at NCAA-member schools are student-athletes—is essential to the NCAA because it obscures the legal reality that some of these athletes, in fact, are also employees.").

2. *Rules and Regulations Applying to Student-Athletes*

The NCAA maintains that its “enforcement program’s” objective is to facilitate fairness and to maintain competitive balance.³² The NCAA states that with this program, “[it] is dedicated to creating positive student-athlete experiences by preserving the integrity of the enterprise.”³³ This enforcement program was designed, as described by the NCAA, to ensure that NCAA member institutions are in compliance with the stated NCAA rules and bylaws, especially as applied to its student-athletes.³⁴

a. General Principles of Amateurism

The NCAA describes “amateur competition” as “a bedrock principle of college athletics and the NCAA . . . [that] is crucial to preserving an academic environment in which acquiring a quality education is the first priority.”³⁵ As a condition of being a student-athlete, students must abide by the amateurism requirements detailed in Article 12 of the NCAA Division I Manual, and athletes must be certified as amateur athletes.³⁶ The NCAA’s rationale behind utilizing the amateurism model is that “[m]ember institutions’ athletics programs are designed to be an integral part of the educational program.”³⁷ Further, Mark Emmert, the NCAA President, recently testified that the NCAA’s amateurism rules were implemented to guarantee that student-athletes only received resources that would further their pursuit of education.³⁸ The NCAA claims “maintaining a clear line of demarcation between college athletics and professional sports”³⁹ is necessary to preserving the “student” in student-athlete and to protecting educational programs.

A “professional athlete,” as defined by the NCAA, is “one who receives any kind of payment, directly or indirectly, for athletic participation except as permitted by the governing legislation of the Association.”⁴⁰ Scholarship student-athletes are distinguished from professionals in that they receive scholarships, or “grant-in-aid.”⁴¹ The NCAA main-

32. Pitt Blather, *NCAA vs PSU—Lack of Institutional Control*, YARDBARKER (June 20, 2012), http://www.yardbarker.com/all_sports/articles/ncaa_vs_psu_lack_of_institutional_control/11051183.

This statement was originally found on the Rules & Compliance page of the NCAA’s website; however, during the course of writing this Note, the NCAA has revamped its website and has omitted the statement.

33. *Id.*

34. See Katherine Elizabeth Maskevich, Note, *Getting Due Process into the Game: A Look at the NCAA’s Failure To Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 302 (2005) (“Members are ‘obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.’” (citation omitted)).

35. *Amateurism*, NAT’L COLLEGIATE ATHLETIC ASS’N LATEST, <http://www.ncaa.org/amateurism> (last visited Nov. 15, 2014).

36. DIV. I MANUAL, *supra* note 5, at art. 12.1.1.

37. *Id.* at art. 12.01.2.

38. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014).

39. DIV. I MANUAL, *supra* note 5, at art. 12.01.2.

40. *Id.* at art. 12.02.4.

41. *Id.* at art. 12.01.4.

tains that grant-in-aid administered by a university is not payment for the athlete's skill or performance, so long as that payment, or grant-in-aid, is less than the values established by the NCAA.⁴² Although there is debate regarding whether student-athletes are actually amateur athletes, the NCAA still considers student-athletes to be amateur athletes because the grant-in-aid is limited by NCAA regulations.⁴³

Even former NCAA executives have found it difficult to justify the organization's emphasis on amateurism.⁴⁴ The NCAA can, however, point to the fact that professional athletes do not experience such limitations.⁴⁵ By camouflaging athletes as amateurs, the NCAA and its member institutions are essentially permitted to employ a type of labor without paying the athletes a competitive wage.⁴⁶

b. General Limitations

Per the amateur athletic model, the NCAA also regulates the amount of time student-athletes can participate in athletic related events, restrictions unknown to professional athletes.⁴⁷ During each sport's season, student-athletes may participate in athletic activities for up to four hours daily and up to twenty hours weekly.⁴⁸ The purpose behind the restrictions is to promote the façade of the amateur model. The restrictions might exist in the NCAA Division I Manual, but it is generally accepted

42. *Id.*

43. *Id.* at art. 12.1 (stating that, in general, amateurism requirements do not allow contracting with professional teams, receiving a salary for participating in athletics, receiving prize money "above actual and necessary expenses," or playing with professionals, to name a few).

44. See Fram & Frampton, *supra* note 28, at 1016. In this work, Fram and Frampton identify an interview conducted by *Sports Illustrated* with Myles Brand, one of the NCAA's former Presidents. *Id.* This interview brilliantly identifies precisely the lack of justification for deeming student-athletes amateurs:

[Brand:] They can't be paid.

[Q:] Why?

[Brand:] Because they're amateurs.

[Q:] What makes them amateurs?

[Brand:] Well, they can't be paid.

[Q:] Why not?

[Brand:] Because they're amateurs.

[Q:] Who decided they are amateurs?

[Brand:] We did.

[Q:] Why?

[Brand:] Because we don't pay them.

Id.

45. NCAA DIV. I MANUAL, *supra* note 5, at art. 12.1.

46. See McCormick & McCormick, *supra* note 21, at 75.

47. See NCAA DIV. I MANUAL, *supra* note 5, at art. 17.

48. *Id.* at art. 17.1.6.1. "Countable athletically related activities" are defined in Article 17.02.1: Countable athletically related activities include any required activity with an athletics purpose involving student-athletes and at the direction of, or supervised by, one or more of an institution's coaching staff (including strength and conditioning coaches) and must be counted within the weekly and daily limitations under Bylaws 17.1.6.1 and 17.1.6.2. Administrative activities (e.g., academic meetings, compliance meetings) shall not be considered as countable athletically related activities.

Id. at art. 17.02.1.

that these rules are not enforced and thus rarely followed.⁴⁹ Major university athletic programs have never been amateur.⁵⁰ The industry of intercollegiate athletics is commercial at its core, and, as such, university programs operate in an industry that is designed to help athletic programs flourish commercially.

B. *The Industry of Intercollegiate Athletics*

“Almost every sports historian agrees that the first intercollegiate athletic event in American history was a boat race between Harvard and Yale in 1852.”⁵¹ Modeled after the famous Oxford-Cambridge boat race, Harvard and Yale were the first to realize the potential of college sports.⁵² James M. Elkin, a successful businessman, was the driving force behind the event, understanding the boat race would draw media coverage to his resort.⁵³ To Elkin, the Harvard-Yale contest was a commercial event;⁵⁴ it was one from which he expected to profit. Thus, the industry of intercollegiate athletics was created, and it was created upon the notion of commercialism.⁵⁵

The NCAA took its name from the previously founded Intercollegiate Athletic Association of the United States (“IAAUS”), which constituted sixty-two higher education institutions.⁵⁶ Today, the NCAA has expanded to include greater than 460,000 student-athletes⁵⁷ and 1200 institutions,⁵⁸ generating revenue of \$871.6 million for the 2011–12 year.⁵⁹ In addition to its financial power, the NCAA has become a monopolist

49. See, e.g., *infra* notes 189–92 and accompanying text. Most recently, the NCAA has faced scrutiny for its failed investigation conducted on the University of Miami. Amy Ybarra, *NCAA’s Missteps Offer Lessons for Employers*, TEX. EMP. L. LETTER, Oct. 2013, at 1 (stating that “[t]he NCAA began investigating the University of Miami’s football program after a former booster” admitted to giving benefits to recruits and that the NCAA “admitted there were ‘missteps’ and ‘insufficient oversight’ in the investigation”). If the neither the university nor the NCAA can protect athletes, they must be availed to a legal outlet where they can seek a remedy.

50. McCormick & McCormick, *supra* note 21, at 75.

51. Murray Sperber, *College Sports, Inc.: How Big-Time Athletic Departments Run Interference for College, Inc.*, in *BUYING IN OR SELLING OUT? THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY* 17, 17 (Donald Stein ed., 2004).

52. *Id.*

53. *Id.*

54. *Id.*

55. Even in the late 1900s, aspects of commercialism were extremely apparent. Even Woodrow Wilson tried to reform big-time college athletics when he was serving as President of Princeton University. RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* ix (2011). By then, however, Wilson believed that “students were preoccupied with nonacademic activities; or as he said, ‘The sideshow has swallowed up the circus.’” *Id.*

56. Library of Cong., *Topics in Chronicling America—The 1905 Movement to Reform Football*, NEWSPAPER & CURRENT PERIODICAL READING ROOM (Jan. 29, 2013), <http://www.loc.gov/rr/news/topics/football1.html>.

57. *Investing Where It Matters*, *supra* note 15.

58. DELOITTE & TOUCHE, LLP, *NAT’L COLLEGIATE ATHLETIC ASS’N AND SUBSIDIARIES, CONSOLIDATED FINANCIAL STATEMENTS 6* (2013), available at http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf (stating that the NCAA is made up three different divisions: Division I, Division II, and Division III).

59. *Id.* at 5.

power over college sports, completely dominating the industry.⁶⁰ The NCAA has grand power over intercollegiate athletics in the United States,⁶¹ rendering insubstantial of the National Association of Intercollegiate Athletics (“NAIA”) and other such groups.⁶²

Some have characterized the NCAA as similar to a cartel because of its tremendous power.⁶³ However, the NCAA has generally been free from legal implications of its monopolistic power. This is, in part, because of the relaxed antitrust standard applied, which is called the “rule of reason.”⁶⁴ According to *O’Bannon v. NCAA*: “A restraint violates the rule of reason if the restraint’s harm to competition outweighs its procompetitive effects.”⁶⁵ The reason for the relaxed standard lies in the categorization of student-athletes as amateur athletes and judicial and congressional accommodation in light of purported purposes of education.⁶⁶ In *Gaines v. NCAA*, the court recognized: “There is no dispute that ‘[w]hile organized as a non-profit organization, the NCAA—and its member institutions—are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of ‘profit-making’ enterprises.’”⁶⁷ Because of the NCAA’s dual purposes, however, courts have rarely held that NCAA regulations were related to a purely commercial market.⁶⁸ As a result of the “rule-of-reason” application, and because the NCAA hides

60. See generally Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655 (1978). Further, some argue that the NCAA’s “no-pay rules violate Section 1 of the Sherman Act.” Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 61 (2013).

61. Christopher L. Chin, Comment, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1222 n.75 (1993).

62. See John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 171–72 (1983). The NAIA describes itself as, “a governing body of small athletics programs that are dedicated to character-driven intercollegiate athletics. Since 1937, the NAIA has administered programs and championships in proper balance with the overall college educational experience. The student-athlete is the center of all NAIA experiences.” *About the NAIA*, NAT’L ASS’N INTERCOLLEGIATE ATHLETICS, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 (last visited Sept. 22, 2014).

63. See, Chin, *supra* note 61, at 1222–23 (“Some of the NCAA’s cartel-like activities include: (1) setting the maximum price that a university can pay for participants in its intercollegiate athletic programs; (2) regulating the quantity of athletes that a university can purchase in a given time period; (3) periodically informing member universities about transactions, costs, market conditions and sales techniques; (4) pooling and distributing portions of the association’s profits, particularly those that result from intercollegiate football and basketball; and (5) policing the behavior of its members and levying sanctions against those members that violate its rules and regulations.”).

64. See *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136, 1151 (5th Cir. 1977); Chin, *supra* note 61, at 1224–25.

65. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014) (quoting another source).

66. Chin, *supra* note 61, at 1224–25.

67. *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (quoting *Hennessey*, 564 F.2d at 1149 n.14).

68. See, e.g., *McCormack v. Nat’l Collegiate Athletic Ass’n* 845 F.2d 1338, 1340 (5th Cir. 1988) (“The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.”).

behind its educational purpose proclamation, the NCAA has been able to generally shield itself from antitrust law.⁶⁹

In Part III, this Note details how student-athletes are in fact not amateur athletes and how the goals of the NCAA and athletic programs are not centered on education. It becomes clear that the NCAA could be characterized as a monopoly power when its cloak of amateurism is recognized for what it is.

Given that the NCAA has so much power, it has been able to generate extreme revenues for its member universities.

1. *Revenue Generation*

An increase in student-athlete participation has been critical in the development of the intercollegiate athletic industry. Athletic departments have been all but hesitant to capitalize on their growth opportunities. Since 2004, median athletic department generated revenues at Football Bowl Subdivision (“FBS”) Division I schools have increased by more than 77.5%.⁷⁰

Despite the size variations of NCAA athletic departments, the median total revenue in 2012 for an FBS school was \$55,976,000, a 6.2% increase from the prior year.⁷¹ During the same year, the largest total revenue, \$163,295,000, was more than triple that of the median.⁷²

Athletic revenues are derived from two different sources: generated revenues and allocated revenues.⁷³ Generated revenues are derived from athletic department activities,⁷⁴ such as ticket sales, alumni donations, royalties, and conference payments.⁷⁵ Allocated revenues are derived from student fees distributed to athletic departments and from financial support from institutions and government.⁷⁶ These revenues are used to pay salaries to administrators and coaches as well as to fund athletic ventures.⁷⁷ Clearly, athletic departments have tremendous incentive to promote athletic programs; promoting athletic programs will increase revenue.

69. Chin, *supra* note 61, at 1225–1226.

70. NAT’L COLLEGIATE ATHLETIC ASS’N, REVENUES & EXPENSES: 2004–2012 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAM REPORT 12 (2013), available at <http://www.ncaa.com/publications/productdownloads/2012RevExp.pdf> [hereinafter 2013 NCAA REPORT]. The FBS is a subdivision that has additional requirements for football programs, such as a football attendance requirement and higher financial aid expenditure requirements. See DIV. I MANUAL, *supra* note 5, at 349. In 2013, it was reported that Division I athletic programs at public institutions “were a \$6 billion enterprise in fiscal year (FY) 2010.” DONNA M. DESROCHERS, ACADEMIC SPENDING VERSUS ATHLETIC SPENDING: WHO WINS?, AM. INSTITUTES FOR RES. 1 (2013).

71. NCAA REPORT, *supra* note 70, at 17.

72. *Id.* at 12.

73. *Id.* at 9.

74. *Id.*

75. *Id.*

76. *Id.*

77. See McCormick & McCormick, *supra* note 7, at 534.

Revenues are sizable at most Division I schools. Top Division I universities generate larger revenues than smaller universities; however, the smaller schools still receive amounts that help facilitate athletic programs.⁷⁸ Further, while some tend to associate revenue and college sports with only men's basketball and football, sports like college hockey and women's basketball have also been shown to generate substantial revenues.⁷⁹ In a study conducted by Robert W. Brown & Todd Jewell, the authors found that "a premium player at one of the elite women's basketball programs can generate \$403,303 annually, well in excess of her effective compensation."⁸⁰ Similarly, another study found that top "college hockey players generate between \$131,00 and \$165,000 in added revenues to schools."⁸¹ Thus, as demonstrated below, solutions that address all scholarship student-athletes are needed; not ones that only addresses football and men's basketball.

In 2012, the University of Texas had the highest revenue from athletics of any university in the country at \$160.3 million.⁸² This was, in part, due to heightened exposure of University of Texas athletics stemming from the launch of the Longhorn Network ("LHN"), a television network dedicated to the coverage of University of Texas athletic events.⁸³ Despite a \$2 million drop in ticket sales, the University of Texas' athletic department excelled in creating tremendous generated revenues from royalties, sponsorship, advertising, and licensing, as well as conference contributions and donations from its vast alumni base.⁸⁴ This unbelievable revenue allowed the University of Texas' athletic department to sign a ten-year, \$26 million, contract to its former head football coach, "Mack" Brown, in 2004.⁸⁵ Mack Brown is not an extreme example, either: "virtually every head football coach in the FBS—including those of perennially losing teams—earns more than \$1 million dollars, plus lavish perks and the potential for significant outside income."⁸⁶ Despite sub-

78. C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1087 (1997).

79. See *infra* notes 80–81.

80. Robert W. Brown & Todd Jewell, *The Marginal Revenue Product of a Women's College Basketball Player*, 45 INDUS. REL. 96, 100 (2006).

81. Leo H. Kahane, *The Estimated Rents of a Top-Flight Men's College Hockey Player*, 7 INT'L J. SPORT FIN. 19, 21 (2012).

