

# A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics

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## INTRODUCTION

“March Madness” is the culmination of the National Collegiate Athletic Association (“NCAA”) Division I basketball season, a carefully stage-managed tournament showcasing the country’s most talented college athletes. The spectacle is extraordinarily lucrative for many of those involved: in 2010, CBS and Turner Broadcasting paid the NCAA \$10.8 billion for the rights to broadcast the event for the next fourteen years,<sup>1</sup> and advertisers pay networks \$1.22 million for a thirty-second opportunity to sell their products during the final game.<sup>2</sup> Each victory during the tournament earns schools and their coconference members approximately \$1.5 million from the NCAA,<sup>3</sup> and coaches’ contracts regularly include six-figure performance bonuses rewarding tournament victories.<sup>4</sup> At the center of it all, of

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1. Brad Wolverton, *NCAA Agrees to \$10.8-Billion Deal to Broadcast Its Men’s Basketball Tournament*, CHRON. OF HIGHER EDUC. (Apr. 22, 2010), <http://www.chronicle.com/article/NCAA-signs-108-Billion-Deal/65219/>.

2. Anthony Crupi, *March Madness Still One of the Biggest Sports Franchises*, AD WEEK (Mar. 1, 2011), [www.adweek.com/news/television/march-madness-still-one-biggest-sports-franchises-125889](http://www.adweek.com/news/television/march-madness-still-one-biggest-sports-franchises-125889).

3. NCAA, 2010–2011 REVENUE DISTRIBUTION PLAN 7-9, <http://www.ncaa.org/wps/portal> (access login required).

4. Jodi Upton, *Salary analysis: NCAA tournament coaches cashing in*, USA TODAY, (Mar. 30, 2011, 10:53 AM), [http://www.usatoday.com/sports/college/mensbasketball/2011-03-30-ncaa-coaches-salary-analysis\\_N.htm](http://www.usatoday.com/sports/college/mensbasketball/2011-03-30-ncaa-coaches-salary-analysis_N.htm).

course, are the college athletes whose labor the NCAA insists is “motivated primarily by education and by the physical, mental and social benefits to be derived.”<sup>5</sup> But in the mid-1990s—in a story that remains almost entirely untold nearly two decades later<sup>6</sup>—the unpaid amateurs of March Madness nearly brought the entire production to a halt.

During the 1994–1995 season, NCAA basketball players formulated a plan to strike moments before critical post-season games, refusing to compete unless they received an equitable share of the revenue their labor generated. “They were going to get dressed, walk out on court, and refuse to play,” recalls Dr. William Friday, former president of the University of North Carolina and then cochair of the Knight Commission on College Athletics.<sup>7</sup> Rumors of the potential disruptions panicked NCAA officials and television executives. Dr. Friday says: “You can imagine what would happen with the television networks, with ten million people waiting and nothing happening. . . . It would have been chaotic.”<sup>8</sup> Strike plans were “pretty concrete,” according to former University of Massachusetts forward Rigo Núñez, but interventions by coaches and other officials thwarted the effort’s momentum.<sup>9</sup> “If we had Twitter, if we had Facebook, this would definitely have had an impact on the NCAA tournament,” Núñez suggests, but the boycott ultimately unraveled amidst players’ fears that striking

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5. NCAA, 2009–2010 DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS, art.2.9 [hereinafter “NCAA DIVISION I MANUAL”].

6. The 1995 strike was mentioned publicly for the first time on an episode of HBO’S *Real Sports with Bryant Gumbel* (HBO television broadcast Mar. 30, 2011); see also Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 93 (discussing the planned boycott). Recent scholarly works on college athletics make no mention of the planned disruptions. See, e.g., CHARLES T. CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* (2011); RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* (2010).

7. Telephone Interview with William Friday, Founding CoChairman, The Knight Foundation Commission on Intercollegiate Athletics (Dec. 15, 2011).

8. *Id.*

9. Telephone Interview with Rigo Núñez, former college athlete, University of Massachusetts (Dec. 20, 2011).

players would be “blackballed” and branded as “troublemakers.”<sup>10</sup>

Though the history is largely forgotten today, the planned 1995 strike would not have been the first work stoppage in big-time college athletics. In 1936, in a story followed closely by the black and left-wing press, the Howard University football team struck for several games, demanding adequate medical supplies for players, nutritional food, and access to campus jobs.<sup>11</sup> Two years later, the Louisiana State University football team dismissed a player after “he dared to ‘agitate for a union’ of the players.”<sup>12</sup> But the most high-profile disputes of the New Deal era centered on the University of Pittsburgh’s top-ranked football program. After an undefeated 1937 season garnered the squad a Rose Bowl invitation, players demanded \$200 in pocket money for their participation.<sup>13</sup> When university officials balked, the players voted 17-16 to boycott the game.<sup>14</sup> The next fall, sophomores refused to

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10. Dr. Friday’s version of events differs somewhat from that of Mr. Núñez. According to Dr. Friday, the strike rumors focused on one particular top-ranked team, whose players planned to walk out upon reaching the Final Four. See Telephone Interview with William Friday, *supra* note 7. Much to the relief of NCAA officials, the team was unexpectedly ousted early in the tournament. See Branch, *supra* note 6, at 93 (reporting same account). Mr. Núñez maintains that the high-profile athletes from over a dozen schools were discussing strike activities in both 1995 and 1996, but that fear of retaliation ultimately prevented the strike. See Telephone Interview with Rigo Núñez, *supra* note 9.

11. *Howard Students in Football Strike*, CHI. DEFENDER, Nov. 21, 1936, at 1 (noting 85% of student body participated in one-day solidarity walk-out); Jeannette Carter, *Howard-Lincoln Thanksgiving Football Classic Is Called Off: Board Fears New Strike by Players*, CHI. DEFENDER, Nov. 28, 1936, at 1.

12. MICHAEL ORIARD, KING FOOTBALL 247 (2004).

13. SMITH, *supra* note 6, at 79.

14. *Id.* This was not the only example of player agitation for bowl game bonuses in college football. In 1940, Stanford football players (successfully) demanded \$50 per player to compete in the Rose Bowl, while in 1948, University of Arizona players (unsuccessfully) sought a \$175 pay day. And as late as 1961, Syracuse University players refused to play in the relatively new, made-for-television Liberty Bowl if their demands for fancy wristwatches were not met. See DAVE MEGGYESY, OUT OF THEIR LEAGUE 87-89 (1970) (“The [Syracuse] athletic department had never seen the ball players get together on their own before and this, coupled with the talk of boycott, made them quickly agree to give us watches—and before the game as we had demanded.”); ORIARD, *supra* note 12, at 247 (discussing Stanford and Arizona player demands).

attend pre-season training, striking “in order to settle ‘differences’ with the Pitt business department.”<sup>15</sup> The thirty-odd members of the freshman squad threatened to strike again several months later. Their demands included four-year athletic scholarships, shorter working hours, accommodation for class time missed due to football obligations, and collective bargaining rights.<sup>16</sup> The press quipped that “all the Pitt freshmen needed to do now was to join the CIO and turn over their demands for collective bargaining, wages and hours and relief to John L. Lewis.”<sup>17</sup>

College athletics have changed dramatically in the intervening years, but now, after seven decades, talk of strikes and players unions is returning. In January 2012, the *New York Times* published a detailed proposal to begin paying college athletes, including a hypothetical “players’ union” to negotiate with the NCAA.<sup>18</sup> The *Chicago Sun-Times*’s lead sports columnist exhorted college football players to strike the following week: “If you don’t strike, using the time-honored American—yes, patriotic!—technique of banding together over endless exploitation and walking out, sitting down or disrupting the system en masse, you will always be pawns.”<sup>19</sup> But perhaps most significantly, unlike in 1995, college athletes now have a member-driven advocacy group to advance their interests,

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15. *Horrors! Pitt Frosh Grid Players Get Tuition Bills!*, L.A. TIMES, Nov. 16, 1938, at A11; *Pitt Frosh ‘Go Free’: ‘Misunderstanding’ Causes Cancellation of Gridders’ Tuition*, L.A. TIMES, Nov. 24, 1938, at A28.

16. Francis Wallace, *The Football Laboratory Explodes: The Climax in the Test Case at Pitt*, SATURDAY EVENING POST, Nov. 4, 1939, at 21. The university’s refusal to compensate athletes soon prompted the resignation of legendary head coach Jock Sutherland, who characterized the university’s refusal to compensate athletes as the “verse of daffodils and pink sunsets and milky moonlight and anemic idealism.” *High-Pressure Football Defended By Sutherland*, WASH. POST, Apr. 12, 1939, at 19. Students rioted in protest of Sutherland’s departure and the university’s refusal to compensate athletes. *Pitt Students Strike; Protest School Policy*, CHI. DAILY TRIB., Mar. 11, 1939, at 21.

17. Wallace, *supra* note 16, at 21.

18. Joe Nocera, *Here’s How To Pay Up Now*, N.Y. TIMES, Jan. 1, 2012, at MM33.

19. Rick Telander, *A revolting development: College football players need to go on strike and demand a piece of the lucrative pie*, CHI. SUN-TIMES, Jan. 9, 2012, at 58.

notably with union backing.<sup>20</sup> During a brief window in October 2011, rank-and-file organizers with the National College Players Association (“NCPA”) gathered signatures from over three hundred college football and basketball players at five targeted schools (including the entire UCLA football and basketball rosters) demanding that athletes receive a greater share of revenue from the NCAA.<sup>21</sup> A union of college athletes is no longer a theoretical exercise: cultural momentum and a nascent organizational framework already exist.<sup>22</sup>

These developments add urgency to this Article’s central inquiry: would existing labor law allow such a union? If the NCPA were to collect players’ signatures on union authorization cards rather than on protest petitions, could players compel universities to negotiate over the terms and conditions of their service? If school officials were to retaliate against athletes who circulated the October 2011 petition, or against athletes who collectively withheld their labor, could such punishment constitute an unfair labor practice?<sup>23</sup> As college athletes continue to agitate

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20. See National College Players Association, *NCPA & USW—A Winning Team*, [http://www.ncpanow.org/ncpa\\_usw?id=0003](http://www.ncpanow.org/ncpa_usw?id=0003) (last visited June 12, 2012) (noting collaboration between United Steelworkers and NCPA).

21. Alan Scher Zagier, *College athletes press NCAA reform*, ASSOCIATED PRESS, Oct. 24, 2011, available at <http://rivals.yahoo.com/ncaa/football/news?slug=txncaaathletesrights> (noting campaign focused on Arizona, Georgia Tech, Kentucky, Purdue, and UCLA).

22. Our focus for this Article, like that of the NCPA’s organizing campaign, is limited to NCAA Division I scholarship athletes in “revenue-generating sports” (football and men’s basketball). See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 72 (2006) [hereinafter “McCormick & McCormick, *Myth*”]. These two sports are unique in terms of the degree to which they have been commercialized, the millions of dollars spent on such programs, and the vast revenues that college athletes in these sports generate. See *id.* at 75, n.15 (discussing rationale for treating football and men’s basketball differently than other college sports). For reasons discussed in Part I.A., *infra*, we refer to such individuals as “college athletes” rather than the more common moniker “student-athlete.”

23. While this Article focuses mainly on the prospects for collective bargaining in college athletics, it is important to remember that labor law protects all employees engaged in “concerted activity” in the workplace, regardless of their intent to formally unionize. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12 (1962).

against a recalcitrant NCAA, the future of a multibillion dollar industry hinges on these questions.

In the last twenty years, more than a half-dozen law review articles have suggested that the National Labor Relations Board (“Board” or “NLRB”) should recognize Division I scholarship athletes in revenue-generating sports as “employees” under federal labor law.<sup>24</sup> These scholars emphasize that, behind the veil of amateurism, college athletes’ relationships with universities bear all the hallmarks of classic employment. Athletes labor under the direction and control of university coaches and officials; this work is unconnected to (indeed, often at odds with) their educational objective as students, and universities provide valuable scholarships, now potentially supplemented with up to \$2000 in “stipend” payments,<sup>25</sup> in consideration for these prized services. Several other law review articles have questioned whether this is sufficient to meet the statutory definition of “employee” under the NLRA.<sup>26</sup> But practically

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24. See Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOWARD L.J. 259, 278 (1993) (“[M]uch of the reality of college sports belies that interpretation [that student-athletes are not ‘employees’ under the NLRA], as it is very clear that the athletes are paid for their services . . . .”); J. Trevor Johnston, *Show Them The Money: The Threat of NCAA Athlete Unionization in Response to the Commercialization of College Sports*, 13 SETON HALL J. SPORT L. 203, 231 (2003); Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496-500 (2008); Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 644-48 (2010); McCormick & McCormick, *Myth*, *supra* note 22, at 155; Nathan McCoy & Kerry Knox, *Flexing Union Muscle—Is it the Right Game Plan For Revenue Generating Student-Athletes in their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051, 1053-54, 1077 (2002); Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer’s Dream Come True*, 6 SETON HALL J. SPORT L. 167, 172 (1996); Jonathan L.H. Nygren, Note, *Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes*, 2 VA. SPORTS & ENT. L.J. 359, 371 (2003).

25. See *infra* Part I.C. (discussing a new NCAA rule change regarding supplementary stipends).

26. Julia Brighton, *The NCAA and the Right of Publicity: How the O’Bannon/Keller Case May Finally Level the Playing Field*, 33 HASTINGS COMM. & ENT. L.J. 275, 286 (2011) (noting the “difficulty of characterizing student-athletes as ‘employees’”); Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 573-76 (2009); Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical*

the entire body of this scholarship has ignored one critical point: the NLRA, which governs labor relations only in the private sector,<sup>27</sup> simply does not govern the majority of college athletes at public colleges and universities.<sup>28</sup> To the extent that NCAA athletes at public institutions are “employees,” they are public employees, and *state* labor law dictates whether unionization is a feasible option.<sup>29</sup>

This Article offers the first comprehensive analysis of NCAA athletics under state labor law, reaching a novel and potentially game-changing conclusion: that Division I athletes at many top-ranked programs likely enjoy a legal right to unionize under state law. Part I of this Article traces the historical development of the “myth of the student-athlete,” discusses the commercial stakes of today’s big-time college athletics, and explores the economic position of the college athlete within this regime. In Part II,

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*Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 70 (2000) (arguing “student-athletes do not qualify as ‘employees,’” but noting that “if the NCAA adopted the stipend proposal [like that enacted in late 2011] . . . student-athletes would more than likely meet the NLRA ‘employee’ definition . . . [and enjoy] the right to unionize and bargain collectively.”); Marc Jenkins, *The United Student-Athletes of America: Should College Athletes Organize In Order To Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39, 46 (2002) (“Given courts’ deference to the NCAA, and the following decisions in the workers’ compensation context, this argument [that student-athletes are ‘employees’ under the NLRA] would probably fail.”); Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 739-45 (2007).

