

# PAY-FOR-PLAY: AN AGE-OLD STRUGGLE FOR APPROPRIATE REFORM IN A CHANGING LANDSCAPE BETWEEN EMPLOYER AND EMPLOYEE

RYAN VANDERFORD\*

## I. INTRODUCTION

College athletics are big business. In 2012, the National Collegiate Athletic Association (“NCAA”) reported \$871.6 million in revenue.<sup>1</sup> In the 2012–13 fiscal year, the University of Alabama’s Athletic Department alone made \$143.4 million, combining proceeds from ticket sales, donations to the athletic department, media rights, branding, and numerous other revenue streams.<sup>2</sup> Meanwhile, a recent study found that a college football player at the University of Texas is worth, on average, \$578,000,<sup>3</sup> which is more than fifteen times the amount the University of Texas actually spends on each football player at the school (\$37,000).<sup>4</sup> In men’s college basketball, potential venues for the “Final Four” national championship tournament must hold a minimum of 60,000 fans and provide at least 10,000 full-service hotel rooms to even be considered.<sup>5</sup> A team that reaches the Final Four wins glory, respect, and \$7.7 million

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\* Class of 2015, University of Southern California Gould School of Law; B.A. 2012, University of Colorado, Boulder. The author would like to thank his parents, Tom and Madelene Vanderford, for their support in furthering his education.

1. NCAA, *2012-13 Financial Statement*, NCAA.ORG, (last updated Feb. 13, 2013), available at [http://www.ncaa.org/sites/default/files/NCAA\\_FS\\_2012-13\\_V1%20DOC1006715.pdf](http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf).

2. Brian Leigh, *Alabama Athletics Report \$143.4 Million in Revenue for 2012-13 Year*, BLEACHERREPORT.COM (Oct. 22, 2013), available at [http://bleacherreport.com/articles/1821041-alabama-athletics-report-1434-million-in-revenue-for-2012-13-year?utm\\_source=twitter.com&utm\\_medium=referral&utm\\_campaign=programming-national](http://bleacherreport.com/articles/1821041-alabama-athletics-report-1434-million-in-revenue-for-2012-13-year?utm_source=twitter.com&utm_medium=referral&utm_campaign=programming-national).

3. Cork Gaines, *The Average University of Texas Football Player is Worth \$578,000*, BUSINESSINSIDER.COM (Sept. 24, 2013), available at <http://www.businessinsider.com/chart-the-average-university-of-texas-football-player-is-worth-578000-2013-9>.

4. *Id.*

5. Matt Norlander, *NCAA Announces Bidding Has Begun for Future Final Fours*, CBSSPORTS.COM (Sept. 19, 2013, 10:57 AM), available at <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/23731042/ncaa-announces-bidding-has-begun-for-future-final-fours>.

dollars for its conference over the next six years.<sup>6</sup> College athletics figures are even the regular recipients of major sponsorship deals—Nike pays Michigan State basketball coach Tom Izzo \$400,000 a year under a shoe and apparel contract.<sup>7</sup> In sum, major college football and basketball can hardly be considered amateur athletics.

Many people are responsible for the business of college football and basketball. Executives at the NCAA and the respective conferences negotiate television deals, apparel contracts, and sponsorships. High-ranking officials at NCAA member institutions wine and dine wealthy boosters, make the game day atmosphere fun and exciting, and make sure the necessary infrastructure exists for successful athletic competition. The coaches work countless hours, seemingly immune to the stress and pressure of the job, in order to prepare their teams. All of these people are compensated, many handsomely, for their contributions to the business of college athletics. Then there are the players who show up for practice, workouts, and games. In return, these “student-athletes,” receive an annual scholarship renewable by coaches, which includes tuition, fees, room, board, and books.<sup>8</sup> As the business of college athletics continues to grow exponentially, more and more attention is directed towards the disparity between the revenue generated and what the players receive as compensation.

This is not the first time others have taken advantage of those who present entertainment on the field, court, or rink. It is definitely not the first time an employer has tried to keep employee compensation as low as possible. Labor history reveals a long-standing pattern of arguments surrounding the pay-for-play controversy. This Note will argue that college athletes in revenue-generating sports should be fairly compensated. Charting the history of labor law, this Note will outline various arguments and mechanisms to apply in order to see pay-for-play to fruition. Part II will explore the history of the NCAA and the creation of the term “student-athlete.” Part III will return to the history of labor law in order to find comparable themes and workable mechanisms that proponents of pay-for-

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6. Chris Smith, *The Money Behind the NCAA Final Four*, FORBES.COM (Apr. 1, 2013, 10:58 AM), available at <http://www.forbes.com/sites/chris-smith/2013/04/01/the-money-behind-the-ncaa-final-four/>.

7. Matthew Kish, *5 Examples of How Nike, Adidas Own College Athletics*, BIZJOURNAL.COM (Aug. 30, 2013, 7:13AM), [http://www.bizjournals.com/portland/blog/threads\\_and\\_laces/2013/08/five-surprises-ncaa-nike-adidas-contract.html?page=all](http://www.bizjournals.com/portland/blog/threads_and_laces/2013/08/five-surprises-ncaa-nike-adidas-contract.html?page=all).

8. Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal and Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 56 (2000).

play can employ in order to achieve fair compensation. Part IV will analyze policy justifications both for and against the payment of college athletes in revenue-generating sports. Finally, Part V will discuss the implementation of a pay-for-play system.

## II. THE “STUDENT-ATHLETE” AND THE NCAA

The NCAA was created in order to combat a crisis in college football around the turn of the twentieth century.<sup>9</sup> Prompted by an alarming number of deaths, in 1906, President Theodore Roosevelt gathered a collection of officials from a few schools to act as a regulatory body for college football.<sup>10</sup> Specifically, the NCAA’s initial function was to develop standardized rules for college football to curb the number of deaths and injuries among its participants.<sup>11</sup> President Roosevelt also noted that the NCAA would serve a secondary purpose in ensuring “no student shall represent a college or university in any intercollegiate game . . . who has at any time received . . . money, or any other consideration.”<sup>12</sup>

As college football grew during the first half of the nineteenth century, so did the NCAA.<sup>13</sup> Gradually, the NCAA began to form rules committees and conduct national championships for more sports, such as track and field, basketball, and hockey. Initially, the NCAA’s lack of enforcement mechanisms meant that schools were allowed to operate however they wished with regard to the amateurism principle identified by President Roosevelt. The NCAA did not wield any real power until 1946, when a large group of World War II veterans, spurred by the G.I. Bill, flooded the college football talent market, creating a recruiting free-for-all.<sup>14</sup> In the wake of the aggressive and increasingly expensive recruiting tactics that followed this influx of talent, a number of prominent NCAA schools created the “Principles of Conduct of Intercollegiate Athletics.”<sup>15</sup> The

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9. See Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 212 (2012).

10. There were 18 football related deaths among Ivy League schools in 1905. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 213.

15. *Id.*

result was a ringing endorsement of the NCAA's amateurism rules coupled with an effective mechanism to enforce them.<sup>16</sup>

In spite of this success, the NCAA had encountered a problem.<sup>17</sup> In 1953, a football player at the University of Denver sued the university, claiming the university was obligated to provide workers' compensation for his injuries sustained while playing football.<sup>18</sup> The Colorado Supreme Court held that the player was an "employee" within the meaning of Colorado's workers compensation statute.<sup>19</sup> The NCAA was stunned, and its response was swift. In a clear effort to shift the characterization of players away from an "employee" status, the NCAA coined the term "student-athlete."<sup>20</sup> The NCAA required the use of the term, and "embarked on [a] long, fervent public relations campaign to persuade the public that these athletes [were] students, not employees."<sup>21</sup> "Student-athlete" soon became firmly entrenched in the landscape of college sports, and is still in prevalent use today.<sup>22</sup> Walter Byers, NCAA Executive Director at the time the term was adopted, reflected years later:

[The] threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts. [To address that threat, w]e 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.<sup>23</sup>

In 1956, three years after *University of Denver v. Nemeth*, the NCAA endorsed full scholarships as compensation for athletic services.<sup>24</sup> Such scholarships were at issue before the California Court of Appeals in *Van Horn v. Industrial Accident Commission*.<sup>25</sup> In *Van Horn*, a football player

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16. Following the inception of "Principles of Conduct of Intercollegiate Athletics" came the "Sanity Code," which was "an assemblage of rules on amateurism, eligibility, and financial aid, coupled with an unprecedented mechanism to enforce those rules," which was voted into the NCAA constitution in 1948. *Id.* at 214.

17. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83 (2006).

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

19. *Id.*

20. McCormick & McCormick, *supra* note 17, at 84.

21. *Id.* at 84–85.

22. *Id.* at 84.

23. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

24. McCormick & McCormick, *supra* note 17, at 84.

25. *Id.* at 85.

on scholarship was killed in a plane crash while returning from a game with his team.<sup>26</sup> The court held that the players' widow was allowed to collect death benefits under California's workers' compensation law because there was a valid contract between the football player and the university "in which a scholarship served as compensation for athletic services."<sup>27</sup>

Once again, the NCAA was sent reeling by a state court decision.<sup>28</sup> To ensure such an employee contract would not be found again, while preserving universities' ability to offer renewable one-year scholarships that closely resembled pay-for-play stipends, the NCAA encouraged its member universities to include the following clause in their athletic scholarship agreements with players: "This award is made in accordance with the provisions of the Constitution of the NCAA pertaining to the principles of amateurism, sound academic standards, and financial aid to student athletes."<sup>29</sup> The move worked.<sup>30</sup> Since *Nemeth* and *Van Horn*, the NCAA has successfully hidden behind the term "student-athlete" and the amateurism principle, obscuring "the reality of the university-athlete employment relationship . . . to avoid universities' legal responsibilities as employers."<sup>31</sup> The following fifty-plus years have seen the profits of the NCAA and its member institutions skyrocket, resulting in part from a "vigorous defense and preservation of this myth."<sup>32</sup>

### III. A HISTORY OF LABOR LAW

The history of American labor law can be studied as a three hundred-year-old debate over the relationship between employers and employees.<sup>33</sup> This national debate has seen issues such as freedom of contract, substantive due process, and paternalism, dictate the law until cataclysmic events spurred change. Those changes have been embodied in legal mechanisms, including the Sherman Antitrust Act ("Sherman Act") and the National Labor Relations Act ("NLRA"), that have affected labor law structurally and in practice. On many occasions, laborers have successfully employed those mechanisms to win important rights. There have also been

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26. *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172–73 (Ct. App. 1963).

27. *Id.* McCormick & McCormick, *supra* note 17, at 85.

28. *See id.* at 85.

29. *See id.* at 85–86.

30. *See id.* at 86.

31. *See id.*

32. *See id.*

33. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L. J. 1509, 1512 (1981).

instances in which organized labor has failed in the application of those mechanisms in court.<sup>34</sup> On such occasions, employees have still been able to successfully change the law on the ground.<sup>35</sup> In comparing the “student-athlete” conundrum to previous similar situations, it appears that the changed scenery of major college football and basketball means that the days of the “student athlete” may be numbered.

#### A. FREEDOM OF CONTRACT & SUBSTANTIVE DUE PROCESS

In the colonial era, the relationship between employer and employee was primarily governed by statute.<sup>36</sup> Those who refused to work at the statutory rates were considered criminals and punished.<sup>37</sup> As the eighteenth century drew to a close, this antiquated system was replaced with a more modern approach in which employees bargained with employers to set a price for their labor.<sup>38</sup> This change ushered in the age of “freedom of contract” and “substantive due process,” which lasted until 1937.<sup>39</sup>

[T]he wage contract was redefined to be a private arrangement between two individuals—a seller and a buyer of a service—not amenable to legislative intervention. The transaction, in this view, was no different from any other transaction between private individuals, and the role of law was merely to facilitate the transaction and to provide remedies should either side fail to perform. The view culminated in the case of *Lochner v. New York*,<sup>40</sup> in which the Supreme Court held that it was a violation of due process for a state to pass a law regulating maximum hours of work.<sup>41</sup>

In *Lochner* and a long line of other similar cases, employers argued that “the right of employers and workers to negotiate wages, hours, and working conditions” was guaranteed by the “due process clause of the Fourteenth Amendment, which says that no state shall ‘deprive any person of life, liberty, or property without due process of law.’”<sup>42</sup> Proponents of this theory argued that one’s labor was property “which a worker had a

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34. See Susan Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 349 (1998).

35. See *id.* at 35–55.

36. Van Wezel Stone, *supra* note 33.

37. EILEEN BORIS AND NELSON LICHTENSTEIN, MAJOR PROBLEMS IN THE HISTORY OF AMERICAN WORKERS 19–20 (2003).

38. See FOSTER RHEA DULLES & MELVYN DUBOFKY, LABOR IN AMERICA: A HISTORY 21 (1984).

39. See Van Wezel Stone, *supra* note 33, at 1512.

40. *Lochner v. New York*, 198 U.S. 45 (1905).

41. Van Wezel Stone, *supra* note 33, at 1512. See, e.g., *Millett v. People*, 117 Ill. 294 (1886).

42. NANCY WOLOCH, MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS 12 (1996).

right to sell to an employer ([proponents] often framed their arguments in terms of the employee's rights)." Under this theory, legislative attempts to curb abusive labor practices with regulations were held as interfering with employees' constitutional right to due process.<sup>43</sup> Critics called this theory a "legal fiction," arguing that in reality, "workers lacked the power to determine the conditions of their employment" because "employers and employees did not operate from positions of equal strength."<sup>44</sup>

With the severity of the Great Depression, public support grew for advancing the protection and welfare of employees. The election of Franklin Roosevelt ushered in a time of dramatic change that saw the creation of powerful government agencies, the enactment of the NLRA, and a change in the makeup of the Supreme Court. In *West Coast Hotel Co. v. Parrish*, the Supreme Court acknowledged the fallacy rooted in the freedom of contract theory.<sup>45</sup> In light of the "recent economic experience," the Court recognized that the "exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenseless against the denial of a living wage, is not only detrimental to their health and wellbeing, but casts a direct burden for their support upon the community."<sup>46</sup>

#### B. PATERNALISM

Employers did not exclusively employ the law in their fight to keep expenditures on employees down. Many promoted the doctrine of paternalism as an attempt to save face and money. Paternalism is commonly defined as "the interference . . . with another person, against their will, and justified by a claim that the person interfered with will be better off."<sup>47</sup> It is often used as a disguise for ulterior motives.<sup>48</sup> The practice of interfering with the rights of others in order to better their lives has been prevalent throughout American history. Paternalism was championed by many of the proponents of slavery who claimed that, because black people were inferior to white people, a state of bondage

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43. *Id.*

44. *Id.* at 13.

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See DULLES & SUBOFSKY, *supra* note 38, at 193.

46. *West Coast Hotel.*, 300 U.S. at 399.

47. M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1523 (2009).

48. *Id.* at 1526.

placed blacks in the best possible position.<sup>49</sup> Additionally, in the nineteenth and early twentieth centuries, the law even treated the unequal relationship between husband and wife paternalistically.<sup>50</sup>

The prime example of paternalism is that of “company towns.” Company towns were communities built, owned, and operated by a single company.<sup>51</sup> As rapid industrialization created tension between employers and employees beginning in the 1840s, companies began to build these company towns, in part, to have more direct control over their employees.<sup>52</sup> In these towns, the company provided everything for its employees: “homes, stores, parks, roads, entertainment, medical clinics, and on and on—all of which were owned by the business enterprise.”<sup>53</sup>

In 1880, George Pullman, a Chicago industrialist and owner of the Pullman Company, began construction on a company town near Chicago, Illinois in an effort to raise the standard of living of his employees, as well as solve the company’s labor problems.<sup>54</sup> In addition to its many residences, the town contained retail stores, a school, several parks, a church, paved streets, and an artificial lake.<sup>55</sup> Unsurprisingly, the company exercised an excessive amount of control in the management of the town.<sup>56</sup> One newspaperman observed:

A stranger arriving at Pullman puts up at a hotel managed by one of Mr. Pullman’s employees, visits a theater where all the attendants are in Mr. Pullman’s service, drinks his water and uses his gas works supply, hires one of his outfits from the manager of Mr. Pullman’s livery stable, visits a school in which the children of Mr. Pullman’s employees are taught by other employees, gets a bill charged at Mr. Pullman’s bank, is unable to make a purchase of any kind save from some tenant of Mr. Pullman’s, and at night is guarded by a fire department every member of which from the chief down is in Mr. Pullman’s service.<sup>57</sup>

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49. Ariela Gross, *Slavery, Anti-Slavery and the Coming of the Civil War*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOL. II 280, 286 (2008).

50. See NANCY F. COTT, PUBLIC VOWS 7 (2000).

51. Henderson, *supra* note 47, at 1535.

52. See *id.* at 1536.

53. *Id.* at 1535.

54. Stanley Buder, *The Model Town of Pullman: Town Planning and Social Control in the Gilded Age*, J. AM. INST. PLANNERS, 33:1, 2 (1967).

55. *Id.* at 3.

56. See *id.* at 6.

57. *Id.* at 7.

The company tried to control all aspects of its employees' lives, including their behavior.<sup>58</sup> Resident-employees "were expected to have proper manners, morals and appearance."<sup>59</sup> Employees could only rent their residences, and the company could void the leases with ten days' notice as a means of enforcement of its policies.<sup>60</sup> The beginning of the end for the Pullman experiment was in 1893, when a severe depression made already high rents untenable for resident-employees.<sup>61</sup> Conditions worsened as a violent strike brought about the intervention of U.S. troops.<sup>62</sup> In 1897, the town was sold in compliance with a court order.<sup>63</sup> Ironically, or perhaps, inevitably, "the model town intended as a solution to industrial and urban problems had become identified with the century's worst labor disturbance."<sup>64</sup>

On the surface, employers looked at towns like Pullman "as visions for a new way of improving social welfare."<sup>65</sup> Many thought that the benevolence demonstrated by employers such as George Pullman created "social progress" and "upliftment."<sup>66</sup> However, there were other motives on employers' minds beyond progress for the common employee, many of which centered on increasing profitability. Company towns helped recruit employees and reduce turnover by making it harder for an employee to simply quit his job and leave.<sup>67</sup> Also, at least theoretically, the towns would eventually pay for themselves over time as employees paid for rents, amenities, goods, and services, all of which went to the company. As the nineteenth century drew to a close with a series of depressions, Congress began to look negatively on the attempts of wealthy industrialists to control every facet of their business, from their employees to the means of production. Accordingly, Congress enacted a statute designed to curb such monopolistic practices.

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58. *Id.* at 6.

59. *Id.*

60. *Id.*

61. *Id.* at 8.

