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College Athletics Internships: The Case for Academic Credit in College Athletics

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College Athletics Internships: The Case for Academic Credit in College Athletics

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COMMENTS

COLLEGE ATHLETICS INTERNSHIPS: THE CASE FOR ACADEMIC CREDIT IN COLLEGE ATHLETICS

M. TYLER BROWN*

College athletes are beginning to speak out against the current college sport model that treats college athletes as unpaid amateurs, while the National Collegiate Athletic Association (NCAA) continues to stand behind that model. The problem, not uncommonly, boils down to money. High-profile college teams and athletes generate substantial revenue for their respective universities. Some college athletes dedicate as much time to their sport as the average American worker dedicates to his or her job. However, college athletes often do not receive the benefit of their bargain with universities: a college education.

This Comment argues for a compromise between the current amateurism model and the oft-proposed "pay-for-play" model of college sports, in which college athletes are paid for their athletic participation. If athletics are an important aspect of a well-rounded education, as the NCAA and others contend, then college athletes should receive some academic benefit for their participation, just as their peers who participate in other extracurricular activities like music or theater do. Awarding academic credit for athletic participation would help further athletes' progress toward graduation, thereby providing college athletes with a greater benefit for their bargain.

* Note & Comment Editor, *American University Law Review*, Volume 64; J.D. Candidate May 2015, *American University Washington College of Law*; B.A. Exercise and Sport Science, *University of North Carolina—Chapel Hill*. I extend my deepest thanks to everyone who dedicated time and effort to this Comment, especially the hardworking staff of *AULR*. I also want to thank my teachers, colleagues, and friends who continue to help me grow in personal and intellectual ways I never knew existed. Finally, I want to thank my family; no words suffice to describe my gratefulness. I see this not as a work of my own, but as a reflection of all of you.

By framing college athletics as an internship under the Fair Labor Standards Act (FLSA), universities would avoid the requirement to compensate all college athletes as employees. Providing academic credit for an educational experience dramatically increases the likelihood that an "employee" is considered an "intern" under the FLSA, thereby exempting the employer from the compensation requirement. Further, universities could structure internship classes to include all students, not just athletes, and provide a forum to teach students important work-related skills that cannot be taught in a traditional classroom setting. Reframing college athletics as internships would increase the benefit to college athletes while still maintaining the current unpaid-amateur model.

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INTRODUCTION

> The sheer volume of all the bad things going on in the sport has overwhelmed me. The criminal behavior of the players, the rampant pursuit of money, the tunnel vision of the coaches, the complacency of the fans, the sliminess of the boosters, the sanctimonious platitudes of the NCAA pooh-bahs, the exploitation of the players, the desire to expand the season and to televise everything, the brutality on the field, the absurdity of the "student-athlete" notion, the lack of anything remotely resembling an ethical anchor holding big-time football programs and their patrons to the ground. . . . And the ugliest part was that these sins were being committed in a world—our universities—that Americans have always assumed to be a realm of virtue and idealism.[1]

The current model of college athletics is ripe for change.[2] The National Collegiate Athletic Association (NCAA), an association of higher-education institutions, organizes competition and promulgates rules for college athletics.[3] The NCAA promotes a student-athlete model in which college athletes are first and foremost students and participate in athletics only as an educational supplement.[4] Even though college athletes often commit more time and effort to their

1. Rick Telander, *Something Must Be Done*, SPORTS ILLUSTRATED, Oct. 2, 1989, at 94.

2. *See generally* Brian L. Porto, *The Legal Challenges to "Big-Time" College Sports: Are They Threats or Opportunities for Reform?*, 27 VT. B. J. 41, 41–42 (2001) ("Whether you loved or loathed 'March Madness,' you should consider the future of 'big-time' college sports for two reasons. First, college sports will face major legal challenges in the years ahead. Second, in resolving these disputes, lawyers will help to determine whether college sports continue on the path of commercialism and professionalism, or travel the road of reform instead.").

3. *College Athletics – NCAA Rules and Regulations*, STATE U., http://education.stateuniversity.com/pages/1852/College-Athletics-NCAA-RULES-REGULATIONS.html (last visited Aug 3, 2014) (noting that the NCAA comprises over 1,000 NCAA member-institutions that compete in over fifty sports).

4. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 122 (1984) (White, J., dissenting) (stating that the NCAA model seeks to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body" (internal quotation marks omitted)); *see also* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *6 (Mar. 26, 2014) (noting that Northwestern football players' greatest time commitment to their sport is during training camp, when they devote fifty to sixty hours per week to football, whereas they only devote fifteen to twenty-five hours per week to football during the spring and summer), *review granted*, 2014 WL 1653118 (N.L.R.B. 2014); NAT'L COLLEGIATE ATHLETIC ASS'N., 2012–2015 DIVISION II STRATEGIC PLAN 2 (Dec. 2012), *available at* http://www.ncaa.org/sites/default/files/2012-15+Strategic+Plan.pdf (observing the NCAA's policy of balancing academics and athletics for the students' and member-institutions' overall benefit).

sports than many employees commit to their jobs, they receive limited benefits that fall short of fair compensation.[5] These minimal benefits appear particularly inequitable when contrasted with the billions of revenue dollars flowing to the NCAA and its member-institutions because of the hyper-commercialization of college athletics.[6] To further the problem, college athletes, especially those in revenue-generating sports like men's basketball and football, often perform poorly in academics or fail to graduate.[7]

Some commentators have argued that the combination of these forces has led to the financial exploitation of college athletes and that the NCAA's system, which purports to exchange an education for a scholarship, is in need of reform.[8] Reform would shift the current model in one of two ways: (1) by moving towards a semi-professional model in which athletes, particularly those in revenue-generating sports, receive compensation; or (2) by returning to a truer form of amateurism in which college athletics become a part of college education as a pure extracurricular experience.[9]

This Comment argues that college athletics should return to a truer amateurism model and that universities should offer college athletes internships for academic credit. Due to the NCAA's unwavering stance against paying college athletes,[10] academic reform

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5. *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 78–79 n.30, 100 (2006). A college athlete's scholarship is provided "solely on the basis of athletic ability" and is permitted to cover tuition, housing, books, and food plans. *Id.* at 109. Although some athletes must commit over fifty hours per week to their sport, "many full-scholarship athletes live below the poverty line." *Id.* at 78–79 n.30, 100.

6. *See generally* Matthew P. McAllister, *Hypercommercialism, Televisuality, and the Changing Nature of College Sports Sponsorship*, 53 AM. BEHAV. SCI. 1476, 1482 tbl.1 (2010) (finding that in-game sponsored commercial graphics appeared on screen during over half of the roughly three and a half hour-long football broadcast and that multiple sponsored commercial graphics regularly appear simultaneously on screen).

7. *See* McCormick & McCormick, *supra* note 5, at 150–52 (comparing the 60% graduation rate for non-athletes with the 44% rate for men's basketball players and the 55% rate for football players).

8. *See id.* at 75–76 (condemning the NCAA policy that prohibits student-athletes from receiving financial benefits relating to their athletic success and further highlighting the NCAA's arbitrary practice of allowing indirect entities to earn tremendous wealth from student-athletes' athletic performance); *see also* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *2 (concluding that Northwestern football players who retain eligibility are "employees" under the National Labor Relations Act). Indeed, have some even suggested that the student-athlete model depicts the NCAA as a cartel. *See, e.g.*, ARTHUR A. FLEISHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 40 (1992).

9. *See* Porto, *supra* note 2, at 41–42 (analyzing potential legal vehicles for reforming the NCAA, such as a hypothetical IRS ruling that college sports are a commercial, non-educational, enterprise).

10. Jeffrey L. Seglin, *Should Colleges Pay Athletes to Play?*, CHI. TRIB. (Sept. 30, 2013, 8:30 AM), http://www.chicagotribune.com/entertainment/sns-201306251100--tms--ritethngctnrt-a20130625-20130625,0,4945501.story.

poses the most viable route to correct unfairness in the current system by providing college athletes with the education they are supposed to receive. If the bargain is to exchange education for athletic performance, then college athletes should receive the full benefit of their bargain—a worthwhile undergraduate education.

Part I describes the forces creating the contradictory and controversial model of college athletics. By tracing the historical development of college athletics, the ever-increasing commercialism of popular college athletics, and the unique legal void in which the NCAA resides, this Comment will show the imminent need for reform in college athletics. Part II describes the legal framework under which internships operate. It begins with a discussion of the FLSA and *Walling v. Portland Terminal Co.*,[11] the U.S. Supreme Court case that defined the meaning of an internship under the FLSA. Part II then discusses the Department of Labor's (DOL) standard for determining what constitutes an internship and recent judicial applications of this standard. Part III of this Comment applies the legal framework for internships to college athletics and argues that colleges and universities currently violate the FLSA because they do not compensate athletes for their services. Part IV then posits that colleges and universities can comply with the FLSA by offering players compensation or academic-credit. It further asserts that compensating college athletes will produce inadequate and unfair results. Instead, college athletes should receive academic credit so they actually receive the benefit of their bargain with the NCAA and its member-institutions. Finally, this Comment briefly concludes that college athletes should be treated as interns because such treatment further promotes the educational ideals of college sports while reducing the current exploitation of college athletes and providing them with the means to progress towards graduation.

I. THE CURRENT MODEL OF COLLEGE ATHLETICS

The history and development of college athletics is crucial to understanding how current inequities in the industry arose. This Part begins by providing background information on the development of the NCAA rules, including amateurism, an NCAA principle adhering to the notion that college athletes are not professionals and therefore should not be paid. It then identifies important moments in the NCAA's history that have shaped the

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11. 330 U.S. 148 (1947).

current model of college athletics. Finally, this background section concludes with a brief discussion of other attempts at reform.

A. The NCAA's Treatment of College Athletes

1. The development of amateurism and commercialism in the NCAA

The NCAA originated in 1906 as the Intercollegiate Athletic Association of the United States (IAAUS) in response to the increasing violence and number of deaths in college football.[12] Since its inception as the IAAUS, the NCAA has served as a self-regulating, discussion, and rule-making body; indeed, at its first meeting in 1906, the IAAUS gave eligibility and amateurism rules serious attention.[13] By 1921 the NCAA also began organizing championship events.[14]

The NCAA's original notion of amateurism derived from British amateur sports, in which an amateur athlete was seen as a man of high status too stately to degrade his body with regular vigorous exercise; the British notion of amateurism excluded physical laborers because their bodies were damaged from constant exertion.[15] In the British university setting, athletics was a necessary skill in the "liberal education of a well-rounded gentleman."[16] The NCAA, however, quickly discarded the British notion of amateurism because American colleges and universities recognized the immense advertising and

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12. *National College Athletic Association (NCAA)*, INTERNET FAQ ARCHIVES, http://www.faqs.org/sports-science/Mo-Pl/National-Collegiate-Athletic-Association-NCAA.html (last visited Aug. 3, 2014). As a result of the mass formations and gang tackling typical of football at the time, deaths and serious injuries frequented the sport. *Id.* U.S. President Theodore Roosevelt organized a conference to reform the sport and to prevent its abolishment in the face of "considerable public pressure to ban football from intercollegiate athletics." *Id.* The IAAUS arose from this conference, and the NCAA adopted its current name in 1910. *Id.*

13. *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 33 (1998) (recounting the NCAA's formative role in promulgating rules and standards to govern college athletics programs, principally in the dual realms of gameplay conduct and university revenue distribution).

14. *National College Athletic Association (NCAA)*, *supra* note 12. In 1921, the NCAA organized and held the first collegiate track and field championships. *Id.* Gradually, the NCAA added more championships, such as the basketball championship in 1939. *Id.*

15. *See* SACK & STAUROWSKY, *supra* note 13, at 15 (discussing the differences between amateur and professional athletes in England and noting that manual laborers were excluded from amateur sports because of their distinct physical advantage). Indeed,

> the gentleman-aristocrat was not expected to put forth too great an effort in any single direction. He could strive for excellence, but not just in one activity and as a consequence of prolonged training. The aristocrat took great pains to distance himself from the highly trained professional . . . . Investing too much time and effort in one specialized activity would be plebeian.

Id. at 11–12.

16. *Id.* at 14.

revenue potential of successful athletic teams.[17] With help from growing mass-media industries, successful athletic programs increased visibility on a national scale, thereby enticing more prospective student applications and bolstering university revenues.[18] This national recognition resulted in intense subsidization of student-athlete talent and a professionalization of college sports; universities openly defied amateurism rules because of the market incentives posed by highly trained athletes.[19]

In response, the NCAA promulgated rules regulating the amount of time a college athlete could spend training, defined amateur status, and controlled the financial compensation of athletes.[20] Later, in the mid-1900s, the NCAA adopted the "Sanity Code" to bolster its recruiting and financial aid requirements.[21] The Sanity Code forbade scholarships for athletic ability and restricted scholarships to academic awards covering tuition and fees.[22] Further, the NCAA formed a Compliance Committee to review issues and terminate NCAA membership for violations.[23] Despite these efforts, however, the Sanity Code lasted only a few years because the NCAA gradually

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17. *See id.* at 31 (adding that "successful sports teams gave students, alumni, trustees, and local fans something to be proud of"). Schools often experience distinct increases in applications after championship seasons. *See* Sean Gregory, *A Cut for College Athletes*, TIME, Sept. 16, 2013, at 40 ("For example, in the two years after Butler University's basketball team made its first Final Four run in 2010 . . . undergraduate applications rose 43%.").

18. *See* SACK & STAUROWSKY, *supra* note 13, at 31 (noting, for example, that Yale University built a football stadium in 1914 with the capacity to seat 75,000 spectators, making it the largest stadium in the country at the time).

19. *Id.* at 35–36.

20. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331–32 (2007). In 1916, the NCAA defined "amateur athlete" as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom." SACK & STAUROWSKY, *supra* note 13, at 34–35 (internal quotation marks omitted).

21. *See* Neil Gibson, Note, *NCAA Scholarship Restrictions As Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 213–14 (2012) (recounting the discordant recruiting process that led to the implementation of the Sanity Code). The Sanity Code was considered a necessary reform because the former policy that left enforcement of amateurism rules to the schools was failing. SACK & STAUROWSKY, *supra* note 13, at 43. The Code was a compromise attempt between advocates and opponents of full athletic scholarships. *Id.* at 44.

