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## Student-Athletes as Employees: Unmasking Athletic Scholarships

Zachary Bock

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# Student-Athletes as Employees: Unmasking Athletic Scholarships

ZACHARY BOCK\*

*The National Collegiate Athletic Association (NCAA) and its member institutions have increasingly become some of the most powerful organizations in the country. With increased power it was only a matter of time before the NCAA and member institutions would feel pressure from its own constituents. As was expected, the pressure initiated in the summer of 2009 when Edward O'Bannon, former UCLA men's basketball standout, brought a class action lawsuit against the NCAA alleging antitrust violations. After a long battle in the United States District Court for the Northern District of California, O'Bannon's class action prevailed, but only to have the decision partially vacated by the Ninth Circuit Court of Appeals. However, the initial success of the O'Bannon case provided a sense of hope for other collegiate athletes and groups to put forth an effort to limit the NCAA and its member institutions' power. Before the O'Bannon case had been decided another group of athletes at Northwestern University came together with hopes of unionizing. Northwestern University's football team petitioned to the National Labor Relations Board (NLRB), wherein, the case was assigned to the Regional Director in Evanston, IL. The Regional Director applied a standard three prong test, established by prior NLRB decisions, in order to decide if Northwestern University football players were employees of the institution. By the end of the Regional Director's analysis, he had concluded that Northwestern University's football players were employees of the university and could unionize. Yet again, the success of student-athletes was short lived, when Northwestern University appealed to the Board for review. The NLRB denied jurisdiction on the*

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\* Juris Doctor Candidate, May 2017, and incoming Editor-in-Chief for the *Northern Illinois University Law Review*, volume 37. First, I would like to thank the Huskie Athletic Compliance Office at Northern Illinois University for extensively educating me on collegiate athletic compliance and directing me towards necessary sources for which to write this comment. Second, I must thank my loving family, friends, and amazing girlfriend for listening to my rants and rationales throughout the process. Finally, much credit is due to the professional and efficient guidance and editing that is conducted by the *Northern Illinois University Law Review*.

*matter, effectively killing the Regional Director's order. Now we all sit and wait for an appeal*

*This Comment focuses on the Regional Director's analysis of the three prong test for employee status, especially the third prong, which focuses on compensation for a service. The term compensation is never truly defined by the Regional Director nor by the NLRB. Traditionally, when we talk about compensation we are thinking of a paycheck, some sort of direct access payment. But in this scenario we are dealing with athletic scholarships; a form of compensation that is not a paycheck but, rather, an institutionally controlled financial aid. This Comment further attacks the rationale of the Regional Director by diluting his arguments that institutions can cancel or reduce athletic scholarships for any reason at any time by offering NCAA By-laws and regulations, and case samples that specifically prevent institutions from cancelling or reducing athletic scholarships for any reason. Even more importantly, this Comment introduces the potential side effects and implications of allowing student-athletes to unionize, including: tax ramifications, violation of Title IX, nonscholarship discrimination, and a complete dissolution of amateurism.*

I. INTRODUCTION .....	133
II. HISTORY OF THE NCAA .....	135
III. BACKGROUND ON THE UNION PETITION .....	137
IV. DEFINING SCHOLARSHIP .....	140
A. NCAA DEFINITION .....	140
B. DICTIONARY DEFINITIONS .....	141
C. IRS DEFINITION .....	141
V. TRUTH ABOUT ATHLETIC SCHOLARSHIPS .....	142
VI. ATHLETIC SCHOLARSHIPS AND THE REALITY OF A PROFESSIONAL CAREER .....	144
VII. DEBUNKING THE LOGIC OF THE REGIONAL DIRECTOR .....	147
A. BREAKING DOWN THE ARGUMENT .....	147
B. SCHOLARSHIP TENDER AGREEMENTS .....	150
1. GENERAL TERMS AND CONDITIONS .....	151
2. UNIVERSITY OF ARIZONA .....	152
3. IOWA STATE UNIVERSITY .....	153
4. UNIVERSITY OF SOUTH CAROLINA .....	153
5. NORTHERN ILLINOIS UNIVERSITY .....	154

VIII. IMPLICATIONS OF UNIONIZATION .....	155
A. WALK-ONS .....	155
B. ECONOMIC IMPACT .....	156
C. TITLE IX RAMIFICATIONS .....	158
IX. UPHOLDING AMATEURISM .....	159
A. NCAA CRITERIA .....	159
B. STUDENT-ATHLETE EXPLOITATION .....	160
C. THE ULTIMATE REALIZATION .....	162
X. CONCLUSION .....	163

## I. INTRODUCTION

The popularity of college athletics has grown immensely over the years; almost to the point that sports such as men's basketball and football have become commercial conglomerates.<sup>1</sup> Accompanying the growth in the popularity of collegiate athletics, was the rapid growth of universities' revenues. In fact, in the 2015-2016 school year Texas A&M University profited about \$73,133,004, with a large percentage of that coming from the football program.<sup>2</sup> Though universities and colleges have benefited largely from the popularity of football and the athletes, recent concern has surfaced off the field.<sup>3</sup> As the game has adapted, so too has the average athlete. In a world where sports dominate the airwaves and offer riches, some college athletes have focused their attention more to improving their protection from being ostracized by the National College Athletic Association (NCAA).<sup>4</sup> By now we have seen the transition of the college athlete, especially in football, from student-athlete<sup>5</sup> to professional-athlete before even

1. See Chris Isidore, *Wildly Profitable College Football About to Get More Profitable*, CNN MONEY (January 13, 2015, 6:53 AM), <http://money.cnn.com/2015/01/12/news/companies/college-football-profits/>.

2. Steve Berkowitz et al., *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/> (last visited Apr. 20, 2016).

3. Colleen Curry, *What Unionizing Athletes Would Mean for College Sports*, ABC NEWS (April 25, 2014), <http://abcnews.go.com/US/unionizing-athletes-college-sports/story?id=23469250>.

4. See generally COLLEGE ATHLETE PLAYERS ASSOCIATION, <http://www.collegeathletespa.org/about> [hereinafter CAPA] (last visited December 31, 2015).

5.

A student-athlete is a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interest with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department . . . .

making it to the National Football League (NFL). Student-athletes have begun to attack the institutional strength of the NCAA, and have even taken on a major games media brand, EA Sports.<sup>6</sup> But the strength of the student-athlete has yet to be determined despite its recent loss handed down by the National Labor Relations Board (NLRB).<sup>7</sup>

On August 17, 2015, the NLRB denied jurisdiction over an attempt by Northwestern University football players to unionize student-athletes receiving scholarships.<sup>8</sup> This decision came after the NLRB Regional Director<sup>9</sup> had already ruled that Northwestern University football players were considered university employees and could unionize.<sup>10</sup> Though the NLRB did not directly consider the issues ruled on by the Regional Director, the NLRB broadly concluded that it was not in the Board's best interest to exercise jurisdiction, leaving Northwestern football players unable to unionize.<sup>11</sup> Despite this decision by the NLRB, the door was left open for future programs to bring an action for the purpose of unionizing.<sup>12</sup> There has been

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NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.02.13 (2015).

6. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015) (affirming the district court's decision that collegiate student-athletes suffered an anti-trust injury as a result of the NCAA's current compensation rules, which made it that student-athletes could not profit from their name, image, and likeness (NIL) in sales of merchandise. However, on appeal the circuit court denied the district court's ruling to award NIL payments because the court reasoned that amateurism was integral to the NCAA's market and that rules served to preserve popularity of the NCAA's product by promoting amateurism, and paying student-athletes for their NIL rights would void their amateur status as collegiate athletes).

7. "The National Labor Relations Board is an independent federal agency that protects the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions." NLRB, WHO WE ARE, <https://www.nlr.gov/who-we-are> (last visited Dec. 31, 2015).

8. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656.

9. Regional Director Peter Sung Ohr sits in Region 13, Chicago, of the twenty-six regional offices of the NLRB. Ohr presided over the union petition involving Northwestern University and university student-athletes. *Peter Sung Ohr*, NLRB, <https://www.nlr.gov/region/13/regional-director> (last visited Dec. 20, 2015).

10. See Northwestern Univ. Emp'r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914.

11. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656.

12. Lawrence E. Dub , *NLRB Blocks Northwestern Football Union Petition*, U.S.L.W., Aug. 25, 2015 <https://www.bloomberglaw.com/s/news/9b1579ff44a4a43704be4cd6b54c4e87/document/N T967Y3H0JK0> ("[o]bserving that NCAA action or other changes in the treatment of college athletes 'could outweigh the considerations that motivate our decision today,' the board warned that its dismissal of the Northwestern petition 'does not preclude a reconsideration of this issue in the future.'").

significant debate on whether scholarship student-athletes are university employees;<sup>13</sup> however, the question still remains open.<sup>14</sup> In retrospect of the NLRB's decision to not exercise jurisdiction, the Regional Director's decision has yet to be directly refuted.

The purpose and intent of this Article is to argue that scholarships are not compensation that can be utilized to define student-athletes as university employees. First, this Article will define scholarships, their purpose, and how they are utilized. Second, this Article will reflect on the realities of an athletic career beyond the collegiate level and the importance of obtaining an education. Third, this Article will dissect the NLRB Regional Director's rationale to classify scholarship student-athletes as employees. Fourth, this Article will conduct a case study on the language and requirements that some Division I institutions implement in their scholarship tender agreements that are presented to and signed by the student-athletes. Fifth, this Article will address the potential concerns that will arise if scholarship student-athletes are deemed to be employees. Lastly, this Article will emphasize the importance of upholding a pure form of amateurism in collegiate athletics.

