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**Can Congress Play Ball: Congressional Power to Implement and Enforce Pay-for-Play among Student-Athletes**

**CAN CONGRESS PLAY BALL?: CONGRESSIONAL  
POWER TO IMPLEMENT AND ENFORCE PAY-FOR-  
PLAY AMONG STUDENT-ATHLETES**

Charles Barrowman III<sup>1</sup>

**ABSTRACT**

Recently, the National Labor Relations Board (“NLRB”) ruled that grant-in-aid student athletes of National Collegiate Athletic Association (“NCAA” or the “NCAA”) universities are permitted to unionize because they are employees of their respective NCAA universities – revolutionizing a troubling but well-settled area of sports and employment law. The issues created from this ruling spread far further than the obvious, begging many questions, in particular: how will a student-athlete be compensated, how will compensation be calculated, how much does the student-athlete deserve, and how will this affect private versus public universities?

Congress is meanwhile seeking to ensure that the NCAA and its member universities can no longer take advantage of athletes who often have no other alternative than to attend a university. Of course, this task will largely be an exercise in public policy. Congress should mainly require universities to compensate student-athletes for the “full cost of attendance” in their scholarships and should share memorabilia royalties with the corresponding player, thus giving each student an additional financial incentive to maximize his potential. In the end, Congress must balance the continued importance of revenue-generating college athletic programs with the well settled principles of employment law and must realize that even though student-athletes derive a benefit from the universities, at current, universities are taking advantage of student-athletes for their own economic advantage. This article calls for Congress to clarify this pressing issue and state that student-

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<sup>1</sup> J.D., May 2015, Northern Kentucky University Salmon P. Chase College of Law.

athletes should derive proper financial benefit from the fruits of their labor.

## I. INTRODUCTION<sup>2</sup>

### A. The NCAA Landscape Today

The College Sports industry generates \$11 billion in annual revenue.<sup>3</sup> This is more than the National Football League's ("NFL") revenue of just under \$10 billion per year.<sup>4</sup> Despite this, NCAA universities continue to forbid student-athletes from receiving any of the revenue.<sup>5</sup> By itself, the NCAA earns nearly \$1 billion each year in revenue, but still retains its §501(c)(3) non-profit status.<sup>6</sup> Meanwhile, NCAA executives, conference commissioners, athletic directors, and coaches continue to receive *much* of this revenue in the form of salaries.<sup>7</sup> For example, the highest paid

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<sup>2</sup> Please note that the NCAA is comprised of 1,281 institutions (both private and public) and regulates athletes in both male and female sports at many different levels. However, in this article, all statistics and information, except as stated otherwise, will pertain to revenue-generating sports; namely, Division I Men's football and/or basketball programs.

<sup>3</sup> Marc Edelman, *The Case for Paying College Athletes: Students Deserve to be Compensated for Their Labor*, U.S. NEWS & WORLD REPORT (Jan. 6, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid>.

<sup>4</sup> See, e.g., Brian Goff, *The \$70 Billion Fantasy Football Market*, FORBES (Aug. 20, 2013, 10:01 AM), <http://www.forbes.com/sites/briangoff/2013/08/20/the-70-billion-fantasy-football-market/>.

<sup>5</sup> Edelman, *supra* note 3.

<sup>6</sup> See Mark Alesia, *NCAA Approaching \$1 Billion Per Year Amid Challenges by Players*, INDY STAR (Mar. 27, 2014, 11:06 PM), <http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/>; Amanda Pintaro, *Is the NCAA Fulfilling Its Tax-Exempt Status*, ILL. BUS. L. J. (Feb. 21, 2010, 10:14 PM), <http://www.law.illinois.edu/bljournal/post/2010/02/21/Is-the-NCAA-Fulfilling-its-Tax-Exempt-Status.aspx>.

<sup>7</sup> See Edelman, *supra* note 3 (noting that NCAA President, Mark Emmert, receives \$1.7 million annually in salary); Rachel Bachman, *Pac-12's Scott is the Highest Paid College Commissioner*, WALL ST J. (May 19, 2013, 6:16 PM) (revealing that Pac-12 Commissioner Larry Scott and Big Ten Commissioner

public employee in 40 of the 50 U.S. states is the state university's head football or basketball coach.<sup>8</sup>

Instead of allowing student-athletes to earn a wage – or even allowing student-athletes to participate in the free market – the NCAA forbids any student-athlete from receiving compensation directly or indirectly tied to his participation in NCAA sanctioned athletics. The one exception to this is that the student may receive financial aid in the amount of a scholarship that does not exceed the cost of attendance.<sup>9</sup> The NCAA has obstinately continued to promote the “principle of amateurism” for more than half a century as an excuse to deny college athletes compensation.<sup>10</sup> However, student-athletes have started to push back. Recently, former student-athletes in both NLRB petitions, as well as two high-profile federal lawsuits, have targeted the NCAA for its restrictive policies.<sup>11</sup>

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Jim Delany receive north of \$3 million and \$2.8 million in compensation each year, respectively).

<sup>8</sup> See Edelman, *supra* note 3 (stating that the highest paid public employee in 40 of the 50 U.S. states is the state university's head football or basketball coach); see also Decision and Direction of Election, Northwestern Univ. and College Athletes Players Ass'n., Case 13-RC-121359, n.2 (N.L.R.B Region 13, Mar. 16, 2014) [hereinafter Decision and Direction of Election] (in the NCAA, seventeen of the Division I FBS football programs are private institutions, while the rest are public).

<sup>9</sup> See NCAA, 2013-14 NCAA Division I Manual art. 15.1 (2013), available at <https://www.ncaapublications.com/p-4322-2013-2014-ncaa-division-i-manual.aspx> [hereinafter *Div. I Manual*].

<sup>10</sup> See *Div. I Manual* art. 2.9 (2013) (defining the “Principle of Amateurism” by stating that “student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental[,] and social benefits to be derived. Student participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises.”). See also Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 73 (2006).

<sup>11</sup> See generally Teddy Greenstein, *Northwestern Football Players Seek to Join Labor Union*, CHICAGO TRIBUNE (January 28, 2014), [http://articles.chicagotribune.com/2014-01-28/sports/chi-northwestern-football-players-labor-union-20140128\\_1\\_basketball-players-labor-union-national-labor-relations-board](http://articles.chicagotribune.com/2014-01-28/sports/chi-northwestern-football-players-labor-union-20140128_1_basketball-players-labor-union-national-labor-relations-board); David Porter, *Lawsuit Seeks to End NCAA's 'Unlawful Cartel'*,

### **B. The College Athletes' Players Association v. Northwestern University Decision and the NCAA Student-Athlete as Employee**

Three former college football and basketball athletes founded the College Athletes' Players Association ("CAPA") in January 2014.<sup>12</sup> CAPA, along with technical and financial backing from the United Steelworker's Union ("USW"), filed a petition with the NLRB on January 28, 2014 to form the first union representing college athletes.<sup>13</sup> While the common belief is that CAPA is seeking to unionize student-athletes as employees for the financial benefits that would come with the salaries, CAPA indicated that salaries and "pay-for-play" salaries are not the ultimate goal.<sup>14</sup> Rather, the ultimate goal is to receive coverage for medical expenses, independent concussion experts, improve graduation rates among student-athletes, due process for scholarship review, et cetera.

The NLRB has statutory jurisdiction over private sector employers but does not have jurisdiction over employers in the

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YAHOO SPORTS (March 17, 2014, 6:48 PM),

<http://sports.yahoo.com/news/lawsuit-seeks-end-ncaas-unlawful-175448180--ncaaf.html>; Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009)

<http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22>.

<sup>12</sup> CAPA, COLLEGE ATHLETES PLAYERS ASS'N.,

<http://www.collegeathletespa.com> (last visited Aug. 9, 2014) (the founders are former college football players Ramogi Huma and Kain Colter, as well as former college basketball player Luke Bonner).

<sup>13</sup> Seth Borden, *College Athletes to Unionize? More on the Northwestern University Football Players Labor Petition*, LABOR RELATIONS TODAY (Feb. 5, 2014), <http://www.laborrelationstoday.com/2014/02/articles/bush-board-reversal/college-athletes-to-unionize-more-on-the-northwestern-university-football-players-nlrp-petition/>.

<sup>14</sup> See Greenstein, *supra* note 11 (noting that CAPA's "demands include financial coverage for sports-related medical expenses, placing independent concussion experts on the sidelines during games, establishing an educational trust fund to help former players graduate . . . 'due process' before a coach could strip a player of his scholarship for a rules violation, and cost of attendance stipends," as well as allowing compensation for commercial sponsorships).

federal, state, and local governments.<sup>15</sup> This is important because a large majority of NCAA member institutions are public universities, while only a small number are comprised of private universities. It is unsettled currently whether the public institutions would qualify as public or private employers in this setting. Clearly, on the surface, a public institution would be a public employer, but that may not be so in this case, since the NCAA is in the big business of revenue-generating college sports. But assuming, *arguendo*, that public universities are public employers in this setting, the NLRB may have only limited power to reform NCAA member institutions and their policies regarding college athletes. In the instant case, however, CAPA brought an action on behalf of players at Northwestern University, a private university subject to the NLRB's jurisdiction. Thus, CAPA had standing to petition the NLRB, and argues that grant-in-aid student-athletes were employees within the meaning of the Nation Labor Relations Act ("NLRA").<sup>16</sup>

On March 26, 2014, Regional Director Peter Sung Ohr, of the NLRB's 13<sup>th</sup> Region, ruled that "all grant-in-aid scholarship players for [Northwestern's] football team who have not exhausted their playing eligibility are "employees" under §2(3) of the [NLRA]." <sup>17</sup> This ruling opened up a whole new world of legal issues, including: how will a student-athlete be compensated, how will compensation be calculated, how much does the student-athlete deserve, and how will this affect private versus public universities? This ruling will inevitably be tied up in litigation for months – if not years. But do student-athletes and the NCAA need wait that long for a ruling? This article will discuss whether Congress has the requisite power to legislate and, if so, how legislation

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<sup>15</sup> *Jurisdictional Standards*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Aug. 11, 2014) (note that this is important because the NCAA is comprised largely of public universities. Also note that private sector employers must meet a "minimal level" of interstate commerce before the NLRB will exercise jurisdiction).