27. 29 U.S.C. § 152(2) (2006) (“The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . .”).

28. Many of the articles apparently fail to recognize this point altogether. *See, e.g.*, Brighton, *supra* note 26, at 286-88; Hurst & Pressly, *supra* note 26, at 70-71; Jenkins, *supra* note 26, at 46, 48; Parasuraman, *supra* note 26, at 739-45. Others observe in passing that state labor law governs public institutions, but devote their analyses exclusively to the NLRA. *See, e.g.*, Clark, *supra* note 24, at 278 n.53; Johnston, *supra* note 24, at 222-23; McCormick & McCormick, *Myth*, *supra* note 22, at 86-89; McCoy & Knox, *supra* note 24, at 1053; Ukeiley, *supra* note 24, at 176-77. The sole exception is Jonathan L.H. Nygren’s *Forcing the NCAA to Listen*, *supra* note 24, at 371-84, which considers college athletes’ “employee” status under both federal law and the labor law of one state—California.

29. *See* 29 U.S.C. § 152(2) (excluding employees of state and local government from NLRA protection); Clark, *supra* note 24, at 278 n.53.

we present the various tests the NLRB has articulated in identifying “employees” entitled to statutory protection and assess the status of college athletes under these tests. We turn then to the varying approaches state labor boards and courts have adopted in pursuing this same inquiry in Part III, and explore the extent to which college athlete unions may be possible under state law. Though some states forbid public employees from unionizing, many endorse the practice, and (most significantly for our purposes) several states have shown considerable solicitude to student-workers seeking recognition as “employees” in the public university setting. The Article concludes in Part IV by discussing the practical consequences of these findings, and the theoretical difficulties implicated by reconceptualizing college athletes as workers. Though some have argued that recognizing athletes as “employees” would fundamentally taint college sports,<sup>30</sup> we offer a counterintuitive suggestion: allowing college athletes to unionize may help preserve the institution as a unique, educationally-focused alternative to professional athletics.

In adopting this approach, this Article represents an intervention in the existing scholarship in several significant ways. First, as noted above, federal labor law simply cannot apply to most big-time college athletes. Of the sixty-six schools constituting the main six Division I Bowl Championship Series football conferences, fifty-five are public;<sup>31</sup> of the fifty-six top-ranked basketball programs from 2007–2011, thirty-eight are public.<sup>32</sup> For these college athletes, federal labor law is all but irrelevant. Second, notwithstanding language in recent opinions suggesting

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30. See, e.g., Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES, Dec. 30, 2011, at MM30 (quoting NCAA president Mark Emmert as stating “If we move toward a pay-for-pay model—if we were to convert our student athletes to employees of the university—that would be the death of college athletics.”).

31. Six conferences—the Atlantic Coast Conference (ACC), Big 12, Big East, Big Ten, Pacific-12, and Southeastern Conference (SEC)—are considered the major BCS conferences, and each conference receives automatic berths to Bowl Championship Series bowl games every year.

32. See *Associated Press NCAA Men's Basketball Rankings, 2006–2011*, ESPN.com, <http://espn.go.com/mens-college-basketball/rankings> (last visited Apr. 4, 2012) (the sample is made up of the fifty-six basketball programs that have appeared in the final AP “Top 25” rankings for the five seasons through the 2011 season).

college athletes may meet the act's statutory definition of "employees," we remain somewhat wary of an approach that looks to the NLRB as an avenue for advancing collective bargaining rights. The Board has become "the flashpoint for unprecedented contentiousness" in recent years,<sup>33</sup> with even its modest efforts to defend workers' rights incurring virulent criticism.<sup>34</sup> As numerous labor law scholars have argued, the Board has been largely ineffective in "keep[ing] the Act up to date"<sup>35</sup> and "keeping pace with changes"<sup>36</sup> to vindicate the interests of workers in a twenty-first century economy.<sup>37</sup> Third, more generally, this Article highlights the growing centrality of state law in American labor relations and illustrates the divergent ways in which courts and labor boards have interpreted state and federal statutes, particularly with respect to student-employees.<sup>38</sup> Our state-level focus is both necessitated by and indicative of the changing landscape of today's labor movement, which now counts fewer union members in the private sector (governed

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33. Tim Mak, *It's World War III at the NLRB*, POLITICO (Dec. 26, 2011, 8:57 AM), <http://www.politico.com/news/stories/1211/70856.html>.

34. See Steven Greenhouse, *Labor Board's Exiting Leader Responds to Critics*, N.Y. TIMES, Aug. 30, 2011, at B1 (noting criticisms that the Board embodies "Marxism on the march" and that its members are "socialist goons").

35. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1558-59 (2002).

36. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2686 (2008).

37. See also Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 97 (2009) ("The road forward for labor relations policy in the United States lies not in Washington, D.C., but in state capitols."); Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143, 197 (2011) ("Our gap-ridden and outdated legal regime simply does not accommodate new labor models very well."); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983) ("Contemporary American labor law more and more resembles an elegant tombstone for a dying institution.").

38. See Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 376 (2007) (highlighting "labor law regime[s] developed by state governments" as source of "new dynamism" in the field of labor law).

primarily by the NLRA) than in the public sector (governed primarily by state labor law).<sup>39</sup>

## I. THE MYTH OF THE “STUDENT-ATHLETE”

### A. *Creation Stories*

When William Rainey Harper became the first president of the University of Chicago in 1892, among his first (and highest paid) faculty appointments was former All-American football standout Amos Alonzo Stagg.<sup>40</sup> Intercollegiate athletic competitions had blossomed over the past five decades,<sup>41</sup> and Harper recognized that an acclaimed football squad could be a “[d]rawing card” for the fledgling institution.<sup>42</sup> He charged his new coach with “develop[ing] teams which we can send around the country and knock out all the colleges. We will give them a palace car and a vacation, too.”<sup>43</sup> Department chairs quipped that Harper was “The P.T. Barnum of Higher Education,”<sup>44</sup> but his marketing strategies worked: Chicago soon built a nationally-renowned football program (despite allegations

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39. In 2011, the Department of Labor’s Bureau of Labor Statistics reported 7.6 million union members in the public sector (37.0% density) compared to 7.2 million union members in the private sector (6.9% union rate). See Bureau of Labor Statistics, *Union Members Summary*, Jan. 27, 2012, <http://www.bls.gov/news.release/union2.nr0.htm>. As a matter of *political* (as opposed to *scholarly*) importance, state labor law’s moment plainly has arrived. The pitched battles being fought over public-sector collective bargaining in Arizona, Wisconsin, Indiana, and several other states reflect its growing importance for Labor (and its critics).

40. Hal A. Lawson & Alan G. Ingham, *Conflicting Ideologies Concerning the University and Intercollegiate Athletics: Harper and Hutchins at Chicago, 1892–1940*, 7 J. SPORT HIST. 37, 42, 44 (1980).

41. The first recorded intercollegiate competition is generally thought to be a crew meet between Harvard and Yale in 1852. ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH* 17 (1998).

42. Lawson & Ingham, *supra* note 40, at 41.

43. *Id.* at 42.

44. *Id.* at 41.

that Stagg was “employing professional athletes”), and enrollment tripled to 5500 by 1909.<sup>45</sup>

Amidst public outcry over the increasingly brutal nature of college football—at least twenty players were killed during the 1904 season<sup>46</sup>—sixty-two colleges met in 1905 to form what would become the National Collegiate Athletics Association.<sup>47</sup> From the outset, the NCAA promoted an ethos of strict amateurism, including a ban on all forms of monetary incentives like athletic scholarships.<sup>48</sup> But for the first fifty years of its existence, the organization lacked meaningful mechanisms to enforce its principles.<sup>49</sup> In a major survey conducted by the Carnegie Foundation in 1929, 81 of 112 schools openly admitted violating NCAA policy, “ranging from open payrolls and disguised booster funds to no-show jobs [for athletes] at movie studios.”<sup>50</sup> With member institutions hungry to satisfy the burgeoning commercial market for college sports, “[t]he NCAA’s amateur code, like the Eighteenth Amendment, proved almost impossible to enforce.”<sup>51</sup>

By the late 1950s, the NCAA had abandoned a central tenet of its original amateur ideal: universities would now be allowed to pay for promising athletes’ tuition, housing, and other living expenses, regardless of academic distinction or economic need.<sup>52</sup> Such payments to students were already commonplace, of course, but the NCAA hoped

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45. *Id.* at 39, 44. Notre Dame’s surprise victory over Army in 1913 similarly launched the school, then a “relatively unknown Midwestern college,” into the national spotlight. SACK & STAUROWSKY, *supra* note 41, at 151 n.1. “Notre Dame became the center of pride for millions of ethnic Americans for whom a Notre Dame victory over Yale or Harvard was a symbolic victory of working people over their bosses.” *Id.*

46. SACK & STAUROWSKY, *supra* note 41, at 32.

47. *Id.* at 33.

48. *Id.* (citing INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES, PROCEEDINGS OF THE FIRST ANNUAL CONVENTION 33 (1906)).

49. TAYLOR BRANCH, *THE CARTEL* 20 (2011). Pulitzer Prize-winner Taylor Branch’s biting expose of the NCAA, *The Shame of College Sports*, appeared in *THE ATLANTIC* magazine in October 2011. A slightly longer version of this piece was published in book form as *THE CARTEL* shortly thereafter.

50. *Id.* at 21-22.

51. SACK & STAUROWSKY, *supra* note 41, at 35.

52. *See id.* at 47.

formal recognition would sanitize the practice and curb its excesses.<sup>53</sup> In affixing its imprimatur to the payment of athletic scholarships, however, the NCAA was also positioning itself to guide the explosive economic growth of college athletics that would come in subsequent years. As Professors Sack and Staurowsky explain, highly commercialized college athletics require both a pool of high-caliber athletes and a regulated distribution mechanism for spreading this talent between competing schools.<sup>54</sup> The NCAA's 1950s reforms "rationalize[d] the recruitment, distribution, and subsidization of player talent . . . [laying] the foundation for today's corporate college sport."<sup>55</sup> Awarding tuition payments on the basis of athletic talent, once anathema to concept of amateurism, became the centerpiece of professionalized college athletics.

But while the NCAA reluctantly embraced this new vision of "amateurism," the courts initially balked, finding it a façade for an underlying employer-employee relationship. In two cases in 1953 and 1963, state courts held that scholarship students, injured or killed in the course of their athletic duties, were actually university "employees" for workers' compensation purposes.<sup>56</sup> Recognizing that "[h]igher education in this day is a business, and a big one,"<sup>57</sup> the courts found that an injured athlete could have "the dual capacity of student and employee. . . . The form of remuneration is immaterial."<sup>58</sup>

Shaken by the prospect that courts might recognize college athletes as "employees," the NCAA invented the now

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53. *See id.*

54. *See id.* at 49.

55. *Id.*

56. *See Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172 (Ct. App. 1963) (holding decedent scholarship athlete eligible for benefits, as he "participated in the college football program under a contract of employment with the college"); *Univ. of Denver v. Nemeth*, 257 P.2d 423, 426 (Colo. 1953) ("A student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation Act is concerned."); *see also Scholarship Player an Employe, Coast Compensation Unit Rules*, N.Y. TIMES, Nov. 1, 1963, at 18 (discussing the *Van Horn* case).

57. *Nemeth*, 257 P.2d at 425-26.

58. *Van Horn*, 33 Cal. Rptr. at 173-74.

ubiquitous watchword “student-athlete” as a direct response to these legal defeats.<sup>59</sup> Walter Byers, who served as the NCAA’s influential executive director from 1951 to 1987, recounts in his memoir the panic such cases provoked. The workers’ compensation cases raised the:

dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts. . . . 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 . . . .<sup>60</sup>

The term “student-athlete” was designed not only to “conjure the nobility of amateurism, and the precedence of scholarship over athletic endeavor,” but to obfuscate the nature of the legal relationship at the heart of a growing commercial enterprise.<sup>61</sup>

It worked. Since the 1960s, the NCAA has repeatedly prevailed in workers’ compensation claims brought by severely injured college athletes.<sup>62</sup> Likewise in the antitrust context, courts have afforded the NCAA considerable deference, accepting NCAA practices as necessary “to preserve the unique atmosphere of competition between ‘student-athletes.’”<sup>63</sup> “Even in the increasingly commercial

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59. See WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

60. See *id.* This mandate apparently still remains in effect today. An author search for the term “student athlete” on the NCAA website, [www.ncaa.org](http://www.ncaa.org), yielded 8950 results. By contrast, the term “player” appears less than a third as many times, and the term “employee” only 232 times, and never in reference to a “student athlete.”

61. BRANCH, *supra* note 49, at 33-35.

62. See Frank P. Tiscione, *College Athletics and Workers’ Compensation: Why the Courts Get It Wrong in Denying Student-Athletes Workers’ Compensation Benefits When They Get Injured*, 14 SPORTS L.J. 137, 144-51 (2007) (describing the early case law that considered athletes employees and the subsequent reversal). Note that these decisions concerning the “employee” status of college athletes in such cases necessarily hinge on the definitions of that term in the relevant states’ workers’ compensation statutes. This determination does not control the “employee” status of college athletes for other legal purposes, including collective bargaining, for which there are discrete statutory definitions and relevant case law.

63. *Gaines v. NCAA*, 746 F. Supp. 740, 744, 748 (M.D. Tenn. 1990) (upholding NCAA eligibility rules barring individuals who “enter[ed] a

modern world,” a federal district judge explained in 1990, “there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.”<sup>64</sup> The notion that athletes “sell their services” and that universities are “purchasers of labor,” the Seventh Circuit held in 1992, is a “surprisingly cynical view of college athletics.”<sup>65</sup> College football players are not market participants, the court reasoned, because they are “student-athletes.”<sup>66</sup>

Yet upon even modest cross-examination, the NCAA’s “amateur defense” seems vulnerable. Consider a recent interview of former NCAA President Myles Brand appearing in *Sports Illustrated*:

[Brand:] They can’t be paid.

[Q:] Why?

[Brand:] Because they’re amateurs.

[Q:] What makes them amateurs?

[Brand:] Well, they can’t be paid.

[Q:] Why not?

[Brand:] Because they’re amateurs.

[Q:] Who decided they are amateurs?

[Brand:] We did.

[Q:] Why?

[Brand:] Because we don’t pay them.<sup>67</sup>

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professional draft,” even where such athletes do not sign professional contracts, against antitrust challenge).

64. *Id.* at 744.

