Putting the “Student” Back in “Student Athlete”

The National Collegiate Athletic Association (NCAA) earns approximately $700 million annually in television and marketing agreements. Critics of the NCAA ask, “Why aren’t student athletes seeing any of this money? Why are the NCAA and universities exploiting our talented youth?” Student athletes, they claim, should be compensated for their skill and efforts. Despite these protests, the NCAA continues and should continue to maintain their policy of organizing and promoting amateur sports. Paying NCAA student athletes would open a Pandora’s Box that will hurt college sports more than it would help them.

First, this paper addresses the structure of the NCAA and address the common misconceptions held by opponents of the NCAA, mainly by exploring the NCAA Division I Manual. Second, it analyzes the relationship between schools and its athletes based on the National Labor Relations Act and the Fair Labor Standards Act. Finally, this paper argues that paying NCAA student athletes is not a solution to the labor problem in college athletics.

NCAA Background

The Pursuit of Amateurism

From its broad, overall mission statement to individual regulations, one of the NCAA’s main goals is to safeguard the amateur status of its student athletes. According to its mission statement, the NCAA’s main purpose is to “[t]o initiate, stimulate and improve intercollegiate athletics programs for student athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit.” The NCAA further hopes to “retain a clear line of demarcation between intercollegiate athletics and

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1 Revenue, NCAA (Feb. 13, 2013), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue
2 NCAA Division I Manual, Section 1.2(a) (2013-2014)
professional sports.”\(^3\) Student athletes’ primary motivation should be education and “the physical, mental, and social benefits” of athletics. Their participation in athletics is an “avocation.”

The NCAA’s “General Principles” exhibit a strong desire to balance athletics and academics, with a preference to academics. The NCAA charges its member schools to “establish and maintain an environment in which a student athlete’s activities are conducted as an integral part of the student athlete’s educational experience.”\(^4\) Athletic programs are supposed to be maintained “as a vital component of the educational program,” and student athletes are supposed to be “an integral part of the student body.”\(^5\)

In addition to these broad policy statements, the NCAA has adopted specific rules regarding student athletes’ amateur status. For example, in addition to not being paid for their services, student athletes cannot sign a contract or commit to play professionally, compete with any pro team regardless of payment, enter into a professional draft, or have an agent.\(^6\) However, student athletes are allowed to work, with extreme limitations. Student athletes can work another job for their school just like any other student, but employment by private parties is highly regulated. In private employment, student athletes cannot use their own name, photograph, appearance, or reputation, even if they own their own business.\(^7\)

These rules are significantly more stringent than other organizations’ amateur status requirements. For example, while an amateur golfer cannot use his golf skills or reputation while advertising, he can still use his photo and likeness for non-golf related endeavors. Further, an

\(^3\) NCAA Division I Manual, Section 1.3 (2013-2014)  
\(^4\) NCAA Division I Manual, Section 2.2.1 (2013-2014)  
\(^5\) NCAA Division I Manual, Section 2.5 (2013-2014)  
\(^6\) NCAA Division I Manual, Section 12.1 (2013-2014)  
\(^7\) NCAA Division I Manual, Section 12.4 (2013-2014)
amateur golfer can compete with professionals, attempt to become a professional, and receive nominal winnings (less than $750) without losing status.  

While the USGA’s only goal seems to be the preservation of amateur status, the NCAA also hopes to protect student athletes from “exploitation by professional and commercial enterprises.” This is one possible explanation of the NCAA’s more stringent definition of amateur status. Another is the NCAA’s emphasis on education; because the NCAA has a strong interest in the development of student athletes off of the field, the eligibility requirements are in place for more than ensuring competitive fairness.

The NCAA does carve out an exception to their prohibition against compensation for athletic scholarships. Athletes may receive financial aid from their school as long as it does not exceed the cost of attendance. This exception is only granted in Divisions I and II schools; Division III student athletes are ineligible to receive athletic scholarships. Athletic scholarships are the only potential “compensation” packages available to student athletes. These scholarships cannot exceed the official cost of living estimate issued by the school each year. Although the student athletes can receive room and board, their housing and food plans must be the same as regular students. Other than a scholarship, “a student athlete shall not receive any extra benefit” for his or her participation in collegiate athletics.

Enforcement of NCAA Policies and Regulations

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8 USGA Amateur Status Rules and Decisions, Rules 1-7. The USGA, or the United States Golf Association, is the governing body for golf in the United States. The USGA hosts professional and amateur tournaments and creates and enforces the rules, including the Amateur Guidelines. USGA rules govern most tournaments in the United States, from the PGA Tour to NCAA Tournaments to youth amateur events. Although the USGA rules govern NCAA events, the NCAA’s more stringent Amateur guidelines trump the USGA’s.
9 NCAA Division I Manual, Section 2.9 (2013-2014)
10 NCAA Division I Manual, Section 2.13 (2013-2014)
11 The NCAA is divided into three divisions. The divisions are not based solely on the size of the universities, but larger schools often tend to be in Division I because they can afford it. Division I is the most competitive division with the most athletic scholarships allowed, while Division III is the least competitive division and does not allow any athletic scholarships.
12 NCAA Division I Manual, Section 16.5.1 (2013-2014)
13 NCAA Division I Manual, Section 16.01.1 (2013-2014)
Contrary to popular belief, student athletes are not directly governed by the NCAA. Instead, the NCAA obligates its member schools to apply and enforce its legislation. All active members of the NCAA are four year colleges, but athletic conferences and other coaches or sports associations can have limited memberships. The NCAA binds student athletes to its policies by governing the colleges’ policies through membership requirements. Because these are mandatory requirements, the NCAA is able to dictate the behavior of member schools and their student athletes. The requirements include a $1,800 annual membership fee, mandatory drug testing, mandatory insurance coverage, enactment of missed class-time policies, formulation of a concussion management plan, and allowed use of a student athlete’s name or likeness.

Schools always comply with the requirements to maintain their membership even though a school’s president or chancellor has “ultimate responsibility and final authority for the conduct of the intercollegiate athletics program.” Membership has its benefits, as member schools are guaranteed a percentage of the NCAA’s general operating revenue and are allowed to compete against other NCAA schools in NCAA Championships. Although NCAA members can compete against non-NCAA schools, generally only Division III schools compete against non-member schools.