<sup>16</sup> Decision and Direction of Election, *supra* note 8, at Part I.

<sup>17</sup> Decision and Direction of Election, *supra* note 8, at Part V.

should be addressed to strike a proper balance between the student-athletes' rights and keeping universities afloat.

## II. BACKGROUND

### A. The Life of the NCAA Student-Athlete

The student-athlete's time commitment to his sport is the equivalent of a full time job. While the "season" is often a small portion of the year, an athlete spends much, if not all, of the year in preparation for his sport. For example, a typical football player has a rigorous schedule.

For college football, the first week in August customarily starts a month-long training camp, often considered the most demanding part of the season.<sup>18</sup> During training camp, the coaching staff gives the players daily itineraries that detail which football-related activities they are required to attend and participate in including meals, training, medical, and practice schedules. Frequently, this includes mornings starting as early as 6:30AM and concluding as late as 10:30PM. During training camp, the players devote between 50 and 60 hours per week to purely football-related activities. Meanwhile, during the football season, the student-athlete devotes between 40-50 hours per week to football related activities.<sup>19</sup> Following the football season, in spring and summer, the athletes devote 20-25 hours per week on mandatory football-related training activities.<sup>20</sup>

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<sup>18</sup> Decision and Direction of Election, *supra* note 8, at Part III.D.

<sup>19</sup> Decision and Direction of Election, *supra* note 8, at Part III.D (noting that the college football season begins in early September and ends at the end of November and the season is extended through early January if the team qualifies for a "bowl" game and also that this time includes travel to and from games).

<sup>20</sup> Decision and Direction of Election, *supra* note 8, at Part III.D



## **B. The Money Behind It All**

### **1. The Player Impact**

Student-athletes and the NCAA are both essential to the other's continuation, as neither could function without the other as they do now. Student-athletes provide the product that sports fans yearn for, while the NCAA provides the infrastructure that student-athletes lack.<sup>21</sup> Each year, the NCAA earns billions of dollars in revenue based on the performance of its student-athletes (for truly, the college sports market without athletes would exist no more than the professional sports leagues), and instead of rewarding these athletes with compensation, they are forbidden from deriving any sort of profit, and are regularly censured for receiving any economic benefit.

#### **i. Ticket Sales and Television Broadcast Contracts**

College athletic departments derive a substantial amount of revenue from ticket sales, "booster" donations, and conference distributions.<sup>22</sup> However, the NCAA also earns more in advertising and marketing revenue each year from its annual Men's basketball tournament than do all of the other major professional sports franchises in the United States.<sup>23</sup> Additionally,

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<sup>21</sup> See Bobby Rush, *Without Athletes, The Big Money in College Sports Disappears*, U.S. NEWS & WORLD REPORT (Apr. 2, 2013, 10:35 AM), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/without-athletes-the-big-money-in-college-sports-disappears> (noting that without the student-athletes, there would be no football, basketball, or other sports to put on the field and without the NCAA's marketability, the students would not have an outlet to display their talents).

<sup>22</sup> Christopher Lee, *College Athletics by the Numbers: A Deeper Look at Profitability*, SPORTSOLOGIST (Sept. 29, 2010), <http://sportsologist.com/college-athletics-by-the-number/> (reporting that 50% of revenues are made up by ticket sales (17%), alumni/booster donations (27%), and NCAA/Conference distributions (14%)).

<sup>23</sup> Cork Gaines, *CHART: The NCAA Tournament Makes More Money on TV Ads than the NFL Playoffs*, BUSINESS INSIDER (Mar. 24, 2014, 4:31 PM),

the “Power Five” NCAA conferences collect \$1.1 billion annually from network partners for “regular season” game coverage.<sup>24</sup> And the newly implemented college football playoff will bring in an estimated \$470 million annually.<sup>25</sup>

## ii. Likeness and Image Revenues

For years, the NCAA has continued to use the likenesses of former and current student-athletes to turn a profit, even long after the student-athlete has left the university. Nowhere is this more evident than the NCAA football and basketball video game franchises.<sup>26</sup> In 2009, former NCAA basketball player, Ed O’Bannon filed an anti-trust class action lawsuit against the NCAA alleging that NCAA basketball and football players are illegally denied a share of the profits under the guise of “amateurism.”<sup>27</sup>

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<http://www.businessinsider.com/ncaa-tournament-tv-ad-revenue-nfl-playoffs-2014-3> (showing that the NCAA tournament makes more than the NFL playoffs and NBA playoffs as well as making nearly double the amount of revenue as the MLB playoffs and almost ten times as much as the NHL playoffs).

<sup>24</sup> Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014, 2:49 PM),

<http://www.forbes.com/sites/chris-smith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/> (stating that the payouts are as follows (rounded): Big Ten - \$250 million; Pac-12 - \$250 million; ACC - \$240 million; SEC - \$205 million; Big-12 – \$155 million).

<sup>25</sup> *Id.*

<sup>26</sup> See generally *NCAA Football Series*, WIKIPEDIA,

[http://en.wikipedia.org/wiki/NCAA\\_Football\\_series](http://en.wikipedia.org/wiki/NCAA_Football_series) (last visited Aug. 13, 2014) (an American football video game franchise spanning parts of three decades that is licensed between Collegiate Licensing Company and EA Sports; the game allows gamers to control and compete against current NCAA Division I FBS teams); see also *NCAA Basketball Series*, WIKIPEDIA,

[http://en.wikipedia.org/wiki/NCAA\\_Basketball\\_series](http://en.wikipedia.org/wiki/NCAA_Basketball_series) (last visited Aug. 13, 2014) (an American basketball video game franchise spanning 13 years where gamers can control and compete against current NCAA basketball teams).

<sup>27</sup> Kurt Streeter, *Former UCLA Star Ed O’Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009),

<http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22>.

On August 8, 2014, Judge Claudia Wilken ruled that “the NCAA [amateurism/non-compensation] rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools.”<sup>28</sup> As such, Judge Wilken enjoined all NCAA rules that prohibited student-athletes from receiving compensation for use of their images.<sup>29</sup> Judge Wilken further ordered that universities should be allowed to offer full cost-of-attendance scholarships to student athletes and cover cost-of-living expenses not currently provided via scholarships. Furthermore, the Judge ruled that colleges be permitted to place as much as five thousand dollars into a trust for each athlete per year of eligibility. Currently, *O’Bannon* has been appealed, arguing that the Court failed to consider *NCAA v. Bd. of Regents of the Univ. of Okla.*, which denied the NCAA control of college football television rights, but also stated that “to preserve the character and quality of the ‘product,’ athletes must not be paid.”<sup>30</sup>

## 2. The NCAA’s Subsidy: Providing for the Student

While it is increasingly evident to even the most casual sports fan that the NCAA and its member universities profit off of the backs of its student-athletes, the NCAA does provide a substantial benefit to those student-athletes.<sup>31</sup> The NCAA uses

<sup>28</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n.*, No. C 09-3329 CW, 2014 WL 2899815, at \*11 (N.D. Cal. Aug. 8, 2014) (finding that the NCAA “violates anti-trust law by agreeing with its member schools to restrain their ability to compensate Division I men’s basketball and FBS football players any more than the current association rules allow.”).

<sup>29</sup> *O’Bannon*, 2014 WL 2899815, at \*147-48 (stating also that while the NCAA may set a cap on compensation provided by the universities to put in trust until the student-athlete either graduates or is no longer eligible, the cap may not be lower than \$5,000 per year).

<sup>30</sup> See Ben Strauss, *N.C.A.A. Appeal of Ruling in O’Bannon Case is Heard*, N.Y. TIMES (Mar. 18, 2015), <http://www.nytimes.com/2015/03/18/sports/ncaa-appeal-of-ruling-in-obannon-case-is-heard.html>.

<sup>31</sup> See, e.g., *Division I Schools Spend More on Athletes than Education*, USA TODAY (July 14, 2013, 1:31 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/01/15/division-i-colleges->

substantial portions of its revenue to provide the student with medical, housing, and travel expenses, in addition to creating an outlet for the athlete to publicize his talents to professional sports organizations.<sup>32</sup>

### i. Medical Policies and Subsidies

The NCAA's medical policy states that a student-athlete must have an insurance policy that covers athletic-related injuries in order to practice and compete.<sup>33</sup> These insurance policies must cover expenses up to the NCAA's \$90,000 deductible under its Catastrophic Injury Policy, at which point the NCAA's policy will kick-in and cover the rest of the bill.<sup>34</sup> However, many student-athletes come from impoverished backgrounds

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spend-more-on-athletes-than-education/1837721/ (showing that NCAA Division I universities spend about six times as much on athletes than is spent on education and the top tier Football Bowl Subdivision spends \$92,000 per athlete and only \$14,000 per full-time student); Sean Gregory, *College Sports Spending is Insane*, TIME (Dec. 4, 2013), <http://keepingscore.blogs.time.com/2014/12/04/college-sports-spending-is-insane/> (recording that The Ohio State University's football program is the top spending school, having spent \$380,757 per scholarship football player in 2011). See generally *Athletic & Academic Spending Database for NCAA Division I*, KNIGHT COMMISSION, <http://spendingdatabase.knightcommission.org/> (last visited Sept. 5, 2014) (offering a searchable catalogue of athletic and academic spending).