62. *Id.*

63. *Id.*

64. *Id.*

65. Henderson, *supra* note 47, at 1538.

66. *Id.*

67. For example, if an employee were to quit, the company would most likely void his lease. *See id.* at 1537.

## C. THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act was enacted in 1890 in response to a depressed agricultural sector, which was thought to be caused by inflation and monopolies.<sup>68</sup> The act sought to relieve small farmers who were upset at large railroad corporations for setting extremely high railroad rates that the farmers had no choice but to pay.<sup>69</sup> Railroads were not the only monopolies subject to the Sherman Act.<sup>70</sup> Flourishing industrial trusts of steel, oil, and finance, were also targets of the Act.<sup>71</sup>

The Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”<sup>72</sup> As the common law around the Act has evolved, courts have come to prohibit only those contracts or combinations that “unreasonably” restrict competition.<sup>73</sup> Although the primary purpose of the Act was to break up large monopolies in order to protect consumer welfare,<sup>74</sup> “employees, like consumers, are entitled to the protections of the Sherman Act.”<sup>75</sup>

*1. The Advent of Free Agency in Professional Sports—Curt Flood, the Reserve Clause, and Major League Baseball*

Baseball was the first sport in which unionization brought about significant gains for athletes.<sup>76</sup> Before the 1950s, players attempted to organize four times with floundering success, due in part to domination of union leadership by team owners.<sup>77</sup> However, after the MLBPA was created in 1954,<sup>78</sup> baseball players collectively won one of the most important victories of all time.<sup>79</sup>

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68. George J. Stigler, *The Origin of Sherman Act*, in *POLITICAL ECONOMY OF THE SHERMAN ACT: FIRST ONE HUNDRED YEARS* 32 (Sullivan Thomas ed., 1991).

69. *See id.* at 32–33.

70. *See id.* at 32.

71. *See id.*

72. 15 U.S.C. § 1 (2012).

73. Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 *NORTE DAME L. REV.* 206, 213 (1990).

74. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, in *POLITICAL ECONOMY OF THE SHERMAN ACT: FIRST ONE HUNDRED YEARS* 39 (Sullivan Thomas ed., 1991).

75. Goldman, *supra* note 73, at 218.

76. PAUL D. STAUDO HAR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING* 15 (1989).

77. *Id.* at 25.

78. JAMES B. DWORKIN, *OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING* 27 (1981).

79. *See* STAUDO HAR, *supra* note 76, at 44.

The reserve clause in baseball essentially dictated that once a player signs a contract with a team, he became property of the club for as long as the owners wanted.<sup>80</sup> Utilizing this clause, baseball owners were able to avoid paying high salaries to players, no matter how successful they were on the field.<sup>81</sup> Nearly all contracts were for only one year.<sup>82</sup> This left players with almost no job or pay security. It also meant that players had no other options because there was only one buyer for their services.<sup>83</sup> Even if a player retired or was severely injured, resulting in a one to two year hiatus, he was bound to the last club that he had a contract with if he decided to make a comeback.<sup>84</sup> In 1915, an up-and-coming baseball league called the Federal League sued Major League Baseball, alleging the agreements that governed their leagues were illegal restraints of trade barred by the Sherman Act.<sup>85</sup> In *Federal Baseball Club of Baltimore, Inc. v National League of Professional Clubs*, decided in 1922, the Supreme Court held that Major League Baseball was exempt from the Sherman Act because playing exhibition games did not constitute trade or commerce, leaving the reserve clause intact.<sup>86</sup>

This was the way baseball operated until the 1969 trade of Curt Flood from the St. Louis Cardinals to the Philadelphia Phillies. Flood, who was not happy about the trade, decided to challenge the reserve clause once again after assurances from Marvin Miller, the player's union executive director, that the union would stand behind him. Somewhat surprisingly, the Supreme Court abided by the *Federal Baseball Club* precedent because of the absence of clear congressional intent to the contrary.<sup>87</sup> Flood lost his case and Major League Baseball's antitrust exemption was preserved.<sup>88</sup> The disappointing outcome only solidified the players' determination to get rid of the hated reserve clause. This sentiment fueled a players' strike over

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80. *Id.* at 34.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Clubs*, 259 U.S. 200 (1922); Seabury, *supra* note 34, at 339.

86. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 200.

87. Seabury, *supra* note 34, at 349.

88. *Flood v. Kuhn*, 407 U.S. 258 (1972). Since *Federal* was decided "and the Flood case was initiated, the law had changed in several areas. Primarily, the Supreme Court decided that other sports were not entitled to exemption from antitrust legislation." "The Court admitted that the game of baseball involved interstate commerce and, as such, normally would be covered by the Sherman Act." *Id.*

pension plans during the 1972 season, which was sparked by heated rhetoric from the owners.<sup>89</sup> After the 1974 season, two pitchers, Andy Messersmith and Dave McNally, failed to come to terms with their respective teams and subsequently filed a grievance with the support of Marvin Miller and their fellow players.<sup>90</sup> The grievance outlined a contract theory claiming the reserve clause meant that “if a player played one season under his old contract after such contract had expired, he had played out his ‘reserve year’ and was then a [free agent].”<sup>91</sup> This time, however, the case was decided by an arbitrator, rather than the courts, because of a clause in the 1970 collective bargaining agreement.<sup>92</sup> The arbitrator sided with the players, and baseball salaries were forever changed, to the benefit of professional athletes everywhere.<sup>93</sup>

## 2. *The NCAA and the Sherman Act*

Courts have twice ruled in favor of the NCAA on the legality of the NCAA’s restraints on payment of its “student-athletes.”<sup>94</sup> However, both decisions are untenable, as they relied on dicta found in a case that had nothing to do with the NCAA’s amateurism restrictions.<sup>95</sup> In *NCAA v. Board of Regents*, the Universities of Oklahoma and Georgia used the Sherman Act to challenge the NCAA’s control over football game television rights.<sup>96</sup> To illustrate a reasonable restraint on competition, the Supreme Court suggested in dicta that restraints on pay-for-play were necessary to further the NCAA’s essential purpose of amateurism.<sup>97</sup> Subsequently, two lower courts relied on the *Board of Regents* dicta in denying challenges to the NCAA’s amateurism restrictions.<sup>98</sup> The failure of those courts to come up with original reasoning means new challenges to the NCAA under the Sherman Act would not be frivolous and are currently occurring.

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89. “[W]e voted unanimously to take a stand . . . We’re not going to give them another goddamn cent.” *Id.*

90. *Id.* at 353.

91. *Id.*

92. *Id.*

93. *Id.*

94. Goldman, *supra* note 73, at 213–215.

95. *Id.* at 213.

96. *NCAA v. Board of Regents*, 468 U.S. 85, 92–93 (1984).

97. *Id.* at 102, 117, 120.

98. See *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *United States v. Walters*, 711 F. Supp. 1435 (N.D. Ill. 1989).

One of the basic requirements “for application of the Sherman Act is that the activity in question involve or affect interstate commerce.”<sup>99</sup> The NCAA restraints on competition easily satisfy this requirement.<sup>100</sup> Athletes are recruited nationally across state lines.<sup>101</sup> They play games all across the country, often on national television.<sup>102</sup> With the help of technology, tickets to games can be bought from almost anywhere.<sup>103</sup> The NCAA might argue that they are not involved in commerce at all because they are a nonprofit organization.<sup>104</sup> Although the NCAA is technically a nonprofit organization, it is still a commercial entity.<sup>105</sup> When the “NCAA and its member institutions, [present] amateur athletics to a ticket-paying, television-buying public, [they] are engaged in a commercial venture of far greater magnitude than the vast majority of ‘profit-making’ enterprises.”<sup>106</sup>

Under the Sherman Act, there are two ways to determine if a combination is illegal.<sup>107</sup> The “per se” rule recognizes that “there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable.”<sup>108</sup> Recent jurisprudence suggests that the NCAA would be able to avoid application of the per se rule.<sup>109</sup> Some success has been attained by former “student-athletes” in applying the alternative “Rule of Reason,” which “requires a consideration of the nature, purpose, and competitive effect of any challenged agreement before a decision is made about its legality.”<sup>110</sup> Under this analysis, “the restraint’s effect in a relevant market must be identified” and “the precompetitive justifications for the challenged practice must be analyzed.”<sup>111</sup>

The aforementioned success, the widely-publicized Ed O’Bannon lawsuit, is a pending class action against the NCAA involving former players challenging NCAA amateurism rules under the Sherman Act. In

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99. Goldman, *supra* note 73, at 215.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 216.

106. *Id.* at 217.

107. *See id.*

108. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

109. Goldman, *supra* note 73, at 221. *See, e.g., McCormack*, 845 F.2d at 1344; L.A. Mem. Coliseum Comm’n v. NFL, 726 F.2d 1381, 1390–98 (9th Cir. 1984).

110. Goldman, *supra* note 73, at 219.

111. *Id.* at 225.