Although there is no privity between the NCAA and the student athletes, the student athletes are subject to all of the NCAA’s guidelines because of the students’ relationship with the member schools. Although they are not associated with the NCAA, student athletes transfer numerous benefits to the Association. In addition to contributing their athletic performances, student athletes allow the NCAA or a third party on behalf of the NCAA to “use the name or

14 NCAA Division I Manual, Section 3.1.1 (2013-2014)
15 NCAA Division I Manual, Section 3.02.3 (2013-2014)
16 NCAA Division I Manual, Section 3.2.4 (2013-2014)
17 NCAA Division I Manual, Section 6.1.1 (2013-2014)
18 NCAA Division I Manual, Section 4.01.2.1 (2013-2014)
picture of an enrolled student athlete to generally promote NCAA championships or other
NCAA events, activities, or programs.”19 Before competing in any NCAA competition each
year, student athletes sign away their image rights to the NCAA through a Form 08-3a.20 This
form allows the NCAA to use a student athlete’s image or likeness in NCAA advertisements in
print or on television.

The NCAA has expanded this interpretation to also include using student athletes’
likenesses in video games. This ambitious interpretation of the Association’s bylaws has led to
marginal profits for the NCAA, which transfers those profits straight to its member schools. The
Association distributes over $75,000 annually to each of the top schools that was earned from the
NCAA Football video game franchise alone.21 The NCAA is facing class actions, however, from
former student athletes based on unjust enrichment.22 The situation looks bleak for the NCAA;
all other defendants, including EA Sports, the video game creator, have settled.23 EA has also
announced that they have discontinued the franchise.24

Popular Support for Student Athlete Compensation: From Ware to Waldrep

In March 2013, Louisville basketball star Kevin Ware fell awkwardly on his right leg
after attempting to block a shot during the NCAA March Madness tournament. He fell directly in

19 NCAA Division I Manual, Section 3.2.4.18 (2013-2014)
20 An example of this form can be found in the University of Kentucky’s archives at
21 Chris Smith, NCAA Football Video Game is Worth Over $75,000 Per Year For Top Teams, Forbes (Aug. 22,
2013) http://www.forbes.com/sites/chris smith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-
for-top-teams/
22 According to Black’s Law Dictionary, Unjust enrichment is “[t]he retention of a benefit conferred by another,
without offering compensation, in circumstances where compensation is reasonably expected.” UNJUST
ENRICHMENT, Black’s Law Dictionary (9th ed. 2009), unjust enrichment
23 Steve Berkowitz, EA Drops Football in ’14, Settles Cases as NCAA Fights, USA Today (Sept. 26, 2013)
24 Id.
front of the Louisville bench, and all of his teammates immediately turned away or buried their faces in towels; they were unable to stomach the sight injury. “His bone was sticking out of his shin,” said Richard Pitino, Florida International’s head coach. "I'm only 30, but I've never seen something like that. I felt like cancelling the game.”25 Surgeons inserted a steel rod into his leg in a surgery after the incident. Weeks later, Ware was able to sit on the bench with his team as they won the 2013 NCAA Championship. In the months following the incident, critics lambasted the injustice of the situation; Kevin Ware, who many suggest had a guaranteed job in the NBA, might not ever play basketball competitively again. While the NCAA made money off of his efforts, Ware put himself in harm’s way during the 2012-2013 college basketball season with no potential for compensation outside of his scholarship. Thankfully, Ware has made a full recovery from his injury and played in his first game for Louisville a little more than seven months after the incident.

Ware’s coach at Louisville, Rick Pitino, described Ware’s successful recovery as a “fairy tale.” This is a subtle acknowledgment that for every Kevin Ware, there is at least one young man or woman who’s athletic career, or even life, has been changed dramatically because of an injury during an NCAA event.

Kent Waldrep had scholarship offers from two dozen schools in football, track, and golf. He chose TCU, and became the football team’s starting running back. During his freshman year, he was flipped upside down and landed headfirst on artificial turf in a game against Alabama. Almost forty years later, Kent Waldrep is a quadriplegic and confined to a wheelchair. A few years after the accident, Waldrep stated that “the NCAA insurance [has]…taken care of all my

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needs and beyond. And TCU’s been great.”\footnote{Mike Cochran, Former Football Players Display Courage in Wage of Crippling Injuries, Abilene Reporter (Dec. 1, 1997) http://www.texnews.com/texsports97/paths120197.html} Nevertheless, “[t]he NCAA insurance is only a starting point,” he continued, “It only covers the catastrophic situations such as broken necks and head injuries.” Waldrep emphasized the need for additional coverage to protect both non-catastrophic injuries and further rehabilitation throughout the lifetime of student athletes who suffered permanent injuries. Three years after this interview, an Appellate court in Texas held that he was not entitled to Workers’ Compensation to cover the additional $250,000 in medical bills that the insurance didn’t cover. The Court dismissed Waldrep’s case because he was not an employee of the school at the time of the accident.\footnote{Waldrep v. Texas Employers Ins. Ass’n, 21 S.W.3d 692, 697 (Tex. App. 2000)}

Although the catastrophic injury insurance provided for the majority of Waldrep’s medical expenses, the payout could not provide for a lifetime of incapacitation and his loss of earning potential. Elite athletes like Waldrep whose injuries stop them from competing at a professional level are completely out of luck. Because NCAA scholarships are annually renewable, the university does not even have to continue injured athletes’ scholarships for subsequent years.\footnote{While the NCAA does allow multi-year scholarships, the practice has not become common practice in the NCAA. Zac Ellis, NCAA multiyear scholarships not taking hold in major programs, Sports Illustrated (December 13, 2013) http://college-football.si.com/2013/04/19/ncaa-multiyear-scholarships/} Further, although their immediate medical expenses are covered, injured athletes like Waldrep may run into coverage disputes further down the line. Although this is not different from any other disability insurance, many feel that student athletes should receive more comprehensive coverage because of their youth and their contributions to their universities. Finally, the injured athletes likely do not have any sort of savings built up to handle the situation because they have not received any compensation for their services.
Headline grabbing stories like these have vaulted the NCAA student athlete issue into Congressional debates. In 2011, Congress held hearings to determine whether or not it would take action and force the NCAA to compensate athletes. Congressman Bobby Rush, with his ever-present knack for making national headlines, stated,

I have this innate understanding of the NCAA and "(The NCAA) is one of the most vicious, most ruthless organizations ever created by mankind. I think you would compare the NCAA to Al Capone and to the mafia. It's a systemic, ongoing, prolonged abuse of thousands and thousands of innocent young men and women who are only trying to make a life for themselves and live the American dream."

This statement was made just after the NCAA approved a $2,000 stipend for all student athletes. However, this proposal was overridden by the member schools by a two-thirds majority vote by the member schools. The NCAA has not made another push to provide any further economic support for its student athletes since this attempt in 2011.