<sup>32</sup> Jay Weiner & Steve Berkowitz, *USA TODAY Analysis Finds \$120K Value in Men's Basketball Scholarship*, USA TODAY (Mar. 30, 2011, 2:48 PM), [http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four\\_N.htm](http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm) (breaking down the value of the average men's basketball scholarship). But see Lee, *supra* note 22 (reporting that the average university spends 29% of its budget on items such as facilities maintenance and rental, team travel, recruiting, equipment/uniforms/supplies, and game expenses – which is less than it spends just on coaches' salaries).

<sup>33</sup> David Leon Moore, *Insurance by Almost Every School Covers Injuries Like Ware's*, USA TODAY (Apr. 2, 2013, 8:15 PM), <http://www.usatoday.com/story/sports/ncaab/2013/04/02/injuries-like-kevin-ware-covered-by-almost-every-division-i-school/2047939/> (also notes that the student-athlete's injury does not need to be catastrophic or completely debilitating, but must merely amount to at least \$90,000 in medical bills).

<sup>34</sup> *Id.*

and most continue to live below the poverty level throughout their college career; thus, many cannot afford to personally carry such policies.<sup>35</sup> As such, nearly all Division I schools provide coverage for the student's medical policy, as well as more than seventy-five percent of Division II and Division III schools.<sup>36</sup> Because a \$90,000 insurance policy is something that the many student-athletes cannot afford, the NCAA and the universities' policy is of substantial benefit to the student-athlete.

### **ii. Housing, Travel, and Other Necessities**

The NCAA and its member universities also provide student-athletes with housing and travel that the student would otherwise have to pay for himself. The NCAA provides and supports the Student Assistance Fund, which is used to fund student-athletes' trips home, clothing, summer school, tutoring, graduate test fees, health insurance, and other costs that scholarships do not cover.<sup>37</sup> For example, in 2013, the NCAA distributed more than \$73.5 million dollars among its conferences for discretionary use by universities "to assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate

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<sup>35</sup> See generally Meghan Walsh, *'I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes*, THE 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/> (noting that the poor, non-high profile student athlete often cannot afford the necessary surgeries if injured and the university often will not foot the bill).

<sup>36</sup> Moore, *supra* note 33. But see Kristina Peterson, *College Athletes Stuck with the Bill After Injuries*, N.Y. TIMES (July 15, 2009), [http://www.nytimes.com/2009/07/16/sports/16athletes.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/07/16/sports/16athletes.html?pagewanted=all&_r=0) (stating that although the NCAA allows universities to cover student-athletes insurance policy, no clear standards were ever introduced and often student-athletes end up "footing the bill.").

<sup>37</sup> Brian Burnsed, *Meeting the Needs of Student-Athletes: NCAA Provides \$53 Million to Players in Need*, NCAA.COM (Aug. 22, 2012, 9:33 AM), <http://www.ncaa.com/news/ncaa/article/2012-08-20/meeting-needs-student-athletes>.

athletics, enrollment in an academic curriculum[,] or that recognize academic achievement.”<sup>38</sup>

### iii. Training and Marketing

Because many student-athletes come from impoverished backgrounds, most are unable to market themselves to professional sports franchises without the NCAA.<sup>39</sup> The NCAA has thus become a form of a “farm system” for the NFL and National Basketball Association (“NBA”), due in large part to their draft eligibility rules.<sup>40</sup> The typical NCAA university is the modern-day training ground for those who aspire to play professional sports. Athletic programs on these campuses provide weight rooms, tracks, fields, medical facilities, training rooms, physical therapy, and many other amenities that student-athletes use to stay healthy and enhance their physical abilities.<sup>41</sup> Profits from advertising, ticket sales, memorabilia sales, and other such revenue largely contribute to a university’s ability to provide such a venue for an athlete’s training and competition.<sup>42</sup> Additionally, the student-athlete benefits from having his or her image plastered all

<sup>38</sup> NCAA, *NCAA Student Assistance Fund Guidelines*, NCAA.ORG, <http://www.ncaa.org/sites/default/files/2013+Student+Assistance+Fund.pdf> (last visited Sept. 23, 2014).

<sup>39</sup> See Matt Hayes, *Report Concludes 86 Percent of Student Athletes Live in Poverty*, SPORTING NEWS (Jan. 16, 2013, 3:01 AM), <http://www.sportingnews.com/ncaa-football/story/2013-01-15/student-athletes-poverty-paid-scholarships-ncaa-texas-duke>.

<sup>40</sup> *Farm Team*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Farm\\_team](http://en.wikipedia.org/wiki/Farm_team) (last visited Aug. 13, 2014).

<sup>41</sup> See generally Jeffrey 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 all these additional benefits that the student-athlete receives from the universities should count as “pay” within the economic sense of the term).

<sup>42</sup> See generally Michael Smith, *Athletic Budgets Continue to Climb*, SPORTS BUSINESS DAILY (Aug. 22, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/08/22/In-Depth/Budgets.aspx>.

over ESPN during every season, as often this contributes to a rise in his “draft stock.”<sup>43</sup>

Finally, the majority of student-athletes – even those in revenue-generating sports – do not become professional athletes.<sup>44</sup> There are 138 Division I NCAA football programs and 351 Division I NCAA basketball programs.<sup>45</sup> Each NCAA football program is allotted 85 scholarships, whereas the NFL allows 53 roster spots each year.<sup>46</sup> As such, only the elite athletes go on to compete in the NFL and NBA. Potentially, the most important product that the universities provide for the student is the various degrees offered upon graduation. A study equated the long-term value of a student-athlete’s football scholarship at \$2 million dollars per student for some of the universities with the most prestigious football programs.<sup>47</sup>

### **3. The NFL’s Three Year Rule: Is the NFL to Blame?**

The NFL is widely criticized for implementing the draft eligibility rule, colloquially known as the “Three Year

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<sup>43</sup> See Dorfman, *supra* note 41.

<sup>44</sup> See generally NCAA, *The Value of College Sports*, NCAA.ORG, <http://www.ncaa.org/student-athletes/value-college-sports> (last visited Sept. 5, 2014) (noting that the experiences provided by a NCAA scholarship will benefit those students, a majority of whom will “go pro in something other than sports”).

<sup>45</sup> *Division I (NCAA)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Division\\_I\\_\(NCAA\)](http://en.wikipedia.org/wiki/Division_I_(NCAA)) (last visited Sept. 23, 2014).

<sup>46</sup> Note that there are also European and Canadian football leagues as well as European basketball leagues, so the student-athlete’s options are not limited solely to the NFL and NBA.

<sup>47</sup> See Patrick Rishe, *Value of College Football Scholarship Exceeds \$2 Million for College Football’s Top 25*, FORBES (Aug. 21, 2011, 11:32 AM), <http://www.forbes.com/sites/prishe/2011/08/21/value-of-college-football-scholarship-exceeds-2-million-for-college-footballs-top-25/> (revealing that average the long-term average value of a student-athlete scholarship is \$2,045,360).

Rule.”<sup>48</sup> This rule prevents any aspiring NFL player from entering the draft until three years after his high school class has graduated.<sup>49</sup> In *Clarett v. NFL*, former star running back for The Ohio State University football team challenged the Three Year Rule on anti-trust grounds.<sup>50</sup> While Clarett was successful in District Court, Judge Sotomayor, writing for an unanimous court, overturned the ruling on appeal in the Second District Court of Appeals.<sup>51</sup>

### III. STATEMENT OF THE CASE

#### A. NCAA Policies Are Restricting Trade and Violating the Sherman Act

The Sherman Anti-Trust Act (the “Sherman Act”) prohibits certain business activities that unreasonably conspire to restrain trade.<sup>52</sup> The Sherman Act was primarily implemented by legisla-

<sup>48</sup> See generally *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004) (listing the eligibility requirements for a NFL draftee). Also note that the NBA has a similar rule, but only prevents eligibility for one year following the graduation of the high school class with which the athlete entered high school.

<sup>49</sup> See *id.* at 126 (current Supreme Court Justice Sonya Sotomayor illustrates the history of the NFL’s three-year rule by stating “since 1925, when Harold ‘Red’ Grange provoked controversy by leaving college to join the Chicago Bears, the NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft.” *Id.* For much of the League’s history, therefore, a player, irrespective of whether he actually attended college or not, was barred from entering the draft until he was at least four football seasons removed from high school. The eligibility rules were relaxed in 1990, however, to permit a player to enter the draft three full seasons after that player’s high school graduation).

<sup>50</sup> See *id.* (challenging the rule as a restraint of trade in violation of §1 of the Sherman Act (15 U.S.C. §1) and §4 of the Clayton Act (15 U.S.C. §15)).

<sup>51</sup> *Id.* at 143. See also Peter Altman, *NOTE: Stay Out for Three Years After High School or Play in Canada -- and for Good Reason an Antitrust Look at Clarett v. National Football League*, 70 BROOKLYN L. REV. 569, 604 (2004) (concluding that the three-year rule is valid practice under anti-trust laws in light of recent treatment of sports labor law issues by federal courts of appeals).

<sup>52</sup> See 15 U.S.C. §§1, 2 (Westlaw 2006) (“every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be



tors who understood that lack of competition within a market leads to stagnation. Historically, oil and steel barons were those targeted by the Sherman Act, as they sought to destroy competition and then to exploit those in the market for the actor's services.<sup>53</sup> However, modern society has seen the recession of anti-trust suits against the oil and steel barons of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries as organizations such as the NCAA have taken its place.