22. Lazaroff, *supra* note 20, at 332–33.

23. *Id.* The NCAA had an assortment of tools to enforce its rules. For example, when members of the University of Kentucky basketball team committed ongoing rules violations, including point fixing and making illegal cash payments to players, NCAA executives opted not to terminate the university's NCAA membership. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 56–59 (1995). Instead, they planned to invoke a "death penalty" by using an NCAA rule allowing members to play games only with other schools who obeyed NCAA rules, but this proved unnecessary because Kentucky confessed to its violations. *Id.* at 59–60.

promulgated regulations that allowed financial compensation to induce athletes to join the university.[24]

In 1963 in *Van Horn v. Industrial Accident Commission*,[25] the California District Court of Appeals highlighted the shortcomings in the NCAA's amateurism ideals.[26] Edward Van Horn, a football player at California State Polytechnic College, died in a plane crash returning home from a football game in Ohio.[27] The court characterized Van Horn's athletic scholarship as an employment contract, thereby entitling his family to workers' compensation.[28] In response, the NCAA revised its policies and re-categorized college athletes as "student-athlete[s]."[29] The NCAA used this terminology and rules preventing schools from withdrawing injured athletes' scholarships to reduce the likelihood that courts and society would view athletic scholarships as employment contracts.[30]

The NCAA amateurism rules, which strictly classify student-athletes as amateurs, have expanded over the years. In 2014, college athletes can receive financial aid only for the cost of attending their college or university: they cannot accept a promise of pay or acquire agent

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24. Lazaroff, *supra* note 20, at 333–34; *see* BYERS, *supra* note 23, at 54 (highlighting the difficulties faced trying to enforce the Sanity Code because NCAA members were unwilling to enforce the Code on each other).

25. 33 Cal. Rptr. 169 (Dist. Ct. App. 1963) (per curiam), *superseded by statute*, CAL. LAB. CODE § 3352(k) (West 2013 & Supp. 2014), *as recognized in Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 829 (Ct. App. 2002).

26. *Id.* at 172 (holding a deceased college athlete had an employment contract with his university); *see* SACK & STAUROWSKY, *supra* note 13, at 81 (noting that *Van Horn* alerted the NCAA that athletic scholarships could constitute employment contracts).

27. *Van Horn*, 33 Cal. Rptr. at 170.

28. *See id.* at 170, 172–73. Section 3553(k) of the California Labor Code, which excludes student-athletes from the term "employee," overruled *Van Horn*. CAL. LAB. CODE § 3552(k); *Shephard*, 125 Cal. Rptr. at 833. Other cases had similar outcomes to *Van Horn*. For example, in *University of Denver v. Nemeth*, the Supreme Court of Colorado determined that a University of Denver football player who was injured while playing football on university property was an employee of the university for purposes of workers' compensation. 257 P.2d 423, 423, 430 (Colo. 1953) (en banc).

29. BYERS, *supra* note 23, at 69 (emphasis omitted) ("We crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of 'college teams,' not football or basketball 'clubs,' a word common to the pros."); *see also id.* (noting that the term "student-athlete" was meant to address the issue of worker's compensation for athletes).

30. SACK & STAUROWSKY, *supra* note 13, at 48 ("[E]very effort was made by the NCAA to avoid the appearance that an athletic grant-in-aid was a contract for hire. Rules preventing universities from withdrawing financial aid from injured athletes or from athletes who decided not to participate were as much an effort to protect universities from workers' compensation cases as an effort to protect the education and safety of athletes."); *cf.* BYERS, *supra* note 23, at 68–69 (noting that some NCAA members initially opposed the grant-in-aid system that still exists today because it was a "pay-for-play" model of college athletics).

representation.[31] Paradoxically, they may receive compensation from an "outside sponsor," so long as that compensation occurs before or after they enroll.[32] A party interested in the athlete's enrollment at a specific institution can finance the athlete's training, thereby incentivizing the athlete to enroll at that institution.[33]

Throughout its history, the NCAA has grown increasingly commercial.[34] The creation of NCAA championships and the expansion of college athletics into a diverse array of sports have attracted lucrative sponsorship and broadcasting deals.[35] For example, in 2011, the NCAA signed a fourteen-year, $10.8 billion agreement with CBS Sports and Turner Broadcasting for broadcasting rights to the NCAA Division I Men's Basketball Championship.[36] ESPN also signed a multi-year, $500 million contract with the NCAA for rights to twenty-four other NCAA

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31. NCAA OP. BYLAWS. art. 2.13, *reprinted in* NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–14 NCAA DIVISION I MANUAL 5 (2013) [hereinafter NCAA MANUAL], *available at* http://www.ncaapublications.com/DownloadPublication.aspx?download=D114.pdf ("A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution."); *see also* Gregory, *supra* note 17, at 38 (articulating that "[t]he historic justification for not paying players is that . . . the value of their scholarships . . . is payment enough"). College athletes are sometimes penalized even though they do not violate the amateurism rules. For example, the NCAA suspended Johnny Manziel, the Texas A&M quarterback and first college freshman to ever win the Heisman Trophy, for a half of a game. Gregory, *supra* note 17, at 38. Although Manziel "had not personally accepted money when he signed autographs," the NCAA "slapped Manziel on the wrist for failing to realize that trinket brokers would surely profit from his signature." *Id.*

32. NCAA OP. BYLAWS. art. 12.1.2.1.4.4, *reprinted in* NCAA MANUAL, *supra* note 31, at 60.

33. *Id.* For example, a few years ago, the NCAA investigated allegations that the father of Cam Newton—a former Auburn University quarterback, NCAA champion, Heisman Trophy winner, and first overall National Football League (NFL) draft pick—and Kenny Rogers, an ex-Mississippi State University football player, sought a six-figure payment for Newton to sign with the Mississippi State Bulldogs. *Auburn Releases Cam Newton Docs*, ESPN, (Nov. 5, 2011, 10:31 AM), http://espn.go.com/college-football/story/_/id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal'. Allegedly, Rogers acted as an agent for Newton in his recruitment. *Id.* The NCAA declared Newton ineligible to play on the Tuesday before the Southeastern Conference (SEC) football championship but reinstated him the following day when Auburn University successfully argued that Newton's father, rather than Newton, was responsible for the recruiting violation. *Id.*

34. *See generally* Richard M. Southall et al., *A Method to March Madness? Institutional Logics and the 2006 National Collegiate Athletic Association Division I Men's Basketball Tournament*, 22 J. SPORT MGMT. 677, 692 (2008) (noting the regular and scheduled commercial breaks and in-game advertising in NCAA sports).

35. Steve Eder, *Points for Product Placement: N.C.A.A. Cashes in, but Not the Players*, N.Y. TIMES, Apr. 5, 2014), http://www.nytimes.com/2014/04/06/sports/ncaabasketball/financial-rewards-of-ncaas-sponsorship-deals-arent-shared-with-players.html.

36. Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 109 n.1 (2012).

championships.[37] However, the total cost of operating all of the NCAA championships is only about $100 million per year.[38] Although most revenue is dispensed to the NCAA's member-institutions, both the NCAA and its member-institutions reap significant benefits from the popularity of college athletics.[39] Moreover, the gross popularity of college athletics renders flow-over benefits to the towns and counties surrounding the colleges.[40]

The seemingly unlimited financial benefits college athletics provide to the NCAA and its member-institutions contrasts sharply with the limited financial benefit to college athletes, whose compensation is strictly limited to a one-year grant-in-aid.[41] Considering the amount of time college athletes dedicate to practicing, traveling, and competing, the benefits college athletes provide to their universities far surpass the benefits they receive from their universities in return.[42] However, most college athletics teams generate little revenue or actually lose money, and they are funded by their universities' revenue-generating sports (generally men's basketball and football).[43] Thus, only a few college athletes—men's basketball and football players—are truly exploited financially by their universities for their time and effort because men's basketball

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37. *ESPN Extends Deal Through 2023–24: Network Will Expand Final Round Coverage of Championships*, NCAA (Dec. 15, 2011, 4:34 PM), http://www.ncaa.com/news/ncaa/article/2011-12-15/espn-extends-deal-through-2023-24 [hereinafter *ESPN Extends Deal*].

38. *Championships Finances*, NCAA, http://www.ncaa.org/about/resources/finances/championships-finances (last visited June 19, 2014).

39. *See* McCormick & McCormick, *supra* note 5, at 75–76.

40. Gregory, *supra* note 17, at 38 ("All kinds of people beyond campus are also making money from this lop-sided system. Football-game days in particular drive college-town economies. Souvenir hawkers, bars, burger joints, hotels, ticket brokers, stadium vendors, parking attendants and others rely on home games for revenue. According to a 2012 study from Oxford Economics, . . . a season's worth of Texas A&M home football games generate $86 million in business for Brazos County, where A&M is located.").

41. *See* NCAA OP. BYLAWS. art. 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 31, at 59 (enumerating prohibitions placed on student-athletes' pursuit or receipt of compensation for their athletic performance); *see also* Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving'*, CNN, http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/ (last updated Apr. 8, 2014, 1:26 PM) (discussing how University of Connecticut (UConn) men's basketball player Shabazz Napier's scholarship did not cover basic needs like food, while UConn made millions of dollars off of his championship-winning performance in March Madness).

42. *See* McCormick & McCormick, *supra* note 5, at 76–78 (criticizing the system that denies college athletes the full financial benefits of their labor and arguing their college athletes are legally entitled to those benefits).

43. *See* Patrick Rishe, *College Football Profiteering a Necessary Evil for Financing Athletics, Long-Term Branding*, FORBES (Sept. 21, 2011, 2:10 PM), http://www.forbes.com/sites/prishe/2011/09/21/college-football-profiteering-a-necessary-evil-for-financing-athletics-long-term-branding (describing the financing system of college athletics, wherein revenue-generating sports finance non-revenue-generating sports).

and football are usually the only sports that generate revenue.[44] Many athletes receiving full scholarships live below the poverty line despite the financial assistance.[45]

2. The educational benefits conferred on college athletes

In response to criticisms levied against college athletics programs, the NCAA argues that universities confer substantial educational benefits to student-athletes. For example, the NCAA claims that student-athletes perform better academically and graduate at higher rates than the general student body.[46] However, critics argue that the NCAA's statement grossly overlooks two important details: (1) scholarship athletes do not fail to complete school for financial reasons, whereas many in the general student body drop out for such reasons; and (2) the graduation rate for athletes is "inflated" because it includes individuals in non-revenue generating sports, who generally graduate at very high rates.[47] The graduation rates for athletes on teams that perform particularly well in athletic competitions are staggeringly low.[48] Further, African-American men's

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44. McCormick & McCormick, *supra* note 5, at 97–98 (defining "revenue-generating sports" as comprising Division I football and men's basketball).

45. *Id.* at 78–79; *see* Gregory, *supra* note 17, at 42 (discussing how Chris Burnette, a University of Georgia football player, was forced to "open[] a business on the side giving $5 haircuts to his teammates to help pay expenses" even though he had received a scholarship). Less than 2% of all undergraduate students in Bachelor's degree programs receive athletic scholarships. Mark Kantrowitz, *Backgrounder: Athletic Scholarships*, FINAID 2 (May 5, 2011), http://www.finaid.org/educators/20110505athleticscholarships.pdf; *see also How Do Athletics Scholarships Work?*, NCAA (2012), http://www.ncaa.org/sites/default/files/NCAA%2BAthletics%2BScholarships.pdf [hereinafter *Athletics Scholarships*] (noting that only 2% of high school athletes receive college athletics scholarships).

46. *NCAA Grad Rates Hit All-Time High*, NCAA (Oct. 25, 2011, 2:22 PM), http://www.ncaa.com/news/ncaa/article/2011-10-25/ncaa-grad-rates-hit-all-time-high (noting that Division I athletes have a 65% graduation rate while non-student-athletes have a 63% graduation rate). However, the federal government and the NCAA calculate graduation rates differently, resulting in sizeable discrepancies between the two statistics. *See* Gregory, *supra* note 17, at 42 (suggesting the NCAA's graduation success rate is "more generous" than the federal rate). For example, the federal graduation rate for football players at Oklahoma University is 38%, while the NCAA's rate for the Oklahoma football players is 47%. *Id.*

47. McCormick & McCormick, *supra* note 5, at 151. In the NCAA's annual graduation statistics report, female student-athletes—whose sports produce no revenue—graduated at a rate of 88%, while male student-athletes—some of whose sports produce revenue—graduated at a rate of 73%. *NCAA Grad Rate Hits All-Time High*, *supra* note 46. The graduation rate for men's basketball players is at 68%, while women's basketball teams graduate 86% of their players. *Id.* The graduation rate for football is 69%. *Id.* Baseball players, who are particularly notable because they are male student-athletes in a generally non-revenue sport, graduate at a rate of 77%. *Id.*

48. *See Keeping Score When It Counts: Analyzing the Academic Performance of the 2013 NCAA Division I Women's and Men's Sweet 16 Teams*, INST. FOR DIVERSITY & ETHICS SPORT 1–2 [hereinafter *Keeping Score When it Counts: Sweet Sixteen*], *available at* http://www.tidesport.org/Grad%20Rates/2013_Sweet_16_Study_Final.pdf (reporting that although

basketball and football players graduate at depressing rates, while their white teammates graduate at a 25% higher rate.[49]

Participation in college athletics promotes valuable transferable skills that greatly benefit student-athletes.[50] However, because some college athletes often devote more than fifty hours to their sport each week during the in-season, they regularly lack the time necessary to succeed in their coursework.[51] In a recent study, the NCAA recognized that student-athletes regularly devote as much, if not more, time to athletics as to academics.[52] Even students in non-revenue generating sports and lower divisions of the NCAA report dedicating thirty to forty hours each week to athletics during the in-season.[53] Athletes regularly miss class to attend games, many of which require significant travel.[54] This practice has led to tutors completing papers and tests for athletes.[55] Universities have contributed to the situation by creating "marginal" classes that lack academic rigor in

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seven of the 2013 men's Division I basketball Sweet 16 teams had graduation rates above 80%, seven of these teams graduated less than two-thirds of their members, and one team has a graduation rate of 17%); *see also* McCormick & McCormick, *supra* note 5, at 151 (demonstrating that graduation rates among female athletes and athletes in non-revenue generating sports inflate overall student-athlete graduation rates).