## II. HISTORY OF THE NCAA

“[T]he commercialization and propensity to seek unfair advantages existed virtually from the beginning of organized intercollegiate athletics in the United States. The problem of cheating, which was no doubt compounded by the increasing commercialization of sport, was a matter of concern.”<sup>15</sup> This concern led institutions to switch control of athletics from student governance to faculty supervision and even an introduction of conference regulations, but even that did not prove to be sufficient as concerns were still wavering.<sup>16</sup> By the end of the 1905 football season eighteen individuals died and over one hundred suffered major injuries.<sup>17</sup> Simultaneously, hired athletes began appearing on college rosters.<sup>18</sup> At this point the issues had garnered national attention when President Roosevelt called for a

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13. See Joseph Peluso, *Caught in the Wave of Change: Why Scholarship Student-Athletes Should Be Allowed to Unionize*, 17 DUQ. BUS. L.J. 259 (2015); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 157 (2006).

14. Dub, *supra* note 12.

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

16. *Id.* at 12.

17. Frank W. Carsonie, *Educational Values: A Necessity for Reform in Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 661, 667 (1991).

18. *Id.*

White House conference to review the rules of football.<sup>19</sup> However, that effort failed to preclude further catastrophe, leading to yet another meeting this time organized by New York University Chancellor, Henry MacCracken.<sup>20</sup> MacCracken had invited representatives from the nation's major intercollegiate football programs to form a rules committee; subsequently President Roosevelt would have White House conference representatives attend the conference.<sup>21</sup> The conference proved to be a success as sixty-two institutions formed to organize the Intercollegiate Athletic Association of the United States (IAAUS).<sup>22</sup> By 1910, the association was renamed the NCAA.<sup>23</sup>

The NCAA is a private, nonprofit, unincorporated association.<sup>24</sup> Today there are nearly 1,100 NCAA member institutions between the three separated divisions (Division I,<sup>25</sup> Division II,<sup>26</sup> and Division III<sup>27</sup>).<sup>28</sup> Each January, all NCAA members gather for the NCAA convention to vote on new rules and regulations that NCAA committees have drafted throughout the year.<sup>29</sup> Those rules are then added to an annual NCAA Bylaw Manual that corresponds to each division, whereupon all NCAA members are required

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19. Smith, *supra* note 15, at 12.

20. *Id.*

21. *Id.*

22. Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1215 (1993).

23. *Id.*

24. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 30 (1996).

25. *About, NCAA*, <http://www.ncaa.org/about> (last visited Dec. 30, 2015) (Division I schools tend to have the biggest student bodies, generate the largest athletic budgets, and provide "generous number of scholarships;" Division I schools provide over 6,000 athletic teams each year; also, Division I is divided into subparts for football, the Football Bowl Series (FBS) and the Football Championship Series (FCS)).

26. Division II

provide[s] thousands of student-athletes the opportunity to compete at a high level of scholarship athletics while excelling in the classroom and fully engaging in the broader campus experience. This balance, in which student-athletes are recognized for their academic success, athletics contributions, and campus and community involvement, is at the heart of the Division II philosophy.

*Id.*

27. The largest amount of NCAA member institutions identify with Division III, with 444 institutions and more than 170,000 student-athletes attending Division III institutions. Academics are a primary focus for Division III student-athletes as the division minimizes the length of athletic participation in order to optimize academic success. *Id.*

28. *Id.*

29. *Debunking Myth How NCAA Works*, NCAA (Jan. 13, 2015), <http://www.ncaa.org/about/resources/media-center/feature/debunking-myths-how-ncaa-works>.

to adhere to the rules.<sup>30</sup> The NCAA prides itself on promotion of collegiate athletics and has a primary goal of promoting amateurism.<sup>31</sup>

### III. BACKGROUND ON THE UNION PETITION

The College Athletes Players Association (CAPA)<sup>32</sup> brought a petition to the NLRB on behalf of Northwestern University football players in January 2014.<sup>33</sup> Led by Kain Colter, former Northwestern Quarterback, and CAPA President Ramogi Huma,<sup>34</sup> CAPA argued that Northwestern University football players were employees of the University; therefore they could unionize. NLRB Regional Director, Peter Sung Ohr, approached the issue by adopting the common law definition of employee: A worker is an employee when she “performs services for another . . . , subject to the other’s control or right of control, and in return for payment.”<sup>35</sup> Ohr initially discussed the first element by noting that Northwestern University football players performed a service for the University by playing a sport that generated a \$235 million revenue through ticket sales, television contracts, merchandise sales, and licensing agreements ranging from 2003-2012; not to mention the great reputation the University garnered from the winning success on the field.<sup>36</sup> Next, Ohr discussed element two by stating that it was evident from the strict schedule and expectations of the coaches that student-athletes were subject to the institution’s control.<sup>37</sup> Moreover, in discussing the third element, Ohr ruled that athletic scholarships constituted compensation based on the following criteria: (1) scholarships are received by student-athletes to perform sport related activity throughout the year, (2) scholarships are compensation because they are monetary compensation used towards tuition, room and board, fees, and books for the student-athletes tenure at the university, (3) a contractual tender is given to the stu-

30. See e.g., NCAA, 2015-16 NCAA DIVISION I MANUAL (2015).

31. Schott, *supra* note 24, at 31.

32. See COLLEGE ATHLETES PLAYERS ASSOCIATION, <http://www.collegeathletespa.org/what>.

33. See Northwestern Univ. Emp’r, 2014-15 NLRB Dec. P 15781 (March 26, 2014), 2014 WL 1246914.

34. Ramogi Huma is the founder and President of CAPA. Huma is a former collegiate football player at the University of California Los Angeles and has been advocating for the rights of collegiate athletes for more than fifteen years. CAPA, <http://www.collegeathletespa.org/about>.

35. Northwestern Univ. Emp’r, 2014-15 NLRB Dec. P 15781 (March, 26, 2014), 2014 WL 1246914, at \*12 (citing Brown University, 342 NLRB 483, 490, fn. 27 (2004)).

36. *Id.*

37. *Id.* at \*13 (reciting facts that the players spend fifty to sixty hours per week engaging in football-related activities during training camp. In addition, the location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches).

dent-athlete each season to sign before the scholarship takes effect, and (4) coaches and the athletic department can take away the scholarship if the student-athlete withdraws from the team or breaks team rules.<sup>38</sup>

The Regional Director further distinguished CAPA's petition from the NLRB's precedent decision in *Brown University*.<sup>39</sup> In *Brown University*, the NLRB ruled that graduate assistants were not employees because the position was purely academic since they receive credit for their work, they had close relations with faculty, they did not receive compensation because they received the same amount of financial aid as other graduate students who were not required to teach, and the aid was not determined based on performance.<sup>40</sup> However, the Regional Director noted that the collegiate athlete has a purely economic relationship with the institution, receives no academic credit for participation, and receives financial aid that is dependent on athletic performance. Moreover, the Regional Director supported his argument by stating that student-athletes on scholarship must engage in all athletic team activities to keep their scholarship.<sup>41</sup> Based on the foregoing reasons, the Regional Director found that all grant-in-aid or scholarship players for the Northwestern University football team who have not exhausted their playing eligibility were "employees" under Section 2(3)<sup>42</sup> of the National Labor Relations Act.<sup>43</sup>

On appeal, the NLRB acknowledged that scholarship student-athletes are a different class than that of the student groups the Board has dealt with before, stating:

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38. *Id.* at \*17-18.

39. *Brown Univ.*, 342 N.L.R.B. 483 (2004).

40. *Id.* at \*9-11.

41. *Northwestern Univ. Emp'r*, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*15.

42. *National Labor Relations Act*, NLRB, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Dec. 31, 2015)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

*Id.*

43. *Id.*

There has never been a petition for representation before the Board in a unit of a single college team or, for that matter, a group of college teams. And the scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes. In this regard, the scholarship players bear little resemblance to the graduate student assistants or student janitors and cafeteria workers whose employee status the Board has considered in other cases. The fact that the scholarship players are students who are also athletes receiving a scholarship to participate in what has traditionally been regarded as an extracurricular activity (albeit a nationally prominent and extraordinarily lucrative one for many universities, conferences, and the NCAA) materially sets them apart from the Board's student precedent. Yet at the same time, the scholarship players are unlike athletes in undisputedly professional leagues, given that the scholarship players are required, *inter alia*, to be enrolled full time as students and meet various academic requirements, and they are prohibited by NCAA regulations from engaging in many of the types of activities that professional athletes are free to engage in, such as profiting from the use of their names or likenesses.<sup>44</sup>

Despite the Board's understanding of the uniqueness of this case, it declined to exercise jurisdiction based on three core concepts: (1) the NCAA already has significant control over member institutions, (2) NLRB regulation would upset the uniformity of the rules governing member institutions because it would only have jurisdiction over the seventeen private schools in the NCAA, and (3) the NCAA has already initiated reform to satisfy the needs of student-athletes, for instance, legislation that would implement better medical protocol.<sup>45</sup> The NLRB was unwilling to interfere with the NCAA's control over member conferences and institutions because, even if the Board was to take jurisdiction over this matter and control the operations of even one member school of the NCAA, there could be a potential collapse of the authority and structure of the NCAA.<sup>46</sup> Further, exercising jurisdiction in this matter would eliminate any bit of stability that the NCAA had created,<sup>47</sup> especially since out of the 125 Division I FBS

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44. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656, at \*4.

45. *Id.* at \*5-6.

46. *Id.* at \*5.

47. *Id.*

football teams in the NCAA, only seventeen of them are private institutions.<sup>48</sup> The other 108 schools are state run institutions, meaning some of them have state labor employment laws that do not allow students or public employees to unionize.<sup>49</sup> Consequently, this would create an unfair advantage for the minority of the schools in the NCAA. Accordingly, the NLRB effectively denied jurisdiction by leaving this issue to the NCAA to deal with. Although the NLRB overruled the Regional Director's decision that Northwestern University football players were university employees, the Board left the opportunity open for other athletic programs to make a case for unionization.<sup>50</sup> Therefore, the question remains astute as to whether scholarship student-athletes are institutional employees.