To establish a violation of §1 of the Sherman Act, "three elements must be shown: (1) a contract, combination, or conspiracy; (2) affecting interstate commerce; and (3) an unreasonable restraint of trade."<sup>54</sup> As discussed later, while the NCAA's policies have been violating the Sherman Act, a Sherman Act violation analysis may not be the best way to address the NCAA's policies. This idea was expressed by Judge Wilken in *O'Bannon*, indicating that while critics of the NCAA's amateurism policies may have valid complaints, anti-trust lawsuits should instead give way to more meaningful reform within college sports.<sup>55</sup> Judge Wilken

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illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

<sup>53</sup> See 51 CONG. REC. H4, 100 (daily ed. June 20, 1890) (statement of Rep. Mason) ("trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel, it would not right the wrong done to people of this country by the trusts which have destroyed legitimate competition and driven honest men from legitimate business enterprise.").

<sup>54</sup> *Richter Concrete Corp. v. Hilltop Basic Resources, Inc.*, 547 F. Supp. 893, 917 (S.D. Ohio 1981) (citing *Mowery v. Standard Oil of Ohio*, 463 F. Supp. 762, 765 (N.D. Ohio 1976)).

<sup>55</sup> See *O'Bannon*, 2014 WL 2899815, at \*151 ("to the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the anti-trust causes of action in this lawsuit. It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here.").

does not express, however, whether such reforms should come from the NCAA, its universities, its players, or rather – as this article suggests – via Congress.

### **B. Congress has a Duty to Promote and Regulate Trade Between the Several States**

The United States Constitution gives authority to Congress to regulate interstate commerce by means that are “necessary and proper.”<sup>56</sup> In July 2014, Congress’ Senate Committee on Commerce, Science, and Transportation held a public hearing entitled “Promoting the Well-Being and Academic Success of College Athletes.”<sup>57</sup> In the hearing, Committee Chair, Jay Rockefeller stated that “[Congress does] have jurisdiction over sports . . . all sports.”<sup>58</sup> The Senator, however, failed to prove this statement. Even though Senator Rockefeller failed to provide authority for his statement, Congress retains jurisdiction over interstate commerce.<sup>59</sup> Additionally, Congress has jurisdiction over higher education, made evident by the fact that Congress created the Department of Education, a realm in which the NCAA and its universities operate.<sup>60</sup>

<sup>56</sup> U.S. CONST. art. I, §8, cl. 3, 18 (“The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States” and “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>57</sup> Taylor Branch, *NCAA to Congress: Change is Coming*, THE ATLANTIC (July 24, 2014, 4:09 PM), <http://www.theatlantic.com/entertainment/archive/2014/07/the-ncaa-tells-congress-its-going-to-reform-itself/374948/>.

<sup>58</sup> *Id.* (recalling Democratic Senator Rockefeller’s claim of jurisdiction over the NCAA. Branch also notes that the claim of jurisdiction is bi-partisan because Republican Senator Heller agreed that “we do have jurisdiction in this Congress over the NCAA.”).

<sup>59</sup> *The NCAA and College Presidents Admit Inability to Reform; The Need for Federal Intervention*, NCPANOW, [http://www.ncpanow.org/research/body/The\\_Need\\_for\\_Federal\\_Intervention.pdf](http://www.ncpanow.org/research/body/The_Need_for_Federal_Intervention.pdf) (last visited Sept. 5, 2014).

<sup>60</sup> See 20 U.S.C. §3401 et seq. (Westlaw 2006) (creating the Department of Education).

### **C. The Economic Impact of NCAA Policies Demand Immediate Congressional Intervention**

The NCAA, through – and because of – its policies, has recently been called an illegal cartel that artificially depresses the compensation that student-athletes could receive from their respective universities.<sup>61</sup> \$11 billion dollars each year is funneled from ticket sales, memorabilia revenue, and television contracts to various people and groups, yet the student-athletes whose physical labors make it possible still fail to receive a dime.<sup>62</sup> Cases of anti-trust violations have been – and will continue to be – tied up in litigation for years to come. Additionally, the NCAA has proven that it is incapable of making changes on its own accord. Because of this, the buck stops at Congress. Congress’ legislative authority offers the most flexible, expedient, and convenient avenue for correcting a system that has been flawed for decades at the expense of young student-athletes.

## **IV. ANALYSIS**

### **A. The Sherman Act Analysis**

The NCAA’s activities have recently come under anti-trust scrutiny via the Sherman Act. To determine whether a restraint “unreasonably” restrains trade, a court will apply a two-part ap-

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<sup>61</sup> See Philip D. Bartz & Nicholas S. Sloey, *The Joy of College Sports: Why the NCAA's Efforts to Preserve Amateurism Are Both Lawful and in the Best Interest of College Athletics*, BRYAN CAVE BULLS, at 2 (Dec. 13, 2011), available at [http://www.bryancave.com/files/Publication/d1b731c5-7f86-4347-a032-64b2049dae12/Presentation/PublicationAttachment/1ee1ad19-d6cb-4ce4-8f02-66ae12ce1c6b/The%20Joy%20of%20College%20Sports%20-%20Article\\_v2.pdf](http://www.bryancave.com/files/Publication/d1b731c5-7f86-4347-a032-64b2049dae12/Presentation/PublicationAttachment/1ee1ad19-d6cb-4ce4-8f02-66ae12ce1c6b/The%20Joy%20of%20College%20Sports%20-%20Article_v2.pdf) (citing Matt Norlander, Podcast: The Shame of College Sports (Interview of Taylor Branch), CBSSPORTS, (Sept. 16, 2011), available at <http://www.cbssports.com/mcc/blogs/entry/26283066/32016194>).

<sup>62</sup> See discussion *supra* Part I.A.

proach: the *per se* rule and the rule of reason.<sup>63</sup> First, the *per se* rule condemns practices that "are entirely void of redeeming competitive rationales."<sup>64</sup> Second, the rule of reason analysis must decide if the challenged restraint has a substantially adverse effect on competition.<sup>65</sup> Then the court must evaluate whether the pro-competitive virtues justify the anti-competitive impacts.<sup>66</sup>

In *Law v. NCAA*, the Supreme Court ruled that price fixing on NCAA assistant coaches violated §1 of the Sherman Act.<sup>67</sup> However because student-athletes have typically not been considered employees, they have not benefitted from this ruling.<sup>68</sup> Yet, because the NLRB ruled that Northwestern University football players are employees under the NLRA, the floodgates have opened, allowing student-athletes similarly situated to Northwestern football players to challenge the NCAA's no-pay policies under circumstances similar to *Law*.<sup>69</sup> Additionally, Judge Wilken

<sup>63</sup> See *Law v. Nat'l Collegiate Athletic Ass'n.*, 134 F.3d 1010, 1016 (10th Cir. 1998) (describing this two-step process). *But cf.* Edelman, *supra* note 3, at 73 (noting that there is also a "quick-look" test).

<sup>64</sup> *Id.* (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)). See also *id.* at 1016-17 (citing *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 695 (1978) ("once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the pro-competitive justifications for the practice advanced by a defendant before finding a violation of antitrust law. Rule of reason analysis, on the other hand, requires an analysis of the restraint's effect on competition.")). See also 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, 73 (2013) ("if a restraint is 'so nefarious' that there is high probability that it lacks any redeeming value, a court will apply the *per se* test" (emphasis added)).

<sup>65</sup> See *SCFC*, 36 F.3d at 965; *U.S. v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

<sup>66</sup> See *Brown Univ.*, 5 F.3d at 669.

<sup>67</sup> See generally *Law v. Nat'l Collegiate Athletic Ass'n.*, 134 F.3d 1010, (10th Cir. 1998).

<sup>68</sup> See Edelman, *supra* note 64, at 77 ("unlike assistant coaches, student-athletes have not traditionally been defined as employees, so the collective determination of their pay has not traditionally been construed as wage fixing. Nevertheless, any empirical observation of student-athletes' daily activities shows that student-athletes are closely akin in practice to traditional workers.>").

<sup>69</sup> *Law v. Nat'l Collegiate Athletic Ass'n.*, 134 F.3d 1010, (10th Cir. 1998).

determined that restricting players from receiving revenues from their image and likenesses violates the Sherman Act.<sup>70</sup>

### **B. Can Congress Intervene?: The Power of the Commerce Clause**

While Senator Rockefeller claims that Congress has jurisdiction over all sports, no concrete legal precedent exists to back up this claim.<sup>71</sup> Presumably, Congress claims jurisdiction under both the “Interstate Commerce Clause” and “Necessary and Proper Clause” of the United States Constitution.<sup>72</sup> Nonetheless, Congress can exercise jurisdiction over college sports.<sup>73</sup> As discussed previously, in addition to its interstate commerce jurisdiction, Congress can claim jurisdiction over college sports through its creation of the Department of Education. For further proof of Congress’ jurisdiction over college sports, note that “Congress has held at least 12 formal hearings regarding college sports in the past decade.”<sup>74</sup> Yet, Congress has never passed legislation to regulate the NCAA or its member universities.<sup>75</sup>

<sup>70</sup> *O’Bannon*, 2014 WL 2899815, at \*11 (finding that the NCAA “violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men’s basketball and FBS football players any more than the current association rules allow.”).

<sup>71</sup> *See, e.g., Fed. Baseball Club v. Nat’l League*, 259 U.S. 200. (1922) (creating the “Major League Baseball Anti-Trust Exemption” by excluding Major League Baseball from the Sherman Act).

<sup>72</sup> U.S. CONST. art. I, §8, cl. 3, 18 (“The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States” and “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>73</sup> As Congress created the Department of Education and NCAA sports are a branch of the institutions governed by this Department, a logical inference indicates that Congress has power over the NCAA universities.

<sup>74</sup> *But see* Todd Jones, *College Athletics: Congressional Hearing to Examine Union Issue*, THE COLUMBUS DISPATCH (May 8, 2014, 5:16 AM), <http://buckeyextra.dispatch.com/content/stories/2014/05/08/congressional-hearing-to-examine-union-issue.html>.

<sup>75</sup> *But see id.* (stating that the hearings have produced eight written reports on the NCAA).