82. UNIVERSITY OF TEXAS ATHLETICS, 2013 UNIVERSITY OF TEXAS ATHLETICS REPORT 31, available at http://grfx.cstv.com/photos/schools/tex/genrel/auto_pdf/2012-13/misc_non_event/2013-athletics-report.pdf [hereinafter UT REPORT]; see also Alicia Jessop, *The Economics of College Football: A Look at The Top-25 Teams' Revenues and Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), <http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/>.

83. See UT REPORT, *supra* note 82, at 30.

84. Steve Berkowitz & Jodi Upton, *Texas Had \$163.3 Million in Athletic Revenue in 2011-12*, USA TODAY (Feb. 9, 2013, 3:20 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/02/09/university-of-texas-athletic-finances-revenues-expenses/1903915/>.

85. McCormick & McCormick, *supra* note 7, at 531.

86. Andrew Zimbalist, *CEOs with Headsets*, HARVARD BUS. REV., Sept. 2010, at 22.

stantial revenues and salaries paid to Division I coaches, the workforce—student-athletes—is still not compensated.⁸⁷

Although the NCAA claims that it operates under an amateur model, the industry is clearly commercialized, and always has been, in all aspects, except as pertaining to student-athletes.

2. *Valuation of the Student-Athlete*

Student-athletes are highly valued. Student-athletes are compensated for that value in the form of a scholarship covering the cost of tuition and related costs, as well as with a stipend if the student lives off campus. However, are student-athletes undercompensated? In other words, are they exploited? NCAA rules allow student-athletes to receive, at maximum, a scholarship covering the cost of attendance.⁸⁸ Although Division I football and men's basketball programs generate hundreds of thousands, if not millions, of dollars for their universities, "the student-athletes who make the success possible share relatively little in the revenue generated."⁸⁹

Most argue that grant-in-aid is equivalent to being paid to play; however, even if scholarships are considered compensation, student-athletes are severely undercompensated. Eighty-five percent of student-athletes living on campus, and eighty-six percent of those living off campus, are living below the poverty line.⁹⁰ More specifically, a study conducted by the National College Players Association ("NCPA") found that the average full-scholarship University of Texas football player made \$2,841 below the federal poverty line during the 2010–11 season.⁹¹ During the same season, the University of Texas' football coaches made, on average, over \$3.5 million each.⁹² The debate about "pay-to-play" revolves around this point; it seems self-evident that student-athletes that generate hundreds of thousands of dollars should be compensated at least at a value above the poverty line.

The average fair market value of an FBS football player for the 2009–10 academic year was \$121,048.⁹³ This valuation, as compared to the average scholarship value of an FBS student-athlete's room and board stipend at less than \$10,890,⁹⁴ is grossly disproportionate.

Examining statistics for individual players illustrates how much star athletes contribute financially to their institutions. After a successful season in 2012–13, the Indiana Hoosiers men's basketball team's total mar-

87. See Goplerud III, *supra* note 78, at 1088.

88. DIV. I MANUAL, *supra* note 5, at art. 12.1.

89. Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J.L. & PUB. POL'Y 137, 138 (1996).

90. Huma & Staurowsky, *supra* note 10, at 4.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 4, 15.

ginal revenue was \$2,984,604.⁹⁵ Victor Oladipo, the team's best player, was worth \$737,129—valued at the estimated revenue generated from Oladipo's presence that year—yet his scholarship for the academic year at Indiana University was estimated at less than \$30,000.⁹⁶ While not all athletes are valued as highly as Oladipo,⁹⁷ this situation presents a clear example of a student-athlete that is largely undercompensated.

Despite being major revenue generators and visible faces of their institutions, student-athletes remain hidden under the cloak of amateurism rather than being recognized and compensated as valuable employees of their universities. By permitting universities to make millions of dollars without having to share with the revenue generating assets—student-athletes—the NCAA is perpetuating the increasingly commercialized nature of the intercollegiate athletic industry.⁹⁸ This problem lies in that the NCAA maliciously uses its “façade of amateurism” to limit student-athlete bargaining power, preventing athletes from gaining access to workers' compensation benefits and other rights generally available to employees.⁹⁹

III. ANALYSIS

This Part details the relationship between student-athletes and employees. Section A analyzes why student-athletes are generally not considered employees, Section B describes why all scholarship student-athletes should be considered employees, and Section C lays out the legal implications of considering scholarship student-athletes employees.

A. *Scholarship Student-Athletes Are Not Currently Employees*

Some have argued that student-athletes are already employees, as athletes receive compensation for athletic performances in the form of a scholarship.¹⁰⁰ Neither federal courts nor Congress, however, have formally adopted the view that student-athletes are employees, as the

95. Dave Berri, *How About a Free Market for College Athletes?*, FREAKONOMICS (Mar. 22, 2013, 9:36 AM), <http://freakonomics.com/2013/03/22/how-about-a-free-market-for-college-athletes/>.

96. *Id.* Estimates demonstrate one star-football player, of National Football League (“NFL”) caliber, generates over \$1 million dollars in revenue. Robert Brown, *Research Note: Estimates of College Football Player Rents*, 12 J. SPORTS ECON. 200, 200 (2010) (stating revenue figures in 2004–05 dollars).

97. See McCormick & McCormick, *supra* note 7, at 527 (“Syracuse University’s twelve scholarship basketball players would each have been worth \$488,000 during the 2002–2003 season, roughly \$458,543 more than their annual scholarship. Over a four-year college athletic career, each Syracuse scholarship player would have earned approximately \$1.8 million more than the value of his scholarship.”). McCormick & McCormick applied this same model to a number of other universities, all yielding similar results. *Id.*

98. See Riggs, *supra* note 89, at 138.

99. See *id.*; McCormick & McCormick, *supra* note 21, at 79 n.34 (stating that “employees” have rights under various federal law—like “the right to earn a minimum wage” and the right to work in a safe environment—and state laws that are not currently available to student-athletes).

100. See McCormick & McCormick, *supra* note 21, at 75.

NCAA has hidden under the cloak of amateurism.¹⁰¹ Essentially, student-athletes are not legally considered “employees” because they enter into a contract confirming that they are amateur athletes.¹⁰² The NCAA Manual requires confirmation of student-athletes’ amateur status, and it prohibits student-athlete compensation and employment as an athlete.¹⁰³

In July of 2014, Peter Sung Ohr, a Regional Director for the National Labor Relations Board (“NLRB”), reached a stunning conclusion in *Northwestern University*, finding that grant-in-aid football players are employees under the National Labor Relations Act (“NLRA”), and therefore are able to unionize.¹⁰⁴ While this decision represents a “win” for student-athletes, if upheld, it will only govern private universities and grant-in-aid football players, not all grant-in-aid athletes.¹⁰⁵ Northwestern University appealed the decision, and the NLRB has granted the appeal.¹⁰⁶ Because the ruling has not been settled, the effect of the decision is yet to be seen.¹⁰⁷ Thus, until this matter is fully decided, scholarship student-athletes are not employees.

Courts that have faced student-athlete employee status issues have generally applied one of the following common tests: varieties of the common law test, the economic realities test, or the statutory test. This Section details the application of the three tests through the relevant case law in support and in opposition of deeming student-athletes employees.

1. Common Law Test

“Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the oth-

101. See, e.g., *Van Horn v. Indus. Accident Comm’n*, 33 Cal. Rptr. 169, 172 (Ct. App. 1963), *superseded by statute*, Cal. Lab. Code § 3352(j) (West 2013), as recognized in *Shepard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 2d 829, 843–44 (2002).

102. LeRoy, *supra* note 3, at 1099 (stating that the agreement is fictitious because student-athletes are really not amateur athletes).

103. DIV. I MANUAL, *supra* note 5, at art. 15.1.

104. Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *21 (N.L.R.B. Mar. 26, 2014).

105. See Labor and Employment, *Unionizing College Scholarship Athletes: Employees or Students?*, FROST BROWN TODD LLC (Apr. 2, 2014), <http://www.frostbrowntodd.com/resources-1653.html>.

106. Order, Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA) Petitioner, Case 13-RC-121359, 2014 WL 1653118, at *1 (N.L.R.B. Apr. 24, 2014); see also Melanie Trottman, *NLRB to Review Northwestern’s Appeal of Student-Athletes’ Union Decision; Board to Weigh Last Month’s Ruling, Saying Scholarship Football Players Can Form Unions*, WALL ST. J. (Apr. 24, 2014, 4:42 PM), <http://online.wsj.com/articles/SB10001424052702304788404579522063428957786>.

107. See Trottman, *supra* note 106. Brian Hayes, a legal expert, recently remarked in a question and answer session with Practical Law that the NLRB decision raises a number of unanswered questions, including, but not limited to, the following:

Should federal workplace safety rules apply to these individuals?

Should the value of their scholarships be taxed as income?

Should federal and state wage and hour laws apply to them?

Should state workers’ compensation laws be the exclusive remedy for injured athletes?

Expert Q&A with Brian Hayes on the NLRB’s Northwestern University Decision and Pending Football Player Union Election, PRAC. L. (Apr. 8, 2014), <http://us.practicallaw.com/6-564-0603>.

er's control or right of control, and in return for payment."¹⁰⁸ The common law test is generally called the "common law right of control test," as it focuses on the control aspect of the relationship to determine whether one is an employee.¹⁰⁹

In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court adopted the common law test for determining who qualifies as an "employee" to be used for federal laws that do not contain an adequate definition of "employee."¹¹⁰ For example, under the Employee Retirement Income Security Program ("ERISA"), the definition of "employee" is "any individual employed by an employer."¹¹¹ The ERISA definition of employee is too broad to be used in an analysis; as such, as in *Darden*, the common law definition would be used.¹¹² The Court added that since the common law test cannot simply be applied to render an answer, all relationships "must be assessed and weighed with no one factor being decisive."¹¹³

Given the current NCAA regulations as written, a student-athlete cannot be a common law employee, which requires that one receives payment in return for services, without directly violating the NCAA's regulations that require student-athletes to be amateur athletes.¹¹⁴ In other words, the NCAA does not permit student-athletes to be paid, yet the common law test requires one to be paid to be deemed an employee. However, as realized from the analysis applied in *Northwestern*, scholarship football players are employees under the common law test.¹¹⁵

The common law test first requires "payment" for services performed for the employer. The question of whether student-athletes are actually "paid" is subject to debate because it is not clear whether scholarships are a form of compensation contemplated under the common law test.¹¹⁶ Recent court decisions, however, have shed light on this debate by

108. Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014) (citing another source).

109. McCormick & McCormick, *supra* note 21, at 91; *see also* Fram & Frampton, *supra* note 28, at 1029.

110. 503 U.S. 318, 323–24 (1992) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." (quoting another source)). Many federal laws use variances of the common law test. *See* Charles, J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 6 (providing a list of the Federal laws that apply this test).

111. 29 U.S.C. § 1002(6) (2012).

112. *Darden*, 503 U.S. at 323–24.

113. *Id.* at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

114. *See* DIV. I MANUAL, *supra* note 5, at art. 12.01.2, 15.1.

115. Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 26, 2014).

116. *See* *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226 (Mich. Ct. App. 1983) ("[T]he scholarship constituted 'wages' . . . defining wages as items of compensation which are measurable in money or which confer an economic gain upon the employee."); McCormick & McCormick, *supra* note 21, at 109 (stating that student-athletes on scholarship do receive a benefit in the form of a scholarship; thus, grant-in-aid seems to satisfy the element of compensation); Jeffery Dorfman, *Pay College Athletes? They're Already Paid Up to \$125,000 per year*, FORBES (Aug. 29, 2013, 8:00 AM), <http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/> (stating that although student-athletes do not receive "pay" in the form of wages or a sala-

concluding that athletes do receive compensation in the form of “grant-in-aid.”¹¹⁷

Notably, Ohr’s decision in *Northwestern* held that grant-in-aid football players are employees under the common law test.¹¹⁸ Although the NCAA is appealing this decision, Ohr’s analysis represents a thorough and accurate application of the common law test to determine that student-athletes are employees.

In discussing the element of compensation, Ohr conceded that players do not receive a traditional paycheck, but still found that players are compensated because they “receive a substantial economic benefit for playing football.”¹¹⁹ Moreover, Ohr found whether the scholarships were treated as taxable income was not dispositive of finding the scholarships were compensation.¹²⁰ Ohr further stated that the scholarships were received in exchange for football services, directly linking the compensation to the service.¹²¹ In reaching this conclusion, Ohr relied on the fact that the scholarships could be reduced or cancelled and that football players with scholarships were recruited for, and given a scholarship for, their “athletic prowess on the football field.”¹²²

Ohr concluded that the contract-for-hire and control elements were also met, ultimately concluding that scholarship football players are paid athletes and meet the requirements of compensation under the common law test.¹²³ Many scholars would agree the decision in *Northwestern* as a finding that student-athletes satisfy the common law test.¹²⁴ For many of the same reasons employed in *Northwestern*, Section B.1 of this Note elaborates and argues that all scholarship student-athletes, not just football players, are employees under this test.

ry, they are still “paid” because “compensation in the form of educational benefits and living expenses” would be considered “pay” to an economist). *But see* *Rensing v. Indiana State Univ. Bd. Of Trustees*, 444 N.E.2d 1170, 1174 (Ind. 1983) (stating that “Rensing did not receive ‘pay’ for playing football at the University”); Brief for NCAA as Amici Curiae Supporting Employers, at 13, *Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC-121359, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014) (stating that student-athletes are not paid to participate in athletics).

117. *Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014) (“Thus, it is clear that the scholarships the players receive is compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular season and postseason.”); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 971 (N.D. Cal. Aug. 8, 2014) (calling the grant-in-aid that student-athletes receive “compensation”).

118. *Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC-121359, 2014 WL 1246914, at *1, *15 (N.L.R.B. Mar. 26, 2014).

119. *Id.* at *12. The court identified that Northwestern football players received up to \$76,000 annually in total scholarship value and that off-campus scholarship football players also receive a stipend of over \$1000 per month that is used to pay for living expenses and other non-educational costs. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at *12–13.

123. *Id.* at *1.

124. *See e.g.*, Fram & Frampton, *supra* note 28, at 1029–33.

Because there is more than one widely accepted test for determining whether one is an employee, student-athletes and their potential employee status should be analyzed under the other recognized tests.

2. *Statutory Test*

According to some scholars, the NLRA's statutory test "provides the best template for distinguishing" employees from students.¹²⁵ In *Brown University*, the NLRB established a statutory test containing additional requirements in considering whether graduate assistants were employees.¹²⁶ The court concluded that the students were not employees following an evaluation of the following factors: "(1) the status of graduate assistants as students; (2) the role of the graduate student assistantships in graduate education; (3) the graduate student assistants' relationship with the faculty; and (4) the financial support they receive to attend Brown University."¹²⁷ The *Brown University* Court ultimately held that the graduate assistants were not employees because the students were "primarily students and have a primarily educational, not economic, relationship with their university."¹²⁸

Despite the recognition that perhaps the NLRA statutory test is the "best test," Regional Director Ohr in *Northwestern* explicitly stated that it was inapplicable in considering whether scholarship football players were employees because football players are not primarily students and graduate assistants are primarily students.¹²⁹ However, Ohr also stated that his finding of employee status would have been the same had the statutory test been applied.¹³⁰

Although *Northwestern* found the NLRA statutory test inappropriate when considering whether scholarship student-athletes are employees, Ohr's analysis demonstrated that student-athletes easily satisfy its elements. Many scholars have agreed that this test is easily met in the context of considering student-athletes as employees.¹³¹ Because scholarship student-athletes are not primarily related to their universities for academic reasons, all scholarship student-athletes, not just football players, meet the NLRA test for employment; this is detailed below in Section B.2.

125. McCormick & McCormick, *supra* note 21, at 87.

126. Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *15 (N.L.R.B. Mar. 26, 2014).

127. *Id.*

128. *Brown University*, 342 N.L.R.B. 484, 483 (2004).

129. CAPA, 2014 WL 1246914, at *15 (stating that the *Brown* test was inapplicable "because the players' football-related duties are unrelated to their academic studies" whereas the graduate assistants' responsibilities were related to their education).