October of 2013, a federal judge denied the NCAA's motion to dismiss.<sup>112</sup> In her order denying the motion, the federal judge acknowledged that, while the Supreme Court's ruling in *NCAA v. Board of Regents* "gives the NCAA 'ample latitude' to adopt rules preserving 'the revered tradition of amateurism in college sports' . . . it does not stand for the sweeping proposition that student-athletes must be barred . . . from receiving any monetary compensation for the commercial use of their names, images and likenesses."<sup>113</sup> The federal judge noted that the business of college sports has changed dramatically since *NCAA v. Board of Regents*.<sup>114</sup> She concluded that the O'Bannon plaintiffs' "allegations are sufficient to state a Sherman Act claim."<sup>115</sup>

On March 5, 2014, former West Virginia running back Shawne Alston filed a proposed class action lawsuit against the NCAA and five major conferences, alleging violation of the Sherman Act "by agreeing to cap the value of an athletic scholarship at less than the actual cost of attending the school."<sup>116</sup> The lawsuit alleges "Alston had to take out a \$5500 loan to cover the difference between his scholarship and actual costs of attendance."<sup>117</sup>

Even if the courts eventually rule in line with their precedent, there is still hope. "[The motion to dismiss] ruling increases the likelihood that wholesale change will occur in college sports . . . It's like Major League Baseball when free agency came along," said Rob Carey, a lawyer representing one of the ex-college athletes participating in the Ed O'Bannon suit.<sup>118</sup> Major League Baseball players also failed in court with their attempt to win free agency through application of the Sherman Act, but their sustained efforts were rewarded as they finally abolished the reserve clause through arbitration.<sup>119</sup> In continuing to fight for fair

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112. Tom Farrey, *No Past Damages for College Players*, ESPN.COM (Nov. 9, 2013, 10:01 AM), [http://espn.go.com/espn/otl/story/\\_/id/9949204/players-seek-future-revenue-ncaa-pursue-damages](http://espn.go.com/espn/otl/story/_/id/9949204/players-seek-future-revenue-ncaa-pursue-damages).

113. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996 (N.D. Cal. 2013) (order denying motion to dismiss).

114. *Id.* at 1009.

115. In coming to this conclusion, the federal judge abided by the correct motion to dismiss standard, taking all of the plaintiff's facts to be true as plead. In doing this, she found that the former student-athletes sufficiently identified a market and analyzed precompetitive justifications in plaintiff's favor. *Id.* at 1004.

116. AP, *Shawne Alston Suing NCAA, Others*, ESPN.COM (Mar. 6, 2014), [http://espn.go.com/college-football/story/\\_/id/10558893/ncaa-conferences-sued-scholarship-value](http://espn.go.com/college-football/story/_/id/10558893/ncaa-conferences-sued-scholarship-value).

117. *Id.*

118. Farrey, *supra* note 112.

119. Seabury, *supra* note 34, at 349.

compensation, current and former “student-athletes” can strive for a similar change by organizing and pushing for various measures, including alternative dispute resolution, which could bear valuable fruit in the future.

#### D. THE NATIONAL LABOR RELATIONS ACT AND NATIONAL LABOR RELATIONS BOARD

In March of 1933, Franklin D. Roosevelt addressed the nation with a promise of action to cope with the ongoing national emergency of the Great Depression.<sup>120</sup> “A host of unemployed citizens face the grim problem of existence, and an equally great number toil with little return,” and, “Only a foolish optimist can deny the dark realities of the moment . . . . Our greatest primary task is to put people to work.”<sup>121</sup> With Roosevelt in office, the federal government was finally ready to extend aid to labor.<sup>122</sup> Although the NLRA took several years to implement, “[a] basic understanding and sympathy for the rights of labor were nevertheless inherent in the emerging philosophy of the New Deal.”<sup>123</sup> This New Deal philosophy meant that, for the first time in American history, a presidential administration would “make the welfare of industrial workers a direct concern of government and act on the principle that only organized labor could deal on equal terms with organized capital.”<sup>124</sup> It was out of this refusal to adhere to decades of the traditional labor rhetoric, with the dynamic release of energy that followed, that the National Labor Relations Act emerged.<sup>125</sup>

In 1935, the NLRA was passed, celebrating the principles of majority representation, collective bargaining, and the rejection of company-dominated unions.<sup>126</sup> The NLRA governs relations between employees and employers.<sup>127</sup> It states that “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.”<sup>128</sup>

The NLRA established the National Labor Relations Board (“NLRB”), which is charged with the administration of the NLRA. The

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120. DULLES & DUBOFSKY, *supra* note 38, at 255.

121. *Id.*

122. *Id.*

123. *Id.* at 255–56.

124. *Id.* at 256.

125. *Id.*

126. *Id.* at 262.

127. 29 U.S.C. 141 (2012).

128. *Id.*

NLRB is responsible for determining the appropriate unions and supervising elections for those unions. The NLRB has the authority to hear complaints regarding unfair labor practices, but it is not concerned with issues of substance (such as disputes over overtime, wages, or other conditions of work). The NLRA governs only private companies.<sup>129</sup> Nonetheless, most of the state statutes governing the relationship between public employers and employees mirror the NLRA and its interpretations by the NLRB and various courts.<sup>130</sup>

The problem with the NLRA is that it does not cover every single grouping of workers.<sup>131</sup> The NLRB decides whether certain groups of workers are covered by the NLRA as “employees.”<sup>132</sup> The battle over the classification of college athletes as “student-athletes” or “employees” is crucial to the fight for fair compensation. Recognition of college athletes as employees by the NLRB would be an enormous step that could open many doors.

### *1. The Graduate Assistant Labor Movement*

There already has been a concerted effort to organize under the NLRA among valuable students at universities across the country.<sup>133</sup> However, this movement has not been made by college athletes. For more than half a century, graduate assistants have been fighting for their right to collectively bargain under the NLRA.<sup>134</sup> Graduate assistants are graduate students who are working towards their advanced degree while simultaneously being employed by the university as teaching assistants or research assistants.<sup>135</sup> Generally, teaching assistants are responsible for “teaching lecture classes or for leading small discussion sections for larger lecture classes taught by faculty members” while research assistants “primarily aid professors within a particular department with field and laboratory research.”<sup>136</sup>

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129. McCormick & McCormick, *supra* note 17, at 88.

130. *Id.* at 88–89.

131. Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 HOFSTRA LAB. & EMP. L.J. 753, 757 (2004).

132. *Id.* at 757–58.

133. *See id.* at 754–60.

134. *Id.* at 758.

135. *Id.*

136. *Id.* at 758–59.

Because of their wavering status between student and employee, graduate assistants have had a difficult time organizing under the NLRA.<sup>137</sup> Universities are at least partially responsible for this, adamantly fighting against organization efforts because graduate assistants have served “as a pool of cheap labor for universities.”<sup>138</sup> In fact, some hold the opinion that “universities would not be able to function without the use of graduate assistants . . . to supplement their decreasing full-time faculties.”<sup>139</sup>

Similar to the transformation of college football and basketball over the last half century, universities have undergone a dramatic reorganization over the last forty years.<sup>140</sup> Universities have become akin to enormous corporations, as opposed to the community of scholars they once were.<sup>141</sup> Instead of “pursuing the romantic vision of the classroom as an encounter between seasoned scholars and eager young minds, administrators across the country have radically shifted teaching duties away from regular faculty and onto the shoulders of graduate students.”<sup>142</sup> The numbers show why: “In 1999, an average full-time professor earned \$71,000 per year, while graduate student teachers earned between \$5,000 and \$20,000.”<sup>143</sup> It has been estimated that the use of graduate teaching assistants at Yale has saved the university over \$5 million dollars per year.<sup>144</sup> The gap in compensation between full-time professors and graduate assistants has occurred while graduate assistants have increasingly been given more responsibility both in and out of the classroom.<sup>145</sup> Moreover, graduate assistants help institutions compete against other universities for undergraduate applications by providing their inexpensive services.<sup>146</sup>

The influx in the use of graduate assistants seems on track to continue into the future for a multitude of reasons.<sup>147</sup> For one, university officials are now under immense pressure to streamline and promote their research departments (staffed with plenty of research assistants) in an effort to sell

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137. *See id.* at 757–76.

138. *Id.* at 755.

139. *Id.*

140. Gordon Lafer, *Graduate Student Unions Fight the Corporate University*, DISSENT 63 (2001).

141. *Id.*

142. *Id.*

143. *Id.* at 553.

144. *Id.* at 65.

145. *See id.* at 63–64.

146. Falasco & Jackson, *supra* note 131, at 771.

147. Lafer, *supra* note 140, at 64.

the patents those departments generate to the private sector.<sup>148</sup> For the university, the patents represent extremely large profits on a scale that had never been contemplated before.<sup>149</sup> For the private sector, university research departments provide “the availability of thousands of graduate students who are simultaneously among the nation’s most highly trained and most poorly paid technology workers.”<sup>150</sup> The advent of online courses offered by universities also present an opportunity where graduate assistants could play a central role.<sup>151</sup> It is safe to assume that if “graduate assistants are instrumental to the delivery of large lecture classes on campus, their importance will be multiplied when popular courses are marketed to tens of thousands of students around the globe.”<sup>152</sup>

It was under these changed circumstances that the NLRB decided *New York University* in 2000. Applying the common law “right of control” test, the board held that “graduate assistants who are currently enrolled as graduate students, working towards a graduate or post-graduate degree, while simultaneously serving as teaching or research assistants, are employees.”<sup>153</sup> The board reasoned that graduate assistants “perform services under the control and direction of the [University], for which they are compensated.”<sup>154</sup> The board further reasoned that the relationship the university and graduate assistants shared was “indistinguishable from a traditional master-servant relationship.”<sup>155</sup> The board rebuffed the argument that graduate assistants do not have a traditional economic relationship with their employer by stating, “the working relationship with the employer closely paralleled the traditional economic relationship between the faculty and the institution.”<sup>156</sup>

Unfortunately, graduate assistants did not enjoy the success they had won in *New York University* for long.<sup>157</sup> In 2004, the board reversed its position in *Brown University*, holding graduate assistants were not “employees” within the meaning of the NLRA.<sup>158</sup> The Board reasoned that

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148. *Id.*

149. *Id.*

150. *Id.*

151. Lafer, *supra* note 140, at 64. *Id.*

152. *Id.* at 553–54.