## C. An Overview of “Revenue-Generating” College Sports

### 1. Football and Basketball Versus the Rest

While the NCAA divides sports into divisions based upon certain factors such as school size and number of athletic programs, it does not differentiate between revenue-generating sports and non-revenue generating sports.<sup>76</sup> Although many Division I schools bring in millions of dollars because of their sports programs, a deeper breakdown proves that the general rule is that only the football and sometimes the basketball programs at NCAA universities tend to be profitable and self-supporting.<sup>77</sup> Despite this, the NCAA has failed to recognize that some college athletic programs are fully commercialized, while some still cling to the principles of amateurism.<sup>78</sup>

To examine this further, one only needs to look to the NFL and NBA draft eligibility requirements. A college football or men’s college basketball player must wait until three years or one year, respectively, before they may enter a professional

<sup>76</sup> See generally College Sports Scholarships, *Athletic Divisions of the NCAA*, COLLEGE SPORTS SCHOLARSHIPS, <http://www.collegesportsscholarships.com/ncaa-divisions-differences.htm> (last visited Aug. 16, 2014) (stating that Division I member schools are required to sponsor a minimum of seven sports for women and seven for men).

<sup>77</sup> See Lee, *supra* note 22 (noting that only football and men’s basketball were reported as being profitable). But see Dave Berri, *Exploitation in College Sports: It’s not Just Football and Basketball*, FREAKONOMICS (Apr. 6, 2012, 10:31 AM), <http://freakonomics.com/2012/04/06/exploitation-in-college-sports-its-not-just-football-and-basketball/> (stating that a premium college hockey player generates profits in excess of \$100,000 per year for the typical institution).

<sup>78</sup> See Ben Kercheval, *If the NCAA Allowed It, NFL Shouldn’t Hesitate to Help Fund Cost of Scholarship*, BLEACHER REPORT (Apr. 10, 2014), <http://bleacherreport.com/articles/2024136-if-ncaa-allowed-it-nfl-shouldnt-hesitate-to-help-fund-cost-of-scholarship> (stating that “the NCAA has contributed to the problem by allowing football and men’s basketball to become multibillion-dollar enterprises while lumping them together with nonrevenue sports.”).

league's draft.<sup>79</sup> Meanwhile, the NFL and NBA use the NCAA as an unofficial training ground and an extended combine.<sup>80</sup> In contrast, the market for college volleyball is not so lucrative ("yet" some might say) resulting in the professional leagues having set age restrictions. However, the NFL and NBA have implemented these same rules to keep the talent pool from being drained out of college football and men's basketball.<sup>81</sup>

## 2. Title IX Implications

The Pay-for-Play movement has created a stir among those concerned with Title IX implications that may result from compensating student-athletes.<sup>82</sup> Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."<sup>83</sup> A revolutionary tool, Title IX is directly tied to a dramatic increase in the amount of opportunities for women at the collegiate level, including athletics.<sup>84</sup>

However, when understanding the idea of a Pay-for-Play structure, common conceptions about Title IX in college

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<sup>79</sup> See generally *id.* (quoting sportswriter Alicia Jessop that New NBA Commissioner Adam Silver has proposed raising the minimum NBA entry age).

<sup>80</sup> "Combine" refers to the NFL draft combine where scouts assess whether he or she thinks that a player will be successful based upon athletic abilities.

<sup>81</sup> See Chad Walters, *NBA and NFL Draft Eligibility Restrictions – Why?*, LEAN BLITZ CONSULTING (February 15, 2013), <http://leanblitzconsulting.com/2013/02/nba-and-nfl-draft-eligibility-restrictions-why/>.

<sup>82</sup> While it is not the focus of this article to address Title IX, a fully developed argument cannot be created without discussing how Title IX does not apply to the Pay-for-Play ideal.

<sup>83</sup> 20 U.S.C. §1681 et seq. (Westlaw 1986) [hereinafter Title IX]. Title IX is supplemented by its implementing regulation at 34 C.F.R. §106.

<sup>84</sup> See Christine I. Hepler, *Symposium: A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 442 (2013).

athletics are misunderstood.<sup>85</sup> The market for college athletics lies largely in football and men's basketball.<sup>86</sup> Title IX does not address the issue of compensation, but rather, it means that women will be given the same opportunities.<sup>87</sup> Currently, the policy with regard to collegiate athletics is that women are afforded the same amount of sports (and often more) than the men in which to compete.<sup>88</sup> However, the market value for tickets to a women's sporting event are less than a men's sporting event.<sup>89</sup> As such, the market value for a men's basketball player is higher than a women's basketball player.<sup>90</sup>

Universities and the NCAA often claim that because money would be diverted to compensating the revenue-

<sup>85</sup> See generally Karen Blumenthal, *The Truth About Title IX*, THE DAILY BEAST (June 22, 2012), <http://www.thedailybeast.com/articles/2012/06/22/the-truth-about-title-ix.html>.

<sup>86</sup> See Brian Goff, *The Market Value of NCAA Athletes in the Millions*, FORBES (Mar. 31, 2014, 10:27 AM), <http://www.forbes.com/sites/briangoff/2014/03/31/the-market-value-of-ncaa-athletes-in-the-millions/>.

<sup>87</sup> See Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBSSPORTS.COM (June 5, 2014, 9:52 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women> (quoting prominent attorney Jeffrey Kessler, who states that "Title IX says nothing about the issue of compensation. Title IX talks about giving equal opportunities to participate in athletics . . . It's really not different now than the head football coach at Alabama [making] more money in salary than all of the female coaches at Alabama put together. That's not at Title IX violation."). *But see Pay for Play and Title IX*, N.Y. TIMES, March 23, 2014, at SR12 (supporting the idea that male athletes in revenue generating sports could not be awarded additional financial aid scholarships because the total amount of financial aid available to male and female athletes must be "substantially proportionate" to their overall participation rates).

<sup>88</sup> See generally Solomon, *supra* note 87.

<sup>89</sup> See, e.g., K.S.C., *Why Professional Women's Sport is Less Popular than Men's*, THE ECONOMIST (July 27, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/07/economist-explains-19> (note that while this addresses professional sports, the result is the same in college sports).

<sup>90</sup> See Solomon, *supra* note 87.



generating sports' student-athletes, the universities would be forced to cut other programs. However, this will not affect Title IX. Instead, if anything, men's sports will likely see cuts, as Title IX will not allow women's sports to be cut. This is because, even if cuts resulted, men's programs would be the first to go to retain compliance with Title IX. But in the end, it comes down to equal *opportunity*, not equal compensation. The head football coach for the Alabama football program makes more than all of the female coaches at Alabama combined, and yet that is not considered a Title IX violation.<sup>91</sup> In the end, women's sports likely will not see cuts as the revenue needed will increasingly be generated by more lucrative television contracts, cuts in exorbitant head coaching contracts, and increased ticket revenue. However, if a women's sport does become revenue-generating in the future to the point that it is a professional, commercial activity rather than educational, the same argument applies and a female student-athlete should be entitled to compensation.

### **3. Are All Student-Athletes Employees?**

As already discussed, an average student-athlete devotes a substantial amount of his time in college to the athletic field.<sup>92</sup> However, the commercialization of the major, revenue-generating college sports has created a massive market for college football and basketball. As such, the NLRB decided that the grant-in-aid student-athletes on Northwestern University's football team are employees.<sup>93</sup> Under this doctrine, it stands to reason that all

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<sup>91</sup> See Solomon, *supra* note 87.

<sup>92</sup> See Decision and Direction of Election, *supra* note 8, at Part III.D (discussing how the student-athlete devotes 40-60 hours per week during the season to his particular athletic program). See generally Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/> (stating that "the typical Division I football player devotes 43.3 hours to his sport – 3.3 more than the typical American worker.").

<sup>93</sup> Decision and Direction of Election, *supra* note 8, at Part IV.B ("Section 2(3) of the Act provides in relevant part that the "term 'employee' shall include any

student-athletes receiving grant-in-aid scholarships would also be considered employees. However, requiring compensation for all scholarship athletes would be prohibitively expensive and universities would likely be forced to cut programs.<sup>94</sup> Because of the delicate balance that needs to be struck, Congress must legislate to create a new class of employee that will accomplish two things. First, Congress' new class of employee must allow for proper compensation among the revenue-generating student-athletes. Second, Congress must actively remove non-revenue generating sports from consideration as employees.<sup>95</sup> Failure to remove non-revenue generating sports' student-athletes from the compensation structure would be detrimental to both those sports as well as to the revenue-generating student-athletes. Plus, non-revenue generating sports' student-athletes often play more for the scholarship than for a future career in that sport.<sup>96</sup>

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employee . . . ” The U.S. Supreme Court has held that in applying this broad definition of “employee” it is necessary to consider the common law definition of “employee” (citing *Nat’l Labor Relations Bd. v. Town & Country Elec.*, 516 U.S. 85, 94 (1995)). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.

<sup>94</sup> See Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics](http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics) (noting that Title IX may be the best argument against Pay-for-play in college sports). To not remove non-revenue generating sports’ student-athletes from the compensation structure would be detrimental to both those sports as well as to the revenue-generating student athletes. Non-revenue generating sports’ student athletes often play more for the scholarship than for a future career in that sport.

<sup>95</sup> Removing non-revenue generating student athletes in sports that do not turn a profit will ensure that universities do not cut these programs in the fear that they will be required to compensate the student-athletes outside of the scholarships that are already provided.

<sup>96</sup> See Jeffrey Standen, *The Next Labor Market in College Sports*, 92 OR. L. REV. 1093, 1123 (2014) (“Young players devote themselves to games out of passion . . . or for the chance at a college scholarship with its marginal opportunity at a professional career.”).