**Student Athletes as Employees under the National Labor Relations Act**

*Background of the law and precedent from the NLRB*

The NCAA has not needed to craft a means of economic support for student athletes because the law has not forced the Association to do so. While *Waldrep* already determined that student athletes are not employees under the common law, a situation where a student-athlete is claimed to be an employee has never been the principle issue in a claim brought under the National Labor Relations Act (NLRA) or Fair Labor Standards Act (FLSA).

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31 According to the NCAA Division I Manual, a Dominant Provision, which is a provision that would affect all three NCAA Divisions, must be passed by a two thirds majority vote of all member schools. *NCAA Division I Manual*, Section 5.02.1.1 (2013-2014)
The NLRA affords employees the right to associate into unions, engage in collective bargaining, and participate in strikes.\textsuperscript{32} Although it would not apply to student athletes if public universities are the “employer,” the NLRA would theoretically apply to private universities or to all schools if the NCAA was considered the “employer.”\textsuperscript{33}

Much to the delight of litigators everywhere, Congress failed to define sufficiently “employer” and “employee” under the NLRA. An “employer…includes any person acting as an agent of an employer…” and an “employee…shall include any employee.”\textsuperscript{34} Because this is the extent of guidance that Congress provides, the National Labor Relations Board (NLRB) is tasked with determining whether individuals are employees on a case by case basis. Although NLRB decisions are subject to judicial review, they can be used as guidance to predict the outcome of future cases.

A significant portion of litigation has arisen in an attempt to determine whether workers are employees or independent contractors. In this situation, courts traditionally look to the amount of control exerted by the employer, and the Board follows suit.\textsuperscript{35} Applying only the control test, however, would oversimplify the matter; the control test only applies when the employer alleges that the worker is an independent contractor.\textsuperscript{36} The Board will occasionally expand on the control test by further applying an economic realities test to determine to what extent the worker relied on the employer, but the NLRA does not seek to make every worker who is economically dependent an employee.\textsuperscript{37} Even if a worker is completely dependent on a

\textsuperscript{32} 29 U.S.C.A. § 157
\textsuperscript{33} 29 U.S.C.A. § 152
\textsuperscript{34} Id.
\textsuperscript{35} Restatement (Third) Of Agency § 1.01 (2006)
\textsuperscript{36} Paladini, A., Inc., 168 NLRB 952 (1967).
\textsuperscript{37} St. Joseph News-Press & Teamsters Union Local 460, 345 NLRB 474, 483 (2005)
company, like an independent contractor working on only one contract, the worker does not satisfy the economic realities test.

In addition to these two tests, the NLRB has developed a further test to be applied in a university setting. The Board acknowledged that “attempting to force the student-university relationship into the traditional employer-employee framework” is a problem.\textsuperscript{38} Therefore, NLRB disputes between student workers and universities cannot be analyzed based on the control test or economic realities test. Instead, the NLRB has developed a test that specifically deals with student employees of universities. Although these decisions are based on graduate students and not student athletes, the reasoning behind the cases still applies to student athletes’ work.

In \textit{Adelphi University}, 195 NLRB 639 (1972), the Board held that graduate student assistants are not employees under the NLRA. The Board reasoned that the graduate students were students first, and workers second.\textsuperscript{39} The Board emphasized that the students’ employment is contingent upon the students being enrolled in the school working towards a degree.\textsuperscript{40}

In \textit{Leland Stanford}, 214 NLRB 621, 623 (1974), the Board upheld \textit{Adelphi}. It reasoned that the graduate students were enrolled full-time in the school, that the work was required for the students’ degrees, the students received academic credit for their research, and their stipend was not dependent upon the work or skill of the students; whether or not the work was valuable to the school, the students received the same stipend.\textsuperscript{41}

\textit{St. Clare’s Hospital}, 229 NLRB 1000 (1977) similarly upheld the \textit{Adelphi Leland} rule. In \textit{St. Clare’s}, a medical intern working at an internship for her degree was not considered a

\begin{itemize}
\item \textsuperscript{38} \textit{Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Uaw Afl-Cio}, 342 NLRB 483, 487 (2004)
\item \textsuperscript{39} \textit{Adelphi Univ.}, 195 NLRB 639 (1972)
\item \textsuperscript{40} \textit{Id.} at 640
\item \textsuperscript{41} \textit{The Leland Stanford Junior Univ.}, 214 NLRB 621, 623 (1974)
\end{itemize}
statutory employee because the “[m]utual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature.”42 The Board eventually overruled St. Clare’s in Boston Medical Center, 330 NLRB 152 (1999) reasoning that “[n]othing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.”43 Regardless. St. Clare’s is arguably still good law for student currently enrolled in school because Boston Medical Center dealt with students that had already received their degree and were going through post-degree internships or residencies.

Adelphi and Leland governed NLRB decisions for twenty five years until they were overturned by New York University, 332 NLRB 1205 (2000). New York University followed the rationale laid out in Boston Medical Center and held that non-medical graduate students too are employees under the Act. The Board reasoned that the “graduate assistants' relationship with the Employer is … indistinguishable from a traditional master-servant relationship.”44

Four years later, the NLRB changed its mind yet again in Brown University, 342 NLRB 483 (2004). The Board acknowledged that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world.”45 Brown highlighted many reasons for returning to the Adelphi Leland rule. First, every individual was a student at the university, and must be enrolled in the university to be appointed to the position. The graduate assistants were “primarily students” and a majority of their time was focused on being a student. Second, their employment activities were a prerequisite to the Ph.D. program; graduate assistants have to teach classes in order to receive their Ph.D. Third, the graduate assistants conduct their work under the

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42 St. Clare’s Hospital, 229 NLRB 1000 (1977)  
43 Boston Medical Center, 330 NLRB 152 (1999)  
direct supervision of faculty members. Fourth, the money received as compensation is not “consideration for work,” but financial aid to the student. The compensation is “only provided to students and only for the period during which they are enrolled as students.” Further, a majority of Brown students received some sort of financial support from the university, and a “significant segment” of that financial support was for tuition. The Board continued by comparing the “mutual interest in the advancement of education” in a student-teacher relationship with the “conflicting economic interests” of the employee-employer relationship.

Despite the Board’s decision in Brown, the issue is anything but settled. In 2012, the Board granted a Petitioner’s request to review the Brown decision. Although the Board’s second look at Brown has not yet been published, the fact that the Board may potentially overturn itself twice in a decade signifies that the Board’s stance on graduate students is not on firm ground.