153. Falasco & Jackson, *supra* note 131, at 770; *See New York Univ.*, 332 N.L.R.B. 1205, 1205–06 (2000).

154. *New York Univ.* at 1206.

155. *Id.*

156. Falasco & Jackson, *supra* note 131, at 771.

157. *See Brown Univ.*, 342 N.L.R.B. No. 42 (2004).

158. *Id.* at 1–2.

graduate assistants “are primarily students and their work responsibilities are secondary to their academic responsibilities.”<sup>159</sup> Importantly, *Brown* identified four factors to assess student’s employee/student status: (i) the student’s status as a student, (ii) the role of the student’s work in education, (iii) the student’s relationship with the faculty, and (iv) the financial support the student receives to attend the institution.<sup>160</sup> Thus, *Brown* stands for the proposition that students are not employees under the NLRA if “their relationship with the universities is primarily academic and not economic.”<sup>161</sup>

The Board’s reasoning is tenuous.<sup>162</sup> A large part of the decision was based on the majority’s fears of what collective bargaining would do to academic freedom.<sup>163</sup> This was an argument that was squarely rejected in *New York University* through looking at similar instances of collective bargaining in which employee status had little to no effect on academic freedom.<sup>164</sup>

Politics can help explain the NLRB’s sudden reversal in *Brown*. Beginning with the Reagan administration in the early 1980s, “Presidents have placed greater emphasis on a[n] [independent-agency head’s] commitment to the President’s agenda.”<sup>165</sup> Following the precedent established by President Ronald Reagan, President Bill Clinton’s nominees were ideological choices who sat on the Board when it held that graduate students were employees in *New York University*.<sup>166</sup> President George W. Bush’s nominees identified with Republicans, and sat on the *Brown University* Board when it overruled *New York University*.<sup>167</sup> Recent developments have pointed to positive change once again.<sup>168</sup> Some regional director decisions have given graduate assistants hope, and the

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159. Ryan Patrick Dunn, *Get a Real Job! The National Labor Relations Board Decides Student Workers at Private Universities Are Not “Employees” Under the National Labor Relations Act*, 40 *NEW ENG. L. REV.* 851, 853 (2006).

160. See McCormick & McCormick, *supra* note 17, at 121.

161. *Id.* at 130.

162. See Peter Schmidt, *NLRB Official’s Ruling Bolsters Drive to Unionize NYU Teaching Assistants*, *CHRONICLE.COM* (June 20, 2011), [http://chronicle.com/article/NLRB-Officials-Ruling/127958/?sid=pm&utm\\_source=pm&utm\\_medium=en](http://chronicle.com/article/NLRB-Officials-Ruling/127958/?sid=pm&utm_source=pm&utm_medium=en).

163. *Brown Univ.*, 342 NLRB 483 (2004).

164. *New York Univ.*, 332 NLRB 1205. (2000). See also Dunn, *supra* note 159, at 875.

165. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B.U.L. REV.* 459, 492 (2008).

166. See *id.* at 482–83.

167. See *id.* at 496.

168. See Schmidt, *supra* note 162.

reconfiguration of the NLRB under President Barack Obama has led to optimism among unionization supporters.<sup>169</sup>

## 2. *The NCAA and the NLRA*

Looking at the situation objectively, scholarship athletes in revenue-generating sports are employees under the NLRA.<sup>170</sup> If “student-athletes” are to be recognized under the NLRA, they must meet two tests: (i) the common law “right of control” test and (ii) the statutory test established by the NLRB in *Brown University*.<sup>171</sup> The relationship between universities and players on scholarship at revenue-generating schools satisfies both tests.<sup>172</sup>

To satisfy the “right to control” test, a relationship must exist where the employer’s control over the employee includes control of both the result and the means to that result.<sup>173</sup> As the business of college sports has grown, universities have gone to great lengths to compete for championships, which bring in massive amounts of money. The increase in competition has led NCAA-member institutions to exercise an extraordinary amount of control over their “student-athletes.”<sup>174</sup>

A college football player’s time commitment during the week of a home game in the fall amounts to around fifty-three hours.<sup>175</sup> This does not take into account the time “student-athletes” spend in class, studying, or doing homework.<sup>176</sup> Away games require an even greater amount of time due to travel.<sup>177</sup> Arriving late to practice, meetings, study hall, or any other team activity is not permitted, and is punished with extra workouts or suspension.<sup>178</sup> Universities control how many units “student-athletes” take, how many classes they can miss, and even sometimes, where they sit in class.<sup>179</sup> During the offseason, including summer, universities continue to exercise an enormous amount of control.<sup>180</sup> Football players are required to attend workouts, team meetings, spring and summer practices or “camps”,

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169. *Id.*

170. McCormick & McCormick, *supra* note 17, at 86.

171. *Id.* at 89–97.

172. *See id.* at 97–156.

173. *See id.* at 90–91.

174. *See id.* at 97.

175. *Id.* at 99.

176. *Id.* at 100.

177. *Id.* at 101.

178. *Id.* at 100.

179. *Id.* at 101.

180. *Id.*

and study hall.<sup>181</sup> A team participating in a bowl game demands 262 days of a college football player, compared to the 250 days an average American spends at work every year.<sup>182</sup> Universities also exercise a high degree of control over college basketball players.<sup>183</sup> During the season, from October to March, players spend thirty hours a week wholly devoted to basketball.<sup>184</sup> During the offseason, players are required to attend meetings, study hall, and it is “‘understood’ that an athlete will practice on his own and lift weights, and that his failure to do so may result in [punishment].”<sup>185</sup>

One-year university scholarships act as compensation for “student-athletes” in return for their athletic services, satisfying another requirement for an employer-employee relationship under common law.<sup>186</sup> Universities exercise a high degree of control here too, strictly enforcing how players are compensated.<sup>187</sup> Acceptance of cash or other gifts is forbidden from non-family members.<sup>188</sup> These one-year scholarships provide players with food and shelter, further demonstrating how much “student-athletes” are economically dependent upon their universities.<sup>189</sup>

“Student-athletes” must also meet the NLRB’s statutory test, established by *Brown University*.<sup>190</sup> First, college football and basketball players’ status as students is questionable.<sup>191</sup> They spend a large majority of their time in furtherance of their athletic performance, rather than “engaged in learning, education, and academic inquiry.”<sup>192</sup> Many college athletes that play football or basketball attend school with the unrealistic dream they will play professionally, and care little about what they learn.<sup>193</sup> Second, the services rendered by “student-athletes” are completely devoid of contributions to their education.<sup>194</sup> Their activities in the weight room, in

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181. *Id.* at 101–03.

182. *Id.* at 103–04.

183. *Id.* at 105.

184. *Id.* at 106.

185. *Id.* at 108.

186. *Id.* at 108–111.

187. *Id.* at 110.

188. *Id.* at 118.

189. *Id.* at 117–18.

190. *Id.* at 119. Student/employee status is determined by (i) the student’s status as a student, (ii) the role of the student’s work in education, (iii) the student’s relationship with the faculty, and (iv) the financial support the student receives to attend the institution.

191. *Id.* at 122.

192. *Id.*

193. *See id.* at 131.

194. *Id.* at 125.

meetings, on the field, and in the gym do little to further their education.<sup>195</sup> Third, the students' relationship with the academic faculty has nothing to do with the services they provide for the school.<sup>196</sup> Coaches, not academic faculty, supervise the athletes' services.<sup>197</sup> Further, it is the coach, not the academic faculty, who has the authority to renew a player's scholarships.<sup>198</sup> Finally, the financial support the student receives to attend the institution is more than mere financial aid; as previously discussed, the renewable scholarship acts as compensation for athletic services rendered.<sup>199</sup> The difference is demonstrated by comparing athletic scholarships to merit-based or need-based scholarships.<sup>200</sup> Scholarships for athletes are "granted only if the athlete provides athletic services, while merit-or need-based scholarships awarded to non-athletes require no such services in return."<sup>201</sup>

The statutory test also requires that the relationship between employer and employee be an economic one.<sup>202</sup> This is certainly the case for universities and "student-athletes."<sup>203</sup> The college football and basketball businesses are far from amateur, as demonstrated by the astronomical numbers associated with the sports.<sup>204</sup> Revenue-generating sports are highly commercial, and to a degree, professional.<sup>205</sup> Athletes "generate great wealth for their university-employers through their skill and effort," resulting in the creation of a "lucrative component of the sports entertainment industry."<sup>206</sup> After watching a nationally-televised college bowl game chock full of advertisements, where the winning team is awarded millions of dollars for the member schools of its conference, it is laughable to conclude that the players' relationship to the school is a non-economic one. Thus, the NLRB should hold that "student-athletes" in revenue-generating sports are employees under the NLRA, absent any political agenda.

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195. *See id.*

196. *Id.* at 126.

197. *Id.* at 125–26.

198. *Id.* at 126.

199. *Id.*

200. *Id.* at 128.

201. *Id.*

202. *Id.* at 130.

203. *Id.* at 131.