## D. Can Student-Athletes Be Properly Compensated?

### 1. Student-Athlete Interest Versus University Interest

While one might think that the “front lines” have been drawn in this war between student-athletes and universities, the Drake Group – comprised of university faculty members – has proved that these battle lines are not so rigid.<sup>97</sup> As a result of the Drake Group’s efforts, in 2013, Representative Tony Cárdenas introduced a bill entitled the “College Student-Athlete Protection Act” (“CSPA”) to the floor of the United States House of Representatives.

Universities tout the idea that they are solely institutions of education, while skirting the idea that they are businesses as well, beholden to much the same marketing and business models as many corporations. However, just like any business, universities regularly compete to be the best educationally by recruiting the best university presidents, provosts, deans, professors, and other faculty through the use of monetary compensation and other remuneration such as healthcare benefits, pensions, and vacation packages.<sup>98</sup> Students attending universities such as Harvard pay much higher tuition costs to presumably receive a much superior product as compared to the typical state or private university.<sup>99</sup>

<sup>97</sup> The Drake Group is a national association of university faculty members originally organized to defend academic integrity in higher education from the corrosive aspects of commercialized college sports. *See generally The Drake Group*, THE DRAKE GROUP, <http://thedrakegroup.org/> (last visited Aug. 14, 2014).

<sup>98</sup> *See, e.g.,* Michael Kan, *Faculty Pay Can’t Compete with Ivies League*, THE MICHIGAN DAILY (Jan. 10, 2006), <http://www.michigandaily.com/content/faculty-pay-cant-compete-ivies-league>.

<sup>99</sup> *Compare* Harvard University, *Cost of Attendance*, HARVARD, <https://college.harvard.edu/financial-aid/how-aid-works/cost-attendance> (last visited Sept. 5, 2014) (showing that the cost of attendance at Harvard University was about \$60,550/year in 2013-2014), *with* COLLEGEdata, *What’s the Price Tag for a College Education?*, COLLEGEdata, [http://www.college-data.com/cs/content/content\\_payarticle\\_tmpl.jhtml?articleId=](http://www.college-data.com/cs/content/content_payarticle_tmpl.jhtml?articleId=)

But when it comes to college sports and student-athletes, the NCAA would have us believe that college sports are not a business, but are rather “motivated primarily by education and by the physical, mental[,] and social benefits to be derived.”<sup>100</sup> Time and time again, the NCAA’s principle of amateurism serves to “hide the ball” much like a carnival game designed to trick and confuse a participant and bystander alike. While the NCAA’s intentions were likely pure when the principle of amateurism was initially implemented more than half-a-century ago, since that time major college sports have become fully commercialized and the NCAA is no longer doing student-athletes any favors by “protecting them from the commercialization of college sports.” Instead, the NCAA is partially exploiting student-athletes for its own gain under the guise of protection.

In *O’Bannon*, the NCAA argued that if it were to provide compensation to student-athletes, the competition among universities would upset the balance of competition in college sports.<sup>101</sup> Yet the NCAA could not prove this argument.<sup>102</sup> Instead, it is more likely that the most athletically gifted student-athletes will continue to attend the most elite universities as they always have because student-athletes choose to attend a certain university based on a number of non-monetary factors.<sup>103</sup>

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10064 (last visited Sept. 5, 2014) (stating that the average cost of attendance for a “moderate” university in 2013-2014 is \$22,826 and \$44,750 for state and private universities, respectively).

<sup>100</sup> *Div. I Manual* art. 2.9 (2013).

<sup>101</sup> *O’Bannon*, 2014 WL 2899815, at \*126.

<sup>102</sup> *Id.* at 126-30 (quoting testimony based on Katie Baird’s article “Dominance in College Football and the Role of Scholarship Restrictions” revealing that “at least, [NCAA regulations] appear to have a very limited effect, and at worst they have served to strengthen the position of the dominant teams.”).

<sup>103</sup> Standen, *supra* note 96, at 1097, 1119-21 (“[s]tudent-athletes who in the past would have attended non-elite schools will not choose differently on account of the availability of potentially greater compensation elsewhere. The top programs will continue to attract the finest coaching talent, and will continue to fund college athletics as before”). See also *id.* at 1126 (concluding that “the demise of

## 2. Can Universities Afford it? Does it Matter?

NCAA universities have fully abided by the NCAA's principle of amateurism, keeping student-athletes well below the poverty line while the athletic directors and coaches earn millions of dollars.<sup>104</sup> A report released in 2011, found that if college sports shared revenue the same way as professional sports, the average Division I FBS football player would be worth \$121,000 per year and the average basketball player at the same level would be worth \$265,000 per year.<sup>105</sup> Universities and the NCAA often counter by stating that, if forced to compensate revenue-generating student-athletes, they will be forced to cut athletic programs.<sup>106</sup> The argument advanced, however, is flawed. The idea that it is acceptable to deny revenue-generating student-athletes compensation so as not to cut non-revenue generating programs is not tenable. If the NCAA's principles of amateurism are true, the NCAA will find a way to make up the difference by, for example, cutting back on gargantuan salaries offered to football and men's basketball coaches or sharing some of the impressive licensing agreement revenue.<sup>107</sup> In all but ten states, the highest paid public employee is the head football or basketball coach.<sup>108</sup> For example,

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the amateur ideal, however undesirable on other grounds, will not likely change the nature of collegiate athletic competition.”).

<sup>104</sup> See Edelman, *supra* note 64, at 68 (citing Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES (Jan 1, 2012), 32 (Magazine) (noting that “premier college coaches can earn as much or more than a professional coach.”)).

<sup>105</sup> Frederic J. Frommer, *Report: Top College Athletes Worth 6 Figures*, USA TODAY (Sept. 12, 2011, 6:32 PM), [http://usatoday30.usatoday.com/sports/topstories/2011-09-12-662979720\\_x.htm](http://usatoday30.usatoday.com/sports/topstories/2011-09-12-662979720_x.htm).

<sup>106</sup> See *supra* Part IV.C.2 for a discussion on Title IX ramifications and cuts to women's athletic programs.

<sup>107</sup> See Lee, *supra* note 22 (reporting that athletic departments spend about 32% of their entire budget on coaches' salaries and benefits – more than any other single expenditure), and Ben Cohen & Sara Germano, *Nike Reaches \$252 Million Deal to Extend Sponsorship at Ohio State*, WALL ST. J., <http://www.wsj.com/articles/nike-reaches-252-million-deal-to-extend-sponsorship-at-ohio-state-1452811305> (last visited Jan. 19, 2016) (noting that The Ohio State University will receive \$112 million in Nike products and \$103 million in cash from the contract extension).

<sup>108</sup> See Edelman, *supra* note 3.

Alabama head football coach Nick Saban received over \$7 million in compensation in 2014.<sup>109</sup> However undesirable, it is also possible that football and men's basketball powerhouses may increase ticket and memorabilia prices to help soften the financial blow.

## E. How Should Compensation Be Structured?

### 1. Full Cost of Attendance

Currently, a student-athlete who receives a grant-in-aid athletic scholarship is not entitled to compensation that equals or exceeds the actual cost of attendance.<sup>110</sup> Thus, the "full scholarship" so regularly touted is a misconception.<sup>111</sup> Often, scholarships will provide full tuition and fees and often could provide a housing stipend.<sup>112</sup> However, the practical realities of college students do not align with the compensation structures of the NCAA. Some headway was made in the "Power Five" conferences since the

<sup>109</sup> NCAA Salaries, *Nick Saban*, USA TODAY, (<http://sports.usatoday.com/ncaa/salaries/>) (last visited May 26, 2015).

<sup>110</sup> See Karen Gullo & Patrick G. Lee, *NCAA Sued Over College Football Player Scholarship Caps*, BLOOMBERG (Mar. 5, 2014, 6:22 PM), <http://www.bloomberg.com/news/2014-03-05/ncaa-sued-over-caps-on-college-football-player-scholarships.html> (noting that a class-action lawsuit was filed against the NCAA and the Power Five conferences, claiming that they conspired to limit the value of a scholarship to less than the cost of attendance. The named plaintiff, Shawne Alston, had to take out a \$5,500 loan to cover the gap in the cost of attendance); *Study: 'Free Ride' Still Costs Athletes*, ESPN (Oct. 26, 2010, 1:08 PM) (showing that "report by Ithaca College researchers and a national athletes' advocacy group shows that the average "full scholarship" Division I athlete winds up having to pay \$2,951 annually in school-related expenses not covered by grants-in-aid."). *But see* Weiner, *supra* note 32 (breaking down the value of the average men's basketball scholarship).

<sup>111</sup> See Tom Liberman, *Not Enough to Eat for Scholarship Athletes*, TOM LIBERMAN (Apr. 19, 2014), <http://www.tomliberman.com/sports/not-enough-to-eat-for-scholarship-athletes>.

<sup>112</sup> See, e.g., *Athletic Scholarships*, SCHOLARSHIPS, <https://www.scholarships.com/financial-aid/college-scholarships/scholarships-by-type/athletic-scholarships/> (last visited Sept 6, 2014).

CAPA decision was handed down.<sup>113</sup> In August 2014, the NCAA adopted a Division I model that grants authority to the Power Five so that these conferences can create their own rules in certain areas – including compensation structures – to benefit college athletes.<sup>114</sup> But there is still much to do.

Non-athletes in college often have a part or full-time job, and are allowed to do so even if they have another type of scholarship.<sup>115</sup> However, because a typical student-athlete devotes between 40 and 60 hours per week to their athletic endeavors, they are left with very little time to study or socialize, and a part or full-time job is an unrealistic idea.<sup>116</sup> Student-athletes often must find a way to make up the difference. For some, that comes in trading their sports memorabilia for services.<sup>117</sup> For others, it means taking out loans or asking for help from parents – if they can even afford it. As a significant amount of student-athletes come from economi-

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<sup>113</sup> The “Power Five” conferences are the five powerhouse conferences – comprised of 65 universities – in the NCAA Division I structure (the conferences are the: Big Ten, Southeastern (“SEC”), Big 12, Pac-12, and Atlantic Coastal (“ACC”) conferences).