The NCAA has a very strong interest in NLRB litigation regarding the employee status of students. Regardless of the NCAA’s precepts and principles of Amateurism, the NCAA must afford student athletes all of the rights of a statutory employee under the NLRA if the NLRB determines that student athletes are in fact statutory employees.

Applying the NLRB’s rationale to student athletes

If analyzed only under the NLRB’s traditional control test, the Board could easily conclude that a student athlete is a statutory employee. One need only listen to the horror stories of Division I athletes at top schools to understand that student athletes’ lives are heavily structured. In a 2012 survey conducted by the NCAA, Division I-A football players stated that they spend approximately 45 hours on athletics during the season while spending just under 40

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hours on academics. Combined, this amounts to anywhere from two-thirds to three-quarters of a student’s waking hours during football season. Both the athletic and academic hours are highly structured by many universities. Practices, film sessions, weight training, games, and traveling are all necessary team activities. Further, players attend mandatory “study halls” and take only specific classes that fit with their athletic schedule. It would seem as though, at least for the elite programs, universities exert more temporal control over their student athletes than they exert over their regular, salaried employees like administrative staff and faculty.

In addition to control over student athletes’ time, the universities retain much control over the day-to-day lives of student athletes. The universities enforce all NCAA regulations, including mandatory drug testing and limitations on employment and marketing. Further, universities have their own athletic policies regarding everything from correspondence with the press to dress codes. On and off the field, universities exert an extraordinary amount of control over student athletes.

The control test analysis does change for many sports other than football or basketball, for less competitive Division I schools, and for Division II and III schools. Although the NCAA study found that on average most student athletes in all three divisions devote more than thirty hours per week to their sport, the control of the students’ lives outside of the sport is significantly less. Regardless, the Board would likely find that the universities hold sufficient control over students just based on the sheer volume of athletic and academic hours.

When the economic realities test is applied, the situation becomes more complicated. To declare that student athletes are employees under the economic realities test simply because they

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49 Id.
are financially dependent on the universities is a gross oversimplification of the law. The next logical step in this argument would be to conclude that students on full academic scholarships are employees of the university because they are completely financially dependent on the university as well. Next, would students whose loans depend on student status be employees because of their financial dependence? This thought process illustrates why the NLRB does not and cannot make the assertion that every person working for another party and financially dependent on the employer is statutory employee.

Therefore, in order for the economic realities test to be dispositive of employee status, there must be another facet to the analysis. The most significant economic reality in the student athlete employment analysis is the fact that student athletes are never under the assumption that their relationship with their university is that of an employee and employer. Starting in high school, student athletes are familiar with the NCAA’s amateur requirements when they must follow all recruiting protocol and refrain from contracting with a professional agent. Upon enrollment in a university, student athletes are lectured on the do’s and don’ts of amateurism; do play for the “love of the game” and don’t accept money from anyone. Student athletes are not brought into their universities expecting a paycheck, stipend, or any other compensation other than their scholarships. For the student athlete-university relationship, the economic reality is that neither side ever represented or intended that there would be employment status. Therefore, the economic realities test fails to establish that student athletes are statutory employees under the NLRA.

See Robert A. McCormick & Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete as Employee, 81 Wash. L.R. 71 (2006). This is a law review article by two Michigan State Law Professors. In a very thorough argument, Professors McCormick and McCormick argue that student athletes are employees under all three NLRB tests: the control test, the economic realities test, and the Brown test. However, in support of their assertion that student athletes are employees under the economic realities test, the authors fixate on the fact that student athletes are dependent upon the universities for support, even though the Board has consistently held that financial dependence by itself is not dispositive. Further, many student athletes are walk-ons or Division III athletes and therefore receive no athletic scholarships.
The final and most relevant test was laid out in the NLRB’s decision in *Brown*. Although the NLRB just recently agreed to review their decision in *Brown*, the *Brown* decision is buttressed by years of NLRB decisions that refused to give collective bargaining rights to any kind of student and should not be overturned. Because *Brown* has not been overturned yet, it is the best tool possible for predicting future Board decisions because it is specifically geared towards students.

*Brown* focused on four factors in determining that the relationship between graduate students and universities was primarily educational instead of economic: (1) student status, (2) role of the job in the scheme of the student’s curriculum, (3) faculty relationship, and (4) nature of the support provided by the university.51 The Board did not specify whether all four factors must be present, if one factor weighed more heavily than another factor, or if it would apply a totality of the circumstances approach in future cases. Regardless, all four factors are applicable to the student athlete employment analysis.

First, *Brown* held that the graduate students were not statutory employees because of their student status. The Board reasoned that the students’ “principal time commitment at Brown is focused on obtaining a degree.”52 Like in *Brown*, all NCAA student athletes must be full-time students in good standing at their universities in order to compete, and therefore be eligible for their scholarships.53 However, unlike in *Brown*, student athletes’ “primary commitments” vary. One cannot deny that in some programs at some universities, student athletes are athletes first and students second. The commonly held misconception is that student athletes enroll in school for a short while, get burnt out competing in athletics, and drop out at a higher rate than average

51 *Brown Univ.*, 342 NLRB 483, 489-90
53 *NCAA Division I Manual*, Section 14.01.2 (2013-2014)
students. This is not the case. For the incoming freshman class of 2006, 65% of Division I student athletes graduated within six years.\(^{54}\) Although this number seems low, the school wide graduation rate for these same schools was 64%, one point below the student athletes. However, these statistics are not representative of the traditional top tier football schools; top schools actually have better graduation rates on average. The chart on the right lists the graduation rate after six years for all football teams in the SEC, which is arguably the most competitive conference.

These programs often receive the most (negative) attention and are the most visible because SEC teams routinely populate the College Football Top 25 in AP polls. Many of these schools are criticized for acting as an extended training camp for the NFL. For example, of Alabama’s eighty five football players on scholarship, nine players were drafted in the 2013 NFL Draft, and five more participated in the draft but went undrafted.\(^{55}\) While 10.6% of Alabama’s football team became professionals, on average only 1.6% of NCAA Football players play professionally.\(^{56}\) Men’s and women’s basketball, men’s hockey, and men’s soccer all average around 1% as well. The only irregularity is baseball; the sheer number of minor league teams hiring every year inflated the NCAA baseball percentage to 9.7%.\(^{57}\) These numbers show that,

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\(^{54}\) Michelle Brutlag Hosick, *Division I Student-Athletes Make the Grade*, NCAA http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/october/division+i+student-athletes+make+the+grade


\(^{57}\) Id.
for the most part, most student athletes will not go pro and are likely going to school for an education.