204. *See id.*

205. *Id.*

206. *Id.*

### 3. Athletes' Attempts at Organization

The NFLPA and NBPA represent future, present and retired pro-athletes in the NFL and NBA, respectively.<sup>207</sup> However, their representation of college athletes is far from adequate, due to an inherent conflict of interest. Thus, these unions have little incentive to fight for the rights of college athletes. The unions' voting membership consists of only current players, who are focused on maximizing their own gains, rather than those of future employees who will eventually compete for limited roster spots.<sup>208</sup>

In 2001, a group of UCLA football players launched the National College Players Association ("NCPA").<sup>209</sup> For most of its existence, the NCPA has consisted of a small, fragmented collection of lawyers and "student-athletes."<sup>210</sup> The NCPA has won a number of minor victories, but, until recently, it did not advocate for unionization.<sup>211</sup> The NLRB's decision in *Brown*, paired with the exceptionally hard task of organizing a large amount of collegiate players, explains why the NCPA has been reluctant to seek accreditation of players as employees under the NLRA.<sup>212</sup> However, just as highly publicized events have spurred change in the past, recent ineptitude of NCAA investigations combined with the industry's massive influx of revenue seems to have jumpstarted the wheels of change.

In the wake of controversies at the University of Miami, Texas A&M University, and Tennessee University, the NCPA has seen resurgence.<sup>213</sup> In

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207. See S.M. Oliva, *Why a College Football Players Union is Unlikely*, SATURDAYDOWNSOUTH.COM (Oct. 1, 2013, 10:51 AM), available at <http://www.saturdaydownsouth.com/2013/why-a-college-football-players-union-is-unlikely/>.

208. *Id.*

209. *About NCPA*, NCPA, <http://www.ncpanow.org/about/> (last visited Jan. 27, 2015).

210. Jon Solomon, *NCAA Protest: How the NCPA Became College Football Players' Leading Voice*, AL.COM, (Sept. 24, 2013, 12:27 PM), [http://www.al.com/sports/index.ssf/2013/09/how\\_the\\_national\\_college\\_playe.html](http://www.al.com/sports/index.ssf/2013/09/how_the_national_college_playe.html).

211. In 2008, the NCPA "helped win a . . . class-action lawsuit against the NCAA that led to a \$228 million settlement covering unmet educational expenses." *Id.*

212. *See id.*

213. NCAA took over four years to complete an investigation into the football and basketball programs that resulted in only a loss of twelve scholarships. Steve Elder, *After Long N.C.A.A. Inquiry, Miami Loses 12 Scholarships*, N.Y. TIMES, (Oct. 22, 2013), available at [http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html?\\_r=0](http://www.nytimes.com/2013/10/23/sports/miami-avoids-further-bowl-ban-in-ncaa-penalties.html?_r=0). Texas A&M quarterback Johnny Manziel was suspended for half of a game for selling his autograph for cash. See also Peter Berkes, *Johnny Manziel Briefly Suspended*, SBNATION.COM (Aug. 28, 2013), <http://www.sbnation.com/college-football/2013/8/28/4668634/johnny-manziel-suspended-texas-a-m>. NFL running back Arian Foster admitted to taking money from boosters while attending the University of Tennessee. See also Chip Patterson, *Arian Foster: 'I was getting*

September of 2013, twenty-eight college football players on three different teams wrote “APU” on their football gear for “All Players United,” a phrase coined by the NCPA.<sup>214</sup> The act made national headlines and brought even more attention to the “student-athlete” compensation controversy.

On January 28, 2014, the NCPA filed a petition with the NLRB on behalf of some Northwestern football players.<sup>215</sup> The potential organization, the College Athletes Players Association (“CAPA”), is backed by the United Steelworkers union.<sup>216</sup> While not seeking compensation for play yet, CAPA is pursuing increased medical benefits, further concussion research, expanded due process rights in regards to the annual scholarships, and improvement of graduation rates, among other things.<sup>217</sup> In a landmark opinion in March 2014, a NLRB official ruled Northwestern’s scholarship football players were “employees,” such that they had the right to form a union, workers compensation, insurance, and a possibly a larger cut of the profits made by the NCAA.<sup>218</sup>

Speculation abounds as to the meaning of the Northwestern attempt. Change is still a long way off. The NLRB’s litigation process is excruciatingly slow.<sup>219</sup> Even though the NLRB has certified Northwestern’s football players as “employees” eligible to form a union, the players would technically not be allowed to play NCAA football because of their “employee” status. This means a substantial amount of players at other schools must also file a petition with the NLRB in order for the movement to really garner traction. Yet, the attempt is significant in that it will allow official battle lines to be drawn with regard to the

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*money on the side’ at Tennessee*, CBSSPORTS.COM (Sept. 20, 2013), <http://www.cbssports.com/collegefootball/eye-on-college-football/23750851/arian-foster-i-was-getting-money-on-the-side-at-tennessee>.

214. Solomon, *supra* note 210. The three teams were Georgia, Georgia Tech, and Northwestern.

215. Jon Solomon, *Northwestern Football Players Try to Form Labor Union for College Athletes*, AL.COM (Jan. 28, 2014, 8:09 PM), [http://www.al.com/sports/index.ssf/2014/01/northwestern\\_football\\_players.html](http://www.al.com/sports/index.ssf/2014/01/northwestern_football_players.html).

216. *Id.*

217. *Id.*

218. Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES (Apr. 25, 2014), available at <http://www.nytimes.com/2014/04/26/sports/northwestern-football-players-cast-votes-on-union.html>.

219. See Jon Solomon, *5 Questions About Northwestern Football Players’ Attempt to Form a Union in College Sports*, AL.COM (Feb. 1, 2014, 7:10 AM), [http://www.al.com/sports/index.ssf/2014/02/5\\_questions\\_about\\_northwestern.html](http://www.al.com/sports/index.ssf/2014/02/5_questions_about_northwestern.html).

NLRA.<sup>220</sup> Additionally, it puts pressure on the NCAA by giving the issue staying power in the national spotlight.<sup>221</sup>

It is important to note that, in the wake of all this, the Judge in the Ed O'Bannon suit has ruled against the NCAA after a three-week trial in June 2014.<sup>222</sup> The ruling removes restrictions on the compensation “student-athletes” can receive for the use of their names, images, and likenesses.<sup>223</sup> Although the decision was a huge win for “student-athletes,” it does not affect any recruit in college before July 1, 2016.<sup>224</sup> Regardless, the ruling, paired with the NLRB decision to certify Northwestern football players as “employees,” demonstrates a shift in public sentiment that could mean that an enormous change to the college football and basketball landscape is at hand.

#### IV. FOR AND AGAINST

College football and basketball players in high revenue-generating sports deserve fair compensation. Presently, the reality of revenue-generating college athletics is inconsistent with the NCAA's amateurism ideal.<sup>225</sup> In 2012, the NCAA recorded a record \$71 million dollar surplus for the fiscal year.<sup>226</sup> Its total revenue for the year was \$872 million, \$504 million of which was distributed to its member schools and conferences.<sup>227</sup> Member schools of the Pacific 12 Conference will make \$30 million dollars a year over the next twelve years from television agreements with ESPN and Fox.<sup>228</sup> In 2009, the Southeastern Conference renegotiated its long-term television rights contract to the tune of \$3 billion over fifteen years.<sup>229</sup>

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220. *See id.*

221. *See id.*

222. *Judge Rules Against NCAA*, ESPN.COM, (Aug. 9, 2014, 6:20 PM), [http://espn.go.com/college-sports/story/\\_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case](http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case).

223. *Id.*

224. *Id.*

225. Hurst & Pressly, *supra* note 8, at 57.

226. Steve Berkowitz, *NCAA Had Record \$71 Million Surplus in Fiscal 2012*, USA TODAY (May 2, 2013, 8:58 AM), available at <http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/>.

227. *Id.*

228. Steve Berkowitz, *Pacific-12 Schools Will See Big Payday from TV Deals*, USA TODAY (May 21, 2012, 6:15 AM), available at <http://usatoday30.usatoday.com/sports/college/story/2012-05-20/Pacific-12-schools-will-see-big-payday-from-TV-deals/55095542/1>.

229. Steve Berkowitz, *SEC Revenue Set to Jump 50% with Playoff, New Playoff, New TV Deals*, USA TODAY (Jan. 16, 2013, 9:23 PM), available at <http://www.usatoday.com/story/sports/college/2013/01/16/sec-conference-money-increases/1836389/>.

The success of college football and basketball programs have had ancillary effects on universities. Similar to the effect graduate assistants have had on universities, studies have shown that winning football games “reduces acceptance rates and increases donations, applications, academic reputation, in-state enrollment, and incoming SAT scores.”<sup>230</sup> Athletes generate millions of dollars from merchandise sales, coaches’ shoe contracts, and apparel agreements.<sup>231</sup> Moreover, student-athletes help place their universities in the national limelight through media interviews and their on field performance.

While the NCAA member institutions continue to derive large profits, the student-athletes who generate these extravagant profits are limited to receiving tuition, fees, room, board and books.<sup>232</sup> Scholarships do not provide them with any other income.<sup>233</sup> This means that many student-athletes, especially those from low-income households, do not have any money to spend on a trip home to see family or to go on a date.<sup>234</sup> Not that these athletes have much time for visits home or dates. A 2011 study conducted by the NCAA found that Division I<sup>235</sup> football players spend an average of 43.3 hours a week on their sport—playing games, practicing, training, watching film, and traveling.<sup>236</sup>

In light of these arguments, the NCAA has developed a laundry list of reasons why student-athletes should not be paid. The NCAA and its member institutions have framed the argument from the athlete’s perspective, claiming that student-athletes are not forced to accept scholarships in return for their services on the field. The athletic director at Ohio State, Gene Smith, expressed this sentiment in a recent interview: “‘If you want to go pro, go pro,’ . . . . ‘If you want an education, if you want to grow and mature in this incubator called higher education, come to

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230. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* (Nat’l Bureau of Econ. Research, Working Paper No. 18196, 2012).