65. *Banks v. NCAA*, 977 F.2d 1081, 1091-92 (7th Cir. 1992).

66. *See id.* at 1092.

67. Michael Rosenberg, *Change is long overdue: College football players should be paid*, SPORTS ILLUSTRATED (Aug. 26, 2010, 9:43 AM), <http://sportsillustrated.cnn.com/2010/writers/michael-rosenberg/08/26/pay.college/index.html>.

The exchange, with its shades of Abbot and Costello, highlights the arbitrariness (and precarity) of what it means to be a “worker.” With additional tens of millions of dollars flowing into college sports every year, the fiction of amateurism becomes harder to maintain.

### B. *Big Business*

The legal insulation provided by college athletes’ “non-employee” status has proven increasingly profitable for the NCAA and its member colleges over the last several decades, as NCAA Division I basketball and football have evolved into lucrative industries. The NCAA bylaws provide that competitors should be protected “from exploitation by professional and commercial enterprises,”<sup>68</sup> but in many ways, the big-time college sports industry is itself an exploitative commercial endeavor. This subsection explores only briefly what has become, by one 2001 estimate, a \$60 billion industry,<sup>69</sup> but it underscores the growing value of the services rendered by college athletes. Given the astronomical dollar figures involved, it comes as little surprise that college athletes now seek a larger slice of the pie.

While gate receipts, licensing fees, and merchandise sales all accrue significant revenues for universities, television contracts have been the greatest engine of commercialization of college sports in recent years.<sup>70</sup> As noted above, the NCAA recently sold the broadcasting rights for the men’s basketball tournament for \$10.8 billion over the next fourteen years, generating over \$770 million in annual income.<sup>71</sup> Lucrative football television contracts are negotiated by schools and conferences without NCAA involvement, the result of a successful Sherman Act challenge brought by universities against the NCAA in

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68. NCAA DIVISION I MANUAL, *supra* note 5, art. 2.15, at 5.

69. McCormick & McCormick, *A Trail of Tears*, *supra* note 24, at 646.

70. See BRANCH, *supra* note 49, at 6-7.

71. See Richard Sandomir & Pete Thamel, *TV Deal Pushes N.C.A.A. Closer to 68-Team Tournament*, N.Y. TIMES (Apr. 22, 2010), [http://www.nytimes.com/2010/04/23/sports/ncaabasketball/23ncaa.html?\\_r=1](http://www.nytimes.com/2010/04/23/sports/ncaabasketball/23ncaa.html?_r=1) (noting that the NCAA gets \$10.8 billion over the course of a fourteen-year contract, which works out to over \$770 million per year).

1984.<sup>72</sup> The University of Texas, for example, launched its own twenty-four-hour television channel in August 2011, after inking a twenty-year deal with ESPN that earns \$15 million annually for the school and its marketing partner.<sup>73</sup> More common are package deals negotiated by athletic conferences, like the record-setting \$3 billion, twelve-year contract the Pacific-12 (same as Pacific-10) reached in May 2011 with ESPN and Fox.<sup>74</sup> These negotiations have triggered rapid conference realignments, in which “[u]niversities around the country are tossing aside longtime rivalries, geographic sensibilities and many of the quaint notions ascribed to amateur athletics in an attempt to cash in.”<sup>75</sup>

Universities and the NCAA also profit off of college athletes’ celebrity through licensing agreements and endorsement deals (which individual athletes, of course, are prohibited from doing). Thus, while the NCAA investigated Auburn University’s Cam Newton for alleged recruiting violations committed by his father, the standout quarterback “compliantly wore at least fifteen corporate logos—one on his jersey, four on his helmet visor, one on each wristband, one on his pants, six on his shoes, and one on the headband under his helmet—pursuant to Auburn’s \$10.6 million deal with [apparel company] Under Armour.”<sup>76</sup>

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72. See *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 88 (1984) (affirming lower court decision that NCAA regulation of televising of college football games violated the Sherman Act). In a telling indication of the radical changes to college sports in recent decades, the NCAA first regulated television broadcasts in 1951 after concluding television “threaten[ed] to seriously harm the nation’s overall athletic and physical system” by reducing live college football attendance. *Id.* at 89-90.

73. Jason Cohen, *With Texas Network, U.T. Remakes the Playing Field*, N.Y. TIMES, Sept. 4, 2011, at A23B, available at <http://www.nytimes.com/2011/09/04/us/04ttsports.html>.

74. Richard Sandomir, *Pac-10 Secures Rich Deals with Fox and ESPN*, N.Y. TIMES, May 4, 2011, at B12.

75. Pete Thamel, *In Conference Realignment, Colleges Run to (Pay)daylight*, N.Y. TIMES, Sept. 20, 2011, at A1. In 2010, the sixty-eight schools that make up the six major conferences posted \$2.2 billion in combined revenues and \$1.1 billion in combined profits. See Chris Isidore, *College football’s \$1.1 billion profit*, CNNMONEY (Dec. 29, 2010, 9:59 PM), [http://money.cnn.com/2010/12/29/news/companies/college\\_football\\_dollars/index.htm](http://money.cnn.com/2010/12/29/news/companies/college_football_dollars/index.htm).

76. BRANCH, *supra* note 49, at 58-61.

New technologies generate novel ways for the NCAA to increase revenues beyond such traditional endorsement deals, however.<sup>77</sup> For example, an agreement between the NCAA and Electronic Arts (“EA”) allows the videogame manufacturer to produce and sell a popular title called “NCAA Football.”<sup>78</sup> Actual college athletes’ individual names are not used, but the game’s virtual players share the same “jersey number . . . height, weight, build, . . . home state, . . . skin tone, hair color, and often even . . . hair style” as real-life NCAA competitors.<sup>79</sup> When EA negotiated a similar agreement with the NFL Players Association for its “Madden NFL” title, athletes received \$35 million in royalties; the college athletes featured in “NCAA Football” received nothing.<sup>80</sup>

Big-time college sports benefit universities in other ways that are harder to measure on a balance sheet, raising a school’s profile and offering students a ready-made source of campus entertainment. In recent years, for example, the football team at Texas Christian University (“TCU”) has emerged as one of the nation’s finest athletic programs.<sup>81</sup> The team’s success has spurred a four-fold increase in incoming applications—TCU recently receives 20,000 applicants for 1600 freshman slots—in just six years.<sup>82</sup> Articulating a sentiment with which the University of Chicago’s William Rainey Harper would undoubtedly identify,<sup>83</sup> TCU chancellor Victor Boschini, Jr. recently boasted, “[o]ur athletic notoriety is worth billions in publicity.”<sup>84</sup>

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77. The retail market for official collegiate licensed products is now \$4.3 billion per year, according to the NCAA’s Collegiate Licensing Company. See Daniel Grant, *Free Speech vs. Infringement in Suit on Alabama Artwork*, N.Y. TIMES, Jan. 31, 2012, at B12.

78. Class Action Complaint, at 3, 2009 WL 1270069, *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

79. *Id.* at 4.

80. See BRANCH, *supra* note 49, at 44-47.

81. See Joe Drape, *The Outsiders: Gary Patterson has assembled a program at Texas Christian that does more than bust the B.C.S.*, N.Y. TIMES, Aug. 28, 2011, at SP1.

82. *Id.*

83. See *supra* notes 40-45 and accompanying text.

84. *Id.*

The tangible benefits of this rapid commercialization are easier to quantify for coaches, however, whose salaries have skyrocketed along with the influx of television revenues.<sup>85</sup> In part, these inflated sums reflect the rising value (and absence of bargaining power) of the athletes themselves. Unable to offer financial inducements to players, athletic departments invest heavily in marquee coaches, whose reputations can ensure the recruitment of top-level talent.<sup>86</sup> Of the fifty-eight basketball coaches participating in the 2011 tournament, for whom salary information is available, total pay exceeded \$1 million per year for thirty-one.<sup>87</sup> In 2011, at least sixty-four college football coaches also earned more than \$1 million.<sup>88</sup> These massive salaries are of recent vintage; adjusted for inflation, the average professor's salary at forty-four public institutions increased by 32% since 1986 (to \$141,600); the average president's salary grew 90% (to \$559,700); while the average head coach's ballooned 652% (to \$2,054,700).<sup>89</sup> Public university presidents in 1986 slightly outearned head football coaches; now coaches earn almost four times as much as university presidents.<sup>90</sup> When reporters recently asked Ohio State President, E. Gorgon Gee, whether he would consider firing scandal implicated football coach Jim Tressel, his response reflected this shift: "I'm just hoping the coach doesn't dismiss me."<sup>91</sup>

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85. The NCAA previously attempted to restrict coaches' salaries as well, limiting entry-level assistant coaches' salaries to \$16,000 per year. Basketball coaches brought a class action challenging the rule under the Sherman Act, and in 1998, the Tenth Circuit upheld a district court's permanent injunction barring the practice. *See* *Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998).

86. *See* CLOTFELTER, *supra* note 6, at 116.

87. *See* Jodi Upton, *Salary analysis: NCAA tournament coaches cashing in*, USA TODAY (Mar. 30, 2011, 10:32 PM), [www.usatoday.com/sports/college/mensbasketball/2011-03-30-ncaa-coaches-salary-analysis\\_N.htm](http://www.usatoday.com/sports/college/mensbasketball/2011-03-30-ncaa-coaches-salary-analysis_N.htm).

88. Erik Brady, et al., *Salaries for college football coaches back on rise*, USA TODAY (Nov. 17, 2011, 11:02 AM), <http://www.usatoday.com/sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1>.

89. CLOTFELTER, *supra* note 6, at 106 f.5.1, 266 n.39.

90. *See id.* at 266 n.39.

91. Albert R. Hunt, *Athletics Overrun the Ivory Tower*, INT'L HERALD TRIBUNE, Dec. 12, 2011, at 2.

### C. *How the Other Half Lives*

In exchange for the labor that sustains this industry, the NCAA permits colleges to compensate college athletes for “the actual cost of tuition and required institutional fees,”<sup>92</sup> “room and board,”<sup>93</sup> academically required books,<sup>94</sup> medical and life insurance,<sup>95</sup> and now (for some athletes) up to \$2000 for miscellaneous expenses.<sup>96</sup> The NCAA requires institutions to “make general academic counseling and tutoring services available to all student-athletes.”<sup>97</sup> And, for the tiny fraction of NCAA football and basketball players who go on to play professionally—1.7% and 1.2%, respectively—coaching and training services represent a valuable professional development opportunity.<sup>98</sup> The worth of an athletic scholarship will necessarily vary depending on the school, but in 2009, the NCAA estimated that the average annual value of a “full ride” was \$15,000 at an in-state public institution, \$25,000 at an out-of-state public

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92. NCAA DIVISION I MANUAL, *supra* note 5, art. 15.2.2, at 174.

93. *Id.* art. 15.2.2, at 175.

94. *Id.* art. 15.2.3, at 176.

95. *Id.* art. 16.4, at 199.

96. Days after the NCPA submitted its petition in October 2011, the NCAA approved legislation allowing schools to provide promising recruits additional grants to cover miscellaneous expenses, “up to the full cost of attendance or \$2000, whichever is less.” After significant protest from member institutions, the NCAA agreed in January 2012 to temporarily suspend the initiative pending further debate. Meanwhile, however, the vast majority of the nation’s top high school prospects had already signed binding “letters of intent.” The NCAA says it will honor agreements for those prospects promised stipends during the 2011 signing window, meaning hundreds of players will receive such payments come Fall 2013. See Brad Wolverton, *Athletes Inch Closer to \$2,000 Stipend, Multiyear Awards*, CHRON. OF HIGHER EDUC., Jan. 14, 2012, available at <http://chronicle.com/blogs/players/athletes-inch-closer-to-multiyear-awards-2000-stipend/29436>. As of the time of press, the NCAA had not formally implemented the \$2000 stipend proposal. See *Spurrier wants college players to earn as much as \$4,000 a year*, CBS SPORTS.COM (May 31, 2012), <http://www.cbssports.com/collegefootball/story/19216265/spurrier-wants-college-players-to-earn-as-much-as-4000-a-year>.

97. NCAA DIVISION I MANUAL, *supra* note 5, art. 16.3.1.1, at 199.

98. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/pdfs/2011/2011+Probability+of+Going+Pro> (last updated Sept. 27, 2011).

institution, and slightly more than \$35,000 at a private institution.<sup>99</sup> NCAA Bylaws make clear that universities can provide these considerable sums to athletes solely on the basis of athletic promise, not economic need or academic potential.<sup>100</sup>

As NCAA critics frequently point out, however, a full athletic scholarship often fails to cover basic expenses that college athletes incur.<sup>101</sup> A recent study conducted by the NCPA and Drexel University pegged the average “scholarship shortfall”—the gap between a “full” NCAA scholarship and the actual cost of attendance—of a Division I football player at \$3222 per year.<sup>102</sup> At some institutions, the annual scholarship shortfall totals more than \$6000.<sup>103</sup> According to the study, this leaves approximately 85% of “full” scholarship athletes living below federal poverty thresholds.<sup>104</sup> Indeed, while NCAA bylaws prohibit scholarship athletes from receiving many types of external assistance, the NCAA explicitly authorizes players to receive taxpayer-funded food stamps.<sup>105</sup> The NCAA responded to these criticisms in late 2011, proposing legislation that allows individual institutions (if authorized by their athletic conference) to provide athletes additional grants “up to the cost of attendance or \$2,000, whichever is less.”<sup>106</sup> While the measure would help reduce the scholarship shortfall for many players, this language

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99. NCAA, *Behind the Blue Disk: How Do Athletic Scholarships Work?* (2011), NCAA.ORG (June 21, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/How+Do+Athletic+Scholarships+Work>.

100. See NCAA DIVISION I MANUAL, *supra* note 5, art. 15.1, at 174.

101. See Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big-Time College Sport*, NAT'L COLLEGE PLAYERS ASSOC., 3-4 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

102. *Id.* at 4.

103. *Id.* at 3.

104. *Id.* at 16.

105. NCAA DIVISION I MANUAL, *supra* note 5, art. 15.2.2.5, at 176.

106. NCAA Division I Board of Directors, *Division I Proposal 2011-96 (“Financial Aid—Maximum Limits on Financial Aid—Individual and Team Limits”)*, Oct. 3, 2011, <https://web1.ncaa.org/LSDBi/exec/links> (highlight “Search” hyperlink; then follow “Division I Proposals” hyperlink; then search “2011-96” in the “Proposal Number” box; and follow “Go Search” hyperlink).

(“whichever is less”) implicitly concedes that even an additional \$2000 may not cover the “full cost of attendance.”