<sup>114</sup> Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014, 1:41 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy>.

<sup>115</sup> Note that often other restrictions on scholarships exist, such as maintaining a certain grade point average, but these restrictions are usually placed on student-athletes’ scholarships as well.

<sup>116</sup> See generally discussion *supra* Part II.A.

<sup>117</sup> See generally Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (explaining how college football and basketball are rife with scandal due to college athletes taking money under the table in apposition to NCAA amateurism policies). See generally Rusty Miller, *A Lot Happened in a Year in Ohio State Scandal*, BOSTON.COM (Dec. 21, 2011), [http://www.boston.com/news/nation/articles/2011/12/21/a\\_lot\\_happened\\_in\\_a\\_year\\_in\\_ohio\\_state\\_scandal/](http://www.boston.com/news/nation/articles/2011/12/21/a_lot_happened_in_a_year_in_ohio_state_scandal/) (Former Ohio State University star Quarterback, Terrelle Pryor, was caught in a scandal in 2010, where he and a few other fellow student-athletes traded sports memorabilia and autographs in exchange for free tattoo work from a local tattoo parlor. Pryor and the other students were then suspended for some or all of their remaining college athletic careers).

cally disadvantaged homes, parents often cannot help student-athletes pay for such expenses.

Additionally, based on certain financial eligibility thresholds, non-athletes will often qualify for federal or state student “work-study” programs that will allow them to earn money to help pay educational expenses in lieu of taking loans or other financial aid.<sup>118</sup> The NCAA is well within its power to ensure that grant-in-aid scholarships cover the full cost of attendance, including costs of living. However, the NCAA has been reluctant to implement such a policy. Because of this, Congress must take action.

## **2. Allow NCAA Student-Athletes to Participate in the Free Market**

One clear option exists to ensure that student-athletes are allowed compensation without directly costing the university or the NCAA a penny out-of-pocket. This is, of course, under the idea that the NCAA can revise its current policy that forbids student-athletes from receiving monetary benefit from their athletic status. The change would be simple: allow student-athletes to participate in an already thriving market – the market for the athletes’ image, likenesses, and memorabilia.<sup>119</sup> Currently, NCAA student-athletes are not allowed to sell, trade, or otherwise receive value for their status as a student-athlete. A student may not use memorabilia awarded to him by his university to receive services, receive any sort of remuneration for signing autographs, make appearances at local establishments or events, or receive any sort of benefits from prospective agents leading up to graduation or

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<sup>118</sup> See generally Office of the U.S. Department of Education, *Work-Study Jobs*, FAFSA, <https://studentaid.ed.gov/types/work-study> (last visited Aug. 16, 2014). “Federal Work-Study provides part-time jobs for undergraduate and graduate students with financial need, allowing them to earn money to help pay education expenses. The program encourages community service work and work related to the student’s course of study.” *Id.*

<sup>119</sup> Memorabilia would likely need to be the student-athletes’ own, personal memorabilia – not items belonging to the NCAA or the university.



entry into professional drafts.<sup>120</sup> However, many non-athletes in college often make money on the side due to their affiliation with a particular college or university.<sup>121</sup>

If student-athletes were permitted to make money on their likeness, image, or memorabilia, they could then sign pictures of themselves, autograph balls and other items, and do other things of the sort and receive money. Granted, these athletes likely could not sell jerseys with school logos on them and other things subject to licensing restrictions; however, a student-athlete could have a picture of him in a generic uniform or in other workout gear and that would not violate the licensing agreements. Furthermore, an athlete could receive a contract with major sportswear companies such as Nike, Adidas, Under Armour, or Reebok, and could receive monetary deals with such companies. Moreover, student-athletes could create commercials for these companies and many more such as Bose or Beats in the way that many NFL and NBA players do. All of these things are currently forbidden to student-athletes thus keeping the market untapped.

Additionally, the NCAA's restrictions on student-athlete compensation have slowly been eroding. In 2012, Texas

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<sup>120</sup> Terrelle Pryor and other student-athlete football players from The Ohio State University were rendered ineligible for parts of the football season for trading their own personal memorabilia in exchange for tattoos. *See generally* George Schroeder, 'No Evidence' Manziel Took Money for Autographs, *A&M Says*, USA TODAY (Aug. 28, 2013, 6:11 PM), [http://espn.go.com/espn/otl/story/\\_/id/9544137/broker-says-johnny-manziel-took-7500-autographing-helmets](http://espn.go.com/espn/otl/story/_/id/9544137/broker-says-johnny-manziel-took-7500-autographing-helmets) (commenting on how Johnny Manziel was suspended for one half of a game for signing autographs, even though there was no evidence that he received any sort of remuneration for the event). *See generally* Charles Robinson & Jason Cole, *Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2009, 2:59 AM), <http://sports.yahoo.com/ncaa/football/news?slug=ys-bushprobe> (citing an eight-month investigation which uncovered evidence that former Heisman Trophy winner Reggie Bush and his family appear to have accepted improper benefits from prospective agents while still in college).

<sup>121</sup> Local, regional, and national businesses use student representatives as marketing opportunities within the college community and will usually pay the campus representative – who is almost always a current student of the university – hourly wages, salaries, or commissions.

A&M star quarterback Johnny Manziel set up a limited liability company, JMAN2 Enterprises, LLC, and filed for a trademark on his well-known nickname, “Johnny Football.”<sup>122</sup> In 2013, Manziel filed a trademark infringement suit against a person selling various “Johnny Football” memorabilia.<sup>123</sup> Because of this lawsuit, the NCAA issued a ruling that a student-athlete can keep financial earnings as a result of a legal action.<sup>124</sup> This effectively created a loophole within current NCAA policies, meaning that almost nothing stops NCAA “boosters” from purposefully infringing on a player’s nickname and then paying up when the player brings suit.<sup>125</sup> This just furthers the idea that Congress ought to open student-athletes to the free market, instead of passively condoning loopholes and back channeling to make money on something that the athlete already owns.

<sup>122</sup> See Darren Rovell, *Suit Claims Nickname Infringement*, ESPN (Feb. 23, 2013, 10:09 AM), [http://espn.go.com/college-football/story/\\_/id/8977054/lawsuit-filed-claims-johnny-football-infringement](http://espn.go.com/college-football/story/_/id/8977054/lawsuit-filed-claims-johnny-football-infringement).

<sup>123</sup> See *id.* See also J.G. Joakim Soederbaum, *Comment: Leveling the Playing Field – Balancing Student-Athletes’ Short-and Long-Term Financial Interests with Educational Institutions’ Interests in Avoiding NCAA Sanctions*, 24 MARQ. SPORTS L. REV. 261, 283 (2013) (quoting Rovell, *supra* note 122.)

<sup>124</sup> Clay Travis, *Johnny Manziel Opens Massive Loophole in Paying Players Rule*, OUTKICK THE COVERAGE, FOX SPORTS (Feb. 25, 2013, 5:31 PM), <http://www.foxsports.com/college-football/outkick-the-coverage/johnny-manziel-opens-massive-loophole-in-paying-players-rule-022513>.

<sup>125</sup> See *id.* (“Manziel can’t directly profit off the sale of licensed products featuring his likeness, but he can pocket any proceeds that arise from a trademark lawsuit. Which is basically the same thing. Raising this interesting question, what’s to keep a bunch of Texas A&M boosters from intentionally infringing on Manziel’s trademark, being sued for doing so, and then settling out of court for hundreds of thousands of dollars in legal payments to Manziel? Nothing.”). But see Darren Heitner, *Johnny Football to Become Johnny Cash?: Protecting Manziel’s Intellectual Property and Ability to Cash-In*, FORBES (Feb. 26, 2013, 2:06 PM) <http://www.forbes.com/sites/darrenheitner/2013/02/26/johnny-football-to-become-johnny-cash-protecting-manziels-intellectual-property-and-ability-to-cash-in/> (noting that taking advantage of this loophole regularly could possibly turn into violations of criminal statutes such as wire fraud and racketeering, as well as possibly collusion in filing frivolous lawsuits).

### 3. Reclassify Student-Athletes to Qualify Under the Federal Work-Study Program

Congress created the Department of Education, which administers the federal work-study program (“FWSP”) and can pass legislation as necessary.<sup>126</sup> As such, Congress has the implicit authority to restructure the FWSP.<sup>127</sup> The FWSP “provides funds for part-time employment to help needy students to finance the costs of postsecondary education.”<sup>128</sup> It uses a statutory formula to allocate federal funding toward students at universities throughout the United States.<sup>129</sup>

However, if the FWSP were restructured, at least one of two things would happen. First, students who are not student-athletes would likely see their FWSP opportunities cut. Or second, Congress would have to find a way to cover the cost of including student-athletes in the program.<sup>130</sup> Ultimately, restructuring the FWSP while likely part of the solution, is not the whole solution.

#### F. Why Leave the Job to Congress?

Representative John Kline stated that “classifying student-athletes as employees threatens to fundamentally alter college

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<sup>126</sup> See 20 U.S.C. §3401 et seq. (Westlaw 2006) (creating the Department of Education); see also 42 U.S.C. §4271 et seq. (Westlaw 2006) (implementing the Federal Work Study Program).

<sup>127</sup> See generally 42 U.S.C. §4271 et seq. (Westlaw 2006).

<sup>128</sup> U.S. Department of Education, *Federal Work Study Program*, ED.GOV, <http://www2.ed.gov/programs/fws/index.html> (last visited Sept. 6, 2014) (“Students can receive [FWSP] funds at approximately 3,400 participating postsecondary institutions. Hourly wages must not be less than the federal minimum wage.”)

<sup>129</sup> See *id.* (the students must file a Free Application for Federal Student Aid (“FAFSA”) which calculates the student’s need for such funding).