Statistical arguments can be made arguing for or against the first *Brown* factor, but the stronger argument is in favor of student athletes as students first. Although some argue that student athletes are primarily athletes because oftentimes half or more of their time in season is spent on athletic activities instead of academic activities, athletes’ seasons do not last the entire academic year. In the aggregate, more time during the entire school year is likely spent on academics. Further, student athletes are primarily students because athletics are not detrimental to a student athletes’ graduation rate; student athletes are just as likely to graduate and succeed as a student as average students are. Finally, student athletes are primarily students because they are not participating in a “farm system” leading into professional sports; most collegiate athletes do not play their sport professionally.

The second factor in *Brown* is the role of the students’ job in the scheme of their curriculum. The graduate students were not primarily employees because their teaching duties were required as part of their curriculum for their advanced degree. Unlike the graduate students, student athletes are not required to compete in NCAA competitions to obtain their degree. Although student athletes in some instances may receive a physical education credit for their participation on a team, participation in a collegiate sport is certainly not a prerequisite to graduation. Therefore, this factor waves heavily in favor of student athletes as employees because student athletes’ actions are entirely outside the scope of their academic curriculum.

The third factor in *Brown* was the students’ relationship with the faculty. In *Brown*, the graduate students performed under the direction and control of faculty members from their department, they generally did not teach independently, and they researched under grants applied
for by faculty members, who taught or advised the students in their coursework. A variation of the student-faculty relationship in Brown exists between athletes and their coaches.

Like the student-faculty relationship, student athletes are always under the direction and control of their coaches; they do generally do not act independently. Weight training, practicing, and games are all organized and supervised by coaches. Although coaches certainly are not academic faculty, they are still employed by the school as supervisors of the students. Further, like the faculty members in Brown, coaches have an interest in the academic development of their students, albeit a lesser one than supervising professors in PhD programs. Minimum academic standards set by both the NCAA and its member schools ensure that coaches will have at the very least a self-interested concern for their players’ academic careers. Unlike in a traditional employee-employer relationship, both the graduate student-faculty and student athlete-coach relationships’ interests and goals are more or less aligned. Both faculty members and coaches have a paternal interest in fostering their charges. Even though coaches are not directly involved in the academic careers of their student athletes, they are sufficiently involved to satisfy the third factor in Brown.

The fourth Brown factor addressed the nature of the graduate students’ compensation. In Brown, the graduate students are directly paid for their services, mainly through grants. Although the students received compensation just as a regular employee would, the Board considered it financial aid and not “consideration for work.” Graduate and teaching assistants received the same compensation as fellows who did not teach. Further, the compensation did not depend on the quality or value of the services rendered; a graduate student curing cancer would theoretically receive the same compensation as one studying the life cycle of newts.

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58 Brown, 342 NLRB at 489
59 Brown, NLRB at 485
Student athletes’ compensation plans are significantly different than the graduate students’ in *Brown*. While the graduate students received regular paychecks for their teaching or research jobs, student athletes’ compensation can only come in the form of academic and cost of living scholarships. This is exactly the same scholarship as a student receiving a full scholarship for academics. Like the graduate students, however, athletic scholarships are not dependent on the quality or value of services rendered once scholarships are issued. Although a coach can certainly choose to not renew a student athlete’s scholarship at the end of an academic year, a coach cannot revoke a scholarship midseason due to poor athletic play or injury. Once a full or partial scholarship is issued at the beginning of a school year, it cannot be revoked. Likewise, graduate students are likely not granted their grants unconditionally for the duration of their academic tenure. Should the graduate students underperform, they too are in danger of not having their scholarships renewed, just like student athletes would be in danger of losing their scholarships after an unsuccessful season.

Further, the amount of scholarship does not reflect the profitability of the sport or the value of the student athlete’s contribution. A football player receiving a full scholarship to Alabama will receive the same full scholarship as a female golfer at Drake, despite the fact that one sport brings in revenue while the other exhausts it.

Similarly, the NCAA could easily make the argument that student athletes’ scholarships are akin to the academic scholarships of other students. Therefore, student athletes’ compensation is not economic in nature just as regular students’ compensation is not. Like athletic scholarships, academic scholarships are renewable annually. Students are not guaranteed their scholarships for four years just like student athletes. Second, compensation is capped at the cost of tuition plus living expenses. Third, the compensation is premised on student status;
individuals are not eligible for scholarships unless they are enrolled full time in the university. Finally, universities create additional scholarship requirements for academics just as they do for athletics. For example, schools can offer scholarships with perquisite minimum GPAs and moderate behavior with these requirements.

An analysis of these factors does not lead to one definite conclusion. Unlike the graduate students in *Brown*, student athletes do not satisfy all four factors in the analysis. Nevertheless, three of the four *Brown* factors are satisfied: student status, relationship with university employees, and the nature of the compensation. As long as an absence of one of the *Brown* factors is not dispositive, and the Board applies a totality of the circumstances approach, it should find that student athletes are not employees under the NLRA.

The *Brown* factors were laid out by the Board to determine whether or not the relationship between students and their universities was “primarily an educational one,” and not economic. Although it is certainly a stretch to consider the relationship “primarily an educational one,” it is not primarily economic either; three out of the four factors weigh in favor of this conclusion.

Further, in a totality of the circumstances approach, the Board will look at the structure of universities and conclude that NCAA athletics are not run for profit. Although certain top schools do turn a profit on men’s basketball and football, the athletic departments never expect men’s water polo or women’s volleyball to turn a profit for the school. And, as a whole, athletic departments generally operate at a loss. The universities cannot be employers in a primarily economic relationship if they are not even trying to profit from the enterprise.

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60 *Brown*, 342 NLRB 483 at 489
61 NCAA Finances, USA Today, http://www.usatoday.com/sports/college/schools/finances/
Therefore, the NCAA and its member schools have a strong argument that student athletes are not employees under the NLRB.

**Student athletes as Employees under the Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA) has a slightly different analysis when determining whether a worker is an employee. Statutory employees under the FLSA are entitled to overtime pay and limitations on how long they can work. Like under the NLRA, if workers are statutory employees under the FLSA, they are entitled to all of its protections regardless of the NCAA’s stance on the employment status of student athletes.