Once promising Division I basketball and football athletes sign scholarship agreements, university officials exercise extensive control over their daily lives (a factor that, as we shall see in Parts II and III, is often relevant in determining “employee” status).<sup>107</sup> One independent study concludes that a “conservative estimate of a player’s time commitment to football during the week of a home game is approximately fifty-three hours,” and is possibly much greater during the week of an away game.<sup>108</sup> College basketball athletes face a similarly rigorous, and highly regimented, schedule.<sup>109</sup> During the off-season, athletes’ lives in both sports are highly controlled by their teams, with compulsory early-morning conditioning sessions, weightlifting sessions, team meetings, video review sessions, and other grueling practice sessions.<sup>110</sup> To an extent far exceeding that of ordinary campus employees, “virtually every detail of [basketball and football players’] lives is carefully controlled by coaches and athletic staff, not only during the season but year around.”<sup>111</sup>

In his scathing memoir, former NCAA director Walter Byers attacked “the plantation mentality” embodied in this arrangement, and indeed, the politics of race loom heavily over debates about college athletes’ labor.<sup>112</sup> During the 2010–2011 year, black athletes constituted 59.3% of

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107. See McCormick & McCormick, *Myth*, *supra* note 22, at 98-101, 105-07.

108. *Id.* at 98-101. NCAA rules purport to limit student-athletes “to a maximum of four hours per day and 20 hours per week.” NCAA DIVISION I MANUAL, *supra* note 5, art. 17.1.6, at 216. Even the NCAA’s own internal studies, however, have found the time commitment for football and men’s basketball athletes to be equivalent to a full-time job. See NCAA, *Summary of Findings from the 2010 GOALS and SCORE Studies of the Student-Athlete Experience* (Jan. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Research/Student-Athlete+Experience+Research>.

109. See McCormick & McCormick, *Myth*, *supra* note 22, at 106-09.

110. *Id.* at 101-02, 106.

111. McCormick & McCormick, *A Trail of Tears*, *supra* note 24, at 649.

112. BYERS, *supra* note 59, at 390-91; see also McCormick & McCormick, *A Trail of Tears*, *supra* note 24, at 660-65 (discussing the racial implication of NCAA amateurism rules); BRANCH, *supra* note 49, at 14 (“College athletes are not slaves. Yet to survey the scene . . . is to catch a whiff of the plantation.”).

Division I basketball players and 47.6% of Football Championship Series players, more than any other racial group.<sup>113</sup> The comfortable majority of head basketball coaches (72.8%), head football coaches (83.7%), and athletic directors (83.3%), however, were white.<sup>114</sup> As Dale Brown, the longtime Louisiana State University head basketball coach, once candidly complained: “Look at the money we make off predominantly poor black kids. We’re the whoremasters.”<sup>115</sup>

The practical demands placed on “student-athletes” all but dictate that they become athletes first, and students second. In order to maintain their eligibility to compete, players must pursue a “full-time [12 credit-hour] program of studies,”<sup>116</sup> but many of the NCAA’s academic standards are “formulated to serve universities’ commercial interests rather than bona fide academic values.”<sup>117</sup> Low academic expectations are, in fact, embedded in the NCAA’s eligibility requirements: high school seniors who score a 400 on the SAT (reflecting no correct answers) may nevertheless be eligible to compete during their first year.<sup>118</sup> College athletes must select course schedules consistent with team practices, and athletic responsibilities regularly require them to miss

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113. NCAA, *NCAA Race and Gender Demographics*, NCAA.ORG., <http://web1.ncaa.org/rgdSearch/exec/main> (follow “Student-Athlete Data” hyperlink; then search “2010-2011” for “Select an Academic Year,” search “Division I” for “Select a Division,” and search “Basketball” or “Football” for “Select a Sport;” then follow “View Report” hyperlink). White athletes, by comparison, constituted 28.8% and 41.4% of basketball and football players, respectively. *Id.*

114. ERIN IRICK, 2009-10 NCAA RACE AND GENDER DEMOGRAPHICS REPORT, 35 tbl.5b: Head Coaches, 91 tbl.5b: Athletics Administrative Staff (2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Research/Diversity+Research>.

115. ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 20 (2001).

116. NCAA DIVISION I MANUAL, *supra* note 5, art. 14.1.8.2, at 131.

117. McCormick & McCormick, *Myth*, *supra* note 22, at 135.

118. NCAA DIVISION I MANUAL, *supra* note 5, art. 14.3.1.1.2, at 144 (finding freshman athletes eligible to compete with a combined verbal and math SAT score of 400, provided their core high school GPA is 3.55 or higher). *See also* Christopher L. Chin, *Illegal Procedures: The NCAA’s Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1240, n.226 (noting lax treatment of promising athletes “as early as junior high school” to boost students’ GPAs).

classes.<sup>119</sup> Studies have found that college athletes generally enter college with considerable optimism, carrying high aspirations and “idealistic expectations about their impending academic experience.”<sup>120</sup> As the practical realities of athletic obligations set in, however, they become “increasingly cynical about and uninterested in academics.”<sup>121</sup> Low graduation rates predictably reflect this sense of detachment. While the NCAA boasts that “student-athletes,” as a whole, academically outperform non-athletes,<sup>122</sup> football and men’s basketball players’ graduation rates are 17.7% and 34.3% lower, respectively, than other full-time male students at their schools.<sup>123</sup>

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Today’s college sports industry is the inevitable result of a long-standing paradox: throughout the past century, the NCAA has never recognized any inconsistency between its defense of the amateur ideal and its promotion of college athletics as a revenue-generating business.<sup>124</sup> Even in its early decades, when the NCAA adhered to a far stricter understanding of amateurism, the organization actively cultivated college athletics as a burgeoning commercial spectacle.<sup>125</sup> Today, with the economic stakes dramatically

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119. McCormick & McCormick, *Myth*, *supra* note 22, at 142.

120. PETER ADLER & PATRICIA A. ADLER, BACKBOARDS AND BLACKBOARDS: COLLEGE ATHLETES AND ROLL ENGULFMENT xi, 62 (1991) (discussing ten years of participant-observations of college basketball players at five universities).

121. *Id.* at 189.

122. See NCAA, *NCAA grad rates hit all-time high*, NCAA.COM (Oct. 24, 2011, 2:22 PM), <http://www.ncaa.com/news/ncaa/article/2011-10-25/ncaa-grad-rates-hit-all-time-high>.

123. E. Woodrow Eckard, *NCAA Athlete Graduation Rates: Less Than Meets the Eye*, 24 J. SPORTS MGMT. 45, 53-54, tbl.3 (2010). Despite recent improvements, fifteen of the “Top 25” football programs in 2011 remain unable to graduate more than two-thirds of their athletes; in men’s basketball, “72 of the 327 Division I programs . . . saw fewer than half their players earn diplomas—including 2010 regional finalists Tennessee (40%), Kansas State (40%) and Kentucky (44%).” Steve Wieberg, *NCAA football grad rates at all-time high, but top schools falter*, USA TODAY (Oct. 27, 2011, 6:42 PM), [http://www.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study\\_N.htm](http://www.usatoday.com/sports/college/2010-10-27-ncaa-graduation-rates-study_N.htm).

124. See SACK & STAUROWSKY, *supra* note 41, at 79.

125. See *id.* at 32.

higher, the NCAA continues to defend the compatibility of amateurism and commercialism. While the NCAA acknowledges that “[s]ome fans believe institutional relationships with corporate entities somehow tarnish the amateur status of those who play the games,” the organization nevertheless insists that “‘amateur’ describes intercollegiate athletics participants, not the enterprise.”<sup>126</sup>

But with billions of dollars now generated by the labor of “those who play the games,” and many of these young athletes living in poverty, the myth of the “student-athlete” has become harder to maintain. The NCAA’s emphasis on amateur competition, once a quixotic effort to maintain the “purity” of an already commercialized game, has become a cynical justification for maintaining a lucrative status quo.

## II. COLLEGE ATHLETES & THE NLRA

The principal accomplishment (indeed, the very purpose) of the “student-athlete” label was to “de-labor” college athletes, to fashion a workforce largely divested of legal rights with respect to the services it provides. While the NCAA has largely succeeded in past decades in arguing that “student-athletes” are not engaged in “work” for workers’ compensation purposes,<sup>127</sup> the question of whether college athletes are “employees” under existing labor law statutes requires a separate analysis.

The NLRA, as the centerpiece of American labor relations for the past eight decades, is a logical starting point for this inquiry. Although we argue in Part III that state labor law provides a more promising path for college athletes seeking to unionize, our discussion of federal precedent serves several purposes. First, previous treatments of the potential unionization of college sports overlook the fact that, for many decades, the NLRB accepted the “universities are different” rationale to strip *all* university workers of collective bargaining rights. In Section A, we discuss the expansion of NLRA jurisdiction to cover college campuses, a shift triggered by the Board’s recognition that colleges and universities play an

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126. NCAA, *Commercialism*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Commercialism+overview> (last updated July 27, 2010).

127. *See supra* Part I.A.

increasingly prominent role as commercial enterprises. Second, federal precedent serves to introduce several important “tests” that state-level boards and courts have since adopted (or rejected) in weighing the “employee” status of student-employees. In Section B, we consider the various approaches the NLRB has used in cases involving students, and evaluate how college athletes would fair under these standards. Finally, in Section C, we highlight an additional NLRB case—overlooked in previous scholarship because it arose outside the academic context—that lends considerable support to the prospect of a “union of amateurs” under the NLRA.

#### A. *The NLRA and the Ivory Tower*

Just as the NCAA now claims that the special characteristics of the academic setting militates against recognizing college athletes as “employees” under relevant labor law, universities maintained for several decades that they were not “employers” covered by § 2(2) of the NLRA.<sup>128</sup> Although NLRB-sanctioned collective bargaining in the academic context is now commonplace, the NLRB accepted this argument for the first thirty-five years of the act’s existence. The Board recognized in 1951 that educational institutions were undeniably “employers” in the most basic sense contemplated by the act, but still considered it unwise to interfere with relationships that were “noncommercial” and “intimately connected with the . . . educational activities of the institution.”<sup>129</sup> Thus, even where “a group of employees perform[ed] tasks functionally identical to those performed by employees in private industry”—clerical

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128. See 29 U.S.C. § 152(2) (2006) (defining “employer” for NLRA purposes).

129. Columbia Univ., 97 N.L.R.B. 424, 426 (1951), *overruled by* Cornell Univ., 183 N.L.R.B. 329 (1970). The Board did occasionally assert jurisdiction, however, over commercial ventures overseen by institutions (or their divisions) that generated significant revenue for the schools. Thus, the Board recognized employees at a nonprofit trade school that made and repaired tools for the Ford Motor Company, *Henry Ford Trade Sch.*, 58 N.L.R.B. 1535, 1536 (1944), a profitable research center within a nonprofit university, *Illinois Inst of Tech.*, 82 N.L.R.B. 201, 201-03 (1949), and a college-owned commercial radio station, *Port Arthur Coll.*, 92 N.L.R.B. 152, 152 (1950). And, of course, workers at private universities occasionally unionized even without protection of the NLRA. See, e.g., John Wilhelm, *A Short History of Unionization at Yale*, 14 SOC. TEXT 13 (1996).

workers, maintenance personnel, laboratory technicians, dining hall workers, etc.—“the employer’s [educational] purpose[]” was sufficient grounds to deny employees collective bargaining rights.<sup>130</sup>

In the early 1970s, in a landmark case brought by maintenance personnel at Syracuse University and librarians at Cornell University, a unanimous NLRB changed course.<sup>131</sup> Higher education was changing rapidly, the Board noted, and “to carry out its educative functions, the university has become involved in a host of activities which are commercial in character.”<sup>132</sup> Education was “still the primary goal of such institutions,” the Board explained, but nonprofit universities’ educational purpose was no longer sufficient to justify treating them any differently than other “employers” under the Act.<sup>133</sup>

The burgeoning college athletics industry helped influence this shift. When the NLRB declined to assert jurisdiction over a petition filed by librarians at Columbia University in 1951, the university’s involvement in non-academic commercial ventures was relatively modest. The school made “\$4,890 from the sale of photostats, microfilms, and the Germanic and Romanic Reviews,” the Board observed, and “\$21,150 from the sale of radio and television rights to its football games.”<sup>134</sup> When the Board began asserting jurisdiction over universities two decades later, it highlighted that Syracuse University “realize[d] \$500,000 annually from the sale of tickets for football games, and \$250,000 from the sale of television and radio rights.”<sup>135</sup> Such commercial profits—still relatively humble compared to today’s figures—helped dismantle the rationale for treating educational institutions differently from other private employers. Also significant, these early Board cases identified the emergent big-time college sports industry for

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130. Frederick E. Sherman & Dennis B. Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board’s Worthy Cause Exemption*, 83 HARV. L. REV. 1323, 1324 (1970) (emphasis added).

131. *See Cornell Univ.*, 183 N.L.R.B. at 336 (deeming the employees a union for purposes of collective bargaining).

132. *Id.* at 332.

133. *Id.* at 332-33.

134. *Trs. of Columbia Univ.*, 97 N.L.R.B. at 425 n.2.

135. *Cornell Univ.*, 183 N.L.R.B. at 330.

what it was: a commercial enterprise, largely unconnected to the pedagogical mission of the university.

B. *The Medical & Graduate Student Analogy*

Soon after the NLRB ruled that universities are “employers” under federal labor law, the question arose whether certain students—those performing labor for their university in exchange for tuition or other compensation—qualify as “employees” under § 2(3) of the Act. This determination is critical, of course, because only statutory “employees” are entitled to the basic rights and protections contemplated by the Act.<sup>136</sup> Unhelpfully, though, the NLRA provides a circular definition of “employee” (“[t]he term ‘employee’ shall include any employee . . .”) with several categorical exceptions.<sup>137</sup> Over seventy-five years since the NLRA’s enactment, as several cases brought by students claiming “employee” status have shown, the precise contours of this statutory definition are still in dispute.<sup>138</sup>

1. *The “Right-of-Control” Test: College Athletes Under Boston Medical Center and New York University.* Because the NLRA provides little explicit guidance as to the term “employee,” the Board and courts have regularly relied upon the “right-of-control” test (also referred to as the common law agency test) to determine “employee” status.<sup>139</sup> This

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136. See 29 U.S.C. § 157 (2006) (delineating rights of employees).

137. 29 U.S.C. § 152(3) (2006) (“The term ‘employee’ shall include any employee . . . unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased [due to] any current labor dispute or because of any unfair labor practice . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.”).

138. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 314-21 (2001); Anne Marie Lofaso, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, 5 FLA. INT’L U. L. REV. 495, 499-501 (2010) (discussing the idea of the autonomous workplace and whether the statutory definition of “employee” describes the autonomous worker).