#### IV. DEFINING SCHOLARSHIP OR GRANT-IN-AID

##### A. NCAA DEFINITION

If the courts were to only look at how the NCAA defines scholarship or grant-in-aid then this discussion would be mute. According to the NCAA, full grant-in-aid or scholarships is “financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance . . . .”<sup>51</sup> Further, the NCAA clarifies that a grant-in-aid administered by an educational institution is not to be “considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.”<sup>52</sup>

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48. Kevin Trahan, Matt Brown, & Libby Nelson, *College Football Unionization Rankings: Which Private Schools Are Next?*, SBNATION (July 9, 2014, 8:00 AM), <http://www.sbnation.com/college-football/2014/7/9/5880399/college-football-unions-teams-private-schools>.

49. Emily Wagster Pettus & Erick Schelzig, *Union Bargaining A Dream for Many State Workers*, ASSOCIATED PRESS, [http://www.nbcnews.com/id/41810901/ns/business-us\\_business/t/union-bargaining-dream-many-state-workers/#.Voh7MI-cHIV](http://www.nbcnews.com/id/41810901/ns/business-us_business/t/union-bargaining-dream-many-state-workers/#.Voh7MI-cHIV) (last updated 2011); Emily Martin & Mariam Manichaikul, *Bargaining in States without Public Sector Collective Bargaining Legislation*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/state/manichaikul\\_martin.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/state/manichaikul_martin.authcheckdam.pdf) (last visited Dec. 31, 2015) (approximately half of U.S. states and territories lack comprehensive collective bargaining. While some only allow certain public employees the right to collectively bargain).

50. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656, at \*7.

51. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.02.5.

52. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.01.4.

## B. DICTIONARY DEFINITIONS

Merriam Webster Dictionary defines scholarship as, “an amount of money that is given by a school, an organization, etc., to a student to help pay for the student’s education.”<sup>53</sup> The Oxford Dictionary defines scholarship as, “a grant or payment made to support a student’s education, awarded on the basis of academic or other achievement.”<sup>54</sup> Moreover, the Cambridge Dictionary defines scholarship as, “an amount of money given by a school, college, university, or other organization to pay for the studies of a person with great ability but little money.”<sup>55</sup> Based on the definitions provided by Merriam Webster, Oxford Dictionary, and the Cambridge Dictionary it can be deduced that a scholarship is an amount of money or a grant provided to a student based on their academic or other achievements—from a school, college, university, or other organization—to pay for or aid in the student’s education. Scholarship is further defined by the Internal Revenue Service (IRS).

## C. IRS DEFINITION

The IRS defines scholarship as: “an amount paid or allowed to, or for the benefit of, a student (whether an undergraduate or a graduate) at an educational institution to aid in the pursuit of his or her studies.”<sup>56</sup> Similar to the above mentioned definitions, it is clear the IRS treats scholarships the same in that a scholarship is considered an educational tool aimed at financially aiding an individual’s pursuit of an education. But there are other aspects of scholarships that separate it from a regular form of monetary compensation. Academic and athletic scholarships are, for the most part, tax exempt if an individual is a candidate for a degree at an eligible educational institution.<sup>57</sup> A scholarship is tax free only to the extent:

- It doesn’t exceed your expenses;

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53. *Scholarship*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/scholarship> (last visited Jan. 2, 2016).

54. *Scholarship*, OXFORD DICTIONARY, [http://www.oxforddictionaries.com/us/definition/american\\_english/scholarship](http://www.oxforddictionaries.com/us/definition/american_english/scholarship) (last visited Jan. 2, 2016).

55. *Scholarship*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/scholarship> (last visited Jan. 2, 2016).

56. IRS, PUBLICATION 970 (2014), TAX BENEFITS FOR EDUCATION: SCHOLARSHIPS, FELLOWSHIP GRANTS, GRANTS, AND TUITION REDUCTION, <https://www.irs.gov/publications/p970/ch01.html>.

57. *Id.*

- It isn't designated or earmarked for other purposes (such as room and board), and doesn't require (by its terms) that it can't be used for qualified education expenses; and
- It does not represent payment for teaching, research, or other services required as a condition for receiving the scholarship.<sup>58</sup>

NCAA Bylaws permit full grant-in-aid scholarships, which consist of tuition and fees, room and board, required course related-books, and other related expenses.<sup>59</sup> Of those financial figures covered by the scholarship, room and board is the only figure that is taxable.<sup>60</sup> Accordingly, scholarships are different than ordinary monetary compensation in that they are not, for the most part, subject to a gross income tax.

## V. TRUTH ABOUT ATHLETIC SCHOLARSHIPS

Only about 2% of high school athletes a year receive athletic scholarships to play sports at the collegiate level.<sup>61</sup> There are over seven million high school student-athletes that are part of the recruiting pool in the United States.<sup>62</sup> Of those seven million only 1% actually receive full athletic scholarships to participate in Division I athletics.<sup>63</sup> Effectively, that is only 70,000 student-athletes who are attending a university or college without paying for the cost of attendance. Still the NCAA reported that there was approximately 173,500 student-athletes that participated in Division I athletics.<sup>64</sup> That is an astonishing 103,500 student-athletes who are paying for at least a portion of their attendance at an NCAA member institution. Fifty-three percent of all Division I collegiate student-athletes receive some form

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58. *Id.*

59. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.02.5.

60. IRS, *supra* note 56.

61. *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> (last visited Dec. 26, 2015); *Athletic Scholarships*, NAT'L LETTER OF INTENT, <http://www.nationalletter.org/documentLibrary/athleticScholarship.html> (last visited Dec. 26, 2015) (stating that student-athletes and their parents need to have realistic expectations about receiving an athletic scholarship, and that academics are the best option for a healthy future).

62. *Athletic Scholarship Statistics*, NAT'L COLLEGIATE SCOUTING ASS'N, <http://www.ncsasports.org/how-do-you-get-recruited/athletic-recruiting-scholarships/athletic-scholarship-statistics> (last visited Dec. 26, 2015).

63. *Id.*

64. NCAA *Recruiting Facts*, NCAA, <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> (last updated Aug., 2014).

of athletic aid throughout their years of eligibility.<sup>65</sup> However, in most cases the scholarships or athletic aid that student-athletes are receiving are nowhere near the full price of student enrollment.<sup>66</sup> It is quite possible that some student-athletes are receiving athletic aid in an amount that would only cover the cost of required class books.<sup>67</sup> The reason it is possible for some student-athletes to only receive a portion of an athletic scholarship is because some sports are considered equivalency sports for purposes of financial aid.<sup>68</sup> An equivalency computation allows for a coach to divide his or her total number of scholarships, set by the NCAA, among multiple student-athletes.<sup>69</sup> For example, men's baseball is an equivalency sport and is limited to 11.7 scholarships per year.<sup>70</sup> Those 11.7 scholarships could be divided up among sixteen in-coming freshman, where eight of the students get full rides, then one scholarship can be divided up in thirds for three more students, another scholarship can be divided among two more students, and so on. Even though it is possible to divide scholarships among multiple student-athletes, it does not mean that that will always be the case.

If a sport is not an equivalency sport then it is considered a head count sport, and in head count sports student-athletes are only given full scholarships.<sup>71</sup> The prime examples of a head count sport are Division I men's basketball and football.<sup>72</sup> Football teams are limited at eighty-five scholarships a year,<sup>73</sup> all of which are full scholarships that cannot be divided. The

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65. *Id.*

66. *See Scholarships, supra* note 61.

67. *See generally Scholarships, supra* note 61.

68. David Frank, *Head Count Sports vs. Equivalency Sports: Which One do you Play?*, ATHNET (Nov. 30, 2011, 7:30 AM), <http://www.athleticscholarships.net/2011/11/30/head-count-sports-equivalency-sports.htm> (noting that Division I men's equivalency sports are: Baseball, Rifle, Skiing, Cross-Country, Track and Field, Soccer, Fencing, Swimming, Golf, Tennis, Gymnastics, Volleyball, Ice Hockey, Water Polo, Lacrosse, and Wrestling; Division I women's equivalency sports are: Bowling, Lacrosse, Rowing, Cross-Country, Track and Field, Skiing, Fencing, Soccer, Field Hockey, Softball, Golf, Swimming, Ice Hockey, and Water Polo).

69. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.5.3.2.

70. *College Athletic Scholarship Limits*, SCHOLARSHIP STATS, <http://www.scholarshipstats.com/ncaalimits.html> (last visited Dec. 28, 2015).

71. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.5.3.2 (Division I men's head count sports are: football and basketball, football is only allotted scholarships, and basketball is allotted; Division I women's head count sports are: basketball, gymnastics, tennis, and volleyball).

72. *Head Count Versus Equivalency Scholarships*, ATHNET, <http://www.athleticscholarships.net/sports-scholarships/head-count-versus-equivalency-scholarships.htm> (last visited Dec. 30, 2015).

73. *College Football & Scholarship Opportunities*, SCHOLARSHIP STATS, <http://www.scholarshipstats.com/football.html> (last visited Dec. 28, 2015).

average football roster in Division I-FBS is 118 players,<sup>74</sup> which leaves an average of thirty-three players on each Division I-FBS football roster that do not receive any form of athletic aid. Moreover, 47% of Division I student-athletes do not receive any athletic aid.<sup>75</sup> With nearly half of Division I student-athletes not receiving athletic aid, it is hard to rationalize the merit in classifying scholarship student-athletes as institutional employees. There is nothing logical about dividing a class of students based purely on their good fortune of receiving an athletic scholarship or misfortune of not receiving an athletic scholarship. In essence, we might as well tell non-scholarship student-athletes that they are not worth anything to the university or college. The reality is that a significant number of collegiate student-athletes are not receiving athletic scholarships or athletic aid in any form,<sup>76</sup> and to subjugate those non-scholarship student-athletes to unequal rights would be unfounded.