There has not been any litigation involving student athletes as employees under the Fair Labor Standards Act (FLSA), likely because it is clear that students are not employees under the Act. When determining whether or not an individual is an “employee” under the FLSA, the courts are not limited by contractual language or traditional common law. 62 Instead, courts have applied a six factor economic reality test in order to examine the totality of the circumstances:

1. the degree of control exerted by the alleged employer over the worker;
2. the worker's opportunity for profit or loss;
3. the worker's investment in the business;
4. the permanence of the working relationship;
5. the degree of skill required to perform the work; and
6. the extent to which the work is an integral part of the alleged employer's business. 63

The legal tests for student athletes under the NLRA and FLSA are seemingly very different. However, both the NLRA and FLSA apply an economic realities test to determine whether a worker is a statutory employee. The only reason these two tests are different is because the NLRB has specifically addressed the student-university relationship, while courts have not introduced a similar test for the FLSA. Because the tests under the NLRA and FLSA

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62 Baker v. Flint Eng’g & Const. Co., 137 F.3d 1436, 1440 (10th Cir. 1998)
63 Id.
are different, it is worthwhile to analyze each of the factors of the FLSA test and how they apply to Division I NCAA student athletes.

In light of how previous courts have interpreted these six factors in regards to students working at universities, NCAA student-athletes are not considered employees under the FLSA.

Degree of control asserted by the universities over the student-athletes

The first prong of the totality of the circumstances evaluation falls in favor of classifying student athletes as employees. Because of the demands of coaches, trainers, and the athletic department, student athletes’ daily schedules are pre-determined even before their first day of college.

Returning to the NCAA study of student athletes’ time commitments, the numbers heavily support this conclusion. The study showed that football players in FBS schools spent 43.3 hours a week performing athletics-related activities, men’s basketball players spent 39.2 hours, women’s basketball players spent 37.6 hours, and the rest of the athletes averaged around 32 hours.64 This time spent performing athletic activities are often under the direct supervision and control of coaches and trainers.

Further, even outside of athletic activities, student-athletes’ activities are closely regulated. Athletes can only take classes at certain times of the day so that they don’t conflict with practices or meetings. They must often attend required study halls and follow other school rules that specifically govern the conduct of athletes.

The universities clearly exert a very high degree of control of their student-athletes. However, “[d]etermination of whether a worker is an “employee” within this chapter depends on

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64 Gary Brown, *Second GOALS study emphasizes coach influence*, NCAA (Sept. 25, 2013)  
underlying economic realities, and it is erroneous to focus on a single factor, such as control, and thereby fail to consider the entire circumstances of the work relationship.”

Student-athletes’ opportunity for profit and loss

The fact that student athletes do not get paid beyond their scholarships is a very important point against employee status. Although the term “employee” has been interpreted broadly, “an employee must still be a person whose employment contemplated compensation.” The plaintiff in *Turner v Unification Church*, 473 F. Supp. 367, 377 (D.R.I 1978) never expected to receive payment for her work. Instead, she was given room and board, which the court held was not “contemplating compensation.”

Like the plaintiff in *Turner*, student athletes’ activities do not contemplate compensation. One of the NCAA’s General Principles that the association is intended support is “Amateurism.” As explained in the “Pursuit of Amateurism” section above, by definition, NCAA student athletes’ activities cannot contemplate compensation.

In addition to not being paid, student athletes have no opportunity for profit and loss. Student athletes are not paid for their performance, and under NCAA rules they cannot receive any additional rewards or compensation for performing well. Their only “compensation” is their scholarships. These scholarships are not contingent upon any performance; once granted, student athletes are entitled to their scholarships for the entire year.

Student athletes’ investment in the university or athletic program

The third factor favors for the classification of student athletes as employees because the student athletes invest nothing besides their time and effort into the team. While independent

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65 *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974)
66 *Turner v Unification Church*, 473 F. Supp. 367, 377 (D.R.I 1978) aff’d, F.2d 458 (1st Cir. 1979) (where the plaintiff was held not to be an “employee” under the FLSA when she alleged that she was forced to work long hours because she was never paid for her services but she was given room and board)
contractors will invest in their own facilities or tools, student athletes receive all of their equipment, supplies, and training from the universities. In fact, one of the perks of being an NCAA student athlete is receiving jerseys and other sporting equipment free of charge from the university.

*The permanence of the student-athletes’ working relationship*

In *Demayo v. Palms West Hospital*, 918 F.Supp 2d 1287, 1291 (S.D.Fl 2013), an unpaid student extern claimed that she was an employee under the FLSA. After analyzing the six factors, the court concluded that Demayo was not an employee. One of the court’s main rationales was that the externship was for a fixed time period and she was not guaranteed a job at the end of her externship.67

Student athletes are allowed to compete in no more than four seasons of competition.68 They are also subject to the five-year rule, which states that they must complete all four years of eligibility within five years of starting college.69 Therefore, like in *Demayo*, student athletes are not employees under this prong of the test because their employment is for a fixed duration and they cannot continue as an athlete for the NCAA after their eligibility expires.

*Degree of skill required to be a student-athlete*

The FLSA’s fifth factor is a unique test to determine whether a worker is an employee or an independent contractor. “If a specific individual regularly performs tasks essentially of a routine nature and that work is a phase of the normal operations of that particular business, the Act will ordinarily regard him as an employee.”70 This test is mainly employed when courts are attempting to differentiate between employees and independent contractors. Courts rationalize

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67 918 F.Supp.2d 1287, 1291 (S.D.Fl 2013)  
69  *Id.*  
70  *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961)
that independent contractors are hired to handle especially difficult or complicated tasks, whereas employees perform the routine tasks.

It would be difficult to rationalize classifying many NCAA Division I athletes as performing work of a “routine nature” that does not require specialized skill. Whether the athletes are performing work of a “routine nature” is not dispositive, however, because these tasks are not “in the phase of the normal operations of that particular business.” The “normal operations” of a university are not athletics; this will be explained more in the next section. The fifth factor weighs in favor against student-athletes as employees because their work is not in the normal operations of the universities.

*The extent to which the student-athletes’ work is an integral part of the university’s business*

As stated in the previous section, the university’s business is not athletics; it is education. Every university’s mission statement involves education and creating or fostering knowledge. Every university’s mission statement involves education and creating or fostering knowledge.71 Success or even competition in intercollegiate athletics is not the reason universities exist in the United States.

The fact the universities may derive some economic value from athletics is not dispositive of the issue. In *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324 (10th Cir. 1981), a student residential advisor sued his university claiming that he was a protected employee under the FLSA.72 The court acknowledged that the university was gaining economic value, but the students were not displacing other employees whom the college would have had to hire.73

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71 For example, the University of Illinois’s mission statement is “[t]he University of Illinois is among the preeminent public universities of the nation and strives constantly to sustain and enhance its quality in teaching, research, public service and economic development.” *About the University: Mission and Vision*, University of Illinois, http://www.uiillinois.edu/about/mission

72 666 F.2d 1324, 1326 (10th Cir. 1981)

73 *Id.* at 1327
The fact pattern in *Marshall* most closely resembles the fact pattern of student athletes. Therefore, the last factor also goes against student athletes being employees under the FLSA. Like the RAs in *Marshall*, most student athletes are not going to college solely to play their sport full time. Similarly, just as students were not going to school to work as RAs, student athletes are not enrolled in school for the sole purpose of playing athletics. Student athletes enroll in university and agree to play in the NCAA knowing full well that they cannot be economically compensated for their efforts beyond a scholarship. Although this may not be true for some BCS football and basketball student athletes, these players are the exception, not the rule.