139. See NLRB. v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (“[T]here is no doubt that we should apply the common-law agency test here in

standard, based on the feudal master-servant relationship described in Blackstone's COMMENTARIES,<sup>140</sup> uses traditional agency principles to determine if a cognizable employment relationship exists.<sup>141</sup> As the RESTATEMENT (SECOND) OF AGENCY explains, a "servant" is "a person employed to perform services in the affairs of another and who[,] with respect to the physical conduct in the performance of the services[,] is subject to the other's control or right to control."<sup>142</sup>

In two important cases involving students in 1999 and 2000, the NLRB emphasized that the "definition of the term 'employee' as used in the Act reflect[s] the common law agency doctrine of the conventional master-servant relationship," and used this standard to recognize student-workers' right to unionize as statutory "employees."<sup>143</sup> First, in *Boston Medical Center*, the Board reversed twenty-three years of precedent and held that medical "house staff" (interns, residents, and fellows) were statutory employees, "notwithstanding that a purpose of their being at a hospital may also be, in part, educational."<sup>144</sup> The statutory formulation that "employee' shall include *any* employee," the Board explained, was intended to emphasize the breadth of the ordinary definition of the term.<sup>145</sup> Thus, it must extend to any "person who works for another in return for financial or other compensation," or any "person in the

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distinguishing an employee from an independent contractor.") (citation omitted); Teamsters Nat'l Auto. Transp. Indus. Negotiation Comm., 355 N.L.R.B. 830, 832 (2001) ("[T]he contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test. . . ."); Steinberg & Co., 78 N.L.R.B. 211, 220-21 (1948) (interpreting recent Taft-Hartley amendments to indicate Congress' approval of the "ordinary tests of the law of agency," specifically the "familiar 'right-of-control test,'" to determine employee status) (citation omitted), *set aside by* NLRB v. Steinberg, 182 F.2d 850 (5th Cir. 1950).

140. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410-20.

141. See NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 93-95 (1995) (defining "employee" by reference to RESTATEMENT (SECOND) OF AGENCY).

142. RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

143. *Boston Med. Ctr.*, 330 N.L.R.B. 152, 160 (1999); see also *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000) (also employing the master-servant test), *overruled by* *Brown University*, 342 N.L.R.B. 483 (2004).

144. *Boston Med. Ctr.*, 330 N.L.R.B. at 160.

145. *Id.* (quoting *Town & Country Elec., Inc.*, 516 U.S. at 90).

service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employees in the material details of how the work is to be performed.”<sup>146</sup> Because “[t]he exclusions listed in [§ 2(3) of the NLRA] are limited and narrow, and do not . . . encompass the category ‘students,’” the house staff were found to be “employees” under the Act.<sup>147</sup>

The following year, the Board similarly found graduate students serving as teaching and research assistants to be statutory “employees” in the *New York University* case.<sup>148</sup> Again the Board relied on the common law definition of an employment relationship, which “exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.”<sup>149</sup> The university attempted to distinguish *Boston Medical Center* by arguing that graduate assistants spend significantly less time than house staff performing services, and are compensated only as “financial aid,” but the Board found both of these arguments unconvincing.<sup>150</sup> Next the Board considered two proffered “policy reasons” why (despite finding graduate assistants to be “employees”) it might be preferable to exclude graduate students from coverage under the Act.<sup>151</sup> The university argued that the Board should not sanction collective bargaining because graduate students “do not have a traditional economic relationship with the Employer,” and because doing so might “infringe

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146. *Id.*

147. *Id.* Despite the Board’s expansive language that affirmed students’ place within the NLRA definition of “employee,” the majority opinion consistently attempted to distance house staff from ordinary students. It noted that house staff were more akin to apprentices, serving in low-paying hospital jobs for a set period of time so that they can become fully certified and later practice wherever they wish. While recognizing that “house staff possess certain attributes of student status,” the Board highlighted the fact that “they are unlike many others in the traditional academic setting,” particularly with respect to tuition, traditional examinations, and grades. *Id.* at 161. Thus, although the Board stressed the point that student status “does not . . . change the evidence of . . . ‘employee’ status,” it partially hedged in the final analysis. *Id.* at 160-61.

148. *See New York Univ.*, 332 N.L.R.B. at 1205.

149. *Id.* at 1205-06.

150. *See id.* at 1206-07.

151. *See id.* at 1207-08.

on the Employer's academic freedom."<sup>152</sup> Again the Board rejected these arguments, finding "no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students."<sup>153</sup>

College athletes meet the criteria of this basic "common law test" as set forth in *Boston Medical Center* and *New York University*: they: (a) perform services for another, (b) under the other's control or right of control, and (c) do so in return for payment. First, as performers at the center of a multibillion dollar industry, college athletes plainly "perform services" (just like medical students and graduate assistants) from which universities and others benefit. In terms of actual services performed, big-time college athletes in football and basketball are largely indistinguishable from their unionized counterparts in professional sports. Second, to a degree surpassing almost any other type of university employee (including other student-employees), college athletes' labor and lives are subject to their employer's control. On the field, of course, big-time college athletes must undergo physically demanding (and occasionally hazardous) training regimens and competitions.<sup>154</sup> As noted in Part I, the time commitments of practice and competition schedules typically exceed those of a full-time job—sharply limiting the availability of a traditional "student" experience—and may extend even into the supposed "off-season."<sup>155</sup> Off the field, too, universities' control over athletes extends in ways most other employees would consider intolerable: college athletes are closely monitored in terms of what substances they should (protein supplements, creatine) and should not (alcohol) consume; how they spend their free time and, per NCAA regulations, how they may benefit from their labor outside of sports.<sup>156</sup>

Finally, college athletes receive "payment" for these services in the form of tuition, room and board, and

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152. *Id.*

153. *Id.* at 1205.

154. See McCormick & McCormick, *Myth*, *supra* note 22, 97–117 (documenting in extensive detail the degree of control exercised over college athletes in their daily lives).

155. See *id.* at 99–108.

156. See *id.* at 97–109.

potentially, for some, unrestricted \$2000 stipends.<sup>157</sup> While the NCAA may characterize such compensation as “financial aid” or “scholarships” (as with the graduate assistants in *New York University*) they represent a form of valuable consideration for services rendered. Professors McCormick and McCormick, writing before the NCAA began allowing supplemental cash stipends, creatively likened this practice to payment in company scrip, redeemable only at a company-owned store (the university itself).<sup>158</sup> That such remuneration constitutes “payment”—as opposed to, perhaps, “gifts”—is made clear when college athletes quit (or are cut) from a team. As University of Michigan football coach Brady Hoke recently explained, “Obviously you quit football, you’re not going to be on scholarship.”<sup>159</sup>

2. *The “Primary Purpose” Test: College Athletes Under Brown University.* The newfound freedom of graduate students to organize proved short-lived, as the Board explicitly overruled *New York University* less than four years later in *Brown University*.<sup>160</sup> In a 3-2 decision, the Board denied graduate assistants the right to unionize, determining that they “are primarily students and have a primarily educational, not economic, relationship with their university.”<sup>161</sup> As such, the petitioners were found to be “nonemployees” under the Act.<sup>162</sup>

The Board’s precise rationale for determining that graduate assistants were “primarily students” (and, therefore, not “employees”) is somewhat difficult to discern, but four categories of concerns guided the decision. First,

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157. See *supra* notes 24, 80-91, 101.

158. McCormick & McCormick, *Myth*, *supra* note 22, at 78.

159. Brian Bennett, *Big Ten schools offering more security*, ESPN.COM (Feb. 1, 2012), [http://espn.go.com/college-football/story/\\_id/7528614/some-big-ten-offering-4-year-scholarships](http://espn.go.com/college-football/story/_id/7528614/some-big-ten-offering-4-year-scholarships) (emphasizing contingency of college athletes, even under new NCAA policy allowing universities to grant four-year scholarships instead of one-year renewable scholarships).

160. 342 N.L.R.B. 483, 483 (2004). Puzzlingly, the Board emphasized that it “express[ed] no opinion regarding the Board’s decision in *Boston Medical Center*,” despite noting that it made use of the same “master-servant test” in evaluating student-employees’ status. *Id.* at 483 n.4.

161. *Id.* at 487, 490.

162. *Id.* at 487.

the Board “emphasize[d] the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled” to be eligible for the job.<sup>163</sup> Second, the Board discussed “the role of [the labor] in graduate education.”<sup>164</sup> Under this heading, the Board noted the “limited” time commitment required by graduate assistantships (students’ “principal time commitment . . . is focused on obtaining a degree [rather than graduate assistantships] and thus, being a student”)<sup>165</sup> and the extent to which the required labor “is part and parcel of the core elements” of the degree program.<sup>166</sup> Third, the Board emphasized the extent to which assistantships received oversight by academic faculty, “often the same faculty that teach or advise the graduate assistant student in their coursework or dissertation.”<sup>167</sup> Such oversight bolstered the university’s assertion that graduate assistants were participating in academic (as opposed to economic) relationships. Fourth, the Board highlighted the form of financial support provided to graduate students in exchange for their labor. Noting that “a significant segment of the funds received . . . is for full tuition,” and that the university “recognize[d] the need for financial support” of its graduate students, the Board characterized the payments as a form of financial aid to students (not traditional “wages”).<sup>168</sup> Taken together, these factors established that “the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one.”<sup>169</sup>

The primary purpose test articulated in *Brown University* is plainly less favorable to student-employees, and several of the emphasized factors would cut against a finding that college athletes are “employees” under § 2(3) of the Act. The Board’s emphasis on whether the purported

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163. *Id.* at 488.

164. *Id.* at 489.

165. *Id.* at 488.

166. *Id.*; *see also id.* at 483 (“[S]upervised teaching or research is an integral component of [graduate students’] academic development.”).

167. *Id.* at 489.

168. *Id.*

169. *Id.*

employees “must first be enrolled [as students],”<sup>170</sup> for example, establishes a presumption against recognizing a cognizable employment relationship wherever enrollment is an eligibility requirement for a job. Because college athletes must necessarily be enrolled students, this factor is unhelpful to college athletes’ cases. Likewise, the Board’s attention to the *form* of financial remuneration is significant: compensation that helps pay for tuition and is characterized as “financial aid,”<sup>171</sup> it appears, is categorically different from ordinary consideration for work performed. As universities and the NCAA often stress, grants-in-aid are not payment for “work,” but rather a species of scholarship (albeit based on something other than economic need or academic merit). More generally, the majority approach in *Brown University* appears to ignore, or reject, the helpful insight that individuals can be *both* students and employees of an institution simultaneously. As a blistering dissent aptly noted, “[t]he Act requires merely the existence of [a meaningful] economic relationship, not that it be the only or the primary relationship between a statutory employee and a statutory employer.”<sup>172</sup>

Ironically, however, because of its focus on the *academic* relevance of the services rendered, the Board’s decision divesting graduate assistants of their “employee” status may bolster analogous claims by college athletes. In its lengthy discussion of the “role of graduate assistantships in graduate education,”<sup>173</sup> the Board noted that the assistantship labor consumes only a “limited” amount of the students’ time,<sup>174</sup> and that “supervised teaching or research is an integral component of [graduate students’] academic development.”<sup>175</sup> In *Brown University*, “it [was] beyond dispute that [the students’] principal time commitment . . . [was] focused on obtaining a degree,”<sup>176</sup> but for college athletes, the exact opposite is true. Similarly, the Board emphasized that, for the vast majority of graduate students

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170. *Id.* at 488.

171. *Id.*

172. *Id.* at 497 (Liebman and Walsh, Members, dissenting).

173. *Id.* at 489.

174. *Id.* at 488.

175. *Id.* at 483.

176. *Id.* at 488.

at Brown University, serving as a graduate teaching or research assistant was a graduation requirement for their academic program.<sup>177</sup> Only a tiny minority of college students ever participate as varsity athletes in big-time college sports—certainly no college requires this—so it is unlikely that such services could be considered “part and parcel of the core elements” of a standard undergraduate degree. And, of course, unlike graduate assistantships, college athletes’ labor is not overseen by academic faculty. Particularly given the extraordinary sums their labor generates, there is a colorable claim that, under the primary purpose test, the overall relationship between college athletes and their universities is primarily an economic one.<sup>178</sup>

### C. *The Chorister Analogy? College Athletes Under Seattle Opera*

These “student-employee” cases will likely frame any NLRB treatment of college athletes, but another (entirely overlooked) case involving “auxiliary choristers” at the Seattle Opera may lend additional support for college athletes. The case focused on the “employee” status of a group of choristers, who were essentially—at least as much as college athletes—“amateur” entertainers. Rejecting the Seattle Opera’s claims that the choristers were “volunteers” motivated by their love of opera (rather than the minimal compensation provided), both the NLRB (in 2000)<sup>179</sup> and the D.C. Circuit (in 2002)<sup>180</sup> held that the choristers were “employees” under the NLRA.

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177. *Id.*

178. At press, the National Labor Relations Board had granted review in two cases that may ultimately reverse the standard for graduate student unions at private universities. In its “Notice and Invitation to File Briefs,” issued on June 21, 2012, the Board invited argument on whether *Brown University’s* “primary purpose” test should continue to guide the Board’s interpretation of § 2(3). Briefing should be completed by end of July 2012. See *Board grants review, invites briefs on question of graduate student assistant status in two cases*, NLRB.GOV (June 22, 2012), <http://www.nlr.gov/news/board-grants-review-invites-briefs-question-graduate-student-assistant-status-two-cases>.

179. Seattle Opera Ass’n, 331 N.L.R.B. 1072, 1072 (2000).

180. Seattle Opera v. NLRB, 292 F.3d 757, 757 (D.C. Cir. 2002).

The employment relationships of the 200 “auxiliary choristers”—a pool of talented opera aficionados occasionally called upon to supplement large productions—are analogous to those of college athletes. Like promising athletic recruits, the choristers signed “Letters of Intent” with the Seattle Opera, obliging them to comply with attendance and decorum requirements set forth in a handbook.<sup>181</sup> Once engaged, the opera “possess[ed] the right to control the [] choristers in the material details of their performance,” giving them “artistic feedback . . . and dramatic direction while on stage.”<sup>182</sup> In exchange for their participation, the choristers received ten tickets to dress rehearsal performances<sup>183</sup> and a modest one-time “honorarium” (equivalent to \$2.78 per hour, when spread over twenty-two rehearsals and performances) to defray parking and transportation expenses.<sup>184</sup> The “choristers provide[d] a service to the community and presumably derive[d] pleasure and satisfaction in performing,” the Board conceded, but the opera’s reimbursements also constituted a form of material compensation for the choristers’ labor or services.<sup>185</sup> This created an “economic relationship,” however rudimentary, making the choristers “employees” under § 2(3) of the NLRA.<sup>186</sup> Though the Seattle Opera and college athletics plainly cater to different audiences, in many significant respects—a prestigious nonprofit employer, informal employment agreements, codified behavior guidelines, controlled and directed performances, disputed subjective motivations, and minimal (though artfully characterized) compensation—the labor of their indispensable performers is virtually identical.