## VI. ATHLETIC SCHOLARSHIPS AND THE REALITY OF A PROFESSIONAL CAREER

As of 2013, the average annual cost of attendance, not including personal costs or transportation, for full-time enrollment at a four year degree granting, undergraduate institution was \$23,872.<sup>77</sup> In 2014, the average student, at a four year institution, paid \$18,931 for in-state and \$32,893 for out-of-state tuition, fees, and room and board at a public institution.<sup>78</sup> However, in 2015, the average student, at a four year institution, paid \$19,548 for in-state and \$34,031 for out-of-state tuition, fees, and room and board at a public institution.<sup>79</sup> With cost of attendance continuing to rise every year, scholarships are even more essential to the furtherance of education.<sup>80</sup> Athletic scholarships are an opportunity for those students who have succeeded in athletics, but do not necessarily have the grades to harness a prestigious

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74. *Id.*; NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 17.10.2.1.2 (sets a limit of 105 practicing participants on a Division I roster prior to the first day of classes).

75. *See NCAA Recruiting Facts*, *supra* note 64.

76. *See id.*

77. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATS. (2015), <https://nces.ed.gov/fastfacts/display.asp?id=76>.

78. *Trends in Higher Education: Average Published Undergraduate Charges by Sector*, 2015-2016, COLLEGEBOARD, <http://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16>.

79. *Id.*

80. *See* John W. Schoen, *Why Does a College Degree Cost So Much?*, CNBC, <http://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html> (last visited Dec. 29, 2015).

academic scholarship to pursue a college education.<sup>81</sup> “Scholarships for athletes originate from a wide variety of public and private benefactors, including athletic organizations, foundations, corporations, individual universities, women’s groups and minority advocacy associations.”<sup>82</sup> All of these organizations act to help student-athletes fund their education.<sup>83</sup> Athletic scholarships are tools to diversify academics and athletics by providing more opportunities to minorities, females, and underrepresented athletics.<sup>84</sup>

It is crucial to understand that athletic scholarships are used to further the education of student-athletes, not provide a source of income for their services because the fact is that most collegiate athletes do not make it to the next level of their respective sports, and their education is their future.<sup>85</sup> In 2013, there were 7,429 draft eligible players, but only 1,216 draft picks in Major League Baseball (MLB); 638 of those picks came from an NCAA school, and of those 638, 552 came from Division I.<sup>86</sup> Only 8.6% of NCAA baseball student-athletes were drafted in 2013, but that figure does not factor in how many student-athletes actually make it to the Major League.<sup>87</sup> Further, only about 1.6% of college football athletes make it to the professional level.<sup>88</sup> What makes it worse is that only 79% early entrants<sup>89</sup> to the 2015 NFL draft actually got drafted.<sup>90</sup> Those undrafted early entrants forgo their status as amateurs<sup>91</sup> and any remaining eligibility at the collegiate lev-

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81. *Improve Your Chances for an Athletic Scholarship*, COLLEGE SCHOLARSHIPS, <http://www.collegescholarships.org/athletic.htm> (last visited Dec. 29, 2015).

82. *Id.*

83. *See id.*

84. *Id.*

85. *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [hereinafter *Estimated Probability*] (last updated Apr. 14, 2015).

86. *Id.*

87. *Id.*

88. Albert Breer, *NFL Implementing Changes to Address Underclassmen Issue*, NFL MEDIA REPORTER, <http://www.nfl.com/news/story/0ap2000000365987/printable/nfl-implementing-changes-to-address-underclassmen-issue> (last updated July 19, 2014).

89. *See generally id.* (early entrants are student-athletes that forgo the remainder of their college education to pursue a career in the professional leagues).

90. *Id.* Eighty-four student-athletes entered the 2015 NFL draft early and only twenty-four were drafted, leaving a significant number of undrafted athletes who are left to try out for a team and wait for the coveted call. This is a significant improvement from the 2014 NFL draft where only 62% of entrants were drafted. Despite the improvement in the percentage of early entrants being drafted, there remains a concern for student-athletes that declare for the draft early and find themselves undrafted. *Id.*

91. *Amateur*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/amateur> (an amateur is “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.”); *Amateur*, OXFORD DICTIONARY,

el.<sup>92</sup> Not to mention, the student-athlete may lose his athletic scholarship,<sup>93</sup> potentially making his chances of returning to continue his education less likely unless he is willing to take on student debt or is fortunate to receive an academic scholarship.<sup>94</sup> Needless to say there is sufficient merit to promoting the furtherance of education; to say that athletic scholarships are compensation rather than financial aid undermines the importance of promoting education and incentivizes student-athletes, especially those participating in the dominate collegiate sports,<sup>95</sup> to leave school early to pursue a career in professional athletics where the odds of the athlete actually succeeding and having a full career are miniscule.<sup>96</sup>

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[http://www.oxforddictionaries.com/us/definition/american\\_english/amateur](http://www.oxforddictionaries.com/us/definition/american_english/amateur) (“A person who engages in a pursuit, especially a sport, on an unpaid basis.”).

92. *Remaining Eligible: Professional Draft Inquiries*, NCAA, <http://www.ncaa.org/remaining-eligible-professional-draft-inquiries> (last visited Dec. 29, 2015).

93. *See, e.g.*, UNIV. OF ALA., GRANT-IN-AID AGREEMENT, <http://www.cbssports.com/images/collegefootball/ScholarshipsAlabama1.pdf>; MICH. STATE UNIV., STUDENT-ATHLETES AND FINANCIAL AID POLICIES, <http://www.cbssports.com/images/collegefootball/ScholarshipsMichiganState1.pdf>; *see also* NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.2.4-12.2.5.

94. Currently, there is proposed NCAA legislation that would allow for NCAA men’s basketball players to declare of the NBA draft early, but return to college if they go undrafted or merely change their mind prior to the draft. Nicole Auerbach, *NCAA Proposal Could Let Early NBA Draft Entrants Return to School*, USA TODAY (June 24, 2015, 3:30 PM), <http://www.usatoday.com/story/sports/ncaab/2015/06/24/ncaa-nba-draft-early-entrants-return-college/29221125/> (it is not for certain what will result from this proposal, but it is potentially a great opportunity for collegiate men’s basketball and football student-athletes to continue their education).

95. Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2015), [http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?\\_r=0](http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0) (providing revenue facts to show how NCAA Division I football programs have jolted the annual revenue for member institutions and created a billion dollar industry); Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015, 4:59 PM), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/> (“The NCAA gets most of its annual revenue from its long-term multimedia and marketing rights agreements with CBS and Turner Broadcasting that are primarily tied to the Division I men’s basketball tournament -- \$700 million in fiscal 2014 and growing at rate of about 3% per year.”).

96. *See Estimated Probability*, *supra* note 85; *see also* Aaron J. Lopez, *Life After NBA Comes Sooner Than Many Players Think*, NBA MEDIA VENTURES (June 10, 2010), [http://www.nba.com/nuggets/features/junior\\_bridgeman\\_20100610.html](http://www.nba.com/nuggets/features/junior_bridgeman_20100610.html) (average NBA career is 4.5 years); Nick Schwartz, *The Average Career Earnings of Athletes Across America’s Major Sports Will Shock You*, USA TODAY (Oct. 24, 2013, 10:07 AM), <http://ftw.usatoday.com/2013/10/average-career-earnings-nfl-nba-mlb-nhl-mls> (average NFL career is 3.5 years; average MLB career is 5.6 years).

## VII. DEBUNKING THE LOGIC OF THE REGIONAL DIRECTOR

### A. BREAKING DOWN THE ARGUMENT

The Regional Director first discusses the idea that student-athletes receive their scholarships purely for their athletic ability and their intention to perform athletic services.<sup>97</sup> Then he clarifies that there is no doubt that the scholarship is a monetary benefit because it covers the student-athletes' tuition, fees, room and board, including a monthly stipend to any upper class student-athlete that chooses to live off campus.<sup>98</sup> However, that stipend is not extra benefit, but rather, is part of the actual scholarship amount.<sup>99</sup> In 2015, the NCAA voted to extend scholarship tenders to cover the full cost of university enrollment, which included more than the custom tuition, fees, room and board, and required books.<sup>100</sup> As part of their scholarship tender agreement, student-athletes are now capable of receiving monthly stipends and transportation costs.<sup>101</sup> Further, it is contestable that student-athletes receive their scholarships purely for their athletic participation.<sup>102</sup> It is, however, not the sole reason that these athletes get to keep their scholarships. But there are stipulations that the student-athlete must abide by before he or she can receive the scholarship. The student athlete must meet NCAA, conference, and institutional regulations to be eligible to receive financial aid, such as scholarships.<sup>103</sup> Essentially, this means that even though the student-athlete receives his or her scholarship for athletic performance, he or she must abide by institutional standards to be approved for the scholarship, and one of those institutional standards is academic eligibility.<sup>104</sup> An athlete cannot become a student-athlete or gain financial aid from a school or university without first meeting the academic requirements.<sup>105</sup> Athletic scholarships are only different than non-athletic scholar-

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97. Northwestern Univ. Emp'r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*12.

98. *Id.*

99. See Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015, 11:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/> (NCAA voted to extend athletic scholarships to cover the full cost of attendance, which includes excess costs beyond tuition, fees, room and board, and books).

100. *Id.*

101. *Id.*

102. See generally Northwestern Univ. Emp'r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914.

103. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.01.5.