130. *Id.* Ohr worked through the factors applied in *Brown*, finding that: (1) Northwestern's scholarship football players were not "primarily students"; (2) athletic-related activities were not crucial to earning one's degree; (3) Northwestern's faculty did not oversee the football players' athletic responsibilities; and (4) compensation in the form of grant-in-aid was considered pay for athletic services, not financial aid. *Id.* at *16-18.

131. See, e.g., Fram & Frampton, *supra* note 28, at 1033-36.

3. *Economic Realities Test*

The economic realities test, which is applied under the Fair Labor Standards Act (“FLSA”), turns on whether the employee is “economically dependent” on the employer.¹³² If a worker were economically dependent on their employer, that worker would satisfy the requirements under this test to be considered an employee.¹³³ To determine whether a worker is economically dependent on the employer, there are certain factors that the court must consider, many of which are similar to those of the common law test.¹³⁴ All factors must be considered, and no one factor is dispositive in finding one is an employee.¹³⁵

The economic realities test is “applied to laws whose purpose is to protect or benefit a worker, because courts view the protection of a worker who is financially dependent on a particular employer as important.”¹³⁶ This test is broader than the common law test and is thus more likely to result in finding one is an employee.¹³⁷

Courts have, in the past, used the economic realities test to determine that student-athletes are not employees. For example, in *Coleman v. Western Michigan University*, a state workers’ compensation case, a scholarship football player was injured during his career and was denied workers’ compensation benefits because the court found he was not an employee.¹³⁸ The *Coleman* court relied on the economic realities test factors to determine whether the football player was an employee within the meaning of the workers’ compensation statute.¹³⁹

The *Coleman* court quickly reached two nonobvious conclusions weighing in favor of finding an employment relationship: (1) the student received “compensation” and (2) the student was “dependent on the payment of these benefits for his living expenses.”¹⁴⁰ Despite this, the

132. Muhl, *supra* note 110, at 6–7.

133. *Id.* at 7 (“The test examines the nature of the relationship in light of the fact that independent contractors would typically not rely on a sole employer for continued employment at any one time, but would work for, and be compensated by, many different employers, whereas most employees hold a single job and rely on that one employer for continued employment and for their primary source of income.”).

134. *See id.* at 7–8 (highlighting that factors include the following: (1) the integration of the worker’s services to the employer’s business, (2) the worker’s investment in the work, facilities, and equipment, (3) the employer’s right to control the type of work and the degree of control over the work, (4) the worker’s risk of incurring a profit or a loss, (5) whether the worker requires unique skills or judgment, and (6) whether the worker has a permanent or extended relationship with the business).

135. Jason Gurdus, Note, *Protection off of the Playing Field: Student Athletes Should Be Considered University Employees for Purposes of Workers’ Compensation*, 29 HOFSTRA L. REV. 907, 912 (2001).

136. Muhl, *supra* note 110, at 7.

137. *Id.*

138. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 225–26 (Mich. Ct. App. 1983).

139. *Id.* at 225–26 (stating the factors to be used are as follows: “(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, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and (4) whether the task performed by the proposed employee was ‘an integral part’ of the proposed employer’s business”).

140. *Id.* at 226.

court ultimately concluded that the student-athlete was not an employee because the court found the other two factors of this test more persuasive.¹⁴¹

The court identified that there was control exercised over the football player, although “limited,” but that this control was not tied to the student’s scholarship.¹⁴² In other words, because the player could be “fired” or “terminated” from the team at any point during the season and continue to receive his scholarship for the remainder of the academic year, his compensation was not dependent on his participation.¹⁴³ The court found most persuasive in its analysis that the work performed—playing football—was not an integral part of the university’s “business”—education.¹⁴⁴ This decision demonstrates reliance on the misunderstood notion of “student first, athlete second” in finding the student-athlete was not an employee.¹⁴⁵

The *Coleman* court erred in stating that student-athletes are students first, as many student-athletes are student in name only. Section B.3, below, demonstrates how scholarship student-athletes easily satisfy the test used in *Coleman*. This is significant because this Note recommends that scholarship student-athletes be recognized as employees under the FLSA in Section IV.A.2.

The significance in finding student-athletes are employees is that they are eligible to receive workers’ compensation benefits in the event an athlete is injured, in addition to other advantages that are not of focus in this Note.

4. Workers’ Compensation for Student-Athletes

Student-athletes, mainly football players, have filed workers’ compensation claims where they have argued that they are employees to avail themselves to workers’ compensation benefits.¹⁴⁶ According to one author, “The purpose of workers’ compensation legislation is to place the cost of workers’ injuries on the consumer through the price of products or services.”¹⁴⁷ Workers’ compensation statutes generally create an obligation for an employer to compensate injured employees for their injuries.¹⁴⁸

141. *See id.* at 226–27.

142. *Id.*

143. *Id.*

144. *Id.* at 227 (“In summary, the first and second factors of the ‘economic reality’ test demonstrate that defendant had at least some right to control the activities of plaintiff and to discipline plaintiff for nonperformance, but these rights were substantially limited. The third factor, i.e., the ‘payment of wages[.]’ favors the finding of an employment relationship. The fourth factor, concerning whether the employee’s duties were integral to the employer’s business, however, weighs heavily against the finding of an employment relationship.”).

145. *See id.* at 226.

146. LeRoy, *supra* note 3, at 1102.

147. Gurdus, *supra* note 135, at 908.

148. Mark R. Whitmore, Note, *Denying Scholarship Athletes Worker’s Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763, 769–70 (1991).

To qualify for workers' compensation, two conditions must be met: (1) an employee-employer relationship must exist when the injury occurred, and (2) the injury must have arisen out of the course of employment.¹⁴⁹ In most workers' compensation cases involving student-athletes, courts have refused to grant workers' compensation coverage to injured NCAA athletes because courts find athletes to be student-athletes, not employees.¹⁵⁰ In earlier workers' compensation cases, some courts classified the student-athlete as an employee.¹⁵¹ In more recent cases, however, courts have not been in favor of deeming student-athletes employees.¹⁵² The NLRB's recent decision to find scholarship football players are employees is progress for student-athletes in their journey to earn deserved rights.¹⁵³ However, the implications from this decision are yet to be seen and the NCAA is appealing the decision.¹⁵⁴

a. Supporting Student-Athletes as Employees

In *University of Denver v. Nemeth*, as mentioned above, a football player injured during practice received workers' compensation benefits because the court found an employer-employee relationship.¹⁵⁵ In addition to playing football, Nemeth received fifty dollars per month from the University for working on campus.¹⁵⁶ Nemeth's job, however, was contingent on him participating as an athlete.¹⁵⁷ Nemeth sued his University, claiming that he was a University employee and that he was entitled to workers' compensation benefits because his injuries were received in the course of employment, during football practice.¹⁵⁸ In response to the suit, the University claimed that Nemeth's injuries were not sustained during the course of his employment because football was not a field of employment the University offered.¹⁵⁹

The court held in Nemeth's favor.¹⁶⁰ The court reasoned that "[a] student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation

149. Gurdus, *supra* note 135, at 909.

150. LeRoy, *supra* note 3, at 1099 ("The fact that players are not employees is not because schools want players to practice less and play fewer games so that players can take more classes or challenge themselves in harder classes.").

151. See *infra* notes 155–66 and accompanying text.

152. See *infra* notes 167–81 and accompanying text.

153. See Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 26, 2014).

154. Order, Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA) Petitioner, Case 13-RC-121359, 2014 WL 1653118, at *1 (N.L.R.B. Apr. 24, 2014).

155. Univ. of Denver v. Nemeth, 257 P.2d 423, 426 (Colo. 1953) (en banc).

156. *Id.* at 424.

157. *Id.* at 427.

158. *Id.* at 425 (stating that it was "solely engaged in the field of education"); see also Michael J. Mondello & Joseph Beckham, *Workers' Compensation and Collegiate Athletes: The Debate over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295 (2002).

159. Mondello & Beckham, *supra* note 158, at 295.

160. *Nemeth*, 257 P.2d at 430.

Act is concerned.”¹⁶¹ Further, the court deemed that if Nemeth had failed to continue to play football, his compensation would have stopped.¹⁶²

Ten years after *Nemeth*, in *Van Horn v. Industrial Accident Commission*, the wife of a former college football player sought to recover for her husband’s death after her husband died in an airplane crash while traveling for a football game.¹⁶³ The issue was whether the football player was “an employee of the college within the meaning of the Workers’ Compensation Act.”¹⁶⁴ The court held that there was a contract between the player and the coach, comparing student-athletes to students who have jobs as nurses and teachers, and recognized the duality of student and employee.¹⁶⁵ In response to *Van Horn*, the California legislature amended the Labor Code to explicitly exclude student-athletes from its definition of employee.¹⁶⁶

Few courts have found grant-in-aid athletes to be employees under workers’ compensation laws; *Van Horn* and *Nemeth* are landmark cases that have unfortunately not been followed. The majority of courts have ruled against finding student-athletes as employees for the purpose of workers’ compensation benefits.

b. Arguments Against Student-Athletes as Employees

In recent years, courts have been reluctant to entitle student-athletes to workers’ compensation.¹⁶⁷ Following the *Nemeth* decision, *State Compensation Insurance Fund v. Industrial Commission* compromised the value of *Nemeth* as precedent when the court denied benefits to a football player’s family after the player sustained a fatal football injury during a game.¹⁶⁸ The *State Fund* court held the injury did not occur in the course employment because an employer-employee relationship did not exist due to a lack of consideration.¹⁶⁹ The court found that the benefits received by the university could not stand “as consideration to play football,” meaning the university received no direct benefit from the

161. *Id.* at 426.

162. *Id.*

163. 33 Cal. Rptr. 169 (Ct. App. 1963), *superseded by statute*, Cal. Lab. Code § 3352(j) (West 2013), *as recognized in* Shepard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 843–44 (2002). *See also* David W. Woodburn, Comment, *College Athletes Should Be Entitled to Workers’ Compensation for Sports-Related Injuries: A Request to Broaden the Definition of Employee Under Ohio Revised Code Section 4123.01*, 28 AKRON L. REV. 611, 621 (1995).

164. *Van Horn*, 33 Cal. Rptr. at 172.

165. *Id.* at 173. The court, however, did cite a precaution:

It cannot be said as a matter of law that every student who receives an “athletic scholarship” and plays on the school athletic team is an employee of the school. To so hold would be to thrust upon every student who so participates an employee status to which he has never consented and which would deprive him of the valuable right to sue for damages. Only where the evidence establishes a contract of employment is such inference reasonably to be drawn.

Id. at 175.

166. *Shepard*, 125 Cal. Rptr. at 833.

167. LeRoy, *supra* note 3, at 1102.

168. *State Comp. Ins. Fund v. Indus. Comm’n*, 314 P.2d 288 (Colo. 1957) (en banc). *See also* Mondello & Beckham, *supra* note 158, at 296.

169. *State Comp. Ins. Fund*, 314 P.2d at 289–90.

player's football activities.¹⁷⁰ In its holding, the court also relied on the fact that the university "was not in the football business."¹⁷¹ According to some, the *State Fund* court's decision aligns with the majority of case law on this point.¹⁷² More recent cases are in opposition to the student-athlete because courts believe that the employee-employer relationship does not accurately characterize the student-coach relationship.¹⁷³

Similarly, in *Rensing v. Indiana State University Board of Trustees*, a scholarship football player was injured during an out-of-season practice, rendering the football player paralyzed in all four limbs.¹⁷⁴ The Indiana Supreme Court held that the student-athlete did not qualify to receive workers' compensation benefits, despite the life-changing injury,¹⁷⁵ mainly due to the lack of intent to contract.¹⁷⁶ The court considered that financial aid did not constitute income to qualify him as an employee and that pay is "an essential element of the employer-employee relationship" that was missing.¹⁷⁷ The court also relied on the belief that the institution could not "discharge" Rensing or reduce his benefits, based on his athletic performance or success.¹⁷⁸ Further, the court found lack of intent to contract particularly persuasive, as it stated the intent was not to enter into an employment relationship, but rather to agree to the NCAA's rules, which qualified the student-athlete as an "unpaid" student-athlete.¹⁷⁹ These findings are idealistic beliefs that do not represent reality, as will be demonstrated below.

The rejection of workers' compensation in the above cases relied heavily on the NCAA's "strict regulations . . . designed to protect [one's] amateur status."¹⁸⁰ Courts have continually pointed to the NCAA's stated purpose of enhancing education through sport and used that statement to presume that institutions are actually educating student-athletes.¹⁸¹ This presumption is greatly flawed, as the industry is and always has been a commercial industry that promotes athletic success and demotes academic endeavors, while the NCAA continues to hide under its cloak of amateurism. After a fact-based inquiry, it is easy to see that scholarship athletes should be considered employees, as they satisfy each of the tests explained above.

170. *Id.*

171. *Id.* at 290.

172. Mondello & Beckham, *supra* note 158, at 297.

173. *Id.*

174. LeRoy, *supra* note 3, at 1102.

175. *Id.*

176. *See Rensing v. Indiana State Univ. Bd. Of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983).

177. *Id.* at 1174.

178. *Id.*

179. *Id.* at 1173 (stating "there is evidence that the financial aid which Rensing received was not considered by the parties involved to be pay or income."); *see also* Gurdus, *supra* note 135, at 914.

180. *Rensing*, 444 N.E.2d at 1175; Mondello & Beckham, *supra* note 158, at 299.

181. *See Rensing*, 444 N.E.2d at 1173; Mondello & Beckham, *supra* note 158, at 299.

B. *Student-Athletes Should Be Employees*

Student-athletes are not legally employees “because they sign a grant-in-aid contract that perpetuates a legal fiction of their amateur status.”¹⁸² It is not because there is an absence of an employment relationship.¹⁸³ This Section illustrates how scholarship student-athletes meet the tests outlined above, rendering them employees under each test. Subsection 1 contributes to the analysis employed in *Northwestern*, a decision that is not yet final, and considers how scholarship student-athletes, not just football players, pass the common law test. Subsection 2 also contributes to the analysis in *Northwestern* in regards to how student-athletes pass the NLRA’s definition of employee. Subsection 3 describes how student-athletes pass the economic realities test; this test has the most significant implications for the recommendation proposed in Part IV.A.2 of this Note.

1. *Scholarship Student-Athletes Meet the Common Law Test*

The common law control test turns “on whether the employer has [the] right to control, as opposed to actually controlling, the employee.”¹⁸⁴ In determining whether a worker is an employee under the control test, courts look to the Restatement (Second) of Agency’s “master-servant analysis.”¹⁸⁵ Upon applying the control test and its factors to the activities of coaches and student-athletes, it is clear that scholarship student-athletes are in fact employees under this test. In *Northwestern*, the court held that scholarship football players were employees; however, the analysis should be extended to all scholarship student-athletes.

As discussed in detail above, student-athletes generate huge revenues and provide their universities with many benefits. As such, it is clear that student-athletes “perform services for the benefit of the employer

182. LeRoy, *supra* note 3, at 1099.

183. *Id.*

184. Sean Alan Roberts, Comment, *College Athletes, Universities, and Workers’ Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315, 1322 (1996).

185. *Id.* The Restatement details the tests for determining whether a person is an employee:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control. (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

for which they receive compensation.”¹⁸⁶ Debate lies in the control exercised over the student-athletes and whether the scholarship is directly tied to performance.

Coaches have tremendous control over players. In 2012, the NCAA adopted a new rule that allows coaches to exercise control over their athletes year-round as long as the student is enrolled in academic credit; this includes the summer *before* the athlete’s freshman year begins.¹⁸⁷ While coaches state that the summer process will allow freshmen to better prepare for the rigors of college and their upcoming seasons, the summer is really designed for coaches to exercise control over the students and extract value from them at the outset.¹⁸⁸ This new rule is just one simple demonstration of the control that coaches have over student-athletes.