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In sum, existing Board precedent does not foreclose (and, indeed, may actually favor) the claim that college

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181. *Seattle Opera Ass’n*, 331 N.L.R.B. at 1072.

182. *Seattle Opera*, 292 F.3d at 765.

183. See *Seattle Opera Ass’n*, 331 N.L.R.B. at 1072; cf. NCAA DIVISION I MANUAL, *supra* note 5, art. 16.2.1.1, at 198 (“An institution may provide four complimentary admissions per home or away intercollegiate athletics event to a student-athlete . . .”).

184. See *Seattle Opera*, 292 F.3d at 760, 773.

185. *Seattle Opera Ass’n*, 331 N.L.R.B. at 1072-73.

186. See *id.* at 1073.

athletes are “employees” under the NLRA. Whether the NLRB remains with the primary purpose test or returns to the more relaxed common law standard, analogies to previous student-employee cases support the argument that college athletes are entitled to statutory protection.

But previous scholarly work overemphasizes the likelihood of college athletes successfully unionizing through the NLRB. As a threshold matter, such treatments ignore the fact that the NLRB lacks jurisdiction over public universities, and is therefore powerless to recognize as “employees” the majority of college athletes. More generally, though, focusing on favorable language in Board rulings, particularly *Brown University*, may miss the forest for the trees. Both prior to *Boston Medical Center* and in its most recent opinion, the Board has evinced considerable hostility toward recognizing that individuals can have dual relationships with academic institutions as both students *and* workers. This basic analytical move is critical to any claim brought by college athletes. State labor boards, in contrast, have recognized for decades that the services provided by student-employees can constitute a form of “work.”<sup>187</sup>

### III. STATE LABOR LAW

While several scholars have set forth some version of the argument in Part II.B—that NCAA athletes likely enjoy collective bargaining rights under NLRB precedent involving other student-employees—they have overlooked federal labor law’s limited reach. The NLRA ordinarily preempts attempts by states to establish alternative regimes governing collective bargaining between employers and employees,<sup>188</sup> but the NLRA specifically exempts from its definition of employer “any State or political subdivision thereof.”<sup>189</sup> This statutory exemption leaves collective bargaining rights for public employees, including those at

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187. See *infra* Part III.

188. See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 236 (1959) (stating that “[f]ailure of the [NLRA] to assume jurisdiction does not leave the States free to regulate activities they would otherwise be precluded from regulating.”).

189. 29 U.S.C. § 152(2) (2006).

public universities (athletic or otherwise), contingent on state law.

Unions of public sector workers have existed throughout the twentieth century,<sup>190</sup> but it was not until Wisconsin enacted a landmark law in 1959 that states began to formally recognize and encourage collective bargaining of their employees.<sup>191</sup> By 1972, “the debate over the legitimacy of unionism in the government sector [had become] largely academic,” with the majority of states enacting legislation allowing collective bargaining for public employees.<sup>192</sup> Generally, these laws mirrored federal labor law: “[m]any [state] statutes dr[ew] heavily on the NLRA in their definitions”<sup>193</sup>—including their (vague and circular) definitions of “employee”—and created state labor boards to adjudicate controversies over disputed provisions. This “similarity in language . . . has led to extensive reliance upon federal precedents” by state labor boards and courts.<sup>194</sup> And, as a result, most previous scholars have simply assumed that college athletes would therefore be treated comparably under federal and state labor law regimes. Professors McCormick and McCormick, for example, in their otherwise thorough discussion of potential unionization of college athletes, conclude that because many states’ labor statutes are modeled on the NLRA, federal law “remains the starting, and usually ending, point for this inquiry” into “employee” status.<sup>195</sup>

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190. See JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962* 1-2 (2004).

191. See *id.* at 158-92. (discussing passage of Wisconsin’s public sector labor laws of 1959 and 1962).

192. Harry T. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 885-86 (1972) (noting “rapid and accelerating growth” of public-sector collective bargaining over preceding decade). Notwithstanding the recent high-profile disputes in Wisconsin and Indiana, a comfortable majority of states continue to allow at least some public employees collective bargaining rights. See UNITED STATES GENERAL ACCOUNTABILITY OFFICE, *COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS* GAO-02-835, at 1-3, 8-9 (2002).

193. Note, *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1680 (1984).

194. DONALD H. WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 25 (4th ed. 1993).

195. McCormick & McCormick, *Myth*, *supra* note 22, at 88.

Yet however closely state labor boards and courts may track the NLRB in other contexts, they have diverged from federal precedent when determining the “employee” status of student workers. In adjudicating whether students who provide services for their universities are “employees” entitled to union recognition, state labor boards (unlike the NLRB) have repeatedly recognized that students can have dual academic and economic relationships with their universities. Even in states with statutory language identical to the definition of “employee” in NLRA § 2(3), students at public universities often enjoy more robust rights than their counterparts at private universities. As we show below, some states’ approaches present more auspicious openings to college athletes than others. But in at least a dozen states, it seems likely that NCAA college athletes satisfy the statutory definition of “employee.”

The following section provides the first detailed survey of state laws regarding the collective bargaining rights of students at public universities and explores the status of NCAA athletes under these regimes. In Section A, we consider in depth four states (California, Florida, Michigan, and Nebraska) where college athletes at big-time athletics programs might seek to unionize. Favorable state constitutional and statutory provisions, expansive interpretations of those provisions by state labor boards and courts, demonstrated success in organizing college athletes, a history of undergraduate and graduate unionism, and other political considerations render these states (all of which are home to large, lucrative college athletics programs) particularly promising for college athletes. In Section B, we discuss another twelve states where graduate and undergraduate students have unionized at public universities. While college athletes would struggle to gain union recognition in a few of these states, labor boards in most have issued rulings that would likely recognize a cognizable employer-employee relationship when applied to universities and their athletes. In the interest of space, we provide less detailed discussions of these jurisdictions, though some (e.g., Oregon, Massachusetts) may be even more favorable to college athletes than states discussed in Section A. Finally, in Section C, we briefly consider the remaining states, none of which have directly considered the “employee” status of students. State law is at least open to the possibility of a union of college athletes in a few of these jurisdictions; in others, however, state law clearly

forecloses the possibility of any collective bargaining at public universities.

A. *Four Case Studies*

1. *California*. In October 2011, the entire rosters of the UCLA football and men's basketball teams signed a petition—circulated by members of the NCPA Players's Council—urging the NCAA and college presidents to share a portion of the millions of dollars in recently acquired tv revenues with college athletes.<sup>196</sup> The students' frustration is understandable: though the UCLA football and men's basketball programs generated over \$34 million in combined revenues during 2009–2010 season, the average player's "scholarship shortfall" was between \$3488 and \$4461 per year.<sup>197</sup> In announcing the petition, Ramogi Huma, director of the California-based NCPA, promised that the petition drive was "the beginning of this strategy, not the end."<sup>198</sup>

If college athletes were to attempt to unionize, there is a strong possibility they would be successful under existing California law. In 1978, California enacted the Higher Education Employer-Employee Relations Act ("HEERA"), granting broad collective bargaining rights to "employees" of the University of California ("UC") and California State University ("CSU") systems.<sup>199</sup> Unlike the NLRA, HEERA explicitly recognizes that, under certain circumstances, UC and CSU students may qualify as union-eligible employees.<sup>200</sup> In two landmark cases in 1998, the California

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196. See Zagier, *supra* note 21.

197. Ramogi Huma & Ellen J. Staurowsky, *Price of Poverty Data*, NCPA NOW.ORG, <http://www.ncpanow.org/research?id=0024> (last visited June 14, 2012) (follow <http://www.ncpanow.org/research?id=0024>, then follow "Data and Calculations by Conference" hyperlink). Total revenues (\$31.4 million) and "scholarship shortfalls" (\$3482–\$4044) for UC-Berkeley's programs were similar.

198. Zagier, *supra* note 21.

199. CAL. GOV'T CODE § 3560(b) (West 2012).

200. See CAL. GOV'T CODE § 3562(e) (West 2012) ("Employee' or 'higher education employee' means any employee . . . . The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or that those educational objectives are subordinate to the services

Public Employee Relations Board (“PERB”) ruled that groups of students at two UC campuses—readers, tutors, and teaching “associates” at UC-San Diego<sup>201</sup> and graduate student instructors, readers, tutors, and part-time learning skills counselors at UCLA<sup>202</sup>—met this statutory definition. Today, the United Auto Workers represents thousands of members at UC and CSU campuses throughout the state.<sup>203</sup>

As PERB explained in the 1998 cases, HEERA “sets out a three-part test to determine whether collective bargaining rights should be extended to student employees.”<sup>204</sup> First, the Board asks whether employment is contingent upon the students’ status as enrolled students.<sup>205</sup> If not, the students are immediately recognized as “employees” under HEERA.<sup>206</sup> Where employment is contingent upon student status, however, the inquiry proceeds to step two.<sup>207</sup> At this stage, “the Board must determine whether the services provided by student employees are related to their educational objectives.”<sup>208</sup> If the Board finds the labor provided to be “unrelated to [the students’] educational objectives, [the students] are employees under HEERA.”<sup>209</sup>

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they perform and that coverage under this chapter would further the purposes of this chapter.”).

201. See Regents of the Univ. of Cal., 22 P.E.R.C. ¶ 29084, PERB No. 1261-H (Apr. 23, 1998), 1998 WL 35394392 [hereinafter *Regents of the Univ. of Cal. (ASE-UCSD)*].

202. See Regents of the Univ. of Cal., 23 P.E.R.C. ¶ 30025, PERB No. 1301-H (Dec. 11, 1998), 1998 WL 35395605 [hereinafter *Regents of the Univ. of Cal. (SAGE-UCLA)*].

203. UAW Local 2865 represents over 12,000 student employees at the University of California. See UAW 2865, <http://www.uaw2865.org/> (last visited June 14, 2012). UAW Local 5810 represents over 6000 postdoctoral fellows across the University of California. See *The Union for Postdocs*, UAW 5810, <http://uaw5810.org/> (last visited June 14, 2012). UAW Local 4123 represents over 6000 student-employees across the California State University system. See UAW LOCAL 4123, <http://www.uaw4123.org/> (last visited June 14, 2012).

204. See *Regents of the Univ. of Cal. (ASE-UCSD)*, *supra* note 201.

205. *Id.*

206. *Id.*

207. *Id.*

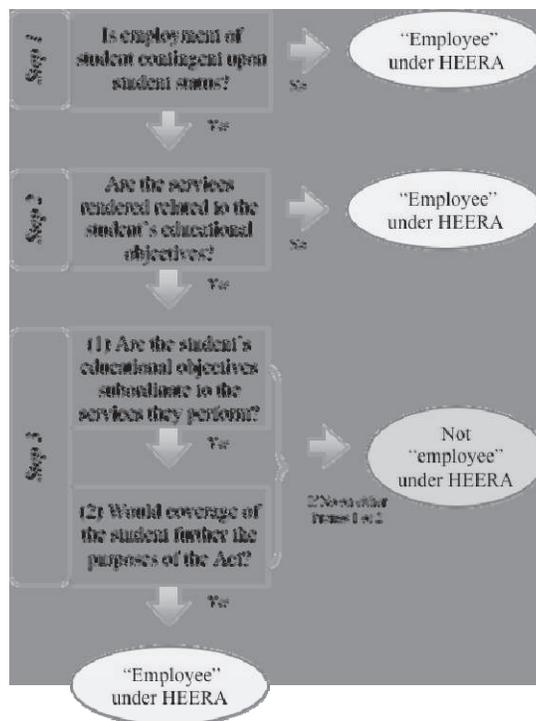
208. *Id.*

209. *Id.*

Even if students are providing services related to their educational objectives, however, they may still be “employees” under the third part of California’s test.<sup>210</sup> The board explained that:

[t]he third part of the test has two-prongs. Under the first prong, the Board must determine whether the educational objectives of student employees are subordinate to the services they perform. Under the second prong, the Board must determine whether coverage of the student employees under HEERA would further the purposes of the Act. In order for the Board to conclude that student employees are employees under HEERA, affirmative determinations must be made under both prongs.<sup>211</sup>

The flowchart below illustrates California’s three-step analysis.



**Chart 1—HEERA Student-Employee Test**

210. *Id.*

211. *Id.*

In the consolidated 1998 cases, PERB found that the student-employees' positions were contingent on their student status and that the services they provided were related to their educational objectives, but nevertheless recognized the students as "employees." As the Board explained:

The Legislature has instructed [us] to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily educational, the inquiry does not end here. PERB must look further—to the services actually performed—to determine whether the students' [sic] educational objectives take a back seat to their service obligations.<sup>212</sup>

This test arguably calls for the weighing of incommensurables: PERB must compare students' subjective motivations for engaging in an activity to the objective value of the services they provide.<sup>213</sup> But as PERB explained, this approach reflects California's rejection of the NLRB's "primary purpose" test, used to deprive students of their unionization rights based solely on imputed subjective motivations.<sup>214</sup> "[E]ven if all the student employees concurred that their purpose in seeking student academic employment was to further their educational objectives, [PERB] could still determine that those educational objectives were subordinate to the value of the services they provided to the University."<sup>215</sup> Recognizing the considerable objective value of the student-employees' services to the university, and declaring that the "extension of collective bargaining rights [are] . . . consistent with, and in furtherance of, the expressed purpose of HEERA,"

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212. *Id.*

213. See *Regents of the Univ. of Cal. (SAGE-UCLA)*, *supra* note 202 ("The Board is not expected to engage in a scientific weighing process, but to exercise its judgment about which factor--service or educational objectives—is subordinate.").

214. See *infra* Part II.B.

215. *Regents of the Univ. of Cal. (ASE-UCSD)*, *supra* note 201.