**Student athletes are not Employees under the FLSA**

Courts apply a totality of the circumstances approach when examining these six factories. In the case of NCAA student athletes, four of the six factors go against classifying students as employees under the Act. Most significantly, student athletes do not contemplate compensation for their work. This seemed to be the controlling issue in *Turner* and a significant factor in *Demayo*. Additionally, the NCAA and athletics in general are not an integral part to the universities’ business. The main mission of universities is education; they can easily function without athletics. Because more factors weigh very strongly against a classification of “employee,” student athletes are not employees under the FLSA.

**Student athletes are not employees under the relevant legal regimes**

Although student athletes certainly qualify as employees under the control test, ceasing the analysis there is a gross oversimplification of the situation. Not all who exercise control are employers, and in the case of student athletes, the economic reality of the situation leads one to the conclusion that student athletes are not employees.
Just as the NLRB acknowledged in Brown for its own analysis, attempting to apply a traditional employee-employer framework for any legal analysis in the academic world will lead to unwanted results. Therefore, the Board in Brown laid out a new framework to ensure that students enrolled in universities will not receive Employee benefits unless they are truly acting in an employee-employer relationship. Although courts have not specifically adjudicated the issue under the FLSA, its factor analysis makes clear that student athletes should not be considered employees under the Act.

Under today’s established employment law, student athletes are not employees under any legal regime and should not be treated as such.

**Designating student athletes as Employees under any legal regime would cause significant problems for the NCAA and its member schools**

The NCAA has been existence since 1906, and it has always existed on the premise that student athletes are amateur athletes and can only receive compensation through scholarships. Forcing the NCAA and its member schools to pay student athletes would change its core values and completely eliminate amateur competition, cause member schools to operate their athletic departments like businesses even more so than they do already, encourage student athletes to devote even more time to athletics at the expense of their studies, and open up universities to further tort liability for the conduct of their student athletes. Finally, no compensation plan exists that would be acceptable to both the student athletes and the universities.

*Paying students athletes would fundamentally alter the NCAA’s mission and eliminate amateur competition*
As explained earlier, amateurism is one of the precepts of the NCAA. Teddy Roosevelt assisted in the NCAA’s establishment specifically to prevent the practice of hiring athletes to play in collegiate sporting events.

For example, James Hogan was a 27 year old man who played football at Yale from 1901-1904. Yale paid for his tuition, gave him a “luxurious suite of rooms,” free meals at the University Club, a $100 stipend (which amounts to over $2,700 today) and a third of all profits from game-day programs sold. Further, he was an agent for a tobacco company for the New Haven, Connecticut area and received commission from all sales. Finally, he was awarded a ten day vacation to Cuba during the fall semester once the football season ended.\(^\text{74}\)

Although Mr. Hogan is an extreme example, the NCAA was established specifically to combat this sort of behavior on the part of the universities. The NCAA broadcasts its mission statement clearly in each of its Division manuals, on its website, and even in commercials during nationally televised events.\(^\text{75}\) Forcing the NCAA and its members to pay its athletes would go against the main principles that the NCAA was founded on.

Requiring schools to pay student athletes would encourage universities to run their athletic departments like businesses

Although it is futile to argue that athletic departments do not make any decisions based on financial gain, many Division I schools do not earn much of a profit; most (90%) take subsidies just to come close to breaking even.\(^\text{76}\) These athletic departments operate at a loss presumptively because there is some benefit to the students and university as a whole that is not economic in nature.

\(^{74}\) Joseph N. Crawley, The NCAA’s First Century In the Arena, (2006)

\(^{75}\) See NCAA Division I Manual, Section 1.3.1 (2013-2014), where the “Basic Purpose” of the NCAA is to “retain a clear line of demarcation between intercollegiate athletics and college sports.” This clear line of demarcation is best maintained by continuing to not pay student athletes.

\(^{76}\) NCAA Finances, USA Today, http://www.usatoday.com/sports/college/schools/finances/
If athletic departments had to pay their student athletes, its expenses would obviously grow. Schools are already having difficulties justifying millions of dollars in annual subsidies (Rutgers received approximately twenty eight million dollars last year)\(^\text{77}\); it is unlikely that schools, especially public schools receiving state funds, will receive more money when teachers and their pensions are becoming harder to pay for.

Because further subsidies are unlikely, schools would have to cut costs in order to address the expanded payroll. While the money making sports will be safe from budget cuts, teams that do not generate income through ticket and merchandise sales (essentially any sport other than football and men’s basketball) are in danger of being discontinued by the university.\(^\text{78}\) Even popular women’s sports, like basketball, operate at a loss. Major Division I schools often offer free admission to women’s basketball games and one even offers free bacon in order to attract crowds.\(^\text{79}\)

Athletic departments will pay the wages of student athletes by reducing the number of sports and student athletes in the budget. Because athletic departments must maintain equality in their athletic teams due to Title IX, athletic departments will have to keep an equal number of women’s teams. However, the quality and quantity of this support will diminish.

While football and male basketball players may rejoice at their newfound spending money, they will do so at the expense of their equally talented but less fortunate peers. Fringe

\(^{77}\) Id.

\(^{78}\) Football is one of the few sports that turn a profit for most major universities. Many of the Top 25 schools in the AP polls earn over ten million dollars annually in profit. Texas hosts the highest profiting football program, earning over seventy five million dollars in profits in the 2011-2012 season. However, Texas’s Athletic Department only earned twenty five million in profits for the same year. Therefore, it lost fifty million dollars paying for other programs that did not turn a profit; these are the programs that will face cuts or elimination if athletic departments must enlarge their payroll. Alicia Jessop, *The Economics of College Football: A Look at the Top 25 Teams’ Revenues and Expenses*, Forbes (Dec. 13, 2013) http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/.

sports like golf and cross country will be completely cut out of collegiate competition, while other slightly more common sports like soccer and track and field may see diminished financial support from their athletic departments.