During the year, athletes have an even greater commitment than during the summer. Although NCAA rules limit weekly time commitment to athletics,¹⁸⁹ these rules are often unenforced. For example, some University of Miami football players have reported committing sixty hours per week to football related activities.¹⁹⁰ The sixty-hour figure does not include the athlete’s time devoted to class or studying.¹⁹¹ Similarly, in *Northwestern*, the record showed that players dedicated fifty to sixty hours per week to football during training camp; this is *before* the regular season begins.¹⁹² Amy Christian McCormick and Robert A. McCormick precisely state “[t]he highly regimented nature of practice and training schedules and the excessive number of hours required of athletes are important elements showing the extreme control coaches exercise over athletes as to both the ends sought and the means of achieving them.”¹⁹³ Ohr agreed, finding that scholarship players are under “strict and exacting control by their Employer throughout the entire year.”¹⁹⁴

The degree of control exercised by the coaching staff over the daily lives of student-athletes is actually greater than any reasonable amount of control exercised over normal university employees, as regulating everything from social life to food consumption is undoubtedly control that satisfies the common law control test.¹⁹⁵ During an investigation into mistreatment of players, many former Oregon State University women’s

186. Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014).

187. See Myron Medcalf, *Summer Access Benefits Freshmen*, ESPN (Jun. 12, 2012), http://espn.go.com/mens-college-basketball/story/_id/8041260/new-rules-allowing-summer-access-benefit-freshmen-coaches-men-college-basketball.

188. See *id.*

189. DIV. I MANUAL, *supra* note 5, at art. 13.11.2.1.

190. See McCormick & McCormick, *supra* note 21, at 99 n.127 (elaborating on the daily life of a football player at the University of Miami).

191. See *id.* at 100 (This time commitment “is in addition to class time, study time, and ten hours per week of mandatory study hall time in academic-support facilities.”).

192. Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *4 (N.L.R.B. Mar. 26, 2014).

193. See McCormick & McCormick, *supra* note 21, at 100.

194. CAPA, 2014 WL 1246914, at *13.

195. McCormick & McCormick, *supra* note 21, at 108.

basketball players expressed the extreme control the head coach exercised over them, including being forced to participate in Weight Watchers.¹⁹⁶ Another player mentioned that the coach set up an appointment for her to speak with a therapist because the coach believed the student's injury was in "[her] head."¹⁹⁷ Clearly, this control extended into the players' personal lives. This type of control would not be tolerated even in the formal employment context.¹⁹⁸

In addition to being controlled, an employee must receive compensation under a contract for hire in exchange for services; in other words, the compensation must be tied to performance.¹⁹⁹ Some scholars note that for student-athletes, athletic grant-in-aid serves as payment.²⁰⁰ The NCAA highly regulates this form of compensation, as student-athletes may not accept payment above and beyond the cost of attendance without losing their eligibility under the NCAA.²⁰¹ As discussed, recent court decisions have agreed that the compensation element is satisfied with receipt of a scholarship. However, some have questioned whether athletes actually provide a service in return for a scholarship.²⁰²

Although the existence and use of one-year scholarships shows that athletic performance is the only reason for which the university contracts with the student-athlete, multiyear contracts can also show that athletic performance is the only reason for which the university contracts with the student-athlete.²⁰³ McCormick and McCormick note that with the implementation of a renewable scholarship option, "the NCAA tied compensation directly to the athletes' performance of athletic services, not merely to athletic promise," weighing in favor of finding that student-athletes are employees.²⁰⁴ However, in *Northwestern*, Ohr found the duration of the scholarship insignificant to determining employment status.²⁰⁵ Northwestern's scholarship football players received four-year scholarships, not one-year renewable scholarships.²⁰⁶ Although Ohr noted that four-year scholarships might reduce the pressure of student-athletes to perform, he found that players' scholarships could still be re-

196. Lindsay Schnell, *Oregon State Coach LaVonda Wagner Built Culture on Fear and Intimidation*, *Sources Say*, OREGONIAN (May, 29, 2010, 11:00 PM), http://blog.oregonlive.com/behind-beaversbeat/2010/05/osu_coach_lavonda_wagner_built.html.

197. Kevin Hampton, *Former Oregon State Women's Basketball Players Critical of Way Coach LaVonda Wagner Treated Them*, DEMOCRAT-HERALD (May, 8, 2010, 11:15 PM), http://democrat-herald.com/sports/college/former-oregon-state-women-s-basketball-players-critical-of-way/article_ff65fca-5b21-11df-bf31-001cc4c002e0.html.

198. See McCormick & McCormick, *supra* note 21, at 108.

199. CAPA, 2014 WL 1246914, at *12.

200. See McCormick & McCormick, *supra* note 21, at 108–09. Debate exists, however, regarding whether student-athletes are "compensated." See *supra* note 116.

201. See *id.* at 110; Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 383 (D. Ariz. 1983).

202. See, e.g., Kavanagh v. Trustees of Boston Univ., 795 N.E.2d 1170, 1175 (2003); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173-74 (Ind. 1983).

203. See McCormick & McCormick, *supra* note 21, at 113; CAPA, 2014 WL 1246914, at *13.

204. McCormick & McCormick, *supra* note 21, at 113.

205. CAPA, 2014 WL 1246914, at *13.

206. *Id.*

duced or cancelled by the coach at any time.²⁰⁷ Scholarships are absolutely tied to performance, as players who do not perform do not have the luxury of keeping their scholarship.²⁰⁸ Therefore, regardless of the duration of the contract, scholarship athletes perform services for their employer and receive compensation, in the form of a scholarship, for the performance of those services.

Student-athletes therefore meet the control test and the requirement of compensation set out by the common law. The analysis in *Northwestern* should apply to all scholarship student-athletes, like the Oregon State women's basketball players, to find that all scholarship student-athletes are employees under the common law. It is even more apparent, however, that student-athletes easily satisfy the other two tests.

2. *Scholarship Athletes Meet the Statutory Test*

As mentioned, *Northwestern* demonstrated that scholarship football players are employees under the common law test.²⁰⁹ The court found that the statutory test was not applicable in the student-athlete context, but found that its application would not affect the outcome.²¹⁰ The court worked through a brief analysis under the statutory test; however, *Northwestern's* conclusion was limited to football players.²¹¹ As demonstrated below, all scholarship student-athletes satisfy this test.

The statutory test, which was established in *Brown University*, requires that "students are . . . employees if they satisfy both the common law . . . test and the Board's additional" requirements.²¹² In *Brown University*, the case turned on whether the students were "primarily student."²¹³ Student-athletes, unlike the graduate assistants considered in *Brown*, meet the standard set forth in *Brown University*, as athletes are limited students and are primarily athletically focused.²¹⁴ Some describe the student-athlete labor market as "de facto employment," as student-athletes engage in activities that are very similar to employment.²¹⁵ Regardless of how athletes are qualified, scholarship student-athletes are not primarily students.²¹⁶ Therefore, scholarship student-athletes should be considered employees under this test.

207. *Id.*

208. *See infra* Part III.B.3.a (generally discussing how scholarships are tied to performance, an element also considered under the economic realities test).

209. *See supra* Part III.A.1, Part III.B.1.

210. *CAPA*, 2014 WL 1246914, at *15.

211. *Id.*

212. McCormick & McCormick, *supra* note 21, at 92-93.

213. *CAPA*, 2014 WL 1246914, at *16.

214. *Id.*

215. LeRoy, *supra* note 3, at 1093.

216. *CAPA*, 2014 WL 1246914, at *16.

a. The Guise of the “Student” Label

The term student-athlete offends me because it’s a contradiction because we know that many of the athletes are not really students. And how many of those student athletes actually attend many classes I don’t [sic] know for sure but my [sic] better judgment tells me often times not many especially during their sports term. . . . They just can’t go to class.²¹⁷

This subsection demonstrates how student-athletes are not primarily students. First, the NCAA’s stated focus on promoting athletics as purely recreational is misleading. Second, student-athletes spend the majority of their time engaged in athletic-related activities, not academics. Because student-athletes are not primarily students, they meet the elements of the statutory test.

i. NCAA’s Stated Educational Purpose is a Sham

Despite the NCAA characterizing participation in intercollegiate athletics as a purely “recreational pursuit,” the NCAA reeled in \$810 million from its “recreational pursuits” in 2012 alone.²¹⁸ The NCAA’s stated purpose and the realities of its actions do not align. The NCAA maintains that its purpose is, “[t]o initiate . . . and improve intercollegiate athletics programs for student-athletes and to promote . . . athletics participation as a recreational pursuit.”²¹⁹ The NCAA can hide under labels of “amateur” and “student-athlete,” but the reality is that many student-athletes are “students” in name only. College athletics is big business, not “purely recreational.”²²⁰

To satisfy its educational purpose, student-athletes should be treated as students first and athletes second. Coaches claim that their student-athletes “are students first and athletes second,” but coaches are really only interested in keeping their athletes academically eligible.²²¹ To keep their players eligible, coaches are will to go to extreme measures, “including credit for phantom courses, surrogates for tests, and counseling on which easy courses do not lead to graduation.”²²² So, while the NCAA claims that its purpose is to promote education first and foremost, reality displays a different story: it is all about business.

217. Podcast, Skip Bayless, *ESPN: First Take*, ESPNRADIO (Oct. 23, 2014) (referencing the discussion between Skip Bayless and Stephen A. Smith) (downloaded using iTunes).

218. DELOITTE & TOUCHE LLP, *supra* note 58, at 5.

219. NCAA CONST., *supra* note 6, at art. 1.2.

220. *See supra* Part II.B.

221. Dean A. Purdy et al., *Are Athletes Also Students? The Educational Attainment of College Athletes*, 29 SOC. PROBS. 439, 439 (1982).

222. *Id.*

ii. Athletic Time Commitment Displays the Focus Is on Athletic Performance

Although coaches and administration are prohibited under NCAA regulations from requiring student-athletes to miss academic commitments to attend practice or athletic events,²²³ student-athletes are rarely given this option because of the power and ability coaches have to control playing time and contributions athletically.²²⁴ If coaches followed the NCAA regulation of twenty hours of athletic commitment per week,²²⁵ student-athletes would likely have more time and energy to focus on academics. However, coaches frequently do not follow such rules. For example, Oregon State's women's basketball players reported having seven to eight hour practice days, about twice the NCAA limit.²²⁶ Moreover, in 2010, the average self-reported time spent on athletics during season was more than forty hours per week for revenue generating sports, the time commitment of a full-time job.²²⁷ In those same sports, the average time spent on academics was thirty-eight hours, quantitatively displaying that athletics is in fact the priority.²²⁸

b. Violation of the Duty to Educate

Speaking with CNN, former Congressman Tom McMillen identified the NCAA's educational purpose defense as a "sham" because:

Kids who are walking out of these schools cannot read. They are getting degrees that are worthless. . . . I think the chink in the armor of the NCAA is that they say you're going to get an education. . . . If these kids aren't getting an education, the whole thing's a sham.²²⁹

Although perhaps thought of as infrequent and contained, academic fraud and high illiteracy rates is much more widespread than even conceivable; it permeates NCAA Division I sports. For example, a recent investigation by *Sports Illustrated* of the Oklahoma State University ("OSU") football team found that twenty-nine players participated in some form of academic misconduct.²³⁰ As one former player describes it: "[T]he main focus [of the program], was to keep [the best players] eligible through any means necessary The goal was not to educate but to

223. See DIV. I MANUAL, *supra* note 5, at art. 17.1.6.6.2.

224. See *supra* notes 185–98 and accompanying text.

225. See DIV. I MANUAL, *supra* note 5, at art. 17.1.6.1.

226. See Hampton, *supra* note 197.

227. NAT'L COLLEGIATE ATHLETIC ASS'N, EXAMINING THE STUDENT-ATHLETE EXPERIENCE THROUGH THE NCAA GOALS AND SCORE STUDIES 17 (2011), available at <http://www.ncaa.org/sites/default/files/%E2%80%A2Examining%20the%20Student-Athlete%20Experience%20Through%20the%20NCAA%20GOALS%20and%20SCORE%20Studies.pdf>.

228. *Id.* at 18.

229. Sara Ganim, *UNC Fake Class Scandal and NCAA's Response Wind Their Way to Washington*, CNN (Apr. 8, 2014, 9:12 PM), <http://www.cnn.com/2014/04/08/us/unc-academic-fraud-investigation/index.html>.

230. *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>.

get them the passing grades they needed to keep playing.”²³¹ Multiple players and assistant coaches of the OSU football team reported that there were OSU players who were actually “functionally illiterate.”²³²

The most recent example of the educational sham comes from the University of North Carolina-Chapel Hill (“UNC”). The academic fraud was so widespread in this case that CNN named it “the biggest academic fraud scandal in all of college sport history.”²³³ After a series of investigations into UNC’s academic practices regarding student-athletes, it was found that more than 3100 students, including about 1500 student-athletes, received credit for phantom classes—classes that did not require class attendance or meeting with professors, but rather required students to turn in a single paper.²³⁴ This fraudulent activity occurred over eighteen years and involved many academic administrators as well as coaches and employees of the athletic department.²³⁵ Several academic advisors that worked in the athletic department admitted that “they used these classes to make sure that athletes who could not compete in the classroom were still able to compete on the field.”²³⁶ One particular student participated in nineteen of these phantom courses.²³⁷ The investigation’s findings also revealed that many student-athletes were “unprepared for real classes at UNC” and some had only slight reading abilities.²³⁸

Worst of all, the NCAA knew about the phantom classes and fraudulent activity and decided not to sanction or punish UNC.²³⁹ In its rationale, the NCAA found the “scandal was academic in nature, not athletic.”²⁴⁰ Now a U.S. Congressman is questioning whether the NCAA properly played its role.²⁴¹ Further, as of November 2014, a former UNC football player is suing the university, claiming that it violated its duty to educate.²⁴² This tragic story clearly identifies the lack of educational purpose and the sham that is maintained to protect an illusion of amateurism and recreational sport. Furthermore, this situation demonstrates the failure of the NCAA’s model: not only are many student-athletes not educated at all, but some are forced to maintain the charade when they cannot even read.

231. *Id.*

232. *Id.*

233. Sarah Ganim, *Academic Fraud or Not, UNC Students Likely Will Keep Degrees*, CNN (Oct. 26, 2014, 7:50 AM), http://www.cnn.com/2014/10/25/us/unc-report-academic-fraud/index.html?hpt=hp_inthenews (referencing statement in video).

234. Sarah Lyall, *U.N.C. Investigation Reveals Athletes Took Fake Classes*, N.Y. TIMES (Oct. 22, 2014), http://www.nytimes.com/2014/10/23/sports/university-of-north-carolina-investigation-reveals-shadow-curriculum-to-help-athletes.html?_r=1.

235. Ganim, *supra* note 233 (referencing statement in video).

236. *Id.*

237. *Id.* (referencing comment in text).

238. *Id.*

239. Ganim, *supra* note 229.

240. *Id.*

241. *See id.*

242. Sarah Ganim, *Former UNC Athlete Sues School Over Academic Scandal*, CNN (Nov. 8, 2014, 3:25 PM), <http://www.cnn.com/2014/11/07/us/unc-academic-scandal/index.html> (claiming that “UNC broke its promise to give him an education in return for playing sports”).

Revenue drives major athletics programs, not the quality of a student-athlete's experience or education.²⁴³ It is no wonder that collegiate teams act against the interests of the student-athletes; they make more money by doing so.²⁴⁴ Some may argue that the NCAA guidelines are beneficial for student-athletes because they at least graduate with a degree, but the legitimacy of that degree is extremely questionable when it has been earned through academic fraud. This is particularly true when vast numbers of student-athletes graduate with a degree but cannot read.²⁴⁵

Phil Hughes, former Associate Athletic Director at Kansas State University, described his job:

My job is to protect The Entertainment Product My job is to make sure that The Entertainment Product goes to class. My job is to make sure that The Entertainment Product studies. My job is to make sure that The Entertainment Product makes adequate academic progress according to NCAA guidelines. . . . They're the raw material in a multibillion-dollar sports and entertainment business.²⁴⁶

Although the NCAA claims that institutions serve the purpose of educating student-athletes, it is actually to "protect The Entertainment Product."²⁴⁷ Beyond functional illiteracy among graduating athletes and fraudulent academic practices, universities also practice "academic clustering."²⁴⁸ The purpose of these practices is to cover up the fact that student-athletes are more athlete than student.²⁴⁹

An increasingly popular trend is "academic clustering," which "occurs when 25% or more of the members of one team share a single academic major."²⁵⁰ The premise behind clustering is that student-athletes choose—or are forced to choose—less challenging majors because it is easier to remain eligible and graduate.²⁵¹ For example, one study demonstrated that, as University of Michigan's sports management program raised its academic standards, the university's football players left the major and pursued a general studies major instead.²⁵² Academic cluster-

243. Warren K. Zola, *Time For Transformative Change in Intercollegiate Athletics*, HUFF. POST COLLEGE (Nov. 29, 2011, 6:23 PM), http://www.huffingtonpost.com/warren-k-zola/college-sports-pay_b_1101643.html.