49. *Keeping Score When It Counts: Sweet Sixteen*, *supra* note 48.

50. *Extracurricular Participation and Student Engagement*, NAT'L CENTER FOR EDUC. STAT. (June 1995), http://nces.ed.gov/pubs95/web/95741.asp (suggesting that extracurricular activities "offer opportunities for students to learn the values of teamwork, individual and group responsibility, physical strength and endurance, competition, diversity, and a sense of culture and community").

51. McCormick & McCormick, *supra* note 5, at 99, 141; *see also* BYERS, *supra* note 23, at 54 ("[A] student who had to work on a job and play football could not at the same time maintain acceptable academic standards.").

52. *Summary of Findings from the 2010 GOALS and SCORE Studies of the Student-Athlete Experience*, NCAA (Jan. 13, 2011) [hereinafter *GOALS Study*], *available at* http://www.ncaa.org/sites/default/files/%E2%80%A2Summary%20of%20Findings%20from%20the%202010%20GOALS%20and%20SCORE%20Studies%20of%20the%20Student-Athlete%20Experience.pdf (highlighting that during the season, Division I men's baseball players often spent ten hours per week more on athletics than on academics).

53. *Id.*

54. *See* McCormick & McCormick, *supra* note 5, at 142 (noting that "coaches do not permit athletes to attend classes that conflict with practice, travel to away games, or tournaments"); *GOALS Study*, *supra* note 52 (stating that men's and women's basketball and men's baseball players often miss 2.5 classes per week, while players in other sports across divisions often miss at least one class per week).

55. *See, e.g.*, McCormick & McCormick, *supra* note 5, at 147 (describing an academic scandal at the University of Minnesota where a secretary and tutor "completed [400] assignments" for basketball players with the team coach's knowledge); *see also* J. Andrew Curliss, *UNC Downplayed Tutor's Actions to NCAA*, NEWS OBSERVER (July 11, 2012), http://www.newsobserver.com/2012/07/11/2192859/law-firm-billed-unc-66000-tied.html (highlighting a recent academic scandal at the University of North Carolina (UNC) where tutors were writing papers for football players and exchanging emails exclamations like "I looked over your paper . . . and expanded it in a lot of areas!!!!", actions that led the school to suspend fourteen football players during the 2010 season).

order to maintain their players' athletic eligibility.[56] Athletes have even reported passing classes that they rarely, if ever, attended.[57] Accordingly, the current trend in NCAA athletic programs emphasizes sports and devalues academics.[58]

B. College Sports Currently Receive Preferential Treatment in the Law

The NCAA has enjoyed unique preferential treatment from courts.[59] Generally, when adjudicating legal claims involving the NCAA, courts have declined to alter the current athletics model and instead have relied on the unique position of college athletics in society.[60] Consequently, the NCAA is nestled in a well-protected legal void.

The NCAA continues to enjoy the benefits of a commercial enterprise while it maintains a tax-exempt status under the veil of its educational mission.[61] The NCAA eludes taxation by the Internal Revenue Service (IRS) because the IRS views the NCAA as an educational entity.[62] Nevertheless, college athletics remains heavily commercialized.[63] If the IRS deemed college athletics a commercial, rather than educational, enterprise, the NCAA would no longer qualify for tax-exempt status and a university's athletics-related profits

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56. McCormick & McCormick, *supra* note 5, at 143–44 (reporting that one athlete stated "*[t]he goal is not to educate the athletes* . . . but to ensure their eligibility" (emphasis added)).

57. *Id.* at 144 & n.338 (citing Mike Freeman, COLLEGES; *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES (July 13, 2003), http://www.nytimes.com/2003/07/13/sports/colleges-when-values-collide-clarett-got-unusual-aid-in-ohio-state-class.html) (reporting that some football players at Ohio State University were once found to have forged names of absent teammates on a class attendance roster).

58. *GOALS Study*, *supra* note 52.

59. *See* Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 332–33 (2005) (recounting federal judicial preservation of NCAA immunity from antitrust provisions); *see also id.* at 334 ("Rather than confront the facts in the cases, which were often squarely at odds with their stated beliefs, . . . judges decided to impose their values on college athletes as a matter of law. As [a] lone dissenter in these cases put it, when 'confronted with the clash between soothing nostalgia and distressing reality,' . . . judges chose the former." (quoting Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1100 (7th Cir. 1992) (Flaum, J., dissenting))).

60. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101–02 (1984) ("The NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.").

61. *See Finances*, NCAA, http://www.ncaa.org/about/resources/finances (last visited Aug. 3, 2014) (noting that the NCAA is a non-profit organization).

62. *See* Porto, *supra* note 2, at 41 (explaining the NCAA's perpetuation of amateurism within college athletics preserves the organization's non-profit tax exempt status).

63. *See supra* Part I.A.1 (discussing the commercialization and profit-maximization of college athletics).

would be subject to taxation.[64] Even those with the most profitable teams would suffer losses; consequently, universities would face difficulties maintaining the current model.[65]

The NCAA also enjoys exclusion from antitrust law.[66] The most significant decision on this issue was the U.S. Supreme Court's decision in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma* (*Board of Regents*).[67] In *Board of Regents*, the plaintiffs, a group of NCAA member-universities, challenged a television broadcasting plan enumerated and enforced by the NCAA.[68] The plan fixed the number of broadcasted games, the prices charged for them, and the broadcasting companies used.[69] The plaintiffs argued that the broadcasting plan unreasonably restrained trade and therefore violated section 1 of the Sherman Antitrust Act.[70]

The Supreme Court found the NCAA's plan was comparable to other restraints of trade that the Court had previously held to be unreasonable.[71] Specifically, the Court noted that "[b]y participating in an association which prevents member institutions from competing against each other on the basis of price[,] . . . the NCAA member institutions have created a horizontal restraint" of trade.[72] Such horizontal price fixing ordinarily constitutes anti-competitive and "illegal *per se*" behavior because it directly limits the quantity of product available.[73] The Court ignored the per se rule in the college athletics context, noting that the college athletics industry needs horizontal restraints for the industry "to be available at all."[74] Instead, the Court used the Rule of Reason to analyze the legality of the

64. Porto, *supra* note 2, at 41.

65. *See id.* (explaining that there is stronger case for replacing the current commercial model of college sports with a less commercial alternative if the most profitable colleges lose profits).

66. *See generally* Nagy, *supra* note 59, at 343–58 (analyzing cases in which courts found anti-competitive practices of the NCAA to be reasonable restraints of trade).

67. 468 U.S. 85 (1984).

68. *Id.* at 94–95.

69. *Id.* at 91–94 (noting that the plan was "intended to reduce . . . the adverse effects" of television broadcasting on football game attendance).

70. *Id.* at 88; *see* ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)) (constituting section 1 of the Sherman Act and providing, in pertinent part, that "[e]very 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 declared to be illegal").

71. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 98–99.

72. *Id.* at 99 (noting that a horizontal restraint of trade occurs when competitors agree on how they will compete with each other).

73. *Id.* at 99–100 (pointing out the limited quantity of televised football available to broadcasters and consumers as a result of the horizontal agreement).

74. *Id.* at 101.

broadcasting plan.[75] Relying on evidence submitted by the parties and the district court's fact finding, the Court ultimately decided that the broadcasting plan was not necessary to successfully market college football.[76] Thus, the Court held that the plan violated the Sherman Act.[77]

Contrary to this ruling, Justice Stevens enumerated an important pro-NCAA policy:

> What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. . . . The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice . . . and hence can be viewed as procompetitive.[78]

Despite ruling against the NCAA's broadcast plan, Justice Stevens reframed the NCAA's anti-competitive amateurism rules as procompetitive by categorizing NCAA athletics separately from professional sports based on the NCAA's academic aspects.[79]

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75. *Id.* at 113 ("Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."). The three-step Rule of Reason analysis involves shifting burdens of proof. *See generally* Nagy, *supra* note 59, at 335–36. First, the plaintiff must show a "substantially adverse effect on competition" caused by the agreement; second, the defendant must prove "that the challenged conduct promotes a sufficiently procompetitive objective"; and third, the plaintiff, in rebuttal, must show "that the restraint is not reasonably necessary to achieve the defendant's stated objective." *Id.* (citing Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Pocono Invitational Sports Camp, Inc. v. Nat'l Collegiate Athletic Ass'n, 317 F. Supp. 2d 569, 580 (E.D. Pa. 2004)).

76. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 114–15.

77. *Id.* at 120.

78. *Id.* at 101–02.

79. *Id.* at 102.

Since the Supreme Court decided *Board of Regents*, courts have consistently looked to the Court's procompetitive description of NCAA regulations to uphold NCAA policies and rules.[80] For example, in *Banks v. National Collegiate Athletic Ass'n*,[81] the U.S. District Court for the Northern District of Indiana upheld the NCAA's "no draft" and "no agent" rules despite their anti-competitive effects because the court found the rules necessary to preserve the amateur spirit of college athletics.[82] Together, these cases and others have proliferated and protected NCAA amateurism rules despite amateurism's anti-competitive effects.[83]

C. Prior Attempts and Proposals for Reform Have Led to Little Change

Some have sought to reform NCAA policies through litigation.[84] In the vast majority of these lawsuits, however, courts have protected NCAA policies.[85] Some ongoing cases—such as a lawsuit by Ed O'Bannon, a former University of California, Los Angeles (UCLA) basketball star, against the NCAA[86]—could still produce reform. Further, the Northwestern University football team, led by quarterback Kain Colter, successfully unionized.[87] However, the Northwestern University decision is currently on appeal and is

80. *See, e.g.*, Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1094 (7th Cir. 1992) (rejecting an athlete's argument that NCCA rules stipulating that athletes who participated in a professional draft or used agents were ineligible to play college sports violated section 1 of the Sherman Act because the athlete "fail[ed] to allege an anti-competitive impact on a discernible market justified the district court's dismissal"); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988) (indicating that the NCAA eligibility rules do not violate antitrust laws); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 748 (M.D. Tenn. 1990) ("[T]he NCAA eligibility Rules are not subject to antitrust scrutiny.").

81. 746 F. Supp. 850 (N.D. Ind. 1990), *aff'd*, 977 F.2d 1081 (7th Cir. 1992).

82. *Id.* at 860–62.

83. *See* cases cited *supra* note 80 (providing examples of cases where courts have held that NCAA policies and procedures do not violate the federal antitrust laws).

84. *See supra* Part I.B (discussing cases brought against the NCAA).

85. *See* Nagy, *supra* note 59, at 333 (indicating courts have protected NCAA policies because of "the NCAA's purported desire to ensure that college athletes [are] protected from exploitation by professional and commercial enterprises" (internal quotation marks omitted)).

86. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013) (ruling for the plaintiff-athletes and allowing their right-of-publicity claims to proceed to the next stage of litigation because the videogame developer's use of college athletes' likenesses in video games was not protected by the First Amendment).

87. Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *2 (Mar. 26, 2014) (finding that players receiving scholarships from Northwestern are employees under the National Labor Relations Act).

therefore far from final.[88] Even if the decision is upheld, it is limited to private universities.[89]

Some scholars also argue that college athletes are employees of their university under the National Labor Relations Act (NLRA).[90] They claim that athletic scholarships are employment contracts for compensation, that coaches have extensive control over athletes' lives, and that the relationship between college athletes and their universities is commercial and not educational in nature.[91] These scholars conclude that college athletes are entitled to federal benefits and employee protections.[92] However, this proposed "pay-for-play" model has been strongly opposed by the NCAA leadership, including NCAA President Mark Emmert, who recently said, "As long as I'm president of the NCAA, we will not pay student-athletes to play sports. Compensation for students is just something I'm adamantly opposed to."[93] Given this strong opposition, reform models proposing monetary compensation seem unlikely; however, models proposing greater educational benefits do not face such opposition.

II. THE LEGAL FRAMEWORK FOR INTERNSHIPS

The continually increasing number of college and post-secondary students interning to gain work experience has created a recent stir in the labor law field.[94] "Between 1981 and 1991, the proportion of

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88. Melanie Trottman, *NLRB to Review Northwestern's Appeal of Student-Athletes' Union Decision: Board to Weigh Last Month's Ruling, Saying Scholarship Football Players Can Form Unions*, WALL ST. J. (Apr. 24, 2014, 4:42 PM), http://online.wsj.com/news/articles/SB10001424052702304788404579522063428957786 (reporting that the NLRB provided no specific timeline for a decision).

89. *See* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *2 (concluding that Northwestern, a private university, employed the student football players in question); Steven Greenhouse, *Union Effort at Northwestern May Not Mean Much for Public Colleges*, NY TIMES (Apr. 26, 2014), http://www.nytimes.com/2014/04/27/sports/union-effort-at-northwestern-may-not-mean-much-for-public-colleges.html?_r=0 (emphasizing that the NLRB lacks power over public universities because "whether football . . . players at a public university can ever unionize is up to its state government").

90. McCormick & McCormick, *supra* note 5, at 79.

91. *See id.* at 155–56.

92. *Id.*

93. Jeffrey L. Seglin, *Should Colleges Pay Athletes to Play?*, CHIC. TRIB. (Sept. 30, 2013, 8:30 AM), http://www.chicagotribune.com/entertainment/sns-201306251100—tms—ritethngctnrt-a20130625-20130625,0,4945501.story; *see also* Chris Smith, *Plans to Pay College Athletes Are Laughable While the NCAA Still Rules*, FORBES (Sept. 5, 2013, 3:46 PM), http://www.forbes.com/sites/chrissmith/2013/09/05/plans-to-pay-college-athletes-are-laughable-while-the-ncaa-still-rules/ (arguing that college athletes will not be paid and treated as employees while the NCAA controls college sports).