*Student athletes will not devote sufficient time to academics if they are paid*

As stated earlier, there is already a problem with student athletes devoting an inordinate amount of time to athletics while their sport is in season. Student athletes are already pressured to attend “optional” training sessions in addition to required events.\(^80\) If student athletes become employees, this pressure to “earn their keep” will only increase. Student athletes will feel like they have to put in more hours to justify their pay or for a chance to increase their pay.

Further, athletic departments will increase their expectations of their student athletes for two reasons. First, the student athletes will now be employees; the employers will justify additional control on the student athletes based on their salaries. Second, because athletic departments will be run more like a business with the ultimate goal to win and earn money, coaches will be harder on their student athletes with a “win first” mentality. Although the top football and basketball schools may already have this approach, the middle and lower caliber universities do not. This will change, however, with the payment of student athletes.

*Classifying student athletes as employees will significantly expand tort liability for universities*

Currently, universities have escaped liability for many of their student athletes’ missteps. Because student athletes are not employees of the university, the universities are not liable under the theory of respondeat superior.

*Kavanagh v. Trustees of Boston University*, 795 N.E.2d 1170 (Mass.2003) supports this proposition. A Boston University player punched Kavanagh, an opposing basketball player, in

the face and broke his nose during a game. Kavanagh sued on the theory that the Boston student athlete, a senior on scholarship, was an agent of the university. The Supreme Judicial Court of Massachusetts firmly rejected Kavanagh’s logic.

The student is a buyer of education rather than an agent.... [A] student retains the benefit of that education for himself rather than for the university.” Hanson v. Kynast, 24 Ohio St.3d 171, 174, 494 N.E.2d 1091 (1986) (member of university lacrosse team not “agent” of university). While schools may benefit in various ways from the presence of a particular student, or may benefit in the future from a former student's later success, the student does not attend school to do the school's bidding. Kavanagh has cited no authority for the proposition that the relationship between school and student is that of principal and agent, master and servant, or employer and employee.81

The court stated that scholarships do not change the situation; while a scholarship is a form of payment, it is not a wage.82 The court cites numerous cases across many jurisdictions that support the conclusion that the relationship between universities and students is primarily academic, and not economic, in nature.

Up to this point, universities have been immune from judgments that other employers would typically have to pay. Kavanagh and Rensing are both premised on the fact that NCAA student athletes do not receive wages and therefore are not employees. For this reason only, workers compensation and tort claims have not held up in court. Should the schools begin to pay their student athletes, however, this relationship will change; the universities’ primary defense to these claims will disappear. This change will bring catastrophic results to universities which will result in significantly higher litigation and settlement expenses and possibly the elimination of collegiate athletics altogether. Cases with factual scenarios similar to Kavanagh, Rensing, and Waldrep will be re-litigated and possibly decided differently.

82 See Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1173 (Ind.1983) (Where a court held that scholarships are not wages because the NCAA prohibits paying wages to student athletes and because scholarships are not taxable as income)
Future workers compensation and tort cases will weigh in favor of the students and against the university. What was once a frivolous lawsuit because students were not employees will become a valid cause of action. Universities can no longer file a motion to dismiss the case early on based on *Kavanagh*. This will significantly increase the legal costs of universities in addition to increasing their liability exposure. Universities could be liable for any athletic related injury. Universities will be forced to pay for the ongoing medical expenses from any injury, possibly even something as extreme as Kent Waldrep’s ongoing medical expenses.

Most athletic departments already operate at a deficit. These additional expenses might force schools to reduce their liability by discontinuing their dangerous sports, or possibly even all athletics. What started as a crusade for ensuring fairness for student athletes would result in the cancelling of their only route into a four year university.

No compensation plan exists that would be economically feasible and acceptable to all parties

The final reason to continue with the current amateur system is that there is no other alternative. There is much public outcry to pay student athletes for their efforts. However, this is an idealized goal with no means for achievement. There are different possible compensation structures, but each have their fatal flaws.

First, each student athlete could be paid a standard hourly rate or annual salary. However, this assumes that all student athletes are equal and provide services of equal value to the school. Further, if this rate was standard across each NCAA Division, the starting quarterback at

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Alabama would make the same as the third string goalie on the women’s water polo team at Wagner College.\(^8^4\)

If the rates vary based on the school, then there will be a widening gap between the schools with money to spend on athletic programs and the schools that do not. Although a salary cap would theoretically solve this problem, in practice it may not work. A salary cap is a maximum amount that a university can spend. In order to appease the major schools and the star athletes who get the most press, the salary cap will certainly be higher than the smaller schools in each Division can afford. Therefore, even though Alabama’s football team does have a salary cap, it will still be outspending the other schools who cannot or choose not to expend extra capital on its athletes.

Universities could also contract individually with individual student athletes, with their pay depending on their skills and sports. In addition to the inequality problems stated above and significant transactional costs, this merit based system would result in the athletes in money earning sports earning significantly more than the athletes in other sports. Because the athletic departments are thinking like businesses, they will use their limited funds on the players that will give the highest returns. Therefore, schools will be paying football and basketball players significantly more than baseball players, golfers, track athletes, etc. The current system is under attack because it is unfair to the players; a new system with individual contracts would remain unfair for more than half of the student athletes in the NCAA, and only reward those in high publicity sports.

**Conclusion**

\(^8^4\) Whatever rate student athletes are paid, schools will have to pay men and women equally to avoid potential Title IX violations or discrimination lawsuits.
Student athletes are not legal “employees” under any legal regime. They are not agents in a principal-agency relationship. They are not “employees” under the NLRA. They are not “employees” under the FLSA. As the law stands right now, student athletes are not entitled to compensation, collective bargaining, or any other protection given by federal or state governments to statutory employees.

The NCAA has thrived and fostered intercollegiate competition for over a century based on the notion that amateur competition was beneficial to universities and its students; it nurtures the development of our youth and provides an extra dimension to their lives. The opportunity to compete and school pride were enough to compensate student athletes for their blood, sweat, and tears. That, and a full four year scholarship with all expenses paid.

A popular movement has existed for at least a few years, claiming that student athletes are being manipulated by the NCAA and executives are making millions from the work of young, naïve student athletes. They claim that student athletes should be paid for their hard work. However, these champions of student athletes’ rights ignore the fact that most of the NCAA’s revenue goes right back into the universities. Further, no reasonable proposal exists that provides a payment system for all deserving student athletes.

For all of the above reasons, the NCAA is a necessary governing body of intercollegiate athletics and should maintain its policies. Although intercollegiate athletics are certainly flawed, throwing money into the equation will only encourage corruption and manipulation of the system in order to win. The NCAA and its principle of amateurism is the foundation of intercollegiate athletics and should not go anywhere.