244. *Id.*

245. See generally Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html> (discussing an investigation into illiteracy in college sports that found illiteracy was a widespread problem among student-athletes across the country).

246. MARK YOST, VARSITY GREEN: A BEHIND THE SCENES LOOK AT CULTURE AND CORRUPTION IN COLLEGE ATHLETICS 13 (2010).

247. *Id.*

248. Jeffrey J. Fountain & Peter S. Finley, *Academic Clustering: A Longitudinal Analysis of Division I Football Program*, 4 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 24, 27 (2011).

249. See Purdy, *supra* note 221, at 445.

250. Fountain & Finley, *supra* note 248, at 24.

251. See *id.* at 24–27. The study identifies a former basketball player who claimed he, alongside other student-athletes, was "forced into a major." *Id.* at 27.

252. *Id.*

ing has also been shown to occur across many Division I women's basketball teams.²⁵³ The problem with clustering is that student-athletes can be slotted into majors in which they are not interested or that do not adequately prepare them for their career path.²⁵⁴

These practices exist because they create the illusion that student-athletes are being educated, while really the institutions' main goal is to extract the most value out of the athlete as possible. This is a violation of the NCAA's stated purpose of educating student-athletes. The impact of admitting students with special admissions policies, as discussed below,²⁵⁵ has resulted in poor performing students and low graduation rates by student-athletes.²⁵⁶

According to an NCAA study, forty-seven percent of football players from major Division I universities and thirty-three percent of basketball players from major Division I universities graduate in six years.²⁵⁷ These numbers are actually inflated, and, if one takes into account the level of academic fraud that occurs in major Division I programs, many of those students who did graduate did not truly earn their degrees.²⁵⁸

In sum, according to *Hall v. Minnesota*, student-athletes are not incentivized to excel academically because what really matters is the student-athlete's athletic performance, not academic performance.²⁵⁹ Universities further expose the hypocrisy by violating the very rules to which they ascribe. Walter Byers, a former NCAA Executive Director, explained: "There seems to be a growing number of coaches and administrators who look upon NCAA penalties as the price of doing business—if you get punished that's unfortunate"²⁶⁰

Because student-athletes are more student than athlete, and because many student-athletes are not educated at all, scholarship student-athletes are clearly employees under the "primary purpose" test.

3. *Scholarship Athletes Meet the Economic Realities Test*

The argument that student-athletes are not economically dependent on their athletic grant-in-aid falls apart upon a fact-based inquiry. In *Coleman*, discussed above,²⁶¹ the court applied the economic realities test to determine whether a student-athlete was an employee.²⁶² The court

253. *Id.* at 26.

254. *See id.* at 27.

255. *See infra* notes 317–26 and accompanying text.

256. *See Riggs, supra* note 89, at 141.

257. *Id.*

258. Ganim, *supra* note 245 (stating that "the NCAA graduation rates are flawed because they don't reflect when a student is being helped too much by academic support.").

259. *Hall v. Minn.*, 530 F. Supp. 104, 109 (D. Minn. 1982); *see also Riggs, supra* note 89, at 141.

260. *Riggs, supra* note 89, at 141–42.

261. *See supra* notes 139–45 and accompanying text.

262. *See generally Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983). The *Coleman* court identified the following four factors as the economic realities test factors:

(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

reasoned that the football player's responsibilities were not "integral to the employer's business," and thus that he was not an employee.²⁶³ In the analysis, the court conceded that the athlete did earn wages—"items of compensation which are measurable in money or which confer an economic gain upon the employee"—and that the athlete was dependent on his wages to live.²⁶⁴ However, the court pointed out three governing facts weighing against finding student-athletes are employees: (1) the plaintiff could not be fired from his position as a football player; (2) the football program was not essential to the operation of the business of the university; and (3) the plaintiff was more of a student than an athlete.²⁶⁵ Scholarship student-athletes are certainly more athlete than student.²⁶⁶ Thus, Subsection a demonstrates that athletic scholarships are tied to performance and that student-athletes are more athlete than student, and Subsection b demonstrates that athletics greatly benefit universities.

a. Scholarships Are Tied to Performance and Student-Athletes Can be "Fired"

As to the first point, the *Coleman* court erred in its conclusion "that the university could not fire Coleman because [the university] could not revoke his scholarship during the year."²⁶⁷ The *Coleman* court distinguished this case from *Van Horn* because the plaintiff's wage was guaranteed, regardless of his participation, with the dissemination of an annual scholarship, whereas *Van Horn's* compensation was dependent on his part time job.²⁶⁸ The *Coleman* court, however, should have held that the university could fire the student-athlete, as coaches can reduce or cancel a scholarship based on failure to athletically perform.²⁶⁹

As stated, the *Coleman* court found that while there was control over the football player, this control was independent of the scholarship because the student could not be fired from the team.²⁷⁰ Thus, the inquiry centers on whether a student-athlete can be "fired" or "terminated" from their team. As agreed upon by Ohr in *Northwestern*, scholarship student-athletes can lose their scholarships for nonperformance.²⁷¹ The idea that a

'wages' and, particularly, the extent to which the proposed employee is dependent upon the payment of wages or other benefits for his daily living expenses; and (4) whether the task performed by the proposed employee was 'an integral part' of the proposed employer's business.

Id. at 226–27.

263. *Id.* at 227. However, the court found that the first three factors weighed in favor of finding the student-athlete an employee. *Id.*

264. *Id.* at 226.

265. *Id.*

266. See *supra* notes 218–28 and accompanying text.

267. Frank P. Tiscione, Note, *College Athletics and Workers' Compensation: Why the Courts Get it Wrong in Denying Student-Athletes Workers' Compensation Benefits When They Get Injured*, 14 SPORTS LAW. J. 137, 155 (2007).

268. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 228 (Mich. Ct. App. 1983).

269. Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *13 (N.L.R.B. Mar. 26, 2014); see also Tiscione, *supra* note 267, at 155.

270. See *supra* note 265 and accompanying text.

271. CAPA, 2014 WL 1246914, at *14.

student-athlete will receive full compensation without the full completion of the athlete's service is not valid in reality, as coaches can cancel or reduce a student-athletes scholarship.²⁷²

In a recent interview, Kain Colter, a former Northwestern University quarterback, explained that scholarships are dependent on the rendering of services:

Right now [sic] we're paid to play, and we're paid in the form of a scholarship and through stipend checks. . . . [T]hat payment is paid based upon a service we provide to the school[,] which is an athletic service. Say, for instance, I decided not to go to practice or I decided not to go to games . . . my scholarship is not going to be there anymore.²⁷³

When athletes do not participate in athletic events, the scholarship will not be renewed.²⁷⁴ This is the reality.²⁷⁵ Student-athletes sign with a particular university based on the "implied promise of a four-year scholarship and the potential for the university not to renew a scholarship" implies that the university can fire a noncompliant student.²⁷⁶ Even where student-athletes have guaranteed four-year scholarships, like Colter, their scholarship can be cancelled due to lack of performance of athletic activities.²⁷⁷

Division I coaches widely agree that athletic grant-in-aid is tied to athletic performance.²⁷⁸ The NCAA recently amended its rule on multi-year scholarships, deciding to allow universities to offer guaranteed multiyear scholarships over the former mandated single year, renewable, scholarships.²⁷⁹

Major universities, however, have been hesitant to implement four-year scholarships, favoring one-year scholarships because scholarship renewal helps programs refresh their rosters.²⁸⁰ The University of Texas' Women's Athletic Director, Christine A. Plonsky, expressed that the lack of implementation of multiyear scholarships was grounded in not wanting to make four-year promises to student-athletes that do "not hold up their end of the bargain."²⁸¹ Further, an athletic director at the University of Tennessee agreed, stating: "Fundamentally, why wouldn't your

272. See *id.* at *13.

273. Will West, *Is Kain Colter College Football's Curt Flood?*, SPORTS ANIMAL (Jan. 29, 2014, 10:40 AM), http://www.sportsanimal99.com/common/more.php?m=49&action=blog&post_id=434.

274. *Id.*

275. See *CAPA*, 2014 WL 1246914, at *13; Tiscione, *supra* note 267, at 155.

276. Tiscione, *supra* note 267, at 155; see *CAPA*, 2014 WL 1246914, at *19 (stating that Kain Colter was admitted to Northwestern because of his athletic skill and that he selected to attend Northwestern for football reasons).

277. *CAPA*, 2014 WL 1246914, at *13; see also West, *supra* note 273.

278. See Brad Wolverton & Jonah Newman, *Few Athletes Benefit From Move to Multiyear Scholarships*, CHRON. HIGHER EDUC., April 2013, at A3-A4, available at <http://chronicle.com/article/Few-Athletes-Benefit-From-Move/138643/?key=HT8ndAZoYXURZ39mZG1CZWxRPHRtOBh3NSVKPitzbltVGQ%3D%3D>.

279. See *id.*

280. See *id.*

281. *Id.*

scholarship be tied to performance, however you measure it? . . . It's not to say you've got to have 1,000 yards receiving and 10 touchdowns, but are you living up to your responsibilities?"²⁸² Thus, many universities do not offer four-year scholarships to student-athletes.²⁸³ The universities that do offer such contracts still tie performance to the receipt of the aid by adding responsibilities to the contract, offering an "out" when a student-athlete is not performing.²⁸⁴

As found in *Northwestern*, "the scholarship is clearly tied to the player's performance of athletic services as evidenced by the fact that scholarships can be immediately canceled if the player voluntarily withdraws from the team or abuses team rules."²⁸⁵ In *Coleman*, the court seemed particularly persuaded by the belief that grant-in-aid was guaranteed for the full year, regardless of performance.²⁸⁶ However, as demonstrated, coaches can fire student-athletes.

b. NCAA's Hidden Truth: Commercialism and its Benefit to Universities

In *Coleman*, the court found that the football program was not essential to the operation of the business of the university.²⁸⁷ Although the primary purpose of a university is to educate, universities generate millions of dollars through their athletic programs.²⁸⁸ Because of the immense revenue generated from college athletics, some courts, when working through an antitrust analysis, have recognized that college sports are a substantial business for many universities.²⁸⁹

It is generally recognized that athletics increase the visibility of universities, and that universities in turn "benefit from increases in applications for admissions, publicity, visibility, and alumni donations that stem from [collegiate athletics]," even if a university's athletics programs are not generating substantial ticket revenues.²⁹⁰ However, many of the major NCAA Division I athletic programs generate hundreds of thousands of dollars in revenue.²⁹¹ Northwestern University, for example, generated

282. *Id.* (internal quotation marks omitted).

283. *See id.*

284. *See id.*

285. *Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA)*, Case 13-RC-121359, 2014 WL 1246914, at *13.

286. *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226 (Mich. Ct. App. 1983).

287. *Id.* at 227 (defining the term "integral" to mean "that the task performed by the employee is one upon which the proposed employer depends in order to successfully carry out its operations.>").

288. *See* RONALD A. SMITH, *SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS* 214 (1988); *supra* notes 70–87 and accompanying text.

289. *See Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1149 (5th Cir. 1977).

290. Whitmore, *supra* note 148, at 782.

291. *See supra* notes 70–87 and accompanying text. Athletic programs benefit universities in other ways besides just generating revenue, like increasing applications to the university and generating publicity for the university. *See* MATTHEW DENHART ET AL., *THE ACADEMICS ATHLETICS TRADE-OFF: UNIVERSITIES AND INTERCOLLEGIATE ATHLETICS*, CENTER C. AFFORDABILITY & PRODUCTIVITY 6–7 (2009) (discussing the general benefits of intercollegiate athletics to universities and institutions). Athletic programs not only benefit the universities, but also the surrounding economy. Athletic pro-

about \$235 million in football revenue over the course of about nine years.²⁹² This is equivalent to about \$26 million annually from football revenue alone.

The NCAA has played a major role in helping universities profit from their athletics programs. For example, the NCAA signed a \$10.8 billion contract with CBS and Turner Broadcasting in 2010.²⁹³ The contract is a fourteen-year agreement and will provide at least \$740 million annually to NCAA member colleges.²⁹⁴ Individual conferences also generate television revenues: the Big Ten and Pac-12 conferences, two major Division I conferences, each generate television revenues of about \$250 million annually.²⁹⁵ The Southeastern Conference (“SEC”) launched its own network in 2014; this was probably the largest television contract in the history of college sports contracts.²⁹⁶

Television contracts, however, are not unique to major conferences; rather, as an independent program, Notre Dame’s football program receives about \$15 million annually from its contract with NBC.²⁹⁷ Small conferences are also included in earning extraordinary revenue figures from television contracts. In August 2014, the Mid-American Conference (“MAC”) signed a thirteen-year television contract with ESPN that will pay out at \$670,000 per university annually through 2027.²⁹⁸

Furthering the point that universities financially benefit from sports programs is the substantial monetary investment by universities in their sports programs. As reported in a study regarding financial spending in athletics, athletic programs invested \$15.2 billion into collegiate athletics from 1995 to 2005.²⁹⁹ It would be illogical to invest in athletics so heavily if athletic programs were not financially benefiting those universities.

grams stimulate the economy through job creation, increases in consumer spending, increases in tax revenue, and increases in tourism. See generally William B. Beyers, *Economic Impact of Husky Athletic Program on the Washington Economy*, UNIV. WASH., 2006; Timothy A. Duy, *The Economic Impact of the University of Oregon Athletic Department FY2011-12*, UNIV. OR., Dec. 2012.

292. Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *12.

293. Brad Wolverton, *NCAA Agrees to \$10.8-Billion Deal to Broadcast Its Men’s Basketball Tournament*, CHRON. OF HIGHER EDUC., Apr. 22, 2010, available at <http://chronicle.com/article/NCAA-Signs-108-Billion-De/65219/>.

294. *Id.*

295. Chris Smith, *SEC, ESPN to Announce SEC Network, Likely the Most Valuable TV Deal in College Sports*, FORBES (Apr. 12, 2013, 11:50 AM), <http://www.forbes.com/sites/chris-smith/2013/04/12/sec-espn-to-announce-sec-network-likely-the-most-valuable-tv-deal-in-college-sports/>. The Big Ten actually has its own television network.

296. *Id.*

297. Kristi Dosh, *Notre Dame Peaks at Right Time for TV Deal*, ESPN, http://espn.go.com/blog/playbook/dollars/post/_id/2412/notre-dame-peaks-at-right-time-for-tv-deal (last visited Nov. 15, 2014).

298. Mark Znidar, *College Athletics: New Deal with ESPN a Significant Payday for MAC Schools*, COLUMBUS DISPATCH (Aug. 20, 2014, 5:22 AM), <http://buckeyextra.dispatch.com/content/stories/2014/08/20/0819-mac-tv-deal.html>.

299. Coyte G. Cooper et al., *An Investigation of Financial Spending and Distributive Justice Principles in NCAA Division I Athletic Departments*, J. STUDY SPORTS & ATHLETES IN EDUC., Apr. 2014, at 47, 48.