104. *Id.*

105. *Academic Eligibility*, NCAA, <http://www.ncaa.org/student-athletes/resources/division-i-initial-eligibility-toolkit> (last visited Dec. 30, 2015).

ships in that the recipient is initially receiving the scholarship for their athletic ability as opposed to their academic merit, they still have to be admitted into their respective institutions.<sup>106</sup> Despite the reasoning for presenting an athletic scholarship, the prerequisites for eligibility and maintaining an athletic scholarship are purely academic.<sup>107</sup> To participate and actually compete in the first semester of enrollment, a student-athlete must achieve at least a 2.3 Grade Point Average (GPA) in their high school core courses, meet an increased sliding scale for a combined ACT or SAT test score, and complete sixteen core courses in eight semesters (ten of which must be completed prior to the beginning of the seventh semester).<sup>108</sup> In some instances, educational institutions require student-athletes to meet stricter eligibility requirements than the NCAA requires.<sup>109</sup> Overall, academic and athletic scholarships are treated the same by the IRS and educational institutions; scholarships are intended to financially aid the furtherance of education.<sup>110</sup> Based on that requirement, it is hard to buy the argument that a student-athlete only receives his or her scholarship for athletic purposes when they are expected, just like all other students, to abide and perform by the academic standards of their respective institutions. In fact, athleticism is merely a determining factor, as opposed to the only factor that determines whether a student-athlete receives an athletic scholarship.

Further, the Regional Director reasoned that the tender agreements student-athletes sign each year before they receive their scholarships are considered an employee contract to receive compensation.<sup>111</sup> A student-athlete does sign a tender agreement to receive their scholarship, but it is no different than when any student agrees to accept financial aid from the institution. In fact, it is required that any student receiving any financial aid must approve the aid before it is disbursed.<sup>112</sup> Moreover, there is a contrac-

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106. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 14.1.1 (“A student-athlete shall not represent an institution in intercollegiate athletics competition unless the student has been admitted as a regularly enrolled, degree-seeking student in accordance with the regular, published entrance requirements of that institution.”).

107. See, e.g., Jon Solomon, *Sign on the Dotted Line: Scholarship Forms for Top Division I Schools*, CBS SPORTS (Sept. 16, 2014, 10:17 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24711135/sign-on-the-dotted-line-scholarship-forms-for-top-division-i-schools> (listing of example tender agreements from Division I institutions).

108. *Academic Eligibility*, *supra* note 105.

109. See UNIV. OF S.C., ATHLETICS FINANCIAL AID AGREEMENT (2014), <http://www.cbssports.com/images/collegefootball/ScholarshipsSouthCarolina1.pdf>; SAMPLE OF N. Ill. Univ. TENDER AGREEMENT (2015).

110. See Solomon, *supra* note 107; IRS, *supra* note 56.

111. Northwestern Univ. Emp’r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*13.

112. See *Accepting Aid*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/fafsa/next-steps/accept-aid> (last visited Dec. 30, 2015).

tual relationship or some form of agreement that accompanies most forms of financial aid. For example, loans may require promissory notes<sup>113</sup> and scholarships may require a certain GPA or participation in an activity.<sup>114</sup> There is an inherent contractual relationship in every form of financial aid; there is nothing fundamentally different about an athletic scholarship in that respect. Regardless, the NCAA contends that institutional tender agreements are not binding contractual relationships because the student-athlete is not bound to the institution since student-athletes are not giving up anything and can transfer from the institution without any binding responsibilities to the former institution.<sup>115</sup>

Lastly, the Regional Director discussed how in 2011 the NCAA approved multi-year scholarship tenders,<sup>116</sup> as opposed to the traditional yearly renewable scholarship tender.<sup>117</sup> The Regional Director dismissed the importance of this change arguing that it does not matter how long the term of the scholarship is because a coach can still terminate the scholarship in many ways.<sup>118</sup> A logical response would note that a four year scholarship tender creates stability by safeguarding a student-athletes' educational funding and creates an appearance of an academic atmosphere rather than an employment atmosphere.<sup>119</sup> But the real issue with the Regional Director's reasoning is that it limits the reasons for which a scholarship can be reduced or cancelled to simply when a student-athlete withdraws from a team or breaks team rules.<sup>120</sup> On the contrary, there are numerous other reasons for

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113. *Id.*

114. *How to Win a Merit Scholarship*, FINAID, <http://www.finaid.org/scholarships/winning.phtml> (last visited Dec. 30, 2015).

115. *Frequently Asked Questions About the NCAA*, NCAA, <http://www.ncaa.org/about/frequently-asked-questions-about-ncaa> (last visited Dec. 29, 2015).

116. Athletic scholarships were introduced in 1957 and tendered for a length of four years to avoid accusations and assumptions that student-athletes were being paid to play. By 1967, the NCAA passed rules making it possible for scholarships to be cancelled if the student-athlete quit the team or broke team rules. Then in 1973, the NCAA voted to ban multi-year scholarships because it gave too much power to the student-athlete. However, the one year scholarship created significant power to the coach. It was not until recently, 2012, that the NCAA voted to bring back the multi-year scholarship. Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, But Many Don't*, CBS SPORTS (Sept. 16, 2014, 10:15 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24711067/schools-can-give-out-4-year-scholarships-to-athletes-but-many-dont>.

117. Northwestern Univ. Emp'r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*2.

118. *Id.* at \*13.

119. Ben Strauss, *Colleges' Shift On Four-Year Scholarships Reflects Players' Growing Power*, N.Y. TIMES (Oct. 28, 2014), [http://www.nytimes.com/2014/10/29/sports/colleges-shift-on-four-year-scholarships-reflects-players-growing-power.html?\\_r=1](http://www.nytimes.com/2014/10/29/sports/colleges-shift-on-four-year-scholarships-reflects-players-growing-power.html?_r=1).

120. *Id.*

why a student-athlete could lose their scholarship or have it reduced. For example, an athletic scholarship can be reduced or cancelled during the period of the award if the recipient becomes ineligible for intercollegiate activity (this includes academic standards),<sup>121</sup> or found to have engaged in misconduct by the institution's regular student disciplinary authority.<sup>122</sup> On the other hand there are a few reasons for which a student-athlete cannot have their scholarship reduced or cancelled. A student-athlete cannot have their scholarship reduced or cancelled based on: (1) the student-athlete's athletic ability, performance, or contribution to the team; (2) injury, illness, or physical or mental disability; or (3) for any athletic reason.<sup>123</sup> Reduction or cancellation of athletic scholarships is not based purely on athletic means. The Regional Director ignored the many stipulations that are in place to protect the student-athlete from unfair scholarship reduction or cancellation, as well as the many regulations that the NCAA and member institutions implement to uphold a quality education for student-athletes and to help them graduate.

#### B. SCHOLARSHIP TENDER AGREEMENTS

As mentioned above, when a student-athlete commits to participate in athletics at an NCAA sponsored institution and is awarded an athletic scholarship, he or she must sign an institutional tender agreement.<sup>124</sup> Those tender agreements require the issuing institution to provide a statement detailing "the amount, duration, conditions and terms of the award."<sup>125</sup> The general requirements in the tender agreement are laid out in the NCAA by-laws.<sup>126</sup> Even so, some institutions expand the terms and conditions beyond the general requirements by specifying academic and institutional responsibilities that student-athletes are required to adhere to. CBS Sports issued an article in the Fall of 2014 that discussed the NCAA's adoption of four year tender agreements, as opposed to the regular one year agreements.<sup>127</sup> Accompanying the article was a compiled list of twenty-five Division I institutions and their respective sample tender agreements.<sup>128</sup> Effectively, the specifically tailored tender agreements provide significant substance to the terms and conditions that Division I athletes are expected to abide by. Some of the institutions that provided their tender agreements are as follows:

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121. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.3.4.2.
  122. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.3.4.2.4.
  123. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.3.4.3.
  124. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.3.2.2.
  125. *Id.*
  126. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 15.3.
  127. Solomon, *supra* note 116.
  128. Solomon, *supra* note 107.

University of Arizona, Iowa State University, University of South Carolina, and the University of Wisconsin-Madison.<sup>129</sup> Additionally, this Article utilizes the tender agreement from Northern Illinois University as a prime example of what responsibilities and obligations are expected and required when a student-athlete signs a tender agreement.

1. *General Terms and Conditions*

Generally, all the tender agreements provide the standard terms and conditions, in some form, that all scholarship student-athletes are mandated to follow. For example:

I understand to qualify for this athletics grant, I **must**:

- Fulfill the admission requirements of [the institution].
- Meet and maintain the eligibility requirements for athletic participation and financial aid established by the National Collegiate Athletic Association (NCAA), the . . . Conference, and [the institution].
- Meet the athletic and academic expectations, including all ethical conduct provisions, as presented by my coach and/or [the institution's] Athletics Department.<sup>130</sup>

Further, the tender agreements detail the conditions for how a student-athlete may have their scholarship cancelled or reduced.<sup>131</sup> A majority of

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129. Solomon, *supra* note 107.

130. IOWA STATE UNIV., ATHLETICS FINANCIAL AID AGREEMENT FORM, <http://www.cbssports.com/images/collegefootball/ScholarshipsIowaState1.pdf>.

131. See, e.g., LA. STATE UNIV., ATHLETICS FINANCIAL AID AGREEMENT, <http://www.cbssports.com/images/collegefootball/ScholarshipsLSU1.pdf>.

2.) NCAA Bylaw 15.3.4.2 permits financial aid during the period of the award to be reduced or cancelled if:

- (a) You render yourself ineligible for intercollegiate competition;
- (b) You fraudulently misrepresent any information on your application, letter of intent or financial aid agreement;
- (c) You engage in serious misconduct warranting substantial disciplinary penalty;
- (d) You voluntarily withdraw from your sport at any time for personal reasons.

3.) Aid may also be reduced or cancelled during the period of the award if you engage in misconduct within the University or community (e.g. arrest). Violation of team rules, Athletic Department policy and/or the University Student Code of Conduct is also grounds for reduction or cancellation of your financial aid.

the tender agreements are broad in their terminology.<sup>132</sup> However, there are a few examples that provide clarity on the expectations that universities place on scholarship student-athletes, especially in regards to educational expectations.