231. Hurst & Pressly, *supra* note 8, at 58–59.

232. *Id.* at 56.

233. *Id.* at 57.

234. *Id.*

235. Now called the Football Subdivision (“FBS”).

236. Compare 43.3 hours a week to the 40-hour workweek mandated by the Fair Labor Standards Act. 29 U.S.C. § 207; Steve Wieberg, *NCAA Survey Delves into Practice Time, Coaches’ Trust*, USA TODAY (Jan. 15, 2011, 5:53 PM), available at [http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey\\_N.htm](http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey_N.htm).

us.”<sup>237</sup> The thing is, “going pro” is not as easy as Mr. Smith makes it out to be. To be eligible for the NFL draft, a player must be at least three years removed from the graduation of his high school class.<sup>238</sup> To be eligible for the NBA draft, a player must be at least one year removed from the graduation of his high school class.<sup>239</sup>

Players who would rather not play for a scholarship at a university still have options. A football player coming out of high school may elect to play semi-pro football until he is draft eligible. Basketball players have more options. If a player is talented enough, he can play in the NBA’s Developmental League (“D-League”) or travel overseas to play in a professional league in Europe or Asia.<sup>240</sup> All of these options allow a player coming out of high school to be compensated for his play.

Arguments pointing to these options are molded in similar fashion to the ones made by employers in the late nineteenth and early twentieth centuries. There, employers argued that employees were free to contract their own labor to whomever the employee desired for whatever negotiated salary the employee could sell it for. The reality was that employees were not equal bargainers; many factors limited their ability to freely negotiate the best offer for their labor. The same factors affect seventeen to eighteen year-old athletes coming out of high school today. These athletes should have the same rights their peers have: the ability to graduate from high school and seek employment where their services are fairly compensated. Currently, athletes’ only option is to take a chance with a semi-pro or European team at the risk of losing visibility, and thus, value.

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237. Billy King & Michael Smith, *A Pay-for-Play Model*, SPORTSBUSINESSDAILY.COM, (Dec. 2, 2013), <http://www.sportsbusinessdaily.com/Journal/Issues/2013/12/02/In-Depth/Main-story.aspx>.

238. *NFL Draft Rules*, DRAFTSITE.COM, <http://www.draftsite.com/nfl/rules/> (last visited Jan. 23, 2015).

239. *Article X: Player Eligibility and NBA Draft*, NBPA.ORG, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (last visited Jan. 23, 2015). . . The “one year removed rule” will likely be raised to two years within the next couple of years. See Dan Devine, *Adam Silver Wants to Raise the NBA’s Draft Age Minimum to 20 to Make League, Draft ‘More Competitive’*, YAHOO.COM (Feb. 14, 2014, 4:44 PM), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/adam-silver-wants-to-raise-the-nba-s-draft-age-minimum-to-20-to-make-the-league-and-the-draft--more-competitive-214448718.html>.

240. Some are of the opinion that the D-League is not a viable alternative and is less competitive than Division I college basketball. See Tim MacMahon, *Larry Brown Champions College Path*, ESPN (Mar. 6, 2014, 10:50 AM), [http://espn.go.com/dallas/mens-college-basketball/story/\\_/id/10556427/larry-brown-smu-mustangs-coach-says-no-way-d-league-better-prep-ncaa](http://espn.go.com/dallas/mens-college-basketball/story/_/id/10556427/larry-brown-smu-mustangs-coach-says-no-way-d-league-better-prep-ncaa).

Similar to the paternalism demonstrated by titans of industry like George Pullman, the NCAA claims student-athletes under scholarship are well taken care of. The NCAA articulates that in addition to the privilege of playing college athletics, players receive a valuable education.<sup>241</sup> Every year, the NCAA saturates the public with studies and advertisements claiming student-athletes graduate at a higher rate than the average student.<sup>242</sup> There are a number reasons why those studies are skewed.<sup>243</sup> The situation on the ground does not align with the rosy picture the NCAA likes to portray. In reality, many student-athletes do not graduate with the degrees they were supposed to receive in return for their services.<sup>244</sup> This can be attributed to a variety of factors, some of which can be placed on the individual player. But the fact is, the excessive time commitments required of a student-athlete coupled with a standard class schedule “virtually guarantee[s] that many athletes will be markedly unsuccessful as students.”<sup>245</sup> Graduation rates for student-athletes, especially for successful programs, are often substantially lower than those of average students.<sup>246</sup> For example, in 2011, the graduation rate for Division I football players was 19.7 percent lower than that of the general student body.<sup>247</sup> That same year, the graduation rate of Division I men’s basketball players in major conferences was a staggering 21.6 percent below that of their peers.<sup>248</sup>

In addition to education, the NCAA states that the benefits of a scholarship are room and board, tutoring, mentoring, health care, security, clothing, and the books players receive for classes.<sup>249</sup> Again, the reality is not as ideal as it sounds. The current system allows coaches and school

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241. See Paul Steinbach, *Record NCAA Graduation Rates Don’t Tell The Whole Story*, ATHLETIC BUS. (Dec. 2011), <http://www.athleticbusiness.com/Governing-Bodies/record-ncaa-graduation-rates-don-t-tell-the-whole-story.html>.

242. *Id.*

243. The NCAA’s Graduation Success Rate (“GSR”) “is not the same metric as is used for the general student population.” For example, the GSR does not take into account athletes who leave school in good academic standing. So if a coach does not renew an athlete’s scholarship, and that athlete is in good academic standing when he or she leaves school, it is not recorded as a “dropout.” Additionally, many NCAA-backed studies aggregate all athletes together. This means the high graduation rates of tennis, golf, and lacrosse players are able to balance out the low graduation rates of football and basketball players. *See id.*

244. Hurst & Pressly, *supra* note 8, at 59.

245. McCormick & McCormick, *supra* note 17, at 146.

246. *Id.* at 150–55.

247. Steinbach, *supra* note 241.

248. *Id.*

249. See *Student Athlete Benefits*, NCAA (Feb. 3, 2015), <http://www.ncaa.org/about/resources/finances/student-athlete-benefits>.

administrators to take advantage of the young men that attend their institution. As previously mentioned, the scholarships awarded to student-athletes are not guaranteed for four years.<sup>250</sup> The one-year, renewable scholarships awarded to student-athletes allow coaches to employ the abhorrent practice of “recruiting over,”<sup>251</sup> a practice reminiscent of the cancellable rents in Pullman’s company town. When players fall into disfavor with the coaching staff, whether it is for drug/alcohol infractions, poor performance on the field, or even injury, the player may be “recruited over,” or replaced by a new player.<sup>252</sup> To accomplish this, “the coach may terminate a player by refusing to renew his scholarship, reserving it instead for another player.”<sup>253</sup>

Even worse, the system allows NCAA member institutions to mistreat and cast aside players that are of no benefit to the school but are still in need of help. When an incoming player signs a letter of intent binding him to an institution, many institutions are under no contractual obligation to treat injuries suffered while playing for that institution.<sup>254</sup> The results can be tragic. Stanley Doughty was a defensive tackle that played football for three years at the University of South Carolina (“USC”).<sup>255</sup> In 2007, Doughty decided to skip his senior year to play in the NFL, and signed a contract with the Kansas City Chiefs.<sup>256</sup> While undergoing standard mandatory medical testing, the Chiefs found that Doughty had a cervical spine injury. That meant that if he were hit in the wrong place then he would be paralyzed for life.<sup>257</sup> The injury was the result of two helmet-to-helmet collisions suffered while playing in college. Both collisions left Doughty momentarily unable to move.<sup>258</sup> The trainers at the University of

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250. See McCormick & McCormick, *supra* note 17, at 85–6. In light of recent criticisms about the one-year renewable scholarships, college football programs around the country have begun to offer guaranteed four year scholarships. See, e.g., Jeff Eisenberg, *Offering Four-Year Scholarships May Give USC a Recruiting Edge*, YAHOO! (Jun. 23, 2014), <http://sports.yahoo.com/blogs/ncaab-the-dagger/offering-four-year-scholarships-may-give-usc-a-recruiting-edge-203630463.html>.

251. *Id.* at 104.

252. *See id.*

253. *Id.*

254. Meghan Walsh, *I Trusted ‘Em’: When NCAA Schools Abandon Their Injured Athletes*, ATLANTIC, (May 1, 2013, 8:38 AM), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/>.