One cannot truly state that the benefits provided to institutions from athletics programs are not essential to the operation of a university's business.³⁰⁰ Even further, it is readily apparent that the NCAA was founded to promote the commercial aspects of intercollegiate athletics—rather than educational aspects of universities—for the purpose of assisting with generating revenue.

i. Commercialism is at the Core of the NCAA

The NCAA has been criticized for its focus on commercialism since its inception in 1906. The same year that the NCAA was formed, historian Fredrick Jackson Turner criticized the NCAA, stating that: “Football . . . ‘has become a business, carried on too often by professionals, supported by levies on the public, bringing in vast gate receipts, demoralizing student ethics, and confusing the ideals of sport . . . and decency.’”³⁰¹ Since 1906, the NCAA has commercialized in all aspects except in regards to “athletic compensation.”³⁰²

Take television revenues, for example. The 2012–2013 NCAA revenue breakdown shows that televising athletic events is the most lucrative moneymaker for the NCAA.³⁰³ The media market has been a major success for NCAA sports, as evidenced by the NCAA's \$10.8 billion, fourteen-year contract with CBS Sports and Turner Broadcasting.³⁰⁴ The development of NCAA television coverage began when the Supreme Court eliminated the NCAA's restrictions on television appearances and when the television industry was deregulated.³⁰⁵

In *Board of Regents*, the University of Oklahoma and the University of Georgia claimed that the NCAA violated the Sherman Act because of its television plans from 1982–1985.³⁰⁶ The plan was adopted for its stated purpose of limiting “the adverse effects of live television upon football game attendance.”³⁰⁷ Essentially, the plan contained specific “requirements” and “limitations” regarding each institution's television appearances.³⁰⁸ The Supreme Court held that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.”³⁰⁹ However, despite the “ample latitude” that the Court stated

300. See Riggs, *supra* note 89, at 138 (stating that in 1994, “two-thirds of men's Division I-A basketball programs boasted an average profit of \$1.6 million”).

301. SMITH, *supra* note 288, at 214.

302. Warren K. Zola, *The Illusion of Amateurism in College Athletics*, HUFF. POST SPORTS (Feb. 11, 2013, 5:01 PM), http://www.huffingtonpost.com/warren-k-zola/college-athletes-pay-to-play_b_2663003.html.

303. DELOITTE & TOUCHE LLP, *supra* note 58, at 4–5.

304. See *id.* at 17.

305. Zola, *supra* note 243.

306. Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents, 468 U.S. 85, 88–91 (1984).

307. *Id.* at 91.

308. *Id.* at 94. (internal quotation marks omitted).

309. *Id.* at 120.

the NCAA should receive to play that role, the Court concluded that the NCAA plan restricted college athletics.³¹⁰

While the Court found that “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletics teams and . . . they enhance public interest in intercollegiate athletics,” the Court found that NCAA’s restraint on televised football games was not justifiable.³¹¹

Because of the judicial protection granted NCAA regulations, the NCAA has been able to expand its commercial activities to profit more than ever, especially due to expansive \$10.8 billion television contracts, as described above.³¹² *Board of Regents* held that the NCAA’s commercial activities were distinguished from its noncommercial activities; however, some argue the analysis “rests upon the false premise that its activities promote and preserve an amateur, noncommercial product.”³¹³ In reality, athletes are recruited for the sole purpose of being commercial products.

ii. Lowered Admissions Standards for Athletes Displays Member Institution’s Commercial Purpose

Major college athletic programs have little to do with education, as student-athletes are recruited for their athletic prowess and their potential revenue generating ability.³¹⁴ In addition to the discussions above on academic fraud³¹⁵ and academic clustering,³¹⁶ the practice of recruiting talent often requires lowering admissions standards for student-athletes.³¹⁷ This is not a rarity in college sports.³¹⁸ Universities that lower admissions standards for athletes are often more athletically successful, as some have calculated that successful players who were admitted under “special admission” circumstances generate about \$155,000 in revenue for their institutions.³¹⁹

University of California-Berkeley (“UC Berkeley”) is known for its special admissions practice. In an effort to climb out of debt that compiled through football and basketball stadium renovations and bringing in a new high-salaried football coach, UC Berkeley has become more fo-

310. *Id.*

311. *Id.* at 117 (“The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.”).

312. *See* Wolverton, *supra* note 293.

313. McCormick & McCormick, *supra* note 7, at 501.

314. Riggs, *supra* note 89 at 141.

315. *See supra* notes 229–45 and accompanying text.

316. *See supra* notes 248–54 and accompanying text.

317. Riggs, *supra* note 89, at 141; *see, e.g.*, John Cummins & Kirsten Hextrum, *The Management of Intercollegiate Athletics at UC Berkeley: Turning Points and Consequences*, RESEARCH & OCCASIONAL PAPER SERIES, Nov. 2013, at 25.

318. *See* Riggs, *supra* note 89 at 141.

319. *Id.*

cused on ticket sales and revenue generation from athletics than ever before.³²⁰ In response, UC Berkley changed the way athletes are accepted into its school.³²¹ In 2011, UC Berkley openly accepted student-athletes athletes with an average SAT score of 370 out of a possible 800 per subject, and a “B” to “C” average high school GPA.³²² The average incoming freshman SAT score of the nonathlete population was nearly double that, at an average of 700.³²³ In the nonathlete population, many straight “A” high school students were declined by admissions because of UC Berkley’s high standards; standards that clearly do not apply to student-athletes.³²⁴ Interestingly, the world’s top-ranked public university also has the worst student-athlete graduation rates in the country for men’s basketball and football.³²⁵ The study that reported these findings also found that while the lowest graduation rates were seen the men’s basketball and football, commercialization of intercollegiate sports was occurring outside of just football and men’s basketball and that they were also a cause for concern.³²⁶

The NCAA does not require that students have to measure-up to the admissions standards of the university; rather, the NCAA Manual’s definition of a “student-athlete” forgoes any mentioning of academics in a student’s recruitment: “A student-athlete is a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student’s ultimate participation in the intercollegiate athletics program.”³²⁷

Moreover, the NCAA’s eligibility rules allow a student-athlete to maintain their athletic eligibility despite being on academic probation at their university; this is due to the NCAA’s low standard with regard to academic performance.³²⁸ If the true goal of enrolling student-athletes were educationally related, the NCAA Manual would include the student’s ultimate academic goals. Further, if the NCAA were primarily concerned with academic success, it would not allow for student-athletes to be able to compete while on academic probation at their university. Thus, the NCAA’s goals are not academically related, despite its professing such purpose.

In summary, courts thus far have mistakenly concluded that athletes are not integral parts of their respective universities. In part, this is because of the cloak of amateurism that the NCAA promotes as a safeguard. Regardless of the NCAA’s stated purpose, in reality, athletes, like

320. Ann Killion & Nanette Asimov, *Cal’s Shockingly Low Athletic Admission Standards*, SFGATE (Nov. 15, 2013, 10:52 AM), <http://www.sfgate.com/collegesports/article/Cal-s-shockingly-low-athletic-admission-standards-4984721.php>.

321. *Id.*

322. *Id.*

323. Cummins & Hextrum, *supra* note 317, at 25.

324. Killion & Asimov, *supra* note 320.

325. *Id.*

326. Cummins & Hextrum, *supra* note 317, at 40.

327. DIV. I MANUAL, *supra* note 5, at art. 12.02.6.

328. Cummins & Hextrum, *supra* note 317, at 26.

the athlete in *Coleman*, are in fact integral parts of their universities because athletes are the means by which universities reap incredible revenues from their athletic programs.³²⁹

Applying the logic used in the *Coleman* analysis, student-athletes surely pass the economic realities test, as scholarship student-athletes can be “fired” from their university, the NCAA is a commercialized industry that allows universities to directly benefit from athletics, and student-athletes are more student than athlete.

It is clear that scholarship student-athletes meet the standards of all three commonly applied tests above, and should receive the same state and federal protections afforded to employees.

IV. RECOMMENDATION

This Part proposes that Congress include student-athletes as employees under the FLSA. Section A advocates that Congress mandate the NCAA adopt an employable-athlete model. This model would properly recognize scholarship athletes as university employees. Section B recommends a compensation plan for the employable athletes.³³⁰

A. *Universities Should Employ Student-Athletes and Create Optional Education for Athletes – A New Model*

This section demonstrates that the NCAA, universities, and scholarship athletes would benefit from the legal recognition of college athletes as employees, removing athletes from the classroom, and from compensating them as legal employees. These reforms will allow athletes to fully commit to athletic performance and earn protection under state workers’ compensation laws. They will also allow universities to effectively utilize their resources toward students actively pursuing a degree.³³¹

1. *Scholarship Athletes Should Not Have to Wait and All Scholarship Athletes Should Be Afforded the Same Rights*

Mark Emmert, the NCAA President, recently alluded to the fact that the NCAA was “looking at a fair way to treat student-athletes”:

It’s a dynamic tension that we really need to work on because it’s at heart of part of what [we’re] talking about here Why would we want to force someone to go to school when they really don’t want

329. See *supra* notes 70–87 and accompanying text; *Tiscione, supra* note 267, at 156.

330. Others have recommended new models for NCAA amateur sports and new compensation structures for student-athletes, but mine differs substantially. See *infra* note 357–58.

331. This recommendation applies to all student-athletes that are compensated for their athletic services. These athletes will likely include Division I and Division II athletes, as they are eligible for athletic scholarships. The focus of this Note, however, is on Division I athletes and the analysis considering all levels of college athletics is out of the scope of this Note.

to be there? But if you're going to come to us, you're going to be a student.³³²

Emmert is steadfast in the NCAA's traditional view that one must be a "student" to participate in the NCAA, but even he must realize that the word "student" includes those athletes who are student in name only. It is time for the NCAA to remove the cloak of amateurism that perpetuates the misconception that the NCAA focuses on educating student-athletes.

Individual universities and NCAA conferences have evidenced that they are in agreement with student-athletes and that they should be compensated. SEC Commissioner Mike Slive confirmed that the five major conferences considered leaving the Division I of the NCAA for a "Division IV," a division that currently does not exist, in the hopes of attaining greater autonomy to set bylaws.³³³ In response, the NCAA voted to allow the "Big 5" conferences to make their own decisions regarding scholarships and stipends, health care, and insurance.³³⁴ This decision, in short, allows member institutions of the Big 5 conferences to increase the stipend that student-athletes currently receive.³³⁵ The vote passed, allowing the Big 5 conferences to begin the legislative process.³³⁶

Following the NCAA's grant of autonomy, the Pacific-12 ("Pac-12") quickly responded to the grant by proposing new rules to apply to all student-athletes, including: (1) guaranteed four-year scholarships; (2) "educational expenses" to earn a degree at a future date if the student leaves before graduation; (3) medical coverage for four years after the student's departure; (4) relaxed transfer rules; and (5) incorporating student-athletes into the governance model.³³⁷ The University of Texas also responded, as Steve Patterson, Athletic Director for The University of Texas, stated that if courts conclude that the NCAA must compensate student-athletes in some form, it would pay \$10,000 to all student-athletes.³³⁸ Patterson stated that the payments would cost the University

332. Editorial, *Coach K Backs NCAA Changes*, ESPN (Oct. 3, 2013, 11:22 AM), http://espn.go.com/mens-college-basketball/story/_id/9762424/duke-coach-mike-krzyzewski-says-ncaa-needs-new-definition-amateurism-report-says.

333. Jordan Webb, *SEC Threatens Leaving Division I if NCAA Doesn't Grant Conferences More Authority*, HEADLINES & GLOBAL NEWS (May 30, 2014, 11:44 PM), <http://www.hngn.com/articles/32706/20140530/sec-threatens-leaving-division-ncaa-grant-conferences-more.htm>.

334. Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy; Move Lays Groundwork for Those Schools to Pay Players a Few Thousand Dollars More a Year*, WALL ST. J. (Aug. 7, 2014, 7:44 PM), <http://online.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146> ("The decision by the NCAA Division 1 board affects the 65 schools in the Atlantic Coast, Big Ten, Big 12, Pacific-12 and Southeastern conferences—collectively known as the Big 5.").

335. *Id.*

336. Michelle Brutlag Hosick, *Board Adopts new Division I Structure*, NCAA (Aug. 7, 2014, 11:49 AM), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>.

337. Pac-12 Conference, *Pac-12 Universities Adopt Sweeping Reforms for Student-Athletes, Guaranteeing Scholarships, Improving Health Care, and More*, PAC-12 NEWS (Oct. 27, 2014), <http://pac-12.com/article/2014/10/27/pac-12-universities-adopt-sweeping-reforms-student-athletes-guaranteeing>.

338. Cork Gaines, *Texas AD Says it Would Cost \$6 Million to Pay Their Athletes and The Fallout Would Change College Sports Forever*, BUS. INSIDER (Oct. 22, 2014, 5:40 PM), <http://www.businessinsider.com/university-texas-pay-athletes-2014-10> (stating that \$5,000 would be considered pay for use of the students' name and likeness and \$5,000 would fill the gap between current stipend payments

about \$6 million, but that this would not present a problem for the University.³³⁹

While these adjustments may serve as a small “win” for student-athletes,³⁴⁰ it seems more like a diversion from the real issue: that student-athletes are undercompensated employees who lack legal rights afforded to employees. Further, the lack of consistency in the benefits provided among the conferences will further the gap between the wealthy and the struggling conferences.³⁴¹ Under the most recent NCAA rule change, the Pac-12 conference will offer a different compensation package than midmajor conferences, like the West Coast Conference (“WAC”), because the rule change only applies to the Big 5 conferences.³⁴² This, in turn, will make universities in major conferences much more attractive than smaller conferences, which will negatively impact the competitive balance in the NCAA. Thus, a student-athlete-wide solution should be adopted to prevent a widening gap between the Big 5 conferences and the rest of the NCAA.

The proposed model should be based on the legal recognition of scholarship athletes as employees. Congress has recently begun to question the NCAA’s role in higher education. For example, Representative Bill Thomas asked the President of the NCAA in 2006: “How does playing major college football or men’s basketball in a highly commercialized, profit-seeking, entertainment environment further the educational purpose of your member institutions?”³⁴³ It does not. Because of Congress’ heightened awareness of the issue, and because athletes meet the tests outlined above, athletes should be recognized as athletes under the FLSA immediately.

2. *Writing Grant-in-Aid Athletes into the FLSA’s Definition of “Employee”*

The FLSA was established to create a minimum standard of working conditions and also to set a minimum wage.³⁴⁴ The FLSA applies the economic realities test to determine whether one is an employee.³⁴⁵ How-

and cost of attendance). The ruling in *O’Bannon v. NCAA* opens the door to some form of compensation to student-athletes for the use of their name and likeness while the NCAA’s grant of autonomy allows for conferences to increase compensation to cover full cost of attendance. Mark Koba, *Student-Athletes to Get Paid? Looks That Way*, NBC NEWS (Aug. 12, 2014, 6:23 AM), <http://www.nbcnews.com/business/business-news/student-athletes-get-paid-it-looks-way-n178131>. However, neither decision concluded that athletes are employees or that they could be “paid to play.” *Id.*

339. Gaines, *supra* note 338.

340. Ivan Maisel, *Autonomy Set to Benefit Athletes*, CNN (Aug. 7, 2014), http://espn.go.com/college-football/story/_id/11321434/autonomy-grants-power-5-more-control.

341. Terlep, *supra* note 334; *see also* Cooper, *supra* note 299, at 47; Koba, *supra* note 338.

342. Terlep, *supra* note 334.

343. Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, in SCOTT R. ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 577 (2d ed. 2010) (internal citation omitted).

344. *See The Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB., <http://www.dol.gov/compliance/laws/comp-flsa.htm> (last visited Nov. 7, 2014).

345. *See* Muhl, *supra* note 110, at 3, 6.

ever, the FLSA has yet to consider whether student-athletes are employees.³⁴⁶ Although the Big Ten stated in its amicus brief to the NLRB that federal courts have held that student-athletes are not employees, the cases cited do not support the false assertion.³⁴⁷ Scholarship athletes clearly satisfy this test, as shown above,³⁴⁸ and thus should already be considered under the FLSA.