2. *University of Arizona*

The University of Arizona tender agreement lays out a list of prerequisites, which stipulate that the student-athletes' grant-in-aid (scholarship) is subject to, including:

[T]he maintenance of acceptable personal standards, including but not limited to compliance with the University of Arizona Student Code of Conduct, the department of athletics code of conduct and substance abuse policies, specific team rules established by your sport's coaching staff; and [] [s]atisfactory academic performance including all progress toward degree regulations under NCAA, Pac-12 Conference and institutional requirements as well as policies and practices (which may include individual con-

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*Id.*; SAMPLE OF UNIV. OF WIS. TENDER AGREEMENT, CBS SPORTS, <http://www.cbssports.com/images/collegefootball/ScholarshipsWisconsin1.pdf>.

1. A grant-in-aid may be canceled if the student-athlete fails to maintain satisfactory academic progress toward a degree in accordance with university policy currently in effect.
2. A grant-in-aid may be canceled during the period of the award if the student-athlete (a) becomes academically ineligible for intercollegiate competition; (b) fraudulently misrepresents any information on the admission application, letter of intent, or tender of financial aid; (c) engages in serious misconduct which results in a substantial disciplinary penalty; or (d) voluntarily withdraws from a sport for personal reasons.
3. A grant-in-aid may not be reduced or canceled by the university during the period of the award on the basis of: (a) a student-athlete's athletics ability, performance or contribution to a team's success; (b) Because of an injury, illness, or physical or mental medical condition (except as permitted above); (c) For any other athletics reason.
4. A grant-in-aid may not be renewed if the student-athlete is suspended from an athletic team for participating in the use, sale, or distribution of any narcotic drug or controlled substance.
5. A grant-in-aid must be signed by the first day of classes to avoid pro-ration. If a student-athlete has had his or her grant-in-aid cancelled or reduced, they have the opportunity for a hearing. The student-athlete should consult compliance office or the athletic administrator of his or her sport on the hearing procedure process.

*Id.*

132. See Solomon, *supra* note 107.

tracts) established by the Academic Services Center (C.A.T.S.).<sup>133</sup>

Not only does a University of Arizona student-athlete have to meet the prerequisites for eligibility for admission to the university, but he or she must also comply with University policies and code, both athletic and academic.<sup>134</sup> Moreover, under the tender agreement student-athletes are required to maintain “[s]atisfactory academic performance, including all progress toward degree regulations under NCAA, Pac-12 Conference and institutional requirements . . . .”<sup>135</sup> Not to mention the agreement goes on to state that policies and practices established by the Academic Services Center (C.A.T.S.)<sup>136</sup> must be followed as well.<sup>137</sup> The University of Arizona’s tender agreement is a prime example of how institutions treat scholarship student-athletes with the same academic standards as any other student, regardless if they have a scholarship.

### 3. *Iowa State University*

Iowa State University provides similar substance as the University of Arizona in its tender agreement. When student-athletes sign their tender agreement, they agree to the terms that their scholarship or aid may be reduced or cancelled during the period of their award if, among other stipulations, they become “ineligible for intercollegiate competition;” “fail to adhere to academic standards” provided by the Academic Services Office; or neglect their academic responsibilities.<sup>138</sup>

### 4. *University of South Carolina*

The University of South Carolina provides the contents of their Athletics Department Rules as part of their tender agreements.<sup>139</sup> The Athletics Department Rules explicitly state that:

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133. SAMPLE OF UNIV. OF ARIZ. TENDER AGREEMENT (2014), <http://www.cbssports.com/images/collegefootball/ScholarshipsArizona2.pdf>.

134. *Id.*

135. *Id.*

136. *CATSACADEMICS: Welcome to C.A.T.S. Academics*, UNIV. OF ARIZ., [http://www.arizonawildcats.com/ViewArticle.dbml?&ATCLID=210220032&DB\\_OEM\\_ID=30700](http://www.arizonawildcats.com/ViewArticle.dbml?&ATCLID=210220032&DB_OEM_ID=30700) (last visited Dec. 29, 2015) (C.A.T.S. is an academic program that “provides customized services to student-athletes for them to achieve academic success.”).

137. UNIV. OF ARIZ. TENDER AGREEMENT, *supra* note 133.

138. IOWA STATE UNIV., ATHLETICS FINANCIAL AID AGREEMENT FORM, *supra* note 130.

139. UNIV. OF S.C., ATHLETICS FINANCIAL AID AGREEMENT, *supra* note 109.

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1. Student-athletes must attend all academic meetings including, but not limited to class, required study hall sessions, tutoring appointments, and mentoring sessions.

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5. Student-athletes must maintain academic eligibility and consult with their academic advisor before making academic changes including but not limited to altering class schedules and changing majors. If academic changes impact a student-athlete's ability to participate in mandatory practice or conditioning activities, the student-athlete must apprise the head coach.<sup>140</sup>

There are other criteria that the Athletics Department Rules require. For example, any obscene or troublesome conduct, off-campus or on-campus, on the part of the student-athlete that may reflect poorly on the student or the University is subject to discipline, including reduction or cancellation of their athletic award.<sup>141</sup> It is important to recognize that the Athletics Department places an emphasis on academic and personal responsibilities that student-athletes are required to follow because it provides notice to the student-athlete that they are more than an athlete; they are in fact a student who carries academic responsibilities and represents an institution.

5. *Northern Illinois University*

Northern Illinois University (NIU) provides a tender agreement to their student-athletes that explicitly states the way in which a student-athlete may have their scholarship reduced or cancelled:

[F]ailure to maintain good academic standing per University policy; failure to achieve a passing grade in any class; failure to follow University, athletic department, Conference, NCAA, or team rules and regulations; failure to fulfill your academic responsibilities by attending and preparing for class, attending required study table, and utilizing the academic resources that are available to you (e.g., tutoring, academic advising); failure to inform your head coach at the University within 24 hours of being found in viola-

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140. *Id.*

141. *Id.*

tion of your current academic institution's code of conduct

.....<sup>142</sup>

As evident from the NIU tender agreement, student-athletes can lose their scholarships for failing to attend study tables, failing to utilize academic resources, and failing to even show up to classes.<sup>143</sup> NIU's tender agreement emphasizes the importance of education and the actual responsibilities and expectations of student-athletes. It is hard to agree with Regional Director Ohr that the tender agreements are purely athletic based when the tender agreements require extensive academic and university policy standards as part of maintaining the award.

### VIII. IMPLICATIONS OF UNIONIZATION

#### A. WALK-ONS

All of the discussion surrounding the unionization of student-athletes has involved grant-in-aid student-athletes. Grant-in-aid or scholarship student-athletes are the only individuals that the Regional Director classified as university employees.<sup>144</sup> Specifically, the Regional Director stated that "walk-ons do not meet the definition of 'employee' for the fundamental reason that they do not receive compensation for the athletic services that they perform. Unlike the scholarship players, the walk-ons do not sign a 'tender' or otherwise enter into any type of employment contract with the Employer."<sup>145</sup> Though this rationale is accurate, it still fails to realize the furthering disadvantage that is placed on walk-ons if scholarship student-athletes are considered university employees.<sup>146</sup> Walk-ons are already treated differently than the scholarship student-athletes<sup>147</sup> and even the "pre-

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142. N. ILL. UNIV. TENDER AGREEMENT, *supra* note 109.

143. *Id.*

144. Northwestern Univ. Emp'r, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*15.

145. *Id.*

146. Tim Lavin is a former walk-on fullback for the USC Trojan football team. He spent his first two years as a walk-on experiencing the discriminatory and unfair practices and treatment of non-scholarship athletes. In 2013, Lavin authored the book "Walk on U," which focuses on the harsh realities of being a Division I football walk-on and the fight for change. See Bruce Feldman, *Former USC Fullback Pushing for Walk-On Reforms*, CBS SPORTS (Mar. 31, 2014, 6:49 PM), <http://www.cbssports.com/collegefootball/writer/bruce-feldman/24509385/former-usc-fullback-pushing-for-walk-on-reforms>.

147. David Frank, *The Unwritten Code of the College Walk-On*, ATHNET (Apr. 10, 2013, 5:18 PM), <http://www.athleticscholarships.net/2013/04/10/the-unwritten-code-of-the-college-walk-on.htm>.

ferred walk-ons.”<sup>148</sup> Giving extra benefit to scholarship student-athletes creates a large blockade between the scholarship student-athletes and the walk-ons. Essentially, the added benefit will divide teammates by creating an employees vs. non-employees atmosphere.<sup>149</sup>

With so much already dividing the treatment of scholarship student-athletes and non-scholarship student-athletes, employee status for scholarship student-athletes will continue to divide team dynamics and, quite potentially, instill a sense of entitlement among scholarship student-athletes.<sup>150</sup> Though Regional Director Ohr declared that his decision was not fracturing a unit,<sup>151</sup> it was indeed. Ohr rationalized that there was not a fixed unit between scholarship and non-scholarship student-athletes because non-scholarship student-athletes could not be classified as employees because they receive no compensation.<sup>152</sup> However, it is troublesome to claim that there was no unit when both scholarship and non-scholarship student-athletes offer the same services to their institutions, spend equal amounts of time preparing for competition, and are under similar levels of control by the coaching staff.<sup>153</sup> Quite practically, it all comes down to whether or not the student-athlete gets a scholarship, only then will it be determined whether they receive employment status and benefits. Is it really fair to discriminate against a group of individuals who put the same amount of time and effort into their respective sports purely based on their lack of grant-in-aid? This sort of fracture in collegiate athletics creates a black hole for future lawsuits and perhaps the downfall of collegiate athletics.