94. *See, e.g.*, David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215–16 (2002) (discussing the growing necessity for students to gain internship experience while also acknowledging that most interns receive little or no pay and give up many legal rights afforded to typical employees).

college graduates who interned jumped from one in thirty-six to one in three," and recent figures estimate the proportion is two in three graduates.[95] In *O'Connor v. Davis*,[96] a college intern filed sexual harassment charges under Title VII of the Civil Rights Act of 1964 (Title VII),[97] alleging that a doctor had sexually harassed her while she was interning at a health clinic.[98] The Court found for the employer, asserting that Title VII does not provide student interns with employment protections because they did not constitute employees under the Act.[99]

The legal background for internships derives from several sources, including the FLSA, the DOL internship exception, and DOL Wage and Hour Division opinion letters. The following section discusses each of these legal authorities. First, this section discusses the FLSA, its compensation requirement, exceptions to that requirement, and Supreme Court interpretations of the FLSA exceptions. Second, this section analyzes the DOL internship exception and relevant cases and considers how the FLSA's compensation requirement excludes interns. Finally, this section examines DOL opinion letters and discusses how the DOL, the federal agency that enforces the FLSA, applies the internship exception.

A. The Fair Labor Standards Act and the Trainee Exception

The FLSA is the primary federal law covering compensation for employees in the public and private sectors.[100] The FLSA entitles individuals who qualify as employees under the Act to a minimum level of compensation for their work.[101] The Act broadly defines

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95. *Id.* at 217.

96. 126 F.3d 112 (2d Cir. 1997).

97. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

98. *O'Connor*, 126 F.3d at 113–14.

99. *Id.* at 114–15 (describing the Title VII definition of "employee[s]," whom the Act protects by preventing hostile work environments due to discrimination on the basis of race, color, religion, sex, or national origin).

100. Frequently Asked Questions (FAQ): What is the Fair Labor Standards Act, U.S. DEP'T OF LAB., http://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=376&faqsub=The+Fair+Labor+Standards+Act+%28FLSA%29&faqtop=Laws+%26+Regulations (last visited Aug. 3, 2014).

101. 29 U.S.C. § 206(a) (outlining the minimum wage compensation available to employees engaged in commerce). The DOL has promulgated regulations that authorize employees to pay trainees or interns less than minimum wage. 29 C.F.R. § 520.501 (2014); *see* 29 U.S.C. § 214(a) (authorizing DOL to promulgate regulations providing for subminimum wages); *see also Wages: Subminimum Wage*, U.S. DEP'T OF LAB., http://www.dol.gov/dol/topic/wages/subminimumwage.htm (last visited Aug. 3, 2014) ("Employment at less than the minimum wage is designed to prevent the loss of employment opportunities for these individuals.").

"employ" as "to suffer or permit to work."[102] Congress intended courts to interpret "employ" expansively to provide people with increased opportunities for gainful employment.[103] Some scholars argue that college athletes are employees of their college or university[104]; however, because courts frequently determine college athletes are not employees,[105] this Comment will proceed as though college athletes are not employees of their college or university.[106] The Act delineates a few exceptions to the compensation requirement for all employees, including an exception that excludes trainees and apprentices from the definition of "employ," as well as an exception that excludes students.[107] Because college athletes perform for the financial benefit of their college or university, they are subject to the compensation requirement unless they fall into an FLSA exception.[108]

The seminal case that discussed the trainee exception and established the corresponding precedent for what constitutes an

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102. 29 U.S.C. § 203(g).

103. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 151 (1947) (indicating that the Act "empowers the Administrator to grant special certificates for the employment of learners, apprentices and handicapped persons at less than the general minimum wage").

104. McCormick & McCormick, *supra* note 5, at 79.

105. *See, e.g.*, Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692, 696, 701–02 (Tex. App. 2000) (upholding the jury's finding that Waldrep, a football player at Texas Christian University (TCU), was not an employee of his university because he had received an athletic scholarship).

106. The recent NLRB Regional Director decision, which held Northwestern football players constitute employees under the NLRA, does not affect this statement. First, the NLRA and FLSA define "employee" differently. *Compare* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *13 (Mar. 26, 2014) (noting that the NLRA defines "employee" under its common law definition, which provides that "an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment"), *with Portland Terminal Co.*, 330 U.S. at 150 ("[I]n determining who are 'employees' under the [FLSA], common law employee categories or employer-employee classifications under other statutes are not of controlling significance."). Further, the two statutes deal with different labor issues: the FLSA deals solely with compensation, while the NLRA deals with labor organizations and unions. Thus, even if the Northwestern football players retain their union status, it does not immediately follow that the FLSA requires they be compensated. Further, the Regional Director's decision, if upheld, applies only to one private university, *see* sources cited *supra* note 89, so it is unlikely to redefine the field of college athletics.

107. 29 U.S.C. § 214(a)–(b) (denoting employment under special certificates for learners, apprentices, messengers, and students).

108. *See id.*; *see also* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985) (holding unordinary commercial activities undertaken with a "common business purpose" are within the scope of the Act because the workers are employees under the Act "when they work in contemplation of compensation"); Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 31–33 (1961) (determining that homeworkers were employees under the FLSA). *But see Portland Terminal Co.*, 330 U.S. at 153 (finding that trainees are not employees under the FLSA when the employer "receive[s] no 'immediate advantage'" from the trainees' work).

internship was *Walling v. Portland Terminal Co.* In *Portland Terminal*, a railroad company provided a practical training course to prospective railroad yard brakemen.[109] The trainees worked under the close supervision of a yard crew, first observing others and later receiving actual work tasks.[110] They did not take the place of any regular employees, nor did they receive compensation; they also slowed the progress of company business at times.[111] The trainees took the course to become eligible for work in the railroad yard.[112]

Confronted with the question of whether to compensate the trainees, the Supreme Court noted that the Act's definition of "employ" was "not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[113] Recognizing the training was similar to that provided in a vocational school and that the railroad received no immediate advantage from the trainees, the Court held that the trainees were exempt and outside the Act's purview.[114]

B. The Department of Labor's Internship Exception to the FLSA

The DOL, in seeking to provide interpretative guidance of the Act's provisions as applied to trainees, borrowed heavily from *Portland Terminal*. Courts have subsequently adopted this guidance,[115] which is contained in a six-part test in DOL Fact Sheet No. 71.[116] The DOL now uses Fact Sheet No. 71 to determine whether interns fall under the FSLA's compensation requirement.[117]

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109. *Portland Terminal Co.*, 330 U.S. at 149.
110. *Id.*
111. *Id.* at 149–50.
112. *Id.* at 149.
113. *Id.* at 152.
114. *Id.* at 152–53.
115. *See, e.g.*, Solis v. Laurelbrook Sanitarium and Sch., Inc., 642 F.3d 518, 524–25 (6th Cir. 2011) (listing and discussing the DOL's six-factor test for determining whether an individual is an "intern"); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025–26 (10th Cir. 1993) (noting the "FLSA itself provides little guidance in distinguishing between trainees and employees" and citing the factors the Supreme Court delineated in *Portland Terminal* as guidance for the FLSA).
116. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, U.S. DEP'T LAB. (Apr. 2010), http://www.dol.gov/whd/regs/compliance/whdfs71.htm [hereinafter *DOL Fact Sheet No. 71*].
117. *See, e.g.*, U.S. Dep't of Labor Op. Ltr. FLSA2006-12 (Apr. 6, 2006) [hereinafter April 2006 Opinion Letter], *available at* http://www.dol.gov/WHD/opinion/FLSA/2006/2006_04_06_12_FLSA.pdf (advising that program participants in a university externship program are not employees); U.S. Dep't of Labor Op. Ltr. FLSA2004-5NA (May 17, 2004) [hereinafter May 2004 Opinion Letter], *available at* http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.pdf (explaining that, if the six criteria are met, the students "will not be considered employees").

If an internship fulfills Fact Sheet No. 71's six-part test, then the FLSA excludes the intern from its compensation requirement.[118] The six criteria are:

> (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
>
> (2) The internship experience is for the benefit of the intern;
>
> (3) The intern does not displace regular employees, but works under close supervision of existing staff;
>
> (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
>
> (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[119]

If the intern ultimately fails to satisfy the FLSA's requirements for an employee, the "minimum wage and overtime provisions do not apply to the intern."[120] Somewhat problematically, the DOL's statements describing the test create ambiguity about whether the test is a totality of the circumstances approach or an elemental approach.[121]

Likely as a result of this ambiguity, the circuit courts are split on how to apply the DOL's test. In *Donovan v. American Airlines, Inc.*,[122] the U.S. Court of Appeals for the Fifth Circuit described the DOL Fact Sheet No. 71 as an elemental test, requiring all six criteria for an employment relationship to disappear.[123] Conversely, the U.S. Court of Appeals for the Tenth Circuit in *Reich v. Parker Fire Protection District*[124] concluded that the test involves a "totality of the

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118. *See DOL Fact Sheet No. 71*, *supra* note 116 (noting the test applies to internships and training programs).
119. *Id.*
120. *Id.*
121. *Compare id.* (suggesting that DOL uses a totality of the circumstances approach by stating that "[t]he determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program"), *with id.* (suggesting that DOL uses an elemental approach by stating that "[i]f all of the factors listed above are met, an employment relationship does not exist under the FLSA").
122. 686 F.2d 267 (5th Cir. 1982).
123. *Id.* at 267, 273 (holding that a flight attendant and sales agent trainees were not employees under the FLSA). The Fifth Circuit did not fully apply the DOL internship exception but recognized that "if all six of the criteria are met, no employment relationship exists." *Id.* at 273.
124. 992 F.2d 1023 (10th Cir. 1993).

circumstances" approach and is not a rigid elemental formulation such that the heavy weight of one factor may counter the lack of another.[125]

Alternatively, some other federal circuit courts question the DOL's internship exception, claiming it has little support in *Portland Terminal*.[126] However, because the DOL is in charge of administering the FLSA, its interpretation of the FLSA and *Portland Terminal* merits deference.[127] Appreciating both agency deference and the circuit split, this Comment will apply the DOL internship exception and will consider the outcome under both an elemental and a totality of circumstances approach.

A recent case in the U.S. District Court for the Southern District of New York illuminates the application of the internship exception. In

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125. *Id.* at 1026–27, 1029 (finding that firefighting trainees were not employees during their fire academy training). The Tenth Circuit applied the DOL internship exception in *Reich*. *Id.* at 1027–29. Rejecting the plaintiff's argument that no firefighting vocational schools exist in Colorado, the court noted that the "defendant's training curriculum overlapped significantly with what would be taught in any fire fighting [sic] academy" and that the skills taught were "fungible within the industry." *Id.* at 1027–28. The court considered the benefit and immediate advantage prongs together. *Id.* at 1028. Although some of the trainees already had experience in parts of the curriculum and the trainees were taught with the defendant's equipment and procedures, the trainees received a greater benefit from the transferable skills they acquired. *Id.* Further, the defendant received an immediate advantage from some of the trainees' tasks, but that work was always supervised, so the defendant at best received a *de minimis* benefit. *Id.* at 1028–29. The court recognized that the trainees replaced *volunteer* firefighters but that they did not displace *employed* firefighters. *Id.* at 1029. The court found that, although the trainees did expect to be hired after successfully completing their training, they also knew they would not be paid until after completion. *Id.* In sum, the court looked at the totality of the circumstances, finding that no single factor carried "the entire weight of [the] inquiry," and did not find an employment relationship. *Id.*

126. *See, e.g.*, Solis v. Laurelbrook Sanitarium and Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (adopting the "primary beneficiary" test instead); McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989) (deciding the proper inquiry is who "principally benefited" from the arrangement). *But see McLaughlin*, 877 F.2d at 1211 (Wilkins, J., dissenting) (concluding "[t]he Wage and Hour test is . . . a reasonable application of the Fair Labor Standards Act and *Portland Terminal*"); Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531–32 (S.D.N.Y. 2013) (observing that the "primary beneficiary" test is subjective and unpredictable" and *Portland Terminal* does not support it), *appeal docketed*, No. 13-04481 (2d Cir. Nov. 26, 2013). The U.S. Court of Appeals for the Eleventh Circuit recently adopted an "economic realities test" in lieu of the DOL exception and the primary beneficiary test. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834 (11th Cir. 2013) (per curiam) (quoting Donovan v. New Floridian Hotel Inc., 676 F.2d 468, 470 (11th Cir. 1982)) (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 618 (2013).

127. *See* United States v. Mead Corp., 533 U.S. 218, 234 (2001) ("[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency and given the value of uniformity in its administrative and judicial understandings of what national a law requires." (citation omitted)); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504, 532 (S.D.N.Y. 1998) (giving *Chevron* deference to the DOL's Fact Sheet No. 71).

Glatt v. Fox Searchlight Pictures,[128] a class of unpaid interns working on film production sets for Fox Entertainment Group ("Fox") filed suit to recover compensation for their work.[129] The court applied Fact Sheet No. 71 to determine whether the interns were employees under the FLSA.[130] In considering the first factor, which requires training similar to that of an educational environment, the court noted that one intern did not acquire any new skills and that learning the function of a production office did not equate to an educational environment.[131] This necessarily favored classifying the interns as employees under the FLSA.[132]

The second factor, which requires that the internship experience benefit the intern, also demanded treating the interns as employees.[133] The interns received some benefits, such as résumé building, connections and references, and a greater understanding of a production office, which, the court noted, accrue through paid and unpaid positions.[134] Fox, however, benefited from the interns' "unpaid work, which otherwise would have required paid employees."[135]

Under the third factor, which requires that the intern not displace employees and work under close supervision, the court recognized and emphasized that although the interns performed routine tasks, other paid employees would be required to complete those tasks if the interns were not present.[136]

Fox did not dispute receiving an immediate advantage from the interns' work, and the interns did not claim they were entitled to jobs at the completion of their internships.[137] Thus, the fourth and fifth

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128. 293 F.R.D. 516 (S.D.N.Y. 2013), *appeal docketed*, No. 13-04481 (2d Cir. Nov. 26, 2013).

129. *Glatt*, 293 F.R.D. at 522. The Second Circuit placed *Glatt* in tandem with a similar lawsuit to resolve which test applies. *See* Wang v. Hearst Corp., No. 12 CV 793 (HB), 2013 WL 3326650, at *2–3 (S.D.N.Y. June 27, 2013) (granting a motion to certify for appeal the question of what standard applies in determining an intern's status under the FLSA).