One of the recent lawsuits filed against the NCAA centers on whether student-athletes are employees under the FLSA. The complaint, filed in October 2014 in the U.S. District Court for the Southern District of Indiana, alleges that NCAA Division I student-athletes are “temporary employees,” similar to students involved in work-study programs, under the Act and that student-athletes have a right to earn a minimum wage.³⁴⁹ The proposal below more effectively addresses student-athletes’ rights by identifying student-athletes as employees under the FLSA, not “temporary employees.” While this lawsuit might provide some compensation benefits for nonscholarship athletes, anything short of full recognition of scholarship athletes as employees is not adequate.³⁵⁰ Recognizing scholarship athletes as employees under the FLSA would entitle athletes to the rights and protections guaranteed by the Act.³⁵¹

FLSA regulation has not been applied to college sports,³⁵² but it should be. The broad coverage of the FLSA applies to all universities, whereas the NLRA applies to private institutions.³⁵³ This is a tremendously important consideration because if the *Northwestern* decision

346. Brief for Petitioner, at 8, Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014).

347. As the CAPA Brief identifies, *id.* at 8 n.7, the Big Ten’s Brief fails to provide legal support, as the cases cited did not consider whether student-athletes were employees under the FLSA, *see* Brief for The Big Ten Conference, Inc. as Amici Curiae Supporting Employers, at 15, Nw. Univ. Employer & Coll. Athletes Players Ass’n (CAPA), Case 13-RC-121359, 2014 WL 1246914 (N.L.R.B. Mar. 26, 2014). The Big Ten’s Brief cited four cases, *id.* at 15–17, none of which were on point. *See generally* *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981) (considering whether student resident-hall assistants were employees under the FLSA); *Kemether v. Pennsylvania Interscholastic Athletic Ass’n, Inc.*, 15 F. Supp. 2d 740 (E.D. Pa. 1998) (considering discrimination claims under Title VII and Title IX); *O’Halloran v. Univ. of Washington*, 679 F. Supp. 997, 1000 (W.D. Wash. 1988) (considering whether the NCAA’s drug testing policies are unconstitutional). When the court in *Marshall* considered whether resident assistants were employees under the FLSA, the court referenced student-athletes. *Marshall*, 666 F.2d at 1328. The court found that resident assistants, “were legally indistinguishable from athletes and leaders in student government who received financial aid,” and thus found that resident assistants were not employees under the FLSA. *Id.* However, the court was not considering whether student-athletes were employees; the court’s statement cannot be extrapolated to find that student-athletes are not employees. *See id.*

348. *See supra* Part III.B.3.

349. Complaint and Jury Demand at 10, *Sakos v. Nat’l Collegiate Athletic Ass’n*, No. 1:14-cv-01710-WTL-MJD (S.D. Ind. Filed Oct. 20, 2014), 2014 WL 5372242 (“Student athletes meet the criteria for recognition as temporary employees of NCAA Division I Member Schools under the FLSA as much as, if not more than, work study participants, and, thus, NCAA Division I Member Schools are required by law to pay student athletes at least the federal minimum-wage of \$7.25 an hour.”).

350. *Id.*

351. *See* Jennifer Arendes, *Unauthorized Aliens are ‘Employees’ Under FLSA*, MO. EMP. L. LETTER, Sept. 2013, at 1. The FLSA even recognizes that unauthorized aliens are employees under FLSA, despite the fact that they are not legally authorized to work. *Id.*

352. *See* LeRoy, *supra* note 3, at 1096; *supra* notes 347–52 and accompanying text.

353. *See* LeRoy, *supra* note 3, at 1096.

stands, private universities will be able to treat athletes differently—like paying them and allowing them to unionize—than public universities.

According to Professor Michael LeRoy, “The FLSA is potentially relevant because the Wage and Hour Division of the Department of Labor (“DoL”) has determined that some unpaid internships violate the law’s requirement of minimum compensation.”³⁵⁴ Regulations apply to all student-related employment under the FLSA.³⁵⁵ Because of its progressive recognition of student rights and its application of a broad definition of “employee,” grant-in-aid athletes should be recognized as employees under the FLSA, availing athletes to many federal and state protections to which all employees are entitled. Lastly, a federal solution, like legislating under the FLSA, will ensure blanket protection for athletes regardless of the state of the employment.

3. *Implementing the New Model*

Given that grant-in-aid athletes should be considered employees, the NCAA should require universities to treat employable athletes³⁵⁶ similar to traditional university employees by creating optional education and providing them with a salary. This salary would replace the current grant-in-aid model that includes a stipend to cover living expenses for student-athletes that live off-campus. Athletes would not, however, earn different wages like a traditional employee; rather, wages would be capped at a fixed amount. This model differs from other proposed models recommending the creation of a professional market³⁵⁷ or a revenue

354. *See id.*

355. *See id.* at 1096, 1098.

356. “Employable athlete” is a label created to represent those athletes who would be paid an actual wage, above the cost of attendance, for their athletic service.

357. *See, e.g.,* Essay, Allen L. Sack & Ellen J. Staurowsky, *A Rejoinder to Timothy Davis, Intercollegiate Athletes in the Next Millennium: A Framework for Evaluating Proposals*, 9 *Marq. Sports L.J.* 253, 10 MARQ. SPORTS L.J. 117 (1999). Sack & Staurowsky advocate for “a two-tiered” structure that would allow some institutions to operate under the amateur model while allowing other institutions to function like sponsors of professional sports teams. *Id.* at 120. The model proposed in this Note would not result in the creation of separate division for professional athletes; rather, my proposal recognizes that student-athletes under the current NCAA structure are already employees and should be compensated at a fair, but not free market, wage and should have the decision of whether to pursue a degree. While Sack & Staurowsky also advocate that athletes need not “be registered students” to participate in athletics, this Note’s proposal is distinct because it does not advocate for the creation of a professional league, like Sack & Staurowsky propose. *See id.* at 121. The legal implication of finding that student-athletes are employees under the FLSA is that they require a fair wage. Thus, my Note’s proposal includes the payment of a salary to all eligible athletes. The salaried athletes would continue to play alongside the non-salaried (walk-on) athletes, as scholarship players play alongside nonscholarship players currently, unlike Sack & Staurowsky. *See id.* The optional education proposal is just that: optional. All athletes would have a choice of whether to pursue a degree under this Note’s proposed model, unlike how a professional model would likely work. This Note’s proposal does not advocate for a free-market wage, like Sack & Staurowsky. *See id.* at 120–22. Further, my Note’s proposal limits the number of employable athletes per team, similarly to how the NCAA currently limits scholarships per team. Although some argue that paying athletes a salary would result in a minor league, Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 *DENV. U. L. REV.* 213, 274 (1990), this Note’s proposal advocates for a determined wage for all athletes, rather than a free market where players vary in price. For an evaluation of professional models,

sharing or stipend adjustment model.³⁵⁸ Athletes under this model would still be subject to the NCAA's bylaws, and thus the NCAA's rules and restrictions, and would not be compensated at an open market wage.

Revisiting the introductory anecdote about LeBron James,³⁵⁹ it is easily understood that athletes who use intercollegiate sports as a stepping-stone to professional athletics are (1) not earning the protection afforded to legal employees, (2) being inadequately prepared for their career goals, and (3) depleting scarce university resources.³⁶⁰ Athletes like our hypothetical college athlete, Mr. James, would greatly benefit from the proposed model, as they will be fairly compensated for their services, protected under state workers' compensation laws, and would be able to focus solely on their actual career goals, which in large part includes professional athletics.

The new model will effectively solve the issues related to the current amateur athletics model.³⁶¹ First, athletes will be compensated for the risks associated with participating in their sport; this would be offered through the payment of a salary and in the form of workers' compensation protection and other rights generally available to employees. Second, athletes will choose whether to enroll in courses. This will allow athletes to choose how to best prepare for their careers. Lastly, universities can reallocate the academic and financial resources used to accommodate student-athletes who do not desire to pursue an education toward other academic pursuits. Because of its tremendous benefits, even if

see Timothy Davis, *Intercollegiate Athletics in the Next Millennium: A Framework for Evaluating Reform Proposals*, 9 MARQ. SPORTS L.J. 253, 255–70 (1999).

358. See, e.g., Peter Goplerud III, *supra* note 78, at 1089 (proposing a stipend plan that results in providing stipends for Division I athletes in revenue generating sports); see Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L. REV. 307, 337 (1998) (proposing that student-athletes share the profits that their particular teams create); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 25 (1991) (advocating for "student-life" stipends); Charlotte M. Rasche, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes*, 16 REV. LITIG. 219, 240 (1997) (proposing that the NCAA "allow the athlete to participate in endorsement agreements and other market activities."). Goplerud's stipend plan is similar to what the University of Texas hopes to do, if the law allows: paying athletes a fixed stipend amount to be set by the school. See *supra* notes 338–39 and accompanying text; Goplerud III, *supra* note 78, at 1089. This Note's proposal differs from Goplerud's in that it recognizes scholarship student-athletes are employees, whereas Goplerud's estimate is that his proposed stipend-plan might create an employment issue. See *id.* at 1099. Unlike Goplerud, I do not advocate that institutions set the price at which they are willing to pay. See *id.* Lastly, I do not advocate for any revenue sharing or stipend increases, as suggested by the aforementioned articles. Rather, I recommend that a market-adjusted salary be paid to all eligible athletes because student-athletes are employees who deserve a fair wage.

359. See *supra* Part I.

360. See, e.g., Cummins & Hextrum, *supra* note 317, at 13, 22 (stating that UC Berkeley's Athletic Study Center ("ASC"), which provides tutors and academic advising for athletes only, initially proposed a \$50,000 budget to fund the ASC, but was later increased because comparable schools were spending much more on athletic academic assistance programs).

361. See *supra* Part I (stating that the problem with the current model is four-fold: (1) student-athletes are undercompensated; (2) student-athletes lack the bargaining power to protect their well being; (3) many student-athletes are student, or amateur, in name only; (4) universities expend scarce resources to accommodate student-athletes that do not necessarily desire to receive an education—resources that could be invested in other ways).

Congress refuses to step in, the NCAA should still adopt the employable-athlete model.

Some may argue that the NCAA has no incentive to adopt such a model; however, the NCAA has an incentive to implement this model as a preemptive move against both the NBA and legislators. The NCAA faces increased lobbying efforts in support of student-athlete rights as well as the possible reformation of the NBA's Developmental League ("D-League"), which would allow athletes to surpass the NCAA.³⁶²

Mark Cuban, the owner of the Dallas Mavericks, an NBA team, believes elite prospects would be better served by surpassing the NCAA to play in the NBA D-League.³⁶³ In fact, he advocates that athletes pursue this route.

The NCAA rules are so hypocritical, there's absolutely no reason for a kid to go [to college], because he's not going to class [and] he's actually not even able to take advantage of all the fun because the first semester he starts playing basketball. So if the goal is just to graduate to the NBA or be an NBA player, go to the D-League. We can get rid of all the hypocrisy and improve the education. If the whole plan is just to go to college for one year maybe or just the first semester, that's not a student-athlete. That's ridiculous. . . . A major college has to pretend that they're treating them like a student-athlete, and it's a big lie[,] and we all know it's a big lie. At least at most schools, not all. [] But we can put more of an emphasis on their education. We can plan it out, have tutors. [sic] We can do all kinds of things that the NCAA doesn't allow schools to do that would really put the individual first.³⁶⁴

Adopting the proposed model would allow the NCAA to maintain its reputation within the athletic industry, avoid athlete cannibalization from the D-League or other athletic outlets, and preempt impacts from possible legislative changes to NCAA governance. While the most recent NCAA governance changes are a step in the right direction, they will create tremendous inconsistency in how athletes are compensated. The autonomy granted to the major NCAA conferences will result in greater disparity between the small conferences and large conferences. The many student-athletes outside of the Big 5 conferences will be disproportionately undercompensated and underprotected. The proposed model would allow universities, regardless of conference, to better prepare athletes to succeed in the workforce and athletes to extract greater value from their college experience.

362. Tim MacMahon, *Cuban: D-League Better or Prospects*, ESPN (Mar. 6, 2014, 11:02 AM), http://espn.go.com/dallas/nba/story/_/id/10538276/mark-cuban-says-nba-d-league-better-option-ncaa.

363. *Id.*

364. *Id.*

a. Risk Compensation as a Benefit of the Proposed Model

The first benefit of the employable athlete model is that compensating student-athletes for the risk associated with participating in college athletics will help alleviate the exploitive practices of big-time college athletics programs. Coaches are incentivized to overwork student-athletes and challenge athletes physically, as coaches are generously rewarded for achieving winning seasons with gross salaries.³⁶⁵ Yet, the law does not protect student-athletes against the financial ramifications of injury. Essentially, a football player could become paralyzed from in-game activity and never receive full payment of medical expenses or any future payments resulting from the inability to work.³⁶⁶

Student-athletes under the NCAA may purchase insurance that would protect them in the event they become disabled and are prevented from working in their desired field.³⁶⁷ Essentially, the student-athlete would “borrow against [their] future earnings potential.”³⁶⁸ This is an additional expense, however, that student-athletes do not even consider incurring, as it is neither common knowledge nor common practice to insure oneself against future earnings potential.³⁶⁹ Even so, student-athletes would not be able to afford such protection given that student-athletes are compensated at a wage below the poverty line.³⁷⁰ Accumulating debt leveraged against one’s future earning power is a risk, a risk that many student-athletes cannot afford.

Granting athletes employee status would hedge against this risk because they would at least be able to avail themselves to workers’ compensation. Employable athletes would effectively be treated similarly to coaches and offered similar benefits, minus the gross compensation coaches receive. Employable athletes would likely qualify for workers’ compensation benefits, as they would be identified as employees, because they satisfy the requirements of the three common tests applied in workers’ compensation cases.³⁷¹

In addition to compensating athletes for the risk of athletic participation and being protected from exploitive practices, the proposed model will also result in better professional preparation.

365. See *supra* Part II.B.1.

366. See DIV. I MANUAL, *supra* note 5, at art. 16.4.1 (stating that institutions may finance medical expenses and “[s]pecial individual expenses resulting from a permanent disability that precludes further athletic participation”, but that the institution is not required to do so); see also *id.* at art. 3.2.4.8 (stating that member institutions must provide medical insurance “for medical expenses resulting from athletically related injuries sustained” but not stating that the institution is required to pay medical expenses that the mandated insurance coverage does not provide).

367. *Id.* at art. 16.11.1.4.

368. *Id.*

369. In my experience as a former full-scholarship student-athlete, the option of investing in one’s future earning potential was never discussed nor advised.

370. See Huma & Staurowsky, *supra* note 10, at 4.

371. See *supra* Part III.A.4. This is especially clear given that student-athletes already meet the tests outlined by the courts, even though courts generally do not rule in favor of granting student-athletes employee status.

b. Better Career Preparation as a Benefit of the Proposed Model

The second benefit of the employable athlete model is that athletes will be better prepared for their career goals, as they will not be forced to pursue a non-applicable degree. Creating optional education will allow athletes to select whether to invest in their future careers through pursuing education or through in-field job opportunities. Because student-athletes are often unable to complete internships or to obtain meaningful work experience due to the time commitments of both school and athletics, or due to the NCAA's prohibitive rules,³⁷² this option will allow athletes to evaluate what experiences best align with their professional interests.

Going back to our LeBron James anecdote, Mr. James was uninterested in education, enrolled in meaningless classes, and planning on remaining at his university for only one year, as he was expecting to be drafted into the NBA after his freshman season.³⁷³ The current NCAA academic requirements do not result in ensuring Mr. James receives an adequate education, nor do they allow him to prepare for his stated goal of succeeding in the professional athletic market. Athletes like Mr. James would greatly benefit from allocating finite time to further developing athletic skills, learning public relations techniques, and establishing basic personal finance skills, skills that will directly translate in the professional world. This situation sheds light on the issues of the current amateur athletic model: forcing athletes to pursue a degree does not prepare athletes for success in the workforce, as athletes are unable to compete with traditional students who have access to the many experiential opportunities from which athletes are prohibited.³⁷⁴

The NCAA's mission is to educate athletes and prepare them for success in the professional world. Functioning under a model of compulsory education, however, that is used for the sole purpose of promoting the façade of amateurism does not result in educated athletes—it results in underprepared athletes. This point is further supported by the low graduation rates of student-athletes and high illiteracy rates of graduating athletes, as discussed in previous sections.³⁷⁵

Even for those who do graduate, it is no secret that student-athletes are often unable to pursue internships or part-time jobs, weakening their ability to compete with nonathlete students.³⁷⁶ Student-athletes face tre-

372. See *id.* at 787–88; see also DIV. I MANUAL, *supra* note 5, at art. 12.4.

373. See *supra* Part I.

374. See Purdy et al., *supra* note 221, at 441; Ernest T. Pascarella et al., *Intercollegiate Athletic Participation and Freshman-Year Cognitive Outcomes*, 66 J. HIGHER EDUC., 369, 380–85 (1995) (finding that participation in intercollegiate athletics has some negative implications for cognitive development); Mahmoud Bahrani, *Athletes Miss Out on the Study Abroad Experience*, CHI. MAROON (Sept. 30, 2011), <http://chicagomaroon.com/2011/09/30/athletes-miss-out-on-the-study-abroad-experience/> (stating the college athletes are “unable to enjoy the study abroad experience to its fullest capacity”).