#### B. ECONOMIC IMPACT

Another significant concern, if it was determined that scholarship student-athletes were employees, is the more than likely economic impact on NCAA member institutions. In the 2013-2014 season, only 123 NCAA men's basketball teams were profitable, while the other 223 teams either

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148. John Infante, *The Meaning of a Preferred Walk-On*, ATHNET (Feb. 5, 2014, 5:34 AM), <http://www.athleticscholarships.net/2014/02/05/the-meaning-of-a-preferred-walk-on.htm> (defining a “preferred walk-on” as a student-athlete that is recruited actively by a respective coaching staff, but still does not receive an athletic scholarship).

149. Bridget Shanley, *Student-Athletes: Why Employee Status is Not the Answer*, at 12 (2014), <http://www.kentlaw.edu/perritt/courses/seminar/BridgetShanley.pdf>, (unpublished seminar thesis, Chicago-Kent College of Law) (on file with Prof. Henry H. Perritt).

150. *Id.*

151. *Northwestern Univ. Emp’r*, 2014-15 NLRB Dec. P 15781 (Mar. 26, 2014), 2014 WL 1246914, at \*20.

152. *Id.* at \*27.

153. *See Shanley, supra* note 149, at 13.

broke even or lost money.<sup>154</sup> Moreover, only twenty-four out of 128 FBS Division I football programs reported positive revenue figures in 2014.<sup>155</sup> If it is determined that scholarship student-athletes are employees and can unionize, there will be significant financial setbacks for all programs. As defined employees, scholarship student-athletes would likely be afforded employment benefits, which will cost NCAA member institutions a lot of money, and since a large majority of the institutions already operate at a loss these costs could cause great financial distress.<sup>156</sup> Like many athletic programs in the past, larger costs have resulted in necessary cuts elsewhere.<sup>157</sup> It may even be a possibility that institutions reduce the amount of scholarships they offer in order to supplement for the rising costs.<sup>158</sup> If that was to happen, then we could see an increase in the number of walk-ons on each roster, which further fragments the Regional Director's unit.<sup>159</sup> Quite simply, we could end up seeing either the end of collegiate sports programs or we could see the decline of athletic scholarships, essentially eliminating a key factor in classifying a student-athlete as an employee.<sup>160</sup> Who knows to what extent institutions will go when cutting programs, but one thing is for sure, when cuts are made there will be more concerns that will need to be addressed.<sup>161</sup>

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154. Chris Isidore, *Most Profitable NCAA Teams*, CNN MONEY (Mar. 16, 2015, 10:13 AM), <http://money.cnn.com/2015/03/16/news/companies/ncaa-most-profitable/>.

155. Daniel L. Fulks, REVENUE & EXPENSES: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAM REPORT 1, 8 (Sept. 2015), <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf>.

156. Peluso, *supra* note 13, at 285.

157. See generally Will Graves, *Colleges are Cutting Sports Teams in Smaller Athletics Programs as Costs Rise*, HUFFINGTON POST, [http://www.huffingtonpost.com/2013/12/21/colleges-cutting-sports\\_n\\_4486419.html](http://www.huffingtonpost.com/2013/12/21/colleges-cutting-sports_n_4486419.html) (last updated Feb. 20, 2014, 5:59 AM) (noting that schools such as Temple, Rutgers, and Maryland were forced to cut smaller athletic programs due to the rise in costs).

158. See Peluso, *supra* note 13, at 285-86.

159. See Peluso, *supra* note 13, at 286.

160. DAVID S. BIRNBAUM ET AL., EMPLOYEES, EMPLOYERS, AND LABOR ORGANIZATIONS REDEFINED 2 (Mar., 2015), [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2015/march/pp/papers/lions\\_tigers\\_birnbaum.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2015/march/pp/papers/lions_tigers_birnbaum.authcheckdam.pdf).

161. Title IX ramifications remain to be an unanswered question as far as unionization of scholarship student-athletes are concerned. Those questions and concerns should be expected as the development of student-athlete unionization unravels. See David J. Santeusano & Philip J. Catanzano, *NLRB Decision on Student-Athlete Unionization a Win for Colleges, But Title IX Still in Play*, HOLLAND & KNIGHT, LLP (Aug. 26, 2015), <http://www.hklaw.com/Publications/NLRB-Decision-on-Student-Athlete-Unionization-a-Win-for-Colleges-but-Title-IX-Still-in-Play-08-26-2015/>.

## C. TITLE IX RAMIFICATIONS

Cutting athletic programs and paying student-athletes as employees could lead to even more tantalizing concerns, such as, abiding by Title IX regulations. Title IX was passed into law in 1972, against large protest from the NCAA, and provided gender equality in collegiate athletics.<sup>162</sup> However, despite some surmounting change in collegiate athletics, the playing field appears to still be unequal.<sup>163</sup> With student-athlete unions threatening collegiate athletics, the concern is real for female athletes and activists who see the unions ostracizing female athletics even further.<sup>164</sup> Regional Director Ohr already demonstrated that it is possible that only scholarship student-athletes will be able to unionize.<sup>165</sup> He also put large emphasis on the amount of time the athletes spend towards their respective sports and how much of an impact that time spent has on their academics.<sup>166</sup> Not only do those factors impact non-scholarship student-athletes but also, potentially, scholarship student-athletes that participate in smaller athletic sports programs that do not demand large amounts of time, at least in comparison to Division I men's basketball, baseball, and football.<sup>167</sup> Those sports would largely include a majority of female sports, with an exception to Division I women's basketball.<sup>168</sup> Further, the Regional Director focused on the economic benefit Northwestern football had for the university, and found that the program had generated large revenue and an \$8 million profit for the

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162. *Gender Equality in Athletics and Sports*, FEMINIST MAJORITY FOUND., <http://www.feminist.org/sports/titleIX.html> (last visited Apr. 11, 2016).

163. At colleges that play big-time sports, women receive roughly a third of the total dollars spent on athletics, a third of recruiting dollars, and just over 40% of scholarship dollars. Not to mention "men hold more than 60 percent of the coaching jobs on women's teams in Division I, II and III." Jere Longman, *Amid Cheers, Union Bid Stirs Concern for Women*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/04/sports/impact-of-northwestern-ruling-on-womens-sports-is-uncertain.html>.

164. Santeusano, *supra* note 161.

165. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656, at \*22-23.

166. *Id.* at \*12-15.

167. A 2011 survey of collegiate athletes recorded that Division I men's basketball student-athletes dedicated an average 39.2 hours per week to athletic participation in season, Division I baseball averaged 42.1 hours per week, and Division I football averaged 43.3 hours per week in the FBS, 41.6 in the FCS. All other men's sports averaged thirty-two hours a week. On the other side, Division I women's basketball dedicated an average 37.6 hours per week to athletics participation in season, while all other women's sports averaged 33.3 hours per week. Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUSINESS INSIDER (Jan. 27, 2015, 11:44 AM), <http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>.

168. See Erin E. Buzuvis, *Athletic Compensation for Woman Too? Title IX Implications of Northwestern and O'Bannon*, 41 J.C. & U.L. 297, 320 (2015).

university for the 2012-13 academic year.<sup>169</sup> As already established in this Article, a large majority of Division I programs do not generate a profit and, in fact, only one women's program nationally generated a profit in 2013.<sup>170</sup> This distinction is important because if a large economic relationship between an institution and a particular sport is necessary to define a student-athlete as an employee of an institution, then it is evident that almost every scholarship student-athlete with an exception of those who participate in Division I men's basketball and football will be excluded from employee status. Ultimately, this all plays out to be a large roadblock for female athletes.<sup>171</sup> However, the real question is how will Title IX factor in if scholarship student-athletes are eventually allowed to unionize?<sup>172</sup>

## IX. UPHOLDING AMATEURISM

### A. NCAA CRITERIA

There is one essential factor that separates the college athlete from that of a professional athlete: amateurism. Amateurism is the foundation from which the NCAA regulates student-athletes.<sup>173</sup> The NCAA provides a platform for member institutions to design their athletic programs to be an integral part of the educational program.<sup>174</sup> Further, the NCAA establishes that it is necessary to have a clear line of demarcation between college athletes and professional sports in order to preserve the student in the student-athlete.<sup>175</sup> To ensure student-athletes and their institutions are abiding by amateurism rules, the NCAA initialized pre-enrollment amateurism criteria.<sup>176</sup> Before any prospective student-athlete can participate in collegiate athletics, they must be certified in amateurism, which entails approval by

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169. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656, at \*18.

170. See Buzuvis, *supra* note 168, at 320-21.

171. See Buzuvis, *supra* note 168, at 321.

172. See Buzuvis, *supra* note 168, at 327-331 (hypothesizing the potential implications of Title IX through the collective bargaining process).

173. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Dec. 30, 2015).

Amateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.

*Id.*

174. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.01.2.

175. *Id.*

176. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.1.1.

the NCAA Eligibility Center.<sup>177</sup> It is the responsibility of the institution to keep track of the amateurism eligibility of the student-athlete during the student-athlete's enrollment at the university.<sup>178</sup> As soon as a student-athlete loses amateur status, they are no longer eligible for intercollegiate competition. A student-athlete could lose their amateur status in many ways, including: accepting a promise of pay even if the pay is to be received post-intercollegiate athletics participation, signing a contract or commitment to play for a professional team, getting paid to play in a sport, or entering into a professional draft after initial full-time collegiate enrollment.<sup>179</sup>

#### B. STUDENT-ATHLETE EXPLOITATION

The biggest concern over the years, and most recently at the forefront of collegiate athletic spotlight, is the exploitation of student-athletes.<sup>180</sup> The NCAA brings in hundreds of millions of dollars annually, and that number nears closer and closer to the billion dollar mark each fiscal year.<sup>181</sup> In 2014, the NCAA had \$989 million in total revenue which, after expenses, surmounted to an \$80.4 million surplus, \$20 million more than the surplus from 2013.<sup>182</sup> Of the \$908.6 million in NCAA expenses, \$547.1 million was distributed to Division I schools and conferences.<sup>183</sup> The NCAA sets up a distribution fund plan; however, the member institutions have discretion to allocate the funds in whichever manner they think necessary.<sup>184</sup> Moreover, member institutions bring in their own revenue but, truthfully, only about twenty-four of the 230 Division I state institutions are actually self-sustaining purely on athletic revenue.<sup>185</sup> All fifty Power Five<sup>186</sup> conference

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177. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.1.1.1.

178. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.1.1.1.2.1.

179. NCAA, 2015-16 NCAA DIVISION I MANUAL, art. 12.1.2.

180. See Armstrong Williams, *Williams: The Exploitation of College Athletes*, WASH. TIMES (Apr. 16, 2014), <http://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes/>; Linda Chavez, *How Colleges Exploit Athletes*, N.Y. POST (Mar. 28, 2014, 11:58 PM), <http://nypost.com/2014/03/28/how-colleges-exploit-athletes/>.

181. See Berkowitz, *supra* note 95.

182. Berkowitz, *supra* note 95.

183. Each year the NCAA distributes about 60% of its revenue directly to Division I conferences and schools. *Finances: Distributions*, NCAA, <http://www.ncaa.org/about/resources/finances/distributions> (last visited Dec. 30, 2015); see also Berkowitz, *supra* note 94.

184. *Finances: Distributions*, *supra* note 183.

185. Erik Brady, Steve Berkowitz & Christopher Schnaars, *College Athletics Finance Report: Non-Power 5 Schools Face Huge Money Pressure*, USA TODAY (May 26, 2015, 7:49 PM), <http://www.usatoday.com/story/sports/college/2015/05/26/ncaa-athletic-finances-revenue-expense-division-i/27971457/>.

schools are self-sustaining after receiving government funds, university funds, and student fees.<sup>187</sup> With an exception of three non-Power Five conference schools and two non-Football Bowl Series schools, all other Division I non-Power Five conference schools are not self-sustaining.<sup>188</sup> Consequently, there is a lack of leftover funds for the majority of Division I institutions to offer their student-athletes. But despite the shortcomings in profit for some schools, not even the Power Five conference schools provide revenue sharing for student-athletes, despite the large amounts of revenue brought in due to the student-athlete's services.

Most recently, in response to the NCAA's unwillingness to share revenue with the student-athlete, came the case *O'Bannon v. National Collegiate Athletic Association*.<sup>189</sup> A class of current and former Division I men's basketball and FBS football players brought suit against the NCAA for violation of the Sherman Act<sup>190</sup> for restraining trade in relation to the players' names, images, and likenesses.<sup>191</sup> Ultimately, the California District Court ruled that the NCAA was violating the Sherman Act by not allowing the student-athletes to share in the revenue generated from their names, images, and likenesses.<sup>192</sup> Also, the court granted an injunction for plaintiffs, which prevented the NCAA from prohibiting or preventing its member conferences and institutions from sharing the revenue with student-athletes in regards to their names, images, and likenesses.<sup>193</sup> However, *O'Bannon* was partially overturned on appeal.<sup>194</sup> On appeal, the Ninth Circuit agreed with the NCAA's violation of the Sherman Act, but found issue with allowing payment to student-athletes, whether in trusts or not, because lack of payment is essentially what makes student-athletes amateurs.<sup>195</sup> The Ninth Circuit echoed the Supreme Court's language that it "must afford the NCAA

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186. Chip Patterson, *College Football Conference Power Rankings: SEC Still Leads the Way*, CBS SPORTS (Oct. 8, 2015, 11:48 AM), <http://www.cbssports.com/collegefootball/eye-on-college-football/25331439/college-football-conference-power-rankings-sec-leads-the-way> (Southeastern Conference, Big 12, Pac-12, Big Ten, Atlantic Coast Conference).

187. Brady, *supra* note 185.

188. Brady, *supra* note 185.

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

190. Specifically, *O'Bannon* challenged the Sherman Act, which states: "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 illegal." 15 U.S.C. § 1 (2012).

191. *O'Bannon*, 7 F. Supp. 3d at 955.

192. *Id.* at 1007.

193. *Id.* at 1008.

194. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076-1079 (9th Cir. 2015).

195. *Id.* at 1076.

'ample latitude' to superintend college athletics."<sup>196</sup> Moreover, the Ninth Circuit revealed on the importance of amateurism in NCAA history and found there to be a quantum leap between offering student-athletes education-related compensation and offering deferred cash payments that were not, in any way, connected to educational expenses.<sup>197</sup> Strongly believing that once the NCAA and member institutions started offering cash payments, as the district court suggested, there would be "no basis for returning to a rule of amateurism and no defined stopping point,"<sup>198</sup> the Ninth Circuit concluded that the NCAA shall permit its member institutions to grant student-athletes aid equal to the full cost of attendance and no more; not even the \$5,000 deferred trust that the district court constructed.<sup>199</sup>

### C. THE ULTIMATE REALIZATION

Whether or not collegiate athletes, at least Division I men's basketball and football, are truly amateurs in the eyes of today's viewers really does not seem to matter because the courts are still unwilling to recognize student-athletes as anything other than students first, athletes second.<sup>200</sup> There is no doubt that student-athletes spend long hours preparing and competing, perhaps more hours than they spend on classwork for some student-athletes. And there is no doubt that the NCAA and member conferences and institutions are making large revenues off of the services performed by the student-athletes.<sup>201</sup> But perhaps the true issue is being overlooked. In fact, maybe the answer to the continuing battle between the NCAA and student-athletes is stronger government regulation on the NCAA's market presence and stronger NCAA regulations on the amount of time student-athletes are permitted to dedicate to their sport each week. Amateurism is a huge part of collegiate athletics and has been for nearly a century;<sup>202</sup> however, that very concept is being threatened, and will not survive without change from the status quo.

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196. *Id.* at 1079 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984)).

197. *O'Bannon*, 802 F.3d at 1078.

198. *Id.*

199. *Id.* at 1079.

200. *Id.*

201. Berkowitz, *supra* note 2.

202. *See generally* Smith, *supra* note 15.

## X. CONCLUSION

An education holds a higher long term return than a career in athletics, or at least it should.<sup>203</sup> With a career in the professional leagues being rare, it is even more important to promote an education. Allowing scholarship student-athletes to unionize threatens the very importance of an education. Once student-athletes are given power to negotiate the terms of their scholarships, or receive the benefits of being a union employee, the concept of being a student begins to fade away. Sooner or later all that is left is a group of athletes who are being paid to play; from there we will see academic standards begin to slip off into the abyss. Eventually, amateurism will completely vanish, which leaves no purpose in having a collegiate athletic regulatory association. The fact of the matter is there will always be a Cardale Jones<sup>204</sup> in this world, an individual who does not respect the privilege of a quality education. There will be plenty of student-athletes who will use unionization as a way to exploit the system and get more money and benefits.

There is no arguing that student-athletes have an economic relationship with their institutions to some extent.<sup>205</sup> Also, there is no arguing against the fact that coaches and athletic departments have significant control over their athletes. But what is troublesome is that some individuals consider athletic scholarships compensation rather than financial aid. For many student-athletes an athletic scholarship is the only means for which they could attend college, whether that be due to insufficient grades or a lack of financials. With college and university tuitions continuing to increase, athletic scholarships are one of the few means for which some students can attend an institution. Though participating in athletics is a requisite for receiving an athletic scholarship, student-athletes are still expected to maintain good academic standing and are still subject to the same institu-

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203. See generally Letter from Jim Delany, Big Ten Commissioner, to media, *Education First, Athletics Second: The Time for National Discussion is Upon Us*, USA TODAY (Apr. 17, 2015), <http://i.usatoday.net/sports/college/2015-4-17-Education%20First%20Athletics%20Second.pdf>.

204. Jones was a third string quarterback for the Ohio State University Buckeyes during the 2014-15 football season. He was known for his exceptional performance in the first year of the newly slated college football playoffs, which led the Buckeyes to a national championship victory. However, what he is mostly known for by some people is his infamous tweet on the social network system Twitter, where he stated: "Why should we have to go to class if we came here to play FOOTBALL, we ain't come to play SCHOOL classes are POINTLESS . . ." Teddy Greenstein, *Cardale Jones, Known for Ill-Advised Tweet, Takes Stage for Ohio State*, CHI. TRIB. (Dec. 1, 2014, 8:58 PM), <http://www.chicagotribune.com/sports/college/ct-cardale-jones-ohio-state-big-ten-title-game-spt-1202-20141201-column.html>.

205. See Berkowitz, *supra* note 2; Brady, *supra* note 185.

tional rules and criteria as any college student. It must not be forgotten that they are student-athletes, not athlete-students.

This Article is not meant to advocate a continuation of the status quo in collegiate athletics in regards to the NCAA exploitation of student-athletes. There is an apparent issue with the NCAA, member institutions, and conferences that continue to gain financially from the student-athletes' participation in athletics.<sup>206</sup> *O'Bannon* was a step forward in protecting the image of student-athletes, but that decision did not alone provide the necessary change.<sup>207</sup> If there is to be change in collegiate athletics, and the NCAA is to remain true to its goal of amateurism, real amateurism, then there needs to be change in the guiding regulations. For that to happen, there needs to be an understanding among institutional athletic representatives that the demands placed on their student-athletes are reaching a dangerous level that could alter the inner workings of college athletics completely. The NLRB had the right idea when it denied jurisdiction in August of 2015<sup>208</sup> because the NCAA already has the power to fix the issues; it is up to the NCAA to find the right solution before things escalate any further, making it necessary for the Board and legal system to take over.

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206. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

207. See *O'Bannon*, 7 F. Supp. 3d 955.

208. Northwestern Univ., 362 N.L.R.B. No. 167, 2014-15 NLRB Dec. P 15999 (Aug. 17, 2015), 2015 WL 4882656, \*5-6.