130. *Glatt*, 293 F.R.D. at 531–32 (citation omitted) (relying on *Wang*, a recent case decided in the U.S. District Court for the Southern District of New York, in determining whether to use a totality of the circumstances approach).

131. *Id.* at 532–33 (deciding that learning specific tasks such as watermarking scripts and photocopying did not constitute formal training).

132. *Id.* at 534.

133. *Id.* at 533.

134. *Id.* (emphasizing that the benefits listed "[were] not the academic or vocational training benefits envisioned by this factor").

135. *Id.*

136. *Id.* (reasoning that the interns' work constituted basic, administrative tasks by looking to statements from supervisors that acknowledged an additional intern or longer hours for employees were required if the trainees did not complete their assignments).

137. *Id.* at 533–34 (analyzing the "immediate advantage" prong by assessing whether an intern impeded the employer's work, or, by contrast, performed tasks that were "essential" to the employer).

prongs—which require that the employer receive no immediate advantage and that the intern receive a promise of paid employment at the end of the internship—also favored treating the interns as employees.[138] Recognizing that the interns did not expect payment, the court questioned the relevance of the sixth factor, which requires mutual understanding of unpaid benefits, "because the FLSA does not allow employees to waive their entitlement to wages."[139]

After weighing the totality of the circumstances, the court found that the interns were improperly labeled as unpaid interns and, therefore, that they must be compensated.[140] Further, the court distinguished the trainees in *Portland Terminal* from the Fox interns.[141] Unlike the railroad trainees in *Portland Terminal*, the interns' training did not resemble any academic or vocational setting and clearly provided an immediate benefit to Fox.[142] These interns did "not fall within the narrow 'trainee' exception to the FLSA's broad coverage" and should have been compensated accordingly.[143] The application of DOL Fact Sheet No. 71 in *Glatt* suggests a possible transformation in the way courts view large companies' reliance on unpaid intern work for their own gains.

C. The Department of Labor Wage and Hour Division Opinions

The DOL Wage and Hour Division has applied the DOL internship exception in several opinion letters.[144] Although these letters are not binding, they provide valuable insight into the agency's interpretation of the FLSA.[145]

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138. *Id.* (noting that the interns indisputably provided their employer with an immediate advantage but did not have prospects for long-term employment).

139. *Id.* at 534.

140. *Id.*

141. *Id.* (differentiating the trainees in *Portland Terminal* who did not significantly contribute, but rather impeded, their employer's work from the interns at Fox who worked as paid employees).

142. *Id.*

143. *Id.*

144. *See* April 2006 Opinion Letter, *supra* note 117 (applying the six factors to program participants in a university externship program and concluding they were not university employees); May 2004 Opinion Letter, *supra* note 117 (doubting that a marketing internship for college credit satisfied the third and fourth prongs of the test—employee displacement and employer advantage, respectively—when interns working ten hours per week assumed duties low-level employees would engage in); U.S. Dep't of Labor Op. Ltr. (Mar. 25, 1994) [hereinafter March 1994 Opinion Letter] (recommending that summer interns working twenty-five hours per week at a hostel in exchange for a free room be considered employees because they would be providing a direct benefit to the employer).

145. United States v. Mead Corp. 533 U.S. 218, 227 (2001) (recognizing that an administrative agency's statutory interpretation can be a guiding tool for courts addressing the same issue).

These opinion letters provide two helpful guidelines for determining whether the DOL internship exception applies and compensation is therefore not required: (1) an employment relationship likely exists when an internship program is established by a business independent of a school and the intern's work provides an immediate benefit to the employer,[146] and (2) an employment relationship likely does not exist if the internship provides academic credit, offers practical training as an extension of classroom material, and primarily benefits the student.[147] Thus, providing a student with academic credit for an internship, especially if the internship is principally for the student's benefit, influences whether the FLSA requires the intern to be compensated.[148]

III. THE CURRENT COLLEGE-ATHLETICS MODEL DOES NOT SATISFY THE DOL INTERNSHIP EXCEPTION

Absent the conferral of academic credit, student-athletes deserve compensation from their universities because the current college athletics structure convincingly fails the six-part machinery of Fact Sheet No. 71's internship exception. College athletics are a type of experiential education,[149] similar to other experiential forms of education, such as music or theater. College athletics mix educational and employment settings, making them prime candidates for internship qualification.[150] Just as internships often

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146. *See* March 1994 Opinion Letter, *supra* note 144. In this letter, the interns' responsibilities were

> to assist in the daily operation of the youth hostel, to check hostellers in and out, to perform some maintenance and administrative work, to be involved in the establishment/design of educational and interpretive programming for the hostel, and to report to the manager of the hostel who would be their supervisor.

Id. The letter stated that this description indicated the interns provided the employer with an immediate advantage. *Id.* Therefore, the interns were employees under the FLSA. *Id.*

147. *See* U.S. Dep't of Labor Op. Ltr. (May 8, 1996) [hereinafter May 1996 Opinion Letter] (adding that paying such interns a stipend does not create an employment relationship so long as the amount of the stipend is less than any expenses the interns incur by participating in the program).

148. *See id.*; *see also* Yamada, *supra* note 94, at 235–36 (recommending that the DOL replace the six-part test from *DOL Fact Sheet No. 71* with an alternative, three-part test that emphasizes school involvement through faculty supervision and granting course credit before subjectively analyzing which party received a greater benefit).

149. *The Value of College Sports: Benefits to College Students*, NCAA, http://www.ncaa.org/student-athletes/value-college-sports-0 (last visited Aug. 3, 2014) [hereinafter *The Value of College Sports*] (stating that student-athletes have the opportunity to travel around the world and learn important skills, like leadership, time management, and how to effectively work with others toward a common goal).

150. *Id.* (discussing the academic, team-work, communication, and job skills that college athletes harness); *see also GOALS Study*, *supra* note 52 (reporting a strong

help college graduates find permanent employment,[151] many college athletes view athletics as valuable preparation for life after graduation.[152] Given the immense time commitment required to participate in college athletics and the resulting lack of time student-athletes have to take traditional classes, providing college athletes with academic credit will further the athletes', the NCAA's, and the universities' goals of providing college athletes with well-rounded educations.

Under the FLSA, "employ" is defined broadly as "to suffer or permit to work."[153] College athletes fall under this definition of "employ" because of the time they devote to athletics and the value of their efforts to their school.[154] In fact, some college athletes devote up to sixty hours per week to their sport at certain times of the year,[155] and some athletes commit over 260 days per year to athletics.[156] The mere fact that college athletes receive scholarships illustrates that colleges and universities benefit from athletes' efforts.[157] With the ever-increasing similarity between college sports and professional

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correlation between graduating student-athletes and athletes believing their coaches supported them to graduate and identify as students).

151. *See* Yamada, *supra* note 94, at 217 (explaining the institutionalization of an "Intern Economy" where employers rely on the use of internships to train future employees with greater experience and to create a more reliable employment pipeline).

152. *See GOALS Study*, *supra* note 52 ("A large majority of student-athletes across all divisions believe that athletics participation is important in preparing them for life after graduation. Division I baseball players are most likely to have this attitude, while women's participants in Divisions II and III are least likely to endorse this notion.").

153. 29 U.S.C. § 203(g) (2012); *see supra* notes 102–07 and accompanying text (providing a brief overview of the FLSA definition of "employ").

154. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947) (concluding railway trainees did not provide the railway with an "immediate advantage"); *see* McCormick & McCormick, *supra* note 5, at 116–17 (concluding that college athletes have an employment relationship with their universities because of the "unparalleled control" coaches and schools have over athletes, such as the power of termination).

155. *See* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *9, *15 (Mar. 26, 2014) (noting that Northwestern football players devote fifty to sixty hours per week to football during training camp and fifteen to twenty-five hours a week during the spring and summer); Marc Edelman, *21 Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/ ("The typical Division I college football player devotes 43.3 hours per week to his sport—3.3 more hours than the typical American [worker].").

156. McCormick & McCormick, *supra* note 5, at 103–04 (noting that football players on teams participating in bowls devote as many as 262 days per year to their sport, while the average American works 250 days per year).

157. *Id.* at 108–09 (proposing that scholarships function as compensation for services rendered and a "transfer of economic value"); *The Value of College Sports*, *supra* note 149 (reporting that "a full men's basketball scholarship can be worth at least $120,000 per year when factoring in goods, services and future earnings").

sports,[158] college athletes come within the purview of the FLSA and are entitled to compensation for their work as athletes.[159]

The subsequent question is whether the current model of college athletics places athletes within the DOL internship exception, thereby exempting the athletes from the FLSA compensation requirement. The DOL Fact Sheet No. 71 provides the relevant prongs for the analysis, each of which is discussed below.[160]

A. *Participating in College Sports Equates to Training in a Professional Environment*

The first consideration is whether "[t]he internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment."[161] This first factor derives directly from *Portland Terminal*, where the trainees had participated in a training program to learn the practical skills required of railroad yard brakeman.[162] In finding the trainees did not constitute employees, the Supreme Court emphasized that the trainees could have learned the skills in a vocational program separate from the railroad company.[163] Although specific classroom training is unnecessary, if the internship offers formal training similar to what would be offered in a school setting, then the internship will generally fall outside of the protections of the FLSA.[164]

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158. *See* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011) http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ (noting how the NCAA amasses cash as a governing body and disperses large sums of money to member universities "in the manner of a professional sports league").

159. *See* 29 U.S.C. § 206 (2012) ("Every employer *shall pay to each of his employees* who in any workweek is engaged in commerce[.]" (emphasis added)).

160. *Supra* note 116–120 and accompanying text (describing, briefly, DOL Fact Sheet No. 71 and its six-part test).

161. *DOL Fact Sheet No. 71*, *supra* note 116.

162. Walling v. Portland Terminal Co., 330 U.S. 148, 149 (1947).

163. *Id.* at 152–53 (concluding the FLSA "was not intended to penalize railroads" for providing trainees with free, useful instruction); *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2561 (1993) [hereinafter WEBSTER'S] (defining "vocational education" as "training for a specific occupation in agriculture, trade, or industry through a combination of theoretical teaching and practical experience provided by many high schools in their commercial and technical divisions, and by special institutions of collegiate standing ([such] as a college of agriculture, a school of engineering, or a technical institute)").

164. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (understanding that an employer's specific policies may coincide with what might be taught at a vocational school if the trainee learns general, industry-wide skills as opposed to mere "on-the-job training"), *appeal docketed*, No. 13-04481 (2d Cir. Nov. 26, 2013); May 2004 Opinion Letter, *supra* note 117 (explaining that the professional experience outside the classroom must be "academically oriented for the benefit of the students" to satisfy the first prong).

Participating in college athletics is not similar to the training given in an educational or vocational environment; therefore, the first factor favors finding college athletes do not qualify for the DOL internship exception and are subject to the FLSA's compensation requirement. Although college athletes receive training through athletic conditioning, coaching, and skills refinement, this instruction is not provided in an educational or vocational environment, such as a classroom.[165] Indeed, a college athlete cannot sign up for vocational training in basketball, football, tennis, or wrestling; however, a prospective railroad employee, engineer, or technician may enroll in vocational training in his or her respective vocation.[166] College athletes have already developed the requisite skills for athletics and simply refine them by participating in college athletics.[167] Participating in college athletics is therefore not "a practical application of material taught in a classroom."[168]

The current college athletics model mirrors professional sports in its ultimate goal of generating profits.[169] College athletes perform the same duties as professionals, such as participating in workouts, practices, attending team meetings, and traveling for games.[170] They are similar to the interns in *Glatt*, who performed general clerical tasks that other full-time employees also performed.[171] The increasingly professional nature of college sports, combined with the

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165. *See* McCormick & McCormick, *supra* note 5, at 123–24 (describing the separation between academics and athletics in the college athlete's life).

166. *See Portland Terminal*, 330 U.S. at 152–53 (noting that the railroad trainees could have "taken courses in railroading in a public or private vocational school"); WEBSTER'S, *supra* note 163, at 2561 (noting that technical institutes and engineering schools are vocational institutions that provide both theoretical and practical training to their students).

167. That college athletes are recruited and offered scholarships to take part in athletics shows they already have the requisite skills of the trade. *See* SACK & STAUROWSKY, *supra* note 13, at 43.

168. April 2006 Opinion Letter, *supra* note 117.

169. *See* Richard G. Sheehan, *The Professionalization of College Sports*, *in* HIGHER EDUCATION IN TRANSITION: THE CHALLENGES OF THE NEW MILLENNIUM 133, 136 (Joseph Losco & Brian L. Fife eds., 2000) (arguing athletic departments' primary objectives are "maximizing profits or total revenues, maximizing victories or the winning percentage, or maximizing the college's reputation or enrollment"); Mark Alesia, *NCAA Approaching $1 Billion per Year Amid Challenges by Players*, INDIANAPOLIS STAR (Mar. 27, 2014, 11:06 PM), http://www.indystar.com/story/news/2014/03/27/ncaa-approaching-billion-per-year-amid-challenges-players/6973767/ (reporting that the NCAA's total annual revenue increased by several hundred thousand dollars between 2003 and 2013 to over $912 million in 2013, and that the NCAA hoards cash because the NCAA leadership fears potential court action will order the NCAA to pay student-athletes).

170. *See* McCormick & McCormick, *supra* note 5, at 99–101 (adding that football players may commit up to fifty-three hours to their sport during weeks of home games).

171. *See* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 533 (S.D.N.Y. 2013) (noting that the work performed by the interns "otherwise would have been done by a paid employee"), *appeal docketed*, No. 13-4481 (2d Cir. Nov. 26, 2013).

fact that student-athletes cannot receive similar training in vocational skills, demonstrates that participation in college athletics is assuredly not educational.[172] Consequently, this prong supports the inapplicability of the DOL intern exception to college athletes, thereby entitling them to compensation.