California allowed students at public universities to unionize.<sup>216</sup>

Under the California test, college athletes at schools like UCLA and UC-Berkeley should be eligible to collectively bargain. Participation in NCAA sports is necessarily contingent on student status (step one), but the services college athletes provide to universities are wholly “[un]related to their educational objectives” (step two). College athletes are not subject to faculty supervision when they train and compete, their services are entirely ancillary to degree requirements, and, as noted in Part I, the demands of athletics often impede their educational pursuits. This is a threshold issue: where students provide services to universities unrelated to their educational objectives, they are “employees” under California labor law.<sup>217</sup>

But even if PERB declared student-athletes’ labor to be related to the students’ educational objectives—perhaps deferring to the NCAA’s claim that “intercollegiate athletics [is] an integral part of the educational program”<sup>218</sup>—the balancing test built into step three would likely be availing for college players. Measured against the economic worth of the services performed by UCLA and UC-Berkeley athletes (totaling tens of millions of dollars per year), the “*educational* objectives of student employees” in performing these services are modest, at best. If academic student employees (tutors, graduate student instructors, etc.) prevail in step three balancing, it is difficult to see how college athletes would not.

2. *Florida*. Florida is another state where several large public universities operate big-time college sports programs.<sup>219</sup> The University of Florida boasts the largest

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216. *Id.*

217. *See id.* Depending on the individual student’s personal academic goals—perhaps the student hopes to pursue a career in sports medicine—it is conceivable that participation in Division I sports could be deemed “related to [a student’s] educational objectives.” *Id.* However, as a *class*, it is exceedingly hard to argue that college athletes’ labor meaningfully relates to their educational goals.

218. NCAA DIVISION I MANUAL, *supra* note 5, art. 1.3.1, at 1.

219. The University of Florida, Florida State University, University of South Florida, University of Central Florida, Florida Atlantic University, and Florida

program, by a comfortable margin, with a football team that reported over \$72.8 million in revenues and \$46.5 million in profits in 2010–2011.<sup>220</sup> Under a revenue-sharing plan loosely based on that negotiated by players' unions in professional basketball and football, one study estimates that the average "fair market value" of University of Florida athletes in both sports would be over \$375,000 per year.<sup>221</sup>

As a "right-to-work" state<sup>222</sup> with only a 3.1% unionization rate in the private sector,<sup>223</sup> Florida might seem an unlikely candidate to pioneer collective bargaining in college sports. But the Florida Constitution enshrines collective bargaining for public employees as a fundamental right under Florida law,<sup>224</sup> and in the public sector, a full 27.8% of Florida workers are covered by union contracts.<sup>225</sup> The robust constitutional and statutory protections afforded public workers under state law, coupled with the dramatic profits earned from Division I football in Florida, create a favorable playing field for college athletes seeking to unionize. But perhaps most importantly, the idiosyncratic history of disputes over the "employee" status of students on Florida campuses has established legal precedent extraordinarily favorable to student-workers. As a result, "the rights of graduate assistants to bargain collectively"—

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International University are all public universities with NCAA Division I programs in both football and men's basketball.

220. Office of Postsecondary Education, *The Equity in Athletics Data Analysis Cutting Tool*, U.S. DEPT OF EDUC., <http://ope.ed.gov/athletics/index.aspx> (click "Get data for one institution" or "Get aggregated data for a group of institutions" and follow the step-by-step instructions once you get to those pages).

221. Huma & Staurowsky, *Priceless Poverty Data*, *supra* note 197.

222. FLA. CONST. art. I, § 6 ("The rights of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.").

223. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density and Employment by State, 2010*, GA. STATE UNIV., [http://unionstats.gsu.edu/State\\_U\\_2010.htm](http://unionstats.gsu.edu/State_U_2010.htm) (last visited Apr. 4, 2012).

224. FLA. CONST. art. I, § 6 ("The rights of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.").

225. Hirsch & Macpherson, *supra* note 223.

and perhaps, by analogy, the rights of college athletes to do the same—“are now more secure in Florida than in any other state.”<sup>226</sup>

In the mid-1970s, graduate research and teaching assistants in the Florida state university system petitioned the Florida Public Employees Relations Commission (“PERC”) for recognition of their union.<sup>227</sup> PERC found the petitioners to be “public employees” under the “broad” and “all-embracing” language of Florida’s labor law.<sup>228</sup> While acknowledging that graduate assistants were students with an academic relationship to the university, PERC found that graduate students also:

[P]erform work for the various universities operated by the Board, their work is of benefit to the universities for which it is performed, the work is performed subject to the supervision and control of professors who are employees of the several universities, and the work is performed in exchange for the payment of money by the Board to the Graduate Assistants who perform the work. A more classic example of an employer-employee relationship can hardly be imagined.<sup>229</sup>

The Board of Regents countered that graduate assistants were “primarily” students and “secondarily” employees, but PERC strongly rejected the relevance of this

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226. Grant M. Hayden, *“The University Works Because We Do”: Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233, 1243 (2001).

227. United Faculty of Florida, FEA/United and Bd. of Regents, 3 *FPER* 304, (Case No. 8H-RC-765-0131, 77E-472) (Nov. 18, 1977), *aff’d* Bd. of Regents v. Pub. Emps. Relations Comm’n, 368 So.2d 641 (Fla. Dist. Ct. App. 1979).

228. *Id.* at 305.

229. *Id.* § 447.203(3), Florida Statutes provided that:

Public employee’ means any person employed by a public employer except: (a) Those person appointed by the Governor or elected by the people. . . (b) Those persons holding positions by appointment or employment in the organized militia . . . (d) . . . managerial or confidential employees . . . (e) Those persons holding employment with the Florida Legislature, (f) . . . inmates confined to institutions within the state.

The fact that the Florida Legislature itemized certain exceptions to the statutory definition of “public employee,” but not students, militated in favor of recognizing the graduate assistants as “employees,” PERC reasoned. *FLA. STAT. ANN.* § 447.203(3) (West 2007).

analysis.<sup>230</sup> Even if accepted, “[t]here is no such qualification in the statutory definition [of “public employee”] and the Commission is without power to fashion one . . . . The fact that they are students does not detract from the fact that they are also employees.”<sup>231</sup>

In response to the PERC decision, the Florida Legislature hastily amended the definition of “public employee” to exclude students.<sup>232</sup> The graduate students’ union, however, (which had since won representational elections at the University of Florida and the University of South Florida) challenged the new law as an impermissible infringement on student-workers’ constitutional rights.<sup>233</sup> Emphasizing the *constitutional* protections for public sector collective bargaining in Florida, the court of appeals embraced the students’ argument, finding that only a “compelling state interest [could] permit such an abridgement and thereby deny the graduate assistants collective bargaining rights.”<sup>234</sup>

The court, at length, rejected the Regents’s argument that the legislature was justifiably concerned about the economic impact of allowing graduate assistants to unionize.<sup>235</sup> University officials, the court reasoned, should not “be protected from bargaining [with student-employees] because [they] might agree to pay more than [they] should . . . [I]f concern about higher costs were sufficient reason, collective bargaining rights could be denied to every employee and the guarantee of Article I, Section 6, would be eliminated altogether.”<sup>236</sup>

The appellate court also revisited the question of whether students could be “public employees,” approving of

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230. *United Faculty of Florida*, *supra* note 227 at 306.

231. *Id.* at 306.

232. *See* *United Faculty of Florida v. Bd. of Regents*, 417 So. 2d 1055, 1057-58 (Fla. Dist. Ct. App. 1982) (referring to Chapter 81-305, Laws of Florida, codified as § 447.203(3)(i) (1981)).

233. *See id.* at 1056.

234. *Id.* at 1059.

235. *Id.* at 1059-60.

236. *Id.* at 1060-61.

a standard even more favorable to student-athletes.<sup>237</sup>  
Under Florida law:

[an] “employee” [is one] who for a consideration agrees to work subject to the orders and direction of another, *usually for regular wages but not necessarily so*, and, further, agrees to subject himself at all times during the period of service to the lawful orders and directions of the other in respect to the work to be done.<sup>238</sup>

The court noted NLRB precedent that found student workers not to be employees “because as a matter of policy the NLRB desired to preclude the students from collectively bargaining.”<sup>239</sup> But federal collective bargaining rights, the court distinguished, “are not based on a constitutional guarantee;” in Florida, only a compelling state interest can justify the deprivation of such rights.<sup>240</sup>

Under the standards articulated in the above cases—essentially the “common law test” discussed in Part II, buttressed with constitutional support—college athletes would likely be found to be “public employees.” The athletes labor “subject to the orders and direction” of university staff; they do so “for a consideration” that need not be regular wages; and (much more so than ordinary employees) they agree to follow “the lawful orders and directions of [the employer] in respect to the work to be done.”<sup>241</sup> PERC’s strong rejection of the “primary purpose” test and its unwillingness to fashion exceptions to the statutory definition also weigh heavily in favor of college athletes. But perhaps most important, if PERC *were* to recognize college athletes as “public employees,” it would be exceedingly difficult to overturn this holding legislatively. Because

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237. *Id.* at 1058.

238. *Id.* (quoting *City of Boca Raton v. Mattef*, 91 So. 2d 644, 647 (Fla. 1956)) (emphasis added).

239. *Id.* at 1059 (distinguishing *St. Clare’s Hosp.*, 229 N.L.R.B. 1000 (1997)).

240. *Id.* Later Florida labor cases have built on this language, and have shown even more skepticism toward efforts to curtail public employees’ bargaining rights. *See, e.g.*, *Chiles v. State Emps. Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (“[I]n order to survive a constitutional challenge, [a restriction on collective bargaining] ‘must serve that compelling state interest in the least intrusive means possible.’”).

241. *See United Faculty of Florida*, 417 So. 2d at 1058.

public employees' collective bargaining rights are constitutional in Florida, only a compelling state interest—something far more compelling than the universities' economic interest in not paying athletes—would suffice.

3. *Michigan.* College athletes might also receive favorable treatment in a state with a much stronger pedigree of cutting edge unionism: Michigan.<sup>242</sup> At both the University of Michigan at Ann Arbor and Michigan State University, college athletics are major industries. During the 2010–2011 season, the two schools' football programs netted approximately \$74 million in profits; their men's basketball programs brought in another \$11 million.<sup>243</sup> During the 2011 season, an average of 112,179 spectators packed Michigan Stadium each Saturday to watch the football squad compete.<sup>244</sup>

The Michigan Employment Relations Commission (“MERC”) and Michigan courts have repeatedly ruled on labor disputes involving student-workers, and historically has been sympathetic to student-worker unionism. In 1973, the Supreme Court of Michigan became the first state supreme court to rule that interns, residents, and post-doctoral fellows at the University of Michigan Hospitals were “employees” under state law.<sup>245</sup> The court unanimously held that “[n]o exception is made for people who have a dual status of students and employees” under Michigan's Public Employees Relations Act (“PERA”), and that if “the

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242. See Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 2, 13-16 (2010). For a historical discussion of the Wagner Act, see also Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265-70 (1978).

243. See Office of Postsecondary Education, *supra* note 220.

244. Gary Johnson, *NCAA Attendance Hits New High*, NCAA.COM (Jan. 26, 2012), <http://www.ncaa.com/news/football/article/2012-01-26/ncaa-attendance-hits-new-high>. The University of Michigan also holds the record for most consecutive 100,000-plus crowds (244), a streak that dates to November 8, 1975. *2011 NCAA Football Attendance Records*, NCAA, 11, [fs.ncaa.org/Docs/stats/football\\_records/2011/Attendance.pdf](http://fs.ncaa.org/Docs/stats/football_records/2011/Attendance.pdf).

245. *Regents of the Univ. of Michigan v. Michigan Emp't Relations Comm'n*, 204 N.W.2d 218, 224 (Mich. 1973).

Legislature had intended to exclude students/employees . . . they could have written such an exception into the law.”<sup>246</sup>

In 1981, MERC found that graduate students serving as teaching and staff assistants were “employees,” as well, but significantly for our purposes, held that research assistants were not.<sup>247</sup> The distinction, the commission explained, hinged on the “academic relevance” of the students’ work, and whether “the performance of services [is principally] for the benefit of another.” Teaching and staff assistants were “admittedly . . . ‘principally students,’” but focus on the “specific services [they] rendered” revealed them to be “employees” under Michigan law.<sup>248</sup> The labor of research assistants, on the other hand, was almost always “academically relevant”<sup>249</sup> to the students’ own research agendas. Thus, MERC concluded that such students’ were acting principally as their “own masters” when they engaged in research—“like the student in the classroom”—rather than as employees of the university.<sup>250</sup>

An analysis that emphasizes the “academic relevance” of the disputed labor, while unfavorable to graduate researchers, militates strongly for the “employee” status of college athletes. Michigan athletes are plainly providing extraordinarily valuable “services . . . for the benefit of another,” and enjoy little autonomy in doing so. Even if big-time college athletes were regarded as the principal beneficiaries of their own labor—an apt characterization of intramural competitors, perhaps, but not NCAA Division I athletes—MERC’s focus on the “academic relevance”<sup>251</sup> of their labor is critical. Plainly, college athlete’s on-the-field exertions have only the most tangential relevance to their academic pursuits.

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246. *Id.* at 225; *see also* Regents of the Univ. of Michigan and Graduate Emps. Org., Case No. C76 K-370, 1981 MERC Lab. Op. 777, 782 (“Although PERA does not define public employees to specifically include or exclude students, MERC has consistently held that students can be employees.”).

247. *Regents of the Univ. of Michigan*, 1981 MERC Lab Op. at 780.

248. *Id.* at 784-86.

249. *Id.* at 810.

250. *Id.* at 785.

251. *Id.*

Additionally promising for Michigan college athletes is MERC precedent holding that *undergraduate* students may be “public employees” under PERA, too.<sup>252</sup> In 1976, a group of undergraduate students employed part time through Michigan State University’s “student employment office” petitioned MERC for recognition.<sup>253</sup> The commission noted that the university made these positions available, in part, to “help defray the cost of [the students’] education,” and that the jobs were generally “interim or temporary.”<sup>254</sup> Nevertheless, MERC held that the students were employees under PERA, “even though their principal vocation is that of a student.”<sup>255</sup> If an undergraduate student assigned to clerical or maintenance tasks in the athletics department qualifies as an “employee,” it is difficult to rationalize why a classmate whose scholarship requires him to compete before 110,000 paying spectators should not.

4. *Nebraska*. On game days, Memorial Stadium in Lincoln, Nebraska becomes not only the center of the University of Nebraska community, but also the “third-largest ‘city’ in the state.”<sup>256</sup> After long-time head coach Tom Osborne stepped down in 1997, voters rewarded him with three terms in the U.S. House of Representatives, and he remains one of the most popular figures in the state.<sup>257</sup> As Osborne’s enduring popularity suggests, Cornhuskers football is serious business: the team generates \$55 million in revenues and \$35 million in annual profits. But even that reported sum may undercount the true financial value of Nebraska’s football program.<sup>258</sup> In order to purchase season tickets, for example, Nebraska alumni must make an additional “donation” to the school, ranging from \$500 per

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252. Michigan State Univ. and Michigan State Univ. Student Workers, Case No. R75 D-197, 1976 MERC Lab Op. 73, 80; *see also infra* Part III.B. (discussing undergraduate unions in Oregon and Massachusetts).