255. *Id.*

256. *Id.*

257. *Id.*

258. The first injury was a helmet-to-helmet collision during a practice in 2004. In 2005, Doughty was injured in the first quarter of an ESPN-televised game against Tennessee, when Tennessee running back Arian Foster barreled into Doughty on a goal line play. *Id.*

South Carolina misdiagnosed his injuries.<sup>259</sup> After the discovery of his cervical spine injury and his release by the Chiefs, Doughty went back to USC to reenroll in school and have his injuries treated.<sup>260</sup> Instead, his old coaches refused to return his phone calls and he was denied re-admittance into school.<sup>261</sup>

Unfortunately, Doughty's story is not uncommon. In 2009, Kyle Hardrick fulfilled a childhood dream by starting his basketball career at the University of Oklahoma.<sup>262</sup> Three months into his first semester, a teammate fell on Hardrick's leg, eliciting a loud pop.<sup>263</sup> Team doctors said that Hardrick pulled a hamstring and would be out a few games.<sup>264</sup> A year later, Hardrick was still not playing and was experiencing extreme pain in his leg.<sup>265</sup> When Hardrick's parents found out the medical clinic that had conducted Hardrick's MRI thought he had torn his meniscus, they confronted the staff at Oklahoma.<sup>266</sup> The staff disputed the MRI results, insisting the injury was a minor one.<sup>267</sup> At the same time, Oklahoma began to push Hardrick out.<sup>268</sup> Oklahoma's athletic director told Hardrick to think about other options. He was no longer told about team meetings and his keycard to the gym was deactivated.<sup>269</sup> Eventually, Hardrick used his dad's military insurance to get surgery on his own.<sup>270</sup> Finally, after almost two miserable years at the University of Oklahoma, Hardrick "received a bill for \$3,500 and a letter informing him that the university had canceled his scholarship—effective at the close of the previous semester."<sup>271</sup>

## V. IMPLEMENTATION

The possibilities seem endless on how to implement a pay-for-play system seem endless. Before any such discussion, a couple of preliminary issues need to be dealt with. First, the authors of change must decide who will get paid. As this Note has argued, athletes participating in revenue-

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259. *See id.*

260. *Id.*

261. *Id.*

262. *See id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

generating sports (that is, football and men's basketball) should be paid because their respective sports create massive amounts of revenue, publicity, and prestige for their respective schools, unparalleled by other college sports.

Next, the implications of Title IX on a pay-for-play system must be considered. Title IX, passed by Congress in 1972, "requires gender equity for boys and girls in every educational program that receives federal funding."<sup>272</sup> In some respect, every college athletic program falls within the purview of Title IX. In order to comply with Title IX, a university must meet three requirements: participation, athletic financial assistance, and treatment of athletes.<sup>273</sup> Participation is not raised with a pay-for-play system as long as universities continue to offer the same number of athletic opportunities to men and women.<sup>274</sup> Treatment of athletes is also not raised as long as men and women's facilities, equipment, supplies, scheduling of games and practice, etc. are similar.<sup>275</sup>

In regards to the athletic financial assistance requirement, the "only express requirement under this section is that scholarships be allocated proportionately in accordance with the number of female versus male athletes."<sup>276</sup> This is something that can still be accomplished while paying athletes in revenue-generating sports because "[the athletic financial assistance requirement] does not directly touch upon whether there is a requirement of equal financial terms for all student-athletes, above and beyond their athletic scholarships."<sup>277</sup> Further, if college football and basketball players' were able to attain employee status under the NLRA, a Title IX analysis would likely change. Regardless, an argument claiming Title IX necessitates equal pay goes above and beyond the requirements of Title IX and does not conform to common sense. Reasoning along these lines is comparable to claiming WNBA players should be paid the same as NBA players. The fact of the matter is the WNBA doesn't generate nearly

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272. *History of Title IX*, TITLEIX.INFO, <http://www.titleix.info/History/History-Overview.aspx> (last visited Jan. 23, 2015).

273. Kristi Dosh, *How Title IX Relates to Paying Players*, BUS.COLL. SPORTS (Jun. 9, 2011), <http://businessofcollegesports.com/2011/06/09/how-title-ix-relates-to-paying-players/>.

274. *See id.*

275. *See id.*

276. *Id.*

277. Mark Edelman, *When it Comes To Paying College Athletes, Title IX Is Just A Red Herring*, FORBES (Feb. 4, 2014, 9:30 AM) <http://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/>.

as much revenue as the NBA does. The same can be said about college athletics.

There are a number of different ways to implement a pay-for-play system. One popular approach would allow athletes to accept endorsement deals from corporate sponsors.<sup>278</sup> Another calls for agents to pay players after the restrictions on agents' participation in the college ranks are lifted.<sup>279</sup> Some proponents of a pay-for-play system would allow university boosters to pay athletes directly.<sup>280</sup> All of these approaches have benefits and drawbacks.

The best approach would be a free-market system mirroring that of the four major professional sports leagues in North America. Instead of the recruiting process that is currently in place, coaches would offer recruits contracts that are determined by what the free market deems that player's value to be.<sup>281</sup> The contract would be in addition to a four-year scholarship.<sup>282</sup> This free-market system would include a salary cap for every team, along with a minimum annual salary for every athlete.<sup>283</sup>

There are a number of benefits to this system. A free-market approach attempts to realign players' incentives by awarding players that contribute the most to revenue generation. The minimum annual salary would act as a form of protection that would ensure college athletes have the means to go on a date, rent an off-campus apartment, visit home, and pay for their parents to occasionally see them play.<sup>284</sup> The benefits of a salary cap would be two-fold. First, it would keep the costs to universities at a reasonable level.<sup>285</sup> Second, it would help maintain parity in college football and basketball.<sup>286</sup>

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278. See generally, Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371 (2012).

279. See Darren Heitner, *Repeal Sports Agent Laws and Pay Student Athletes*, SPORTS AGENT BLOG (Apr. 18, 2011), <http://sportsagentblog.com/2011/04/18/repeal-sports-agent-laws-and-pay-student-athletes/>.

280. See Gwen Knapp, *Get Out Of Their Way*, SPORTS ON EARTH (Sept. 6, 2013), <http://www.sportsonearth.com/article/59748276>.

281. Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), [http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0).

282. Nocera argues for a six-year scholarship. See *id.*

283. *Id.*

284. See *id.*

285. *Id.*

286. *Id.*

Obviously, one can point to problems with such a system. One glaring issue is that universities would be susceptible to paying extremely high salaries to players who do not play to their salary level. Of course, this is inevitable. But even today, college coaches spend an incredible amount of time evaluating recruits because they have a limited amount of scholarships to give out. One could safely assume that the evaluation process will become more intensive and efficient with more money on the line. There is another possible way to rectify recruiting “errors,” or at least soften their blow: arbitration. Similar to Major League Baseball, a player’s contract could include an arbitration agreement that could actually be beneficial to both the university and the player. For example, if a player was not highly recruited out of high school but became one of the best players in the country, he could file for arbitration, which would allow him to attain a higher salary. Conversely, if a highly-recruited player who was paid a ton out of high school turned out to be a disappointment, an arbitration process would allow the university to bring that player’s wage down closer to the minimum annual salary.

If this all sounds semi-professional, that’s because college football and basketball are semi-professional. Larry Brown, a legendary NBA and college basketball coach recently claimed, “[college basketball] is the greatest minor league system in the world,” while arguing that college basketball had more talent in it than the D-League”.<sup>287</sup>

However, it is likely student-athlete compensation will come in the form of a “cost of attendance” stipend. In fact, the Big 12 has recently announced its universities will cover the “cost of attendance” for its student-athletes starting on August 1, 2015.<sup>288</sup> Part of the problem right now is that the “full-ride” given out by universities is not quite full enough.<sup>289</sup> A cost of attendance stipend seeks to cure this problem, while giving college athletes a slice of the pie at the same time.<sup>290</sup> The stipend, which would be around \$2000 to \$3000 a year, would allow athletes to pay for travel home, clothes, and dates.<sup>291</sup> The problem is that a small yearly

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287. MacMahon, *supra* note 240.

288. Sam Cooper, *Big 12 to Provide Multi-Year Scholarships and Full Cost of Attendance*, YAHOO! (Dec. 1, 2014, 3:49 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/big-12-to-provide-multi-year-scholarships-and-full-cost-of-attendance-204926123.html>.

289. Andy Staples, *Full-Cost-of-Attendance Scholarship Debate Could Break up the FBS*, SPORTS ILLUSTRATED (Mar. 8, 2012), [http://sportsillustrated.cnn.com/2012/writers/andy\\_staples/03/08/presidents-scholarships/](http://sportsillustrated.cnn.com/2012/writers/andy_staples/03/08/presidents-scholarships/).

290. *Id.*

291. *See id.*

stipend to cover cost of attendance does not get to the heart of the problem: college athletes deserve a proportional share of the massive revenue they help generate. The cost of attendance solution is akin to Major League Baseball agreeing to pay its players only the minimum wage, while the league rakes in millions in profit. Although a cost of attendance stipend is not the most ideal way to implement a pay-for-play system, it is a start. Every great labor movement in this country started somewhere, and this one is no different. College football and basketball players will eventually get their fair share. It is only a matter of time.

## VI. CONCLUSION

Amateurism existed in major college athletics at one point, and still exists today in many small Division II and III schools across the country. Amateurism, encompassed in those small schools, is an ideal worth protecting. However, amateurism does not exist in major college football or men's basketball. There is no amateurism when the University of Southern California's football team plays in the Coliseum or on the floor of the Final Four. Student-athletes are responsible for millions of the dollars their schools earn. Common sense dictates they should be entitled to at least a small fraction of that revenue. The NCAA should no longer be able to hide behind half-century-old rhetoric. Over time, labor law has evolved in a positive direction that has produced mechanisms college athletes can use to achieve fair compensation. The NCPA, or a new more dynamic association, must now use those mechanisms to tear down the NCAA's rhetoric and bring fair compensation to the players who deserve it. At the moment, such change seems to be on the horizon.