<sup>130</sup> Covering the cost could come in a myriad of ways including, but not limited to, the following: raising taxes; revoking its non-profit, tax-exempt status; or requiring the NCAA to pay dues to a FWSP program.

sports, as well as reduce education[al] access and opportunity.”<sup>131</sup> But one thing has been clear for years: big time college athletics need to be “fundamentally altered.” Big time college athletics have been fully commercialized for years even though the NCAA has not evolved with the times.<sup>132</sup>

Moreover, Representative Kline failed to state how compensating student-athletes would alter educational access. As discussed earlier, many different avenues of restructuring compensation schedules are available.<sup>133</sup> It is more likely that Congress is afraid to act for fear of alienating the electorate. A March 2014 poll showed that significant majority of voters oppose the idea of compensating student-athletes beyond their scholarships.<sup>134</sup>

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<sup>131</sup> Jones, *supra* note 74 (quoting Representative Kline; Kline also stated that “The NLRB’s decision represents a radical departure from longstanding federal labor policies”). Representative Kline is a Republican Congressman from Minnesota and also Chairman of the House Education and Workforce Committee.

<sup>132</sup> See Branch, *supra* note 117 (“Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.”).

<sup>133</sup> See, e.g., Edelman, *supra* note 3 (noting that compensation can be restructured to reduce the exorbitant college coach, Athletic Director, and NCAA employee salaries to offset the costs of compensating student athletes).

<sup>134</sup> See Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, *Washington Post-ABC News Poll Finds*, WASHINGTON POST (Mar. 23, 2014), [http://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b\\_story.html](http://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html) (quoting ESPN Analyst Jay Bilas: “‘It’s laughable, but it’s not funny [. . .] They pay the scholarship, which is the amount the school pays to itself. They’re not out a nickel. The athletics department pays the school. Then they claim that they’re poor. Then they pay themselves these outrageous salaries that are market-based, but they say they don’t have any money to give to the players, but they have \$8 million to give to a football or basketball coach’ . . . According to the poll, critics like Bilas are in the minority. Only 19 percent indicated they strongly support paying salaries to college athletes.”).

Congress has long had the power to define an “employee,” and has statutorily done so in §2(3) of the NLRA.<sup>135</sup> Additionally, the Supreme Court has held that, when determining whether an individual is a statutory employee under the NLRA, one must also consider the common law definition of employee.<sup>136</sup> While the NLRA contained an enabling statute, giving power to the NLRB to define an employee, this does not mean that Congress is without authority to take up the mantle again.

As such, a bill entitled the “Collegiate Student-Athlete Protection Act” (“CSAP”), has been introduced in Congress that aims to alleviate the issues confronting student-athletes in the revenue-generating sector of college sports.<sup>137</sup> If passed, the CSAP would amend the Higher Education Act of 1965 and would require an institution of higher education that has an athletic program that annually receives \$10 million dollars or more in income to comply with certain additional requirements concerning student-athletes to be eligible to continue receiving federal student assistance and work-study programs.<sup>138</sup> However, most of the requirements – while both needed and beneficial – do not directly address the issue of student-athlete compensation.<sup>139</sup>

<sup>135</sup> See 29 U.S.C. §152(3) (Westlaw 2006).

<sup>136</sup> Nat’l Labor Relations Bd. v. Town & Country Elec., 516 U.S. 85, 93-94 (“[I]n the context of reviewing lower courts’ interpretations of statutory terms, we have said on several occasions that when Congress uses the term ‘employee’ in a statute that does not define the term, courts interpreting the statute “must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term . . . . In the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” (quoting, in part, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)).

<sup>137</sup> Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (2013) [hereinafter CSAP].

<sup>138</sup> This bill only applies if the income is derived from media rights for television coverage of the institution’s athletic program. *Id.*

<sup>139</sup> See generally CSAP, *supra* note 137 (CSAP addresses such issues as banning the revocation of an athletic scholarship to a student athlete due to: injury, illness, involuntary dismissal from the team [excluding disciplinary purposes], exhaustion of athletic eligibility, and formal administrative hearings for discipli-

Judge Wilken indicated in *O'Bannon* that criticisms abound in the use of the Sherman Act for further cases against the NCAA's policies.<sup>140</sup> She indicates that the NCAA, its member schools and conferences, or Congress – individually or collectively – could undertake reforms to the NCAA's anti-competitive policies.<sup>141</sup> However, the NCAA's structure makes it incredibly difficult to institute reforms.<sup>142</sup> Furthermore, the universities are hamstrung from compensating the players because of the NCAA's compliance department and the fear of sanctions and possibly the infamous "death penalty."<sup>143</sup>

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nary dismissals from the team. A summary of the proposed benefits can be found at <https://beta.congress.gov/bill/113th-congress/house-bill/3545>).

<sup>140</sup> See *O'Bannon*, 2014 WL 2899815, at \*151 ("To the extent other criticisms have been leveled against the NCAA and college policies and practices, those are not raised and cannot be remedied based on the antitrust causes of action in this lawsuit. It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here.").

<sup>141</sup> *Id.*

<sup>142</sup> See Steve Berkowitz, *NCAA's Mark Emmert Gets Grilling from Senate Committee*, USA TODAY (July 10, 2014, 2:59 AM), <http://www.usatoday.com/story/sports/college/2014/07/09/senate-commerce-committee-ncaa-mark-emmert/12409685/> ("In response to Emmert having noted earlier in the hearing that he has a limited role in NCAA rules-making that is ultimately done largely by college presidents, [Senator Claire] McCaskill said: 'I can't tell whether you are in charge or whether you are a minion' to the schools and college presidents.").

<sup>143</sup> See generally *Death Penalty (NCAA)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Death\\_penalty\\_\(NCAA\)](http://en.wikipedia.org/wiki/Death_penalty_(NCAA)) (last visited Aug. 21, 2014) (noting that the death penalty has only been instituted three times in revenue-generating college sports, and led to Southern Methodist University's downfall from the pinnacle of college sports in 1986).

## V. CONCLUSION

### A. Congress has a Duty to Act

The NCAA's revenue-generating sports – football and men's basketball – are ripe for serious reform. However, the NCAA has failed to implement systematic change that has been necessary since the commercialization of big time college sports. As such, Congress must act. While the action proposed in this article would be largely an exercise in public policy, precedent does exist by which Congress could justify its actions. By combining the rulings of cases such as *Law*, *O'Bannon*, and the recent CAPA decision, it is clear that student-athletes of these commercialized college sports are employees and must be compensated accordingly.

### B. Three Non-Exclusive Options: (1) Structure Compensation Plans for “Revenue-Generating” Student-Athletes; (2) Force the NCAA to Allow Student-Athletes to Compete in the Free Market; (3) and Restructure the Federal Work-Study Program

Congress has three avenues to institute reform. First, Congress can structure compensation plans to ensure that student-athletes receive the full cost of attendance at their universities. These plans should be aimed at compensating student-athletes while ensuring that the universities are not effectively forced to discontinue major college sports. A quick Internet search shows that suggestions are legion about how this compensation should be structured. However, because the NCAA will not enact this type of policy on its own, Congress must step in and take up the mantle.

Second, Congress can legislate to prohibit any NCAA policies that forbid student-athletes from using their likeness, image, or personal memorabilia to earn money. The idea that a student cannot profit off of his association with a particular university is untenable, considering that “student representatives” are readily seen around college campuses.

Third, the NCAA can restructure the Federal Work Study Program to allow student's athletic endeavors to be counted toward hours worked and compensate them for these activities. Student-athletes should be allowed to use their "optional" workouts and other trainings as countable toward the FWSP. However, if Congress decides to use this option, it must be incredibly delicate. When restructuring the FWSP, Congress should be careful not to reduce the availability of work to non-athletes. Congress may need to create revenue from the NCAA or the universities in the forms of fees to cover this cost. Perhaps the NCAA will be more willing to make changes once Congress gets in its pockets. It's only fair – after all, the NCAA is actively keeping money out of the student-athlete's pockets through its blind belief in the "principles of amateurism."

**C. Congress Should Create a Class of Employee that Requires Student-Athletes to Receive the Full Cost of Attendance and also Forbids Restricting Compensation from Third Parties for Image, Likeness, and Memorabilia Sales**

While all of the options outlined above would each help to properly compensate student-athletes in revenue-generating sports, Congress should limit legislation to include option one and two, while excluding option three. In other words, Congress should institute legislation that will *require* universities to provide scholarships amounting to the full cost-of-attendance, rather than merely providing tuition and fees. This cost-of-attendance should also be sure to include necessary benefits such as travel stipends, medical coverage, housing allowances, and other things necessary for student-athletes to attend college. This will be their "salary," if you will.

Second, Congress *must* create an avenue for student-athletes to profit off of their image, likeness, and personally owned memorabilia. To continue to allow the NCAA to forbid students from doing so unreasonably restrains trade in violation of the Sherman Act. However, student-athletes should not have to go to



court every time they are suspended for selling autographs or signing a football or basketball. Opening up this “secondary market” will do much to alleviate the tension between the NCAA and student-athletes. Of course, student-athletes may still be prohibited from signing jerseys with NCAA or university logos, but training student-athletes, contractual negotiation, and—if that fails—trademark remedies could then be pursued as a way to flesh that out.

The third option of expanding the Federal Work Study Program should be avoided. The red tape that would be required to implement this program would likely make it prohibitively expensive. Congress would have to appropriate more funds for an already strained federal budget and a distinct possibility exists that opportunities would be taken away from students who currently work for this funding.

Too long have student-athletes been “shielded” from fully commercialized, revenue generating college sports – all under the guise of amateurism. The NLRB got it right in the *CAPA v. NCAA* decision. Many college student athletes are not amateurs; they are employees. It is time Congress treats them as the professional employees that they are.