375. See *supra* Part III.B.3.

376. Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY: COLLEGE (Aug. 28, 2011, 4:01 PM), <http://college.usatoday.com/2011/08/28/college-athletes-suffer-the-greatest-injustice-from-ncaa/>.

mendous difficulty with what one author calls, “athletic retirement,” which is a period of transition between when the athlete moves away from athletics into new fields of interest.³⁷⁷ Great concern exists around the lack of “academic and personal development” of student-athletes, especially to help assist student-athletes in dealing with athletic retirement.³⁷⁸ One former college football player stated in an interview with *USA Today*, “A football player is not going to get a job over someone who worked and had internships.”³⁷⁹

The proposed model will result in better-prepared athletes, as it allows athletes who are uninterested in education to free up valuable time to pursue professional interests. Under this model, athletes would receive counseling and mentoring, just as student-athletes receive academic counseling, to ensure that athletes are receiving proper preparation for their professional aspirations. Better yet, they can pursue training that actually prepares them for their career goals, like being a basketball coach, for instance.

Given that not all scholarship athletes are uninterested in academics, a employable athlete that desires to pursue education can enroll in the university and can work toward his or her degree without the NCAA’s stringent academic requirements for amateur athletes. In fact, this is the model currently used by most universities for all staff members—including NCAA college coaches—as many schools offer free education to staff.³⁸⁰ Results yielded from a 2010 survey of benefits programs from over 300 U.S. educational institutions revealed that ninety-eight percent of the respondent institutions provide tuition benefits for full-time employees.³⁸¹ The employable athlete model could treat college athletes as traditional university employees, allowing them to receive the same benefit of free education.

The concept of extending free tuition has already been implemented in athletics through tuition waivers, further confirming that this model is viable under my proposed employable-athlete model.³⁸² The University of Arizona, for example, adopted a policy that waives student-athlete tuition fees rather than charging the athletic department for each student-

377. Judy M. Chartrand & Robert W. Lent, *Sports Counseling: Enhancing the Development of the Student-Athlete*, 66 J. COUNSELING & DEV. 164, 164 (1987) (internal quotation marks omitted).

378. *Id.*

379. Stark, *supra* note 376 (internal quotation marks omitted). I could not agree more with this statement. In my personal experience as a student-athlete, I was unable to attain any internship experience, due to the requirement of summer school classes and workouts, until after my college basketball career ended.

380. See Menachem Wecker, *Some Recommend Working for Colleges for Free Tuition*, U.S. NEWS, Oct. 26, 2011, <http://www.usnews.com/education/best-colleges/articles/2011/10/26/some-recommend-working-for-colleges-for-free-tuition>.

381. *Id.*

382. See Nathan Pine, *The Role of Athletics in the Academy: An Alternative Approach to Financial Investment*, 34 J. SPORT & SOC. ISSUES 475, 476–77 (2010). Pine advocates for such a tuition waiver solution to “address the athletic program’s number one challenge of tuition and fees and at the same time make an investment in education.” *Id.* at 476. Pine does not, however, advocate that student-athletes are or should be employees or that athletes should receive compensation. See *id.* at 476–80.

athlete.³⁸³ An agreement exists between the University and the athletic department stating that the athletic department will receive 315 tuition waivers every year.³⁸⁴ The tuition waiver policy is used as an investment in athletics to ensure athletic sustainability.³⁸⁵ The same logic applies to providing free tuition for university employees—it is an investment in the university’s staff. Although not necessary to the implementation of the proposed model, tuition waivers could be implemented on the institutional level to help alleviate costs.

Granting tuition waivers to athletes might seem financially infeasible, but according to one scholar, including tuition waivers could actually help subsidize the cost³⁸⁶ of athletes that desire to enroll in courses. For example, if UC Berkley adopted the tuition waiver model in 2009, it would have saved a total of \$10.8 million for its 299 student-athletes during the 2009–10 academic year.³⁸⁷ Tuition waivers seem like a substantial financial investment on behalf of the university; however, athletic departments rarely meet their projected budgets, and the university bears the burden of funding the athletic department.³⁸⁸ Thus, the waiver model essentially results in a policy shift: “The policy shift would equal less than the university is spending currently (between subsidy and shortfall) and would give the athletic department a better opportunity to budget and control expenses from the beginning of the year.”³⁸⁹ It must also be considered that not all, or even a majority, of employable athletes would desire to enroll in college courses,³⁹⁰ so this policy could result in a minimal expenditure. The tuition-waiver policy is one potential solution to reducing costs stemming from the implementation of this Note’s proposal. However, each institution should decide how to adequately cover costs related to the proposed model, as financial circumstances are unique to each institution.

In addition to compensating athletes for the risk of athletic participation and providing better job preparation, the proposed model will also free-up resources that are tied to educating student-athletes.

c. Efficient Use of University Resources as a Benefit of the Proposed Model

The third benefit of the proposed model is that universities can reallocate the academic and financial resources used to accommodate many former grant-in-aid student-athletes in their academic pursuits.

Many NCAA member institutions provide academic services including the facilitation of mandatory study hall, tutoring sessions, and

383. *Id.* at 477.

384. *Id.*

385. *Id.*

386. *Id.* at 476.

387. *Id.* at 478.

388. *See id.* at 477–78.

389. *Id.* at 478.

390. *See supra* Part III.B.3 (discussing low graduation rates in intercollegiate athletics).

other support systems to ensure that student-athletes graduate.³⁹¹ These services are costly, but necessary because the NCAA has strict academic requirements.³⁹² Imagine the extent of the necessary resources used to graduate at least four illiterate football players from OSU; there must have been a tremendous depletion of resources for this to happen. The same could be said for the massive academic fraud scandal at UNC; it was a collective effort that utilized the University's resources.

The proposed model will result in a siphoning of the resources used to help student-athletes get by, as the athletes that are motivated to succeed in academics will benefit from academic services that universities provide to traditional students. The athletes not interested in academics will not need these resources, as they will opt out of academia. Although detailed discussion is outside of the scope of this Note, universities could easily use these same resources more efficiently than using them for trying to graduating illiterate athletes just to appease the NCAA's requirements, for example.

d. Parallel to the NCAA's Current Structure as a Benefit of the Proposed Model

The athletes considered under this proposed model would correlate with the current NCAA's rules on the number of scholarships eligible per sport. In other words, revenue-generating sports would have a greater opportunity to employ their athletes while non-revenue generating sports would likely maintain their amateur status, just as currently the revenue-generating sports have more scholarships available.³⁹³ For example, under current NCAA regulations, men's basketball has thirteen scholarships available³⁹⁴ while men's wrestling has 9.9.³⁹⁵ The athlete-employable-athlete model would follow this structure by allowing parallel numbers of employable athletes per team. Essentially, the parallel nature of this model will maintain notions of amateurism as well as help reduce costs to the universities as a result of adopting the model.

Students who are uninterested in academics and who are using intercollegiate athletics as a stepping-stone to a professional athletic career would free up the university's resources that are tied up in educating the athlete—resources that would be better used by a student who desires to gain an education—and the athletes would be able to allocate finite resources to advancing in athletics.

391. See, e.g., STUDENT-ATHLETE SUPPORT SERVS. OFFICE, THE OHIO STATE UNIV., <http://www.ohiostatebuckeyes.com/sports/sasso/spec-rel/about.html> (last visited Sept. 28, 2014).

392. See DIV. I MANUAL, *supra* note 5, at art. 14.01; *supra* note 360 and accompanying text.

393. See *infra* notes 394–95 and accompanying text.

394. DIV. I MANUAL, *supra* note 5, at art. 15.5.5.1.

395. *Id.* at 15.5.3.1.1.

B. Compensation

This Section proposes a compensation plan that will fairly compensate employable athletes for their services and will be affordable for the NCAA and member institutions.³⁹⁶

Under the employable-athlete model, athletes should be paid using a fixed salary that would cover the course of the academic year. This salary should act as a substitute for the current stipend that student-athletes are receiving.³⁹⁷ In other words, an athlete who desires to opt out of education would receive only this salary as a form of compensation. An athlete who desires to enroll in education would receive this salary in addition to the university subsidizing the cost of education.

The amount of this salary should be set by the NCAA, member institutions, and the athletes themselves, and should apply to Division I and potentially Division II member institutions. The parties should fix the salary at a set rate for all Division I athletics programs to prevent athletes from university shopping more than they already do. This model would not represent a free market where prices will determine themselves; this is what differentiates it from a professional model of athletics. Essentially, the best player on a top NCAA team would be paid the same salary as a mediocre player at a midtier school.

There are two major policy arguments in favor of adopting this model. The first is that if NCAA member institutions operated under a free market, wages would skyrocket—athletes would choose the highest-paying school—and as such, universities that rely heavily on their athletic programs to promote the university would be pressured to plow more money into athletic programs, money that should be directed at educational purposes.³⁹⁸ Thus, setting a fixed wage, and avoiding a professionalism model, under this Note's proposed model would avoid such expenditures. After all, universities are educational institutions and should use their resources to invest in educational activities. Under the proposed model, the NCAA would support the institutions by creating a fair standard for all scholarship athletes. The second policy argument in favor of this compensation model is that if all athletes are compensated at the same rate, coaches will not be incentivized to trade players to other teams because he or she could get an equivalent player for a lower price. Currently, the transferring of student-athletes between programs is a

396. While others have proposed compensation plans, this proposal is unique in that it requires a fixed wage, preventing college athletics from becoming a free market, and it requires that compensation not be contingent upon an athlete being enrolled in school. *See supra* notes 356–57 (discussing how this compensation plan and model differs from other proposed plans).

397. *See, e.g.,* Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA), Case 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014) (stating that off-campus players receive a \$1000 stipend per month for living expenses).

398. Davis, *supra* note 357, at 270; *see also* Koba, *supra* note 338.

very common practice, and this practice does not need further encouragement.³⁹⁹

There are drawbacks to implementing both the proposed model and the proposed compensation plan.

The Sherman Antitrust Act[, for example,] is inapplicable to the NCAA and its member institutions . . . because the Act does not reach a voluntary association intended to regulate collegiate athletic competition. Policies governing NCAA eligibility rules focus on amateur status, which creates the exemption from antitrust law. Any scheme to compensate collegiate athletes in the guise of an employee-employer relationship will ultimately subject the NCAA and its member institutions to the proscriptions of antitrust law.⁴⁰⁰

However, student-athletes should not continue to be exploited because the NCAA seeks to maintain its power in the industry. The implementation of a fixed salary, as proposed, could potentially lead to antitrust concerns, as well. In the recent *O'Bannon* decision, the court found colleges restrained trade by not offering college football or basketball recruits more than the value of grant-in-aid in exchange for athletic services.⁴⁰¹ However, the rationale for a set salary under this Note's proposed model is that a level wage would help maintain competitive balance in the NCAA, which the Supreme Court has supported, and prevent the NCAA from functioning like a professional sports league.⁴⁰² Although a full antitrust analysis of the proposed compensation model is outside of the scope of this Note, athletes would still have the opportunity to earn variable compensation—unfixed prices—through compensation for their name and likeness and through funding for education expenses, if *O'Bannon* is upheld.⁴⁰³ Thus, the fixed salary would only be one element of the compensation that athletes could receive, which could po-

399. Todd McFall & Stephen Bronars, *NCAA Men's Basketball: Student Transfer Trends*, WINTHROP INTELLIGENCE: WINAD, <http://winthropintelligence.com/2013/03/04/ncaa-mens-basketball-student-athlete-transfer-trends/#note-1799-1> (detailing a study conducted by two professors that found 4106 men's basketball players transferred between 2002 and 2013) (last visited Nov. 10, 2014).

400. Mondello & Beckham, *supra* note 158, at 300.

401. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 988–993 (N.D. Cal. 2014) (“Because FBS football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product. They have chosen to exercise this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit’s athletic services along with the use of his name, image, and likeness while he is in school. If any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA. This price-fixing agreement constitutes a restraint of trade.”).

402. The Supreme Court has supported the NCAA’s rules and regulations thus far because of the NCAA’s role in maintaining competitive balance. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?* 65 NOTRE DAME L. REV. 206, 239 (1990) (citing another source). Other scholars have identified the structural issues that professional models pose. See Davis, *supra* note 357, at 269–71.

403. *O'Bannon*, 7 F. Supp. 3d at 1005–06 (describing various options that the NCAA could pursue to compensate athletes).

tentially alleviate concerns.⁴⁰⁴ However, it should be noted that the *O'Bannon* decision could have tremendous implications for compensating student-athletes and the legality of restraining that compensation.

Some will argue that implementing the proposed model will be a costly endeavor, but the use of tuition waivers could actually reduce costs.⁴⁰⁵ Furthermore, universities will likely be able to save costs by siphoning academic services costs, as some athletes may elect not to enroll in education under the proposed model.⁴⁰⁶ Even so, if implementing the proposed model marginally increases athletic department costs, athletic departments can compensate by reducing expenditures on travel budgets, clothing, or many other discretionary expenditures.

Again, athletes should not continue to be exploited because granting them their rights might cost more—that would constitute poor logic and many injustices. Thus, the employable-athlete model should be adopted.

V. CONCLUSION

NCAA grant-in-aid athletes are not currently considered employees, but they should be. After analyzing the relationship between student-athletes and their universities, it becomes clear that athletes are employees as defined by both the common law and statutory law tests. Athletes are employees under the common law test because they are compensated for their athletic services and subjected to control by athletic coaches. Athletes are employees under the NLRB's standard because their relationship with universities is primarily an athletic one, as established by immense commercial activity. Athletes also meet the economic realities test under the FLSA because they are dependent on their grant-in-aid and NCAA member institutions are in the business of sports. All parties financially benefit from the NCAA's current "amateurism" model except for the product—the athletes, who are exploited by their coaches and universities.

404. *See id.* at 1004 (“[T]he NCAA has produced sufficient evidence to support an inference that some circumscribed restrictions on student-athlete compensation may yield procompetitive benefits.”). It must be noted that creating optional education could affect the antitrust analysis because courts have recognized the NCAA serves educational purposes. *Id.* However, creating optional education could result in greater education of athletes, although not necessarily in a formal classroom, because the current model does not actually result in educating athletes at all and because this Note's proposed model would focus on *actual* education that would better serve each individual and their goals. *See supra* Section IV.A.3.b (detailing the educational benefits of this Note's proposed model and option to enroll in college academics if the student-athlete desires) and Section III.B.2–3 (detailing the various ways that institutions fail to actually educate student athletes).

405. *See supra* notes 386–90 and accompanying text. Even if the implementation of the proposed model increased costs, *see* Mondello & Beckham, *supra* note 158, at 301 (stating that the employment model would increase costs), the increased cost does not justify failure to recognize one's legal rights. Thus, an athletic department might have to sacrifice certain luxuries to compensate athletes, but as stated multiple times, athletes should not continue to be exploited for the sake of saving athletic departments marginal costs.

406. *See supra* Part III.B.3 (discussing low graduation rates in intercollegiate athletics).

Athletes act as employees in every way, yet the NCAA does not qualify them as such. They are not fairly compensated for the risk of participating in professional-like sports and also lack the bargaining power to protect their well being, as athletes are not eligible for workers' compensation in the event of sustaining an injury. Most importantly, universities are exhausting scarce resources to "educate" and "graduate" their athletes, yet athletes often do not graduate and leave their university uneducated and greatly unprepared for the workforce.

Athletes should no longer be subjected to injustices served by the NCAA's dependence on maintaining its "amateurism" model. The NCAA invoked the term "student-athlete" to shield itself from the legal implications of employing athletes, and it has continued to maintain this fiction. The monopolistic power of the NCAA is undeniable, and its cloak of amateurism has provided a shield from its legal realities for too long. Upon removing this cloak, we find that athletes are legal employees and deserve to be fairly compensated for their services.