B. The NCAA and Member-Institutions Are the Primary Beneficiaries of College Athletics

College athletics fail the second prong of DOL Fact Sheet No. 71 as well because the NCAA and universities exploit student-athletes and sacrifice the athletes' academic involvement for millions of dollars the athletes never see. This second prong considers whether "[t]he internship experience is for the benefit of the intern."[173] Although college athletics provides worthwhile benefits for college athletes,[174] the NCAA and its member-institutions receive a greater benefit.[175] College athletes receive the benefits of a free or less expensive education (if they receive a scholarship) and intangible skills, such as an improved work ethic and self-motivation.[176] Unfortunately, however,

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172. *See* Gregory, *supra* note 17, at 39 (describing the secondary nature of academics for some college athletes).

173. *DOL Fact Sheet No. 71*, *supra* note 116.

174. *See, e.g.*, Richard Lapchick et al., *Keeping Score When It Counts: Assessing the Academic Records of the 2013–2014 Bowl-bound College Football Teams*, THE INST. FOR DIVERSITY & ETHICS IN SPORT 1–2 (Dec. 9, 2013), http://www.tidesport.org/Grad%20Rates/2013-2014%20Final%20College%20Bowl%20Study%20Revision.pdf (reporting that major college football programs provide male athletes, especially African-Americans, with an increasingly greater chance to earn a college degree); *see also GOALS Study*, *supra* note 52 (noting that "[a] large majority of student-athletes across all divisions believe that athletics participation is important in preparing them for life after graduation"). *But see* Joy Gaston Gayles & Shouping Hu, *The Influence of Student Engagement and Sport Participation on College Outcomes Among Division I Student Athletes*, 80 J. HIGHER EDUC. 315, 328–30 (2009) (reporting that male and higher profile athletes engage less frequently and make fewer academic gains than other athletes or students and also recommending that the NCAA and universities encourage greater collegiate engagement with the little spare time the athletes have to curtail a "separate athletic subculture" and promote educational benefits).

175. *See* John Fizel & Timothy Smaby, *Participation in Collegiate Athletics and Academic Performance*, *in* ECONOMICS OF COLLEGE SPORTS 163, 172 (John Fizel & Rodney Fort eds., 2004) (concluding that the "exploitation" of high profile sport athletes for larger revenues comes at the cost of undercutting the athletes' academic performance); Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 506–07, 524–27, 536 (2008) (describing a bargain created by the NCAA and universities that limits an athlete to receiving a scholarship that makes the athlete live' at the poverty line in exchange for the NCAA and universities receiving millions of dollars in athletic department revenues, alumni donations, increased coach and faculty salaries, corporate sponsorships, and even increases in academic quality).

176. *See The Value of College Sports*, *supra* note 149 (discussing how scholarships are highly beneficial to students, especially considering the prominence of student debt).

many college athletes, especially those with the most commercial value, receive little educational benefit from their schools.[177]

In contrast, as discussed in Part I, the NCAA and its member-institutions reap significant financial and reputational benefits from college athletics.[178] The benefits the universities receive are especially noticeable for the most profitable sports, such as Division I men's basketball and football.[179] Athletes in these sports consistently devote the most time and effort to athletics of all college athletes and generate the most revenue for their universities.[180] Further, if the benefit to the student-athlete is the education received, then men's football and basketball players receive the least educational benefit when compared to all other college athletes because they are the athletes who are least likely to obtain degrees.[181]

The outcome remains the same even when considering athletes who play non-revenue-generating sports. While non-revenue-generating-sport athletes generally reap greater educational benefits than revenue-generating-sport athletes, as shown by their higher graduation rates,[182] this is not always true.[183] Moreover, only about 2% of all college athletes receive scholarships,[184] meaning that most college athletes do not benefit from a free education. Because these sports usually generate little or no revenue for the university, the benefit conferred on the university by college athletes is less marked.[185] However, athletes who participate in non-revenue-

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177. *See Keeping Score When it Counts: Sweet Sixteen*, *supra* note 48 (providing graduation statistics for the 2013 Sweet 16 men's and women's Division I basketball teams and showing that one team had only a 17% graduation rate); *see also GOALS Study*, *supra* note 52 (stating that men's and women's basketball and men's baseball players miss 2.5 classes per week, while athletes who play other sports across NCAA divisions typically miss at least one class per week).

178. *See supra* Part I.A.1 (discussing the NCAA and its member-institutions' financial gains that are attributable to the commercialization of college athletics).

179. *See supra* notes 17–19 and accompanying text (listing an increase in advertising potential, student applications for admission, school spirit, and national visibility as benefits of successful athletic programs).

180. *See supra* notes 43–45 and accompanying text (observing that Division I men's basketball and football players are most likely to be exploited for their time and effort because these sports are the most profitable and fund other non-revenue-generating sports).

181. *See supra* notes 46–47 and accompanying text (reporting that athletes who play these two sports have the lowest graduation rates of all NCAA sports).

182. *Supra* notes 47–48 and accompanying text.

183. *See GOALS Study*, *supra* note 52 (noting that, on average, men's baseball players or athletes in a non-revenue-generating-sport miss as many classes as men's basketball players).

184. *See* Kantrowitz, *supra* note 45, at 2; *see also Athletics Scholarships*, *supra* note 45 (emphasizing the importance of the *student*-athlete, given that the vast majority of college athletes "go pro in something other than sports").

185. *See* Brian Goff, *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, *in* ECONOMICS OF COLLEGE SPORTS 65, 67 (John Fizel & Rodney Fort, eds., 2004) (explaining that basketball and football revenues often

generating sports benefit their universities by bolstering their reputation or by increasing application numbers.[186] Thus, participating in college athletics does not primarily benefit any college athlete; rather, it primarily benefits the athlete's college or university.[187] This favors a finding that college athletes do not fall under the DOL's narrow internship exception.

C. College Athletes Do Not Displace Regular Employees

The third prong of DOL Fact Sheet No. 71 asks whether "[t]he intern does not displace regular employees, but works under close supervision of existing staff."[188] In the college athletics context, there are no employees to replace because all of the athletes are students.[189] When analogized to the professional sport context, the athletes are the employees, and if one employee leaves, his or her spot must be replaced to have a full roster. Thus, the question of employee displacement is inapplicable here. When analogized to professional athletes, however, college athletes perform the same roles as professional sports players, which further suggests that college athletes do not satisfy the DOL intern exception.

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subsidize other college athletics teams); *see also* McCormick & McCormick, *supra* note 5, at 74 n.9, 75 n.15 (limiting the definition of "revenue-generating sports" to Division I football and men's basketball); Randy Chua, *How Much Revenue Do College Sports Produce?*, INVESTOPEDIA (Nov. 15, 2011), http://www.investopedia.com/financial-edge/1111/how-much-revenue-do-college-sports-produce.aspx (identifying NCAA Division I football and basketball as virtually the only college sports programs that do not generate revenue losses).

186. *See* Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/ (noting that one main reason universities invest in college athletics is to increase general awareness of the university, which corresponds to higher application numbers); *cf.* Gregory, *supra* note 17, at 40 (citing an increase in undergraduate applications at Butler University after the school's basketball team appeared in the Final Four for the first time, in 2010).

187. *Compare* Northwestern Univ., No. 13-RC-121359, 2014 WL 1922054, at *13 (Mar. 26, 2014) (reporting that the Northwestern football team generated about $8.4 million in revenue for the university during the 2012–2013 academic year), *with* McCormick & McCormick, *supra* note 5, at 78—79 (noting that many full-scholarship athletes live below the poverty line), *and Keeping Score When it Counts: Sweet Sixteen*, *supra* note 48, at 1–2 (reporting that although seven of the 2013 men's Division I basketball Sweet 16 teams had graduation rates above 80%, seven other teams graduated less than two thirds of their members, and one team has a graduation rate of 17%).

188. *DOL Fact Sheet No. 71*, *supra* note 116.

189. *See Academics*, NCAA, http://www.ncaa.org/about/what-we-do/academics (last visited Aug. 14, 2014) (describing the NCAA's commitment to academic achievement).

As to the question of supervision, coaches and team staff closely supervise and control college athletes.[190] The athletic schedule, which is organized by coaches and staff, drives the athletes' schedules.[191] College basketball players devote "four to five hours per day, six days a week" to their sport, all of which are closely supervised.[192] However, this supervision is notably different from the supervision of the railroad trainees in *Portland Terminal*, who at first only observed activities but later performed tasks under "close scrutiny."[193] The railroad employees still performed "most of the work themselves" and stood "immediately by to supervise" the trainees.[194] Although coaches stand by and provide instructions, the coaches and other employees do not train the athletes. Thus, although college athletes are supervised, the supervision differs markedly from the supervision described in *Portland Terminal*.[195] Considering these differences in supervision and the inapplicability of the displacement question, this prong only slightly favors finding that college athletes do not qualify for the DOL internship exception.

D. The NCAA and Member-Institutions Derive Immediate Advantages from College Athletics

The fourth prong is whether "[t]he employer that provides the training derives no immediate advantage from the activities of the intern[,] and on occasion its operations may actually be impeded."[196] Undoubtedly, colleges and universities derive immediate advantages from the activities of college athletes. First, the financial gains from athletic teams can generate hundreds of millions of dollars for a university.[197] Combining its $10.8 billion agreement for the Division I

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190. McCormick & McCormick, *supra* note 5, at 98–103 (observing that football players must attend daily practices, workouts, study hall, and other team events, all of which are controlled and supervised by coaches and staff).

191. *Id.* at 105–06 (comparing college athletes' "highly regimented" lives to those of employees, rather than to those of students).

192. *Id.* at 97 n.123, 106 ("What other university employee is subject to such control by his supervisor that he must lift weights at 5:30 a.m., run in the summer sun, and seek permission to leave campus during summertime off hours, or risk termination?").

193. Walling v. Portland Terminal Co., 330 U.S. 148, 149–150 (1947).

194. *Id.* (adding that a trainee's work may even slow down operations at the railroad).

195. The *Portland Terminal* trainees were supervised only during the day and at their program; conversely, coaches and universities supervise college athletes year-round and in all aspects of the athletes' lives. *Compare id.* at 149–50 (describing a seven- or eight-day training program where the trainees first learned the activities by observation and then gradually performed tasks with employees nearby), *with* McCormick & McCormick, *supra* note 5, at 101 ("[V]irtually every aspect of the athletes' lives on campus is regulated by their university-employers.").

196. *DOL Fact Sheet No. 71*, *supra* note 116.

197. Paul Myerberg, *Texas, SEC Top List of the Most Valuable Teams in NCAA Football*, USA TODAY (Dec. 19, 2012, 4:40 PM), http://www.usatoday.com/story/gameon/2012

Men's Basketball Championship with its $500 million ESPN agreement, the NCAA's revenues are substantial.[198] Moreover, the cost of holding all of its championships removes only $105.3 million from the NCAA's revenue per year, the remainder of which is dispersed mainly to member-institutions.[199] The financial benefits derive mostly from men's basketball and football players because those are the only sports that consistently generate the most revenue.[200] However, all college athletics benefit the university by bolstering the university's reputation and prospective student applications.[201]

College athletes do not impede the operation of their respective teams; rather, the operation of college athletics teams is wholly dependent upon the presence and effort of college athletes because the teams could not exist without them. Thus, not only does the college or university receive an immediate advantage from the participation of college athletes, but that benefit is dependent upon athlete participation. This prong strongly favors a conclusion that college athletes do not satisfy the DOL intern exception because universities benefit immediately and considerably from student-athletes, and the athletes in no way hinder the universities' success, as typical trainees might in an internship program.

E. *College Athletes Are Not Entitled to Jobs at the Conclusion of Their College Tenure*

The fifth consideration under the DOL test is that "[t]he intern is not necessarily entitled to a job at the conclusion of the internship."[202] Many college athletes hope to leave their college for a professional career; however, only about 1% of all college athletes

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/12/19/college-football-most-valuable-teams-texas-notre-dame/1779945/ (noting the top four most profitable football teams—the University of Texas, the University of Michigan, the University of Notre Dame, and Louisiana State University (LSU)—have revenues of over $100 million).

198. *See CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting - ncaa-reach-14-year-agreement (last updated Jan. 12, 2011) (announcing the $10.8 billion agreement); *ESPN Extends Deal*, *supra* note 37 (announcing the $500 million deal).

199. *Championships Finances*, *supra* note 38 (citing the 2011–2012 statistics, the most current information available).

200. *See* Goff, *supra* note 185, at 67 (explaining the difficulties inherent in calculating which sports generate revenue and how much revenue they make); *see also* Chua, *supra* note 185 (claiming that most college sports do not raise revenue).

201. *See* Gregory, *supra* note 17, at 38, 40 (reporting that college athletes are "the most available publicity material the college has" and that schools can see nearly two-fold increases in applications after championship years (emphasis omitted)).

202. *DOL Fact Sheet No. 71*, *supra* note 116.

actually become professional athletes.[203] Moreover, college athletes are generally not entitled to a job with their college or university at the conclusion of their college athletics tenure.[204] This factor favors finding that college athletes do meet the DOL internship exception because universities do not guarantee student-athletes employment after graduation, whether at the university or with a professional sports team, and thus are not entitled to compensation.

F. College Athletes Are Not Entitled to Traditional Wages, but Some Receive Scholarships

The final consideration is whether "[t]he employer and the intern understand that the intern is not entitled to wages for the time spent in the internship."[205] Wages in the traditional sense—hourly- or salary-based compensation—are not provided.[206] In fact, NCAA policy forbids these types of compensation.[207] Many college athletes do receive compensation for their participation in college athletics in the form of one-year grants-in-aid.[208] Athletic grants-in-aid transfer economic value to athletes in return for their athletic participation.[209] Furthermore, some courts have recognized athletic scholarships as employment compensation.[210] There is no doubt that some athletes,

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203. *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA, http://www.ncaa.org/sites/default/files/Probability-of-going -pro-methodology_Update2013.pdf (last updated Sept. 24, 2013) (excepting baseball, where the probability of turning pro is about 9.4%, athletes in other major college sports—football, basketball, ice hockey, and soccer—have a 0.8%–1.9% probability of turning pro after college).

204. *Cf. The Value of College* Sports, *supra* note 149 (noting that employers look to hire college athletes, but providing no indication that college athletes are regularly hired by their university after graduation). *But cf. Coaching Records*, NCAA 2, http://fs.ncaa.org/Docs/stats/m_basketball_RB/2012/coaches.pdf (last visited Aug. 14, 2014) (listing the fifty-two winningest college basketball coaches based on winning percentage, twenty of whom returned to their alma mater to coach at some point in their career).

205. *DOL Fact Sheet No. 71*, *supra* note 116.

206. *See* SACK & STAUROWSKY, *supra* note 13, at 6 (introducing myths and stereotypes about college athletics and the theory that college athletes have been financially exploited by college athletics); McCormick & McCormick, *supra* note 5, at 76 (stating that "[o]nly one group of persons is denied the full financial fruit of the bountiful enterprise known as college sports—the players themselves").

207. *See* NCAA OP. BYLAWS. art. 2.9, 2.13, 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 31, at 4–5, 59 (relying on the concept of amateurism as the basis for a prohibition of compensation other than grants-in-aid that do not exceed a university's cost of attendance).

208. *See* McCormick & McCormick, *supra* note 5, at 108–09 (likening grants-in-aid to employment contracts that lay out employee duties and compensation).

209. Northwestern Univ. N.L.R.B. Regional Director Decision, *supra* note 4, at *12; McCormick & McCormick, *supra* note 5, at 109.

210. *See, e.g.*, Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169, 172–73 (Dist. Ct. App. 1963) (per curiam) (determining that the record showed a decedent football player's athletic scholarship was an employment contract and that he therefore had been entitled to benefits), *superseded by statute*, CAL. LAB. CODE

especially those in revenue-generating sports, will enroll at a university only if they receive an athletic scholarship.[211] The vast majority of college athletes, however, do not expect financial compensation: only 2% of college school athletes receive scholarships to compete in college athletics.[212] Thus, this factor weighs in favor of applying the DOL internship exception to college athletes, except for the small subset of athletes in revenue-generating sports who are nearly guaranteed a scholarship.[213]

G. *Weighing the DOL Internship Exception Factors Shows That College Athletes Currently Do Not Fall into the DOL Internship Exception*

Evaluating the DOL test under the Fifth Circuit's elemental approach,[214] college athletes do not fall into the narrow unpaid internship exception to the FLSA. Colleges and universities do receive an immediate advantage from the participation of college athletes, and their operations are surely not impeded by athletic participation.[215] Failing to satisfy this element directly excludes college athletes from the DOL internship exception under the Fifth Circuit's interpretation; therefore, the athletes would be entitled to protection and compensation.[216]

When considering the DOL factors under the totality of the circumstances test,[217] however, the outcome is less obvious. Again, the fourth factor—whether the employer receives an "immediate advantage" from the intern—strongly favor the exception's application because college athletes will generally benefit their

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§ 3352(k) (West 2013 & Supp. 2014), *as recognized in Shephard v. Loyola Marymount Univ.*, 125 Cal. Rptr. 829 (Ct. App. 2002); Northwestern Univ. N.L.R.B. Regional Director Decision, *supra* note 4, at *1; *see also* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 304-05 (1985) (recognizing that compensation under the FLSA is not limited to hourly- or salary-based-wages but can also include intangibles and other forms of compensation).

211. *Cf. supra* note 45 and accompanying text (noting that, even with the financial assistance they receive, many college-athletes live below the poverty line).

212. *See Athletics Scholarships*, *supra* note 45 (showing that even fewer student-athletes proceed on to a professional career in their sport).

213. *See* Lynn O'Shaughnessy, *8 Things You Should Know About Sports Scholarships*, CBS NEWS (Sept. 20, 2012, 1:06 PM), http://www.cbsnews.com/news/8-things-you-should-know-about-sports-scholarships/ (explaining that all scholarships in six Division I sports—football; men's and women's basketball; and women's gymnastics, volleyball, and tennis—are full scholarships, while "[s]cholarships can be dinky" in other sports and in Division II); *see also Athletics Scholarships*, *supra* note 45 (indicating that Division III schools do not disburse scholarships based on athletic ability).

214. *See supra* notes 122–23 (discussing the Fifth Circuit's test).

215. *See supra* Part III.D (detailing the financial, reputational, and community benefits provided by college athletics).

216. *See DOL Fact Sheet No. 71*, *supra* note 116 (explaining "all" of the factors must be satisfied to apply the internship exception).

217. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993).

university, and college athletics depend on the athletes' participation.[218] The first factor—whether the training is similar to an educational environment—also favors the exceptions' applicability because this type of training is not available in the university context.[219] The second factor—whether the experience is for the benefit of the intern—also weighs in favor of college athletics as an internship because few college athletes receive college athletics scholarships,[220] while those that do receive one are generally the most financially exploited and denied educational benefits.[221] The third factor—the displacement of regular employees and supervision of the interns—is partially inapplicable and otherwise carries little weight because the supervision of athletes, although regular and close, is markedly different from the type of supervision in *Portland Terminal*.[222] The fifth factor—entitlement to a job post-graduation—weighs against applying the internship exception because college athletes generally do not receive jobs with their university after graduation.[223] Finally, the sixth factor—entitlement to wages—favors applying the exception because most high school athletes do not receive college athletics scholarships, and those that do receive scholarships are the most heavily exploited.[224] Considering the totality of the circumstances and the narrowness of the intern exception,[225] college athletes do not fall under the DOL's internship exception; therefore, they are entitled to compensation under the FLSA.[226]

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218. *See supra* Part III.D (discussing the substantial immediate advantages, such as million-dollar revenues, increased application rates, and bolstered community business, that NCAA and member-institutions receive from the participation and performance of college athletes).

219. *See supra* Part III.A (describing the type of training provided by a vocational school and distinguishing college athletics because training in a sport is atypical of vocational schools).

220. *Athletics Scholarships: Finaid*, *supra* note 45, at 2 (providing that less than 2% of college athletes receive scholarships).

221. *See supra* Part III.B (elaborating on the lack of educational benefits conferred on college athletes due to decreased emphasis on academics and increased emphasis on athletic performance).

222. *See supra* Part III.C (distinguishing the duration and type of supervision between college athletes and the *Portland Terminal* trainees).

223. *See supra* Part III.E (reporting the low rate at which college athletes become professional athletes).

224. *See supra* Part III.F (showing that entitlement to hourly- or salary-based compensation is not expected for most college athletes, but high-profile athletes often will not enroll at a school unless they receive a scholarship).

225. *See DOL Fact Sheet No. 71*, *supra* note 116 ("This exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad.").

226. *Id.* (clarifying that when one or more of the six factors does not apply to an activity, the activity is not an internship and FLSA minimum wage and overtime pay provisions apply to the participant).

This determination, that college athletes do not fall within the DOL's Fact Sheet No. 71 exception to the FLSA, relates to all college athletes, regardless of whether they are scholarship or non-scholarship athletes in revenue-generating or non-revenue-generating sports, because only the third and sixth factors weigh slightly differently for certain subsets of college athletics.[227] Although the non-scholarship athlete may not be entitled to compensation, very few high school athletes even receive college athletics scholarships.[228] Non-revenue-generating sports may not financially benefit the university as much as revenue-generating sports, but both of these types of sports add value to the university through reputational and community benefits.[229] Furthermore, because the separation of athletes into classes created the current faults in the college-athletics model,[230] interests in fairness and preventing past wrongs favor similar treatment for all college athletes.[231] Important federal legislative policies, such as Title IX of the Education Amendments of 1972 (Title IX),[232] support this notion of equality among different classes of NCAA athletes.[233]

IV. OPTIONS FOR RESOLVING THE COLLEGE-ATHLETICS MODEL: ACADEMIC- AND COMPENSATION-BASED REFORM

College athletes are entitled to compensation because they do not satisfy the DOL internship exception. If the NCAA continues to refuse to compensate athletes, then the model of college athletics should be altered to enable student-athletes to get academic credit in

227. *Supra* Parts III.C, III.F.

228. *Athletics Scholarships*, *supra* note 45 (stating that only 2% of high school athletes receive athletic scholarships to play sports in college).

229. *See* Gregory, *supra* note 17, at 38, 40 (reporting that schools experience application increases after championship seasons and communities often enjoy significant increases in business from college athletic events).

230. *See supra* notes 46–49 (detailing the differing academic and athletic achievement levels among different groups of athletes).

231. Gary Brown, *Lopiano Asks NCAA to Make Equity a Priority*, NCAA (Jan. 18, 2013, 12:00 AM), http://www.ncaa.org/about/resources/media-center/news/lopiano-asks-ncaa-make-equity-priority (communicating that Donna Lopiano, an advocate of increased equality in college athletics, "urged the Association to keep up the good fight on fairness for all student-athletes").

232. Pub. L. No. 92-318, tit. IX, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

233. *See* 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity[.]"); *cf.* JANET JUDGE ET AL., GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 2 (Karen Morrison ed., 2010), *available at* http://www.ncaapublications.com/p-4206-gender-equity-online-manual.aspx ("An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender.").

exchange for their participation in athletics. This section will first discuss the possibility of compensation-based reform and then discuss the possibility of academic-based reform by awarding academic credit for athletic participation. Ultimately, this section concludes that academic-based reform is preferable to the financial burdens, inequalities, and conflicting policies that result from compensation-based reform.

A. A Model for Compensation-Based Reform

Despite NCAA policies proscribing financial compensation for athletic participation, many athletes nevertheless receive scholarships or so-called grants-in-aid.[234] This being a form of compensation,[235] the question then is whether the compensation complies with the minimum requirements of the FLSA.

The FLSA requires payment of at least minimum wage[236] and requisite overtime compensation, if applicable.[237] In 2014, the prescribed federal minimum wage is $7.25.[238] Thus, for a Division III athlete who spends thirty hours per week participating in athletics,[239] the weekly pay would be $217.50,[240] whereas a Division I football player devoting forty-three hours per week to his sport[241] would be entitled to $322.64.[242] Over the course of an academic year with two fifteen-week semesters, the Division III athlete would be entitled to $6,525.00 for his or her participation.[243] For the same academic year,

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234. *See* NCAA OP. BYLAWS. art. 12.01.4, 12.02.7, *reprinted in* NCAA MANUAL, *supra* note 31, at 57–58 (stating that a grant-in-aid is not considered to be pay or the promise of pay for athletic skills so long as the amount given does not exceed the limits proscribed by the NCAA).

235. *See* McCormick & McCormick, *supra* note 5, at 155–56 (concluding that athletes are "common law employees because they are compensated for their services with athletic scholarships that are unquestionably a quid pro quo for athletic services rendered").

236. 29 U.S.C. § 206(a)(1)(C) ("Every employer shall pay to each of his employees . . . not less than . . . $7.25 an hour[.]").

237. *Id.* § 207(a)(1) (requiring payment of "a rate not less than one and one-half times the regular rate at which he is employed" if the employee works more than forty hours in a week).

238. *Id.* § 206(a)(1)(C).

239. *GOALS Study*, *supra* note 52 (reporting on various athletes' time spent participating in athletics).

240. Calculated as $7.25 times 30 hours per week. All calculations assume payment at the minimum wage amount of $7.25 per hour as prescribed in 29 U.S.C. § 206(a)(1)(C). Overtime pay is calculated as 1.5 times the minimum wage amount, or $7.25 times 1.5 hours, and equaling $10.88 per hour.

241. *GOALS Study*, *supra* note 52.

242. Calculated as $7.25 times 40 hours per week, plus $10.88 times x 3 overtime hours per week.

243. Calculated as $217.50 per week times 30 weeks. *See supra* text accompanying note 240 (providing the weekly minimum wage pay for a typical Division III athlete).

the Division I football player would receive $9,679.20.[244] However, these Division I football players commit much of their time to their sport outside of the regular academic year.[245] They regularly commit 240 days per year to athletic participation, and this number can increase to 262 days if the team plays in a bowl game.[246] Thus, these Division I football players could be entitled to as much as $12,075.95 per year for their participation.[247]

Depending on the athlete's college or university, the cost of an education can greatly outweigh the compensatory value of athletic participation, thereby leading to gross differences in the equality of compensation by scholarship. For example, consider disparities in the cost of attending different universities: compensating a Division III athlete at Amherst College, where tuition and fees exceed $60,000 per year,[248] seems somewhat inequitable when compared to a Division I football player at the University of North Carolina (UNC), where tuition and fees are about $30,000 per year for out-of-state residents and about $8,000 per year for in-state residents.[249]

Although the cost of attending both of the aforementioned institutions is greater than the compensation due to athletes at the respective universities, other reasons dictate that these athletes should be entitled to some form of compensation. First, Division III athletes cannot receive scholarships for athletic participation, and only 2% of all college athletes receive a college athletics scholarship;[250] therefore, the vast majority of college athletes are completely denied their compensation rights under the FLSA.[251] Second, many athletes, especially those generating the most revenue for their college or university, gain little or no educational benefit from their "free" education.[252] Thus, the value of the education actually received is less than the value of the education measured by cost of attendance. Third, scholarships do not fully support college

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244. Calculated as $322.64 per week times 30 weeks. *See supra* text accompanying note 242 (providing the weekly minimum wage pay for a typical Division I football player).
245. *See* McCormick & McCormick, *supra* note 5, at 101–04 (finding that college football teams demand their players spend 240–262 days out of the year on activities related to their sport, including days when school is not in session).
246. *Id.*
247. Calculated as 262 days divided by 7 days per week, or approximately 37.4 weeks, and multiplied by $322.64 per week. *See supra* text accompanying notes 242, 246.
248. *Tuition, Fees and Expenses 2014–2015*, AMHERST C., https://www.amherst.edu/admission/financial_aid/tuition (last visited Aug. 14, 2014).
249. *Cost of Attendance*, U.N.C. CHAPEL HILL, http://admissions.unc.edu/afford/cost-of-attendance/ (last visited Aug. 14, 2014).
250. *Kantrowitz*, *supra* note 45, at 2 (providing that less than 2% of college athletes receive scholarships).
251. 29 U.S.C. § 206(a) (2012) (constituting the FLSA minimum wage requirement).
252. *See supra* notes 47–49, 54–58 and accompanying text.

athletes because many scholarship athletes live below the poverty line.[253] Fourth, assuming a full scholarship is adequate compensation under the FLSA, universities would be forced to spend immense funds on scholarships or cut teams to reduce costs.[254] Considering the immense cost of providing a scholarship for each athlete and the deficient educational and financial benefits conferred by those scholarships, the incentive is strong to alter the college-athletics model such that it falls into the DOL internship exception.

B. A Model for Academic-Based Reform

Providing academic credit in connection with college athletics participation would effectively change the model of college athletics, thereby causing the DOL intern exception to apply to college athletes. "[W]here certain work activities are performed by students that are but an extension of their academic programs," no employment relationship generally exists under the FLSA.[255] An internship providing a student with academic credit likely qualifies for the DOL internship exception and thus creates no employment relationship and no compensation requirement under the FLSA.[256] The DOL Wage and Hour Division stated in an opinion letter that

> [i]n situations where students receive college credits applicable toward graduation when they . . . perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction.[257]

Some colleges and universities do in fact provide academic credit to college athletes for participation in athletics.[258] Among these are

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253. McCormick & McCormick, *supra* note 5, at 78–79 n.30.

254. If a university only had one hundred college athletes, even those schools with low tuition rates would incur an added multi-million dollar expense by providing scholarships to all athletes. Take UNC for example: 100 athletes times $30,000 tuition per out-of-state athlete is $2 million in scholarship expenses. *See Cost of Attendance*, *supra* note 249.

255. May 1996 Opinion Letter, *supra* note 147.

256. *See id.* (stating that a situation where academic credit is given "under a college program" for an internship that provides "educational experiences unobtainable in a classroom setting" is not viewed as an employment relationship).

257. *Id.*

258. *See* Mark Schlabach, *Varsity Athletes Get Class Credit: Some Colleges Give Grades for Playing*, WASH. POST, Aug. 26, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A33987-2004Aug25.html (finding that over thirty of the universities with a Division I-A football team offered academic credit for participating on sports teams where the only requirements were team membership and attendance of practices and games).

the Kansas State, Ohio State, Penn State, Brigham Young, and Florida State Universities.[259] Kansas State provides a course called "AHTM 104" or "Varsity Football" in its Department of Intercollegiate Athletics.[260] However, there are two main issues with providing academic credit in this way, each of which is easily redressed through proper policies: first, these classes can violate NCAA bylaws if they are not available generally to the regular student body;[261] and second, these classes tend to be "sham" classes used to boost athletes' GPAs.[262]

Providing academic credit to college athletes simply for academic participation would violate NCAA policies against providing special benefits to athletes based on athlete status.[263] Section 16.02.3 of the NCAA Division I Manual requires any benefit provided to student-athletes by their academic institution also be "generally available to the institution's students."[264] Thus, providing a class solely available to athletes, such as Kansas State's Varsity Football class, would presumptively violate NCAA rules.[265]

However, one simple way to resolve this issue would be to create an internship seminar class, in which all students of the general student body participating in internships must enroll. The internship seminar would be taught by regular university professors, not coaches,[266] and it would teach valuable topics generally applicable to all types of work, such as building a network, maintaining basic personal finances, and managing workplace relationships.[267] In this sense, the class would function as a practical work-skills course sponsored by the school, and students would receive academic credit

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259. *Id.*
260. *Id.*
261. NCAA OP. BYLAWS. art. 16.01.1, *reprinted in* NCAA MANUAL, *supra* note 31, at 215 (prohibiting the receipt of "extra benefit[s]" by student-athletes). An "extra benefit" is

> any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete . . . a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes . . . is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students . . . or to a particular segment of the student-body (e.g., international students, minority students) determined on a basis unrelated to athletics ability.

Id.
262. Schlabach, *supra* note 258 (noting the disproportionate amount of "A" grades given to student-athletes in such classes).
263. *See* NCAA OP. BYLAWS. art. 16.01.1, *reprinted in* NCAA MANUAL, *supra* note 31, at 215.
264. *Id.* art. 16.02.3, *reprinted in* NCAA MANUAL, *supra* note 31, at 215.
265. *Id.*
266. *See* Schlabach, *supra* note 258 (noting that coaches often teach the "sham" athletic classes and that the classes are not academically rigorous).
267. *Cf. id.* (discussing the "sham" classes as having "no syllabus or exams" and "[no] required . . . written work").

for enrolling in the class, not for the internship itself.[268] This type of classroom setting would render all internships extensions of the students' academic programs, thereby qualifying those students for the DOL unpaid internship exception.[269]

Many colleges and universities already enlist seminars that are similar in style to the kind proposed here.[270] For example, New York University provides an internship course for up to four academic credits that is required when a student partakes in an unpaid internship.[271] Also, Tulane University offers an internship seminar that allows students to discuss issues they encounter during their internship and develop their professional career.[272]

Opponents of the academic credit model argue that many of the classes offered to athletes are shams and provide no academic rigor.[273] However, the lack of academic rigor in these classes is likely attributable to the coaches acting as professors.[274] By providing classroom instruction from real professors, not coaches, colleges and universities would ensure a more valuable and realistic academic setting.[275] Further, by grading these classes on a pass/fail basis, as UNC-Chapel Hill does,[276] academic institutions could ensure that the internship does not artificially boost athletes' GPAs solely so they can maintain their eligibility.[277]

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268. *See* Yamada, *supra* note 94, at 229–30 ("There is a clear sense from the [Wage and Hour] Division's opinion letters that interns serving in such school-sponsored programs are unlikely to be accorded employee status under the FLSA.").

269. May 1996 Opinion Letter, *supra* note 147 (stating that internships should be an extension of an academic program in furtherance of a student's education).

270. *See, e.g.*, *Credit Internship Course*, N.Y.U., http://journalism.nyu.edu/career-services/credit-internship-course/ (last visited Aug. 14, 2014) (offering a for-credit internship course providing no more than four academic credits); *Internships*, U.N.C., http://www.unc.edu/depts/uc/Students/Internships.html (last visited Aug. 14, 2014) (offering a one-credit pass/fail course for students involved in an internship); *Public Service Internship Program – Seminar*, TULANE U., http://tulane.edu/cps/students/internships/seminar.cfm (last visited Aug. 14, 2014) (offering an internship seminar for up to three credits in the student's major or minor course of study).

271. *Credit Internship Course*, *supra* note 270.

272. *Public Service Internship Program – Seminar*, *supra* note 270.

273. McCormick & McCormick, *supra* note 5, at 143–46 (explaining that the college experiences of many student-athletes are typified by classes with irregular attendance, non-transferable credits, a lack of course syllabi, a lack of exams, and a general lack of written work, which all contribute to a weak curricula devoid of academic pursuits).

274. Schlabach, *supra* note 258 (decrying Coach Jim Tressel's "Varsity Football" course at Ohio State University and Kansas State University's "Varsity Football" course taught by Coach Bill Snyder).

275. *Cf.* McCormick & McCormick, *supra* note 5, at 145 (noting one of the questions on the University of Georgia's basketball class final exam: "How many halves are in a college basketball game?").

276. *Internships*, *supra* note 270.

277. McCormick & McCormick, *supra* note 5, at 146.

Providing academic credit for participation in extracurricular activities is not unheard of: many colleges and universities provide credit for participation in theater or band and require extracurricular activities as components of music and drama majors.[278] These activities outside of the classroom all further important skills, including teamwork, understanding roles in a group, dedication, time management, and communication.[279] It is inequitable that the lead violinist of the orchestra receives academic credit for orchestra practice, but the All-American basketball player does not receive academic credit for basketball practice. At least one court agrees that these extracurricular activities should be treated similarly.[280] Further, treating athletics as a component of academics would further the NCAA's stance that athletics play a vital role in education.[281]

Providing academic credit through internship seminars would ensure the applicability of the DOL internship exception to college athletes.[282] First, the training would more closely resemble an educational environment[283] because college athletes would be learning work-related skills in the classroom that they could apply in their athletic internship.[284] Second, college athletes would receive a

278. *E.g.*, *2013–2014 Undergraduate Bulletin: Department of Music*, U.N.C. CHAPEL HILL, http://www.unc.edu/ugradbulletin/depts/music.html (last visited June 20, 2014) (detailing the academic credit provided for participating in individual and group instrument lessons, as well as various ensembles, including symphony orchestra, wind ensemble, and choir); *see also Theater Studies*, YALE U., http://catalog.yale.edu/ycps/subjects-of-instruction/theater-studies/#coursestext (last visited June 20, 2014) (explaining the academic credit provided for courses in theater production and acting, such as musical theater performance, Shakespeare performance, and music and theater of Appalachia).

279. *Extracurricular Participation and Student Engagement*, NAT'L CENTER FOR EDUC. STATS. (June 1995), http://nces.ed.gov/pubs95/web/95741.asp (finding that extracurricular activities have many positive effects beyond the activity itself).

280. *See* Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170, 1174 (Ind. 1983) (noting that "[s]cholarships are given to students in a wide range of artistic, academic, and athletic areas," but nonetheless finding that "[s]cholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by [a university] for their skills in their respective areas").

281. *See Frequently-Asked Questions About the NCAA*, NCAA, http://www.ncaa.org/about/frequently-asked-questions-about-ncaa (last visited Aug. 3, 2014) ("A commitment to academics and student-athlete success in the classroom is a vital part of the NCAA's mission to integrate athletics into the fabric of higher education.").

282. *See* May 1996 Opinion Letter, *supra* note 147 (providing that when students receive academic credit while learning skills applicable outside the classroom, there is generally no employment relationship).

283. *DOL Fact Sheet*, *supra* note 116 ("[T]he more an internship program is structured around a classroom . . . , the more likely the internship will be viewed as an extension of an individual's educational experience[.]").

284. *See supra* notes 266–69 and accompanying text (describing how practical skills internship seminar classes would provide college athletes with an academic extension of their athletic activities).

greater benefit from the training[285] because it would further their progress toward degree completion. The DOL Wage and Hour opinion letters stress that awarding academic credit in connection with an internship, especially when the internship is school-sponsored, generally does not lead to an employment relationship.[286]

Finally, although some argue that awarding academic credit in relation to college athletics would degrade the academic standards of the educational institution,[287] if administered properly to ensure reasonable academic standards, internship seminars would actually promote the student-athlete model that the NCAA so unwaveringly touts.[288] It would actually further college athletes' graduation progress, making them more likely to graduate.[289]

CONCLUSION

College athletics are approaching a necessary time for reform. The NCAA's student-athlete model sharply conflicts with the realistic occurrences of academic fraud, under-the-counter payments to athletes, and hyper-commercialized billion-dollar sporting events.[290] On the one hand, supporters of the pay-for-play model argue that the NCAA's monopolistic restrictions on college athletics violate basic

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285. *See DOL Fact Sheet*, *supra* note 116 (requiring that an internship be "for the [educational] benefit of the intern").

286. *See supra* text accompanying notes 255–57 (providing the DOL's reasoning behind why academic credit generally brings an internship within the DOL intern exception). The DOL's notion about academic credit is further supported by *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518 (6th Cir. 2011). In *Solis*, primary-school students attending a boarding school had a partially academic and partially vocational, or work-based, curriculum. *Id.* at 520. Students helped with the upkeep of the sanitarium by working in the kitchen and housekeeping departments, and other students with certain certifications provided medical care to patients at the sanitarium. *Id.* The Sixth Circuit rejected the DOL test for a primary beneficiary test but nonetheless considered several of the DOL prongs. *Id.* at 529–32. Recognizing that the sanitarium benefitted from the students' work, the court emphasized that these benefits were diminished in several ways because the students required additional supervision, which made regular, supervisory employees less productive. *Id.* at 530–31. Ultimately, the court confirmed that the "intangible benefits" the students received from this educational curriculum outweighed the benefits to the sanitarium. *Id.* at 531–32. Thus, the students were not employees under the FLSA. *Id.*

287. *See* Schlabach, *supra* note 258 (quoting David Ridpath, Assistant Professor of Sports at Mississippi State University, who said such courses are "a violation of the spirit of education").

288. *See supra* note 281 (providing the NCAA's stated mission to further athletes' academic pursuits).

289. *See supra* notes 46–49 and accompanying text (discussing the limited educational benefit that many college athletes receive despite attending the university on an athletic scholarship).

290. *See supra* Part I.A (detailing the significant revenue produced by college athletics, the prevalence of NCAA rule violations, and the lack of educational benefits conferred on college athletes).

principles of antitrust, intellectual property, and employment law.[291] On the other hand, the NCAA and proponents of the amateurism model press that paying college athletes will ultimately destroy one of America's favorite pastimes.[292]

College sports can be differentiated from professional sports only through one key feature: the athletes' devotion of time, effort, and sweat to their sport without regard for financial incentives. However, the lack of financial incentives also appears in other college settings, in which the participants receive academic credit. The lead violinist in a college orchestra receives class credit for attending orchestra practice, but a star basketball player receives none for attending basketball practice.

Providing college athletes with the opportunity to receive academic credit for athletic participation through internships resolves several problems with the current college-athletics model. First, it removes the need to pay athletes because under the Department of Labor's unpaid internship exception, college athletes will lack the requisite employment relationship to trigger the Fair Labor Standards Act compensation requirement if they are classified as interns who receive academic credit.[293] Second, college athletes, especially those in revenue-generating sports, will receive increased academic benefits, thereby bringing them closer to full enjoyment of the education to which they are entitled.[294] Finally, the hypocrisy currently seen in college athletics, in which the NCAA and member-institutions profit so substantially off the work of college athletes, will be reduced because athletes will at least be closer to receiving the full fruits of their free education.[295] If college athletics are such a vital component to the value of an education, as the NCAA purports, athletes should be entitled to reap that educational value through progress towards graduation.

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291. *See supra* Parts I.B–C (highlighting major past and current cases surrounding the legality of certain aspects of college sports).

292. *See supra* notes 91–93 and accompanying text (discussing opposition to the pay-for-play college athletics model).

293. *See supra* notes 255–56 and accompanying text (explaining that an internship that provides academic credit qualifies for the DOL exception, and no compensation is required).

294. *See supra* notes 275–84 (arguing that internship courses taught by professors would be academically rigorous and would teach practical workplace skills).

295. *See supra* notes 288–89 and accompanying text (explaining how academic credit for athletic participation would increase student-athletes' chances to complete their degree).