253. *Id.* at 74.

254. *Id.* at 77-78.

255. *Id.* at 80.

256. Greg Skidmore, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 323 (2004).

257. *See Tom Osborne to Be Honored*, OMAHA WORLD-HERALD, Dec. 9, 2004; Press Release, Public Policy Polling, Nebraskans Favor Civil Unions, Osborne Universally Admired (Oct. 13, 2011) (noting Osborne’s 86% favorability rating).

258. *See* Office of Postsecondary Education, *supra* note 220.

seat (for obstructed-view tickets) to \$3500 per seat (for a fifty-yard-line vantage).<sup>259</sup> Football players apparently serve as an effective auxiliary for the university's development office: the 82,000-seat Memorial Stadium has sold out for every home game since 1962.<sup>260</sup>

Beyond the highly commercialized nature of its college football program, though, Nebraska merits closer attention from college athletes for two reasons: (1) long-standing legal precedent favoring student-workers, and (2) noteworthy support from the state legislature for Nebraska college athletes. While graduate students employed as teaching and research assistants have never petitioned the Nebraska Commission of Industrial Relations ("CIR") for recognition, the Supreme Court of Nebraska reached "the obvious conclusion" some thirty-five years ago that individuals may be "both students and employees of the University of Nebraska" for unionization purposes.<sup>261</sup> Without specifying the precise test that would govern for Nebraska law, the court noted that Nebraska's statutory definition of public "employee" is broad,<sup>262</sup> and found "nothing in the stated purpose of the [Nebraska collective bargaining] act that would indicate that the Legislature intended that persons who are students but also employees of the University of Nebraska should be exempted . . . ."<sup>263</sup> Nebraska's highest court thus became the second state supreme court (after Michigan's) to rule that student-employees were entitled to unionize; two decades later, the NLRB would cite

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259. 2012 Nebraska Football Season Ticket Application, [www.huskers.com/pdf8/770907.pdf?DB\\_OEM\\_ID=100](http://www.huskers.com/pdf8/770907.pdf?DB_OEM_ID=100) (last visited Apr. 21, 2012). Such arrangements are common for top-ranked programs. After a successful 2007 season, for example, the University of Georgia began charging alumni an unprecedented \$10,651 donation to purchase season tickets for football games, though this sum fell dramatically in subsequent years along with the team's on-field success. See CLOTFELTER, *supra* note 6, at 100.

260. 2012 Football Ticket Waitlist, HUSKERS ATHLETIC FUND, [http://huskersathleticfund.com/2012-football-ticket-waitlist/?DB\\_OEM\\_ID=100](http://huskersathleticfund.com/2012-football-ticket-waitlist/?DB_OEM_ID=100) (last visited Apr. 21, 2012).

261. *House Officers Ass'n v. Univ. of Nebraska Med. Ctr.*, 255 N.W.2d 258, 261 (Neb. 1977).

262. *Id.* at 262 ("Employee shall include any person employed by any [public] employer . . . .") (citing NEB. REV. STAT. § 48-801(5) (2004)).

263. *Id.*

Nebraska's decision in its *Boston Medical Center* opinion discussed in Part II.B.<sup>264</sup>

Perhaps as significant, though, is the marked support college athletes have received from state lawmakers. In 2003, the legislature considered Legislative Bill 688, "AN ACT relating to the University of Nebraska-Lincoln; to provide for paying . . . persons competing in intercollegiate athletics."<sup>265</sup> Noting that "[m]any players are recruited from impoverished families" and that "[m]aintaining a winning football team has become an integral aspect of the overall business or occupation of the university," the legislature found that "football players are entitled to some tangible return for the strenuous work they perform and the revenue they generate for the benefit of the university."<sup>266</sup> Without setting a specific dollar amount, the law declared that, "in the same manner that nonathlete students are compensated for performing various tasks while student, football players shall be entitled to fair financial compensation for playing football."<sup>267</sup> The final version of the bill, which passed 26-9 and was signed by the governor,<sup>268</sup> contained a critical proviso: the measure would not become "operative" until four other states with Big Twelve football programs passed similar laws. Nevertheless, the broad support for the measure illustrates an important point: political branches in several states appear prepared to support recognition of college athletes as "employees."<sup>269</sup>

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264. *Boston Med. Ctr.*, 330 N.L.R.B. 152, 163 (1999).

265. L.B. 688, 98 Leg., 1st Sess. (Neb. 2003), available at <http://www.legislature.ne.gov/floordocs/98/pdf/final/lb688.pdf>.

266. *Id.* A Statement of Intent accompanying the bill further explains: "Just as the Declaration of Independence spelled out a detailed bill of particulars justifying the separation of the American colonies from England, LB 688 sets forth very precise and specific reasons that lead inexorably to the conclusion that University of Nebraska-Lincoln football players are entitled to compensation . . ." Senator Ernie Chambers, *Introducer's Statement of Intent*, L.B. 688, 98 Leg., 1st Sess. (Neb. 2003) (Feb. 10, 2003).

267. L.B. 688, *supra* note 265.

268. Legislative Research Div., Neb. Legislature, *A Review: Ninety-Eight Legislature, First Session, 2003*, 27-28 (July 2003).

269. In 2010, California's legislature overwhelmingly passed the "Student-Athletes' Right to Know Act," requiring recruiters to "disclose, among other things, institutional and NCAA policies on medical expenses, scholarship renewals, and transfers for athletes." Libby Sander, *In California, 'Athletes'*

B. *Additional States that have Recognized Student-Worker Unions*

Under a variety of collective bargaining laws, twelve other states now recognize unions of student-workers at public universities. In all but two of these states (Minnesota and Washington), the opinions issued by state labor boards and courts appear to support the contention that student-athletes would also qualify as statutory “employees.” The following Section surveys the myriad approaches and analyses the states have adopted.

1. *Other Balancing Test States (Kansas, Illinois)*. The Kansas Public Employees Relations Board (“PERB”) recognized graduate teaching assistants as “employees”<sup>270</sup> under the state’s collective bargaining law in 1994.<sup>271</sup> Like California’s PERB, the Kansas board applies an intricate, multipart balancing test to “resolve the student/employee issue.”<sup>272</sup> This inquiry similarly looks to whether the

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*Rights’ Measure Becomes Law*, CHRON. OF HIGHER EDUC., Oct. 1, 2010, <http://chronicle.com/blogs/players/in-california-athletes-rights-measure-becomes-law/27359>. Connecticut passed a similar measure in June 2011, and more aggressive bills based on NCPA model legislation are expected in 2012 in Indiana and California. Pat Eaton-Robb, *Laws Force Disclosure of Scholarships’ Fine Print*, ASSOCIATED PRESS, June 25, 2011; NCPA, *California and Indiana Lawmakers to Push Athletes Bill of Rights* (Jan. 9, 2012), [http://www.ncpanow.org/releases\\_advisories?id=0020](http://www.ncpanow.org/releases_advisories?id=0020).

270. Under Kansas law, a “public employee” is “any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts . . . elected and management officials, and confidential employees.” KAN. STAT. ANN. § 75-4322(a) (West 2012).

271. *Kansas Ass’n of Pub. Emps. v. Kansas Bd. of Regents*, No. 75-UD-1-1992, 1994 WL 16779818, at \*24 (PERB Oct. 17, 1994).

272. *Id.* at \*14. (“The first part of the process involves a balancing test to weigh the significance of the educational objectives against the importance of the services rendered. On the ‘educational objectives’ side of the scale, the Board should consider: (1) the subjective motivation of the [petitioners] for participating in the [activity]; (2) the employer’s treatment of [the petitioners] as students as evidenced by faculty and administrative statements and conduct; and (3) indicia of student status. On the ‘services’ side of the scale, PERB should consider the following: (1) indicia of employee status; (2) the employer’s treatment of [the petitioners] as employees as shown by faculty and administrative statements and conduct; and (3) agency principles of master-servant. If this balancing test shows [the petitioners] educational objectives to be subordinate to the services they perform, PERB should proceed to the second

students' "educational objectives are subordinate to the services they perform."<sup>273</sup> If so, the student must also establish that "granting collective bargaining rights . . . would further the purposes of PEERA."<sup>274</sup> In the alternative, the Kansas PERB suggested the board might also apply a "*guiding purpose*" test with similar result.<sup>275</sup> Under this test:

The focus is on factors which indicate the program is operating to benefit the student, (i.e. is educational), as opposed to such benefit being more for the employer and only incidental to the student, (i.e. business based). Where the '*guiding purpose*' is educational (i.e. primarily oriented toward providing education), the students are not '*public employees*' within the PEERA definition. However, where the '*guiding purpose*' is typically business-based, (i.e. where the educational purposes are subordinate to routine business considerations), the students are employees.<sup>276</sup>

For reasons outlined in the discussion of California's statute, college athletes—like Kansas's graduate teaching assistants—have a strong claim to employee status under either test.

In Illinois, the Educational Labor Relations Board ("IELRB") has also recognized student-workers as "employees," despite the statutory language explicitly excluding "student[s]" from those eligible to unionize.<sup>277</sup> After agitation by teaching assistants, research assistants, and graduate assistants at the University of Illinois in 1998, the board found that relying on the plain meaning of the word "student" (one who is enrolled for study at a school) would conflict with the purpose of the collective bargaining law and produce "absurd results."<sup>278</sup> Through a creative

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step of the process: an assessment of whether granting collective bargaining rights . . . would further the purposes of the Act.").

273. *Id.*

274. *Id.* at \*20.

275. *Id.* at \*23 (emphasis in original).

276. *Id.*

277. See 115 ILL. COMP. STAT. 5/2(b) (West 2011) ("Educational employee' or 'employee' means any individual, excluding supervisors, managerial, confidential, short term employees, student, and part-time academic employees of community colleges employed full or part time by an educational employer . . .").

278. Graduate Emps. Org. v. Illinois Educ. Labor Relations Bd., 733 N.E.2d 759, 764 (Ill. 2000).

reading of the act, the board announced that the “student exemption” was meant only as a bar against the unionization of students qua students, and that unionization of students qua workers was permissible.<sup>279</sup> The central inquiry, IELRB explained, is whether the students’ labor is “significantly connected to their status as students.”<sup>280</sup> This “significant connection” test,<sup>281</sup> which the Illinois courts have endorsed, focuses on the degree to which the work performed is related to students’ academic duties: “[t]o say . . . that [a particular form of work] is significantly connected to the student status of an individual [merely] because it is a form of financial aid is . . . clearly erroneous.”<sup>282</sup> Thus, the fact that college athletes must be enrolled students to compete, or that college athletes’ scholarships enable their academic pursuits, is insufficient to establish a “significant connection” under Illinois law. As the IELRB later elaborated, students “who work within their discipline are presumptively within the student exclusion;” students “who do not work within their discipline are presumptively not within the student exclusion.”<sup>283</sup> Illinois’s test bears certain similarities to Michigan’s emphasis on the “academic relevance” of the contested services, and for the similar reasons to those outlined above, it appears highly favorable to college athletes.

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279. *Id.*

280. *Id.*

281. The Illinois courts also considered and rejected using a “primary purpose” test, explaining that such a standard would improperly exclude too few students from collective bargaining. Under Illinois’ version of the “primary purpose” test, graduate assistants would be considered “students” (and thus be ineligible for collective bargaining) where “the primary purpose of [their work], as established through objective evidence, was in furtherance of their educations.” The “significant connection” test thus contemplates a somewhat broader definition of “student,” encompassing those whose work duties are not primarily (though still significantly) in furtherance of their education. *Id.* at 763.

282. *Id.* at 765.

283. Bd. of Trs. and Graduate Emps. Org., 4-5, Case No. 96-RC-0013-S, Mar. 27, 2001. [On file with author]. The presumption that an individual working in their discipline is an excluded “student” (i.e., not an “employee”) can be rebutted with “clear and convincing evidence that the primary duties performed . . . are peripheral to, and thus unrelated to, teaching or research duties.” *Id.* at 4.

2. *Voluntary Recognition States (New Jersey, New York, Rhode Island)*. Public university officials in several states opted not to contest whether students seeking to organize were “public employees” under state law; these universities may have longer histories of student unions on campus, but have fewer precedents to guide determinations on college athletes. In New Jersey, for example, Rutgers University voluntarily recognized its graduate assistants<sup>284</sup> soon after the passage of the New Jersey Employer-Employee Relations Act in 1968.<sup>285</sup> Likewise in New York, when SUNY graduate assistants and teaching assistants petitioned for recognition under the Public Employees’ Fair Employment Act,<sup>286</sup> “the State concede[d] that an employment relationship exist[ed] between the GAs and TAs and the State.”<sup>287</sup> And when graduate students in Rhode Island first

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284. See Rutgers Univ., P.E.R.C. No. 76-13, 7, 1976 NJ PERC LEXIS 44 (Jan. 23, 1976).

285. N.J. STAT. ANN. § 34:13A-3(d) (West 2010) (“The term ‘employee’ shall include. . . any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer . . . except elected officials, members of boards and commissions, managerial executives and confidential employees.”).

The New Jersey Public Employment Relations Commission (NJ PERC) had occasion to address the student-employee issue later, however, in a 1981 opinion involving students hired as “Residence Counselors.” The commission explained that “the statutory definition of employee is very broad and its exceptions are very specific. . . . [T]he term ‘student’ and ‘employee’ are not mutually exclusive.” Despite finding the students to be “employees,” however, NJ PERC concluded that “affording [the students] the right to collective negotiations would [not] effectuate the purposes of the Act.” This mixed approach leaves the counselors in the peculiar position of lacking a recognized bargaining unit, but enjoying the ability to “avail themselves of the unfair practice jurisdiction of the Commission when their rights are violated.” Rutgers Univ., P.E.R.C. No. 82-55, 5, 7, 10 n.10, 1981 NJ PERC Lexis 325 (Dec. 17, 1981).

286. See N.Y. CIV. SERV. LAW § 201(7)(a) (McKinney 2011) (defines “public employee” as “any person holding a position by appointment or employment in the service of a public employer . . .”).

287. Commc’ns Workers of Am. 24 PERB ¶ 3035 (1991). The State argued, however, that graduate students should be prohibited from collective bargaining because they lacked a “regular and substantial” employment relationship with the State and because “the Legislature intended to exclude [this sort of] employment relationship from coverage” under New York’s Public Employees’ Fair Employment Act. The board rejected both arguments. See also Long Island Coll. Hosp., 33 N.Y.S.L.R.B. 161, 172-73 (1970) (recognizing medical house staff as employees).

organized in 2002, students reached a “consent agreement” with University of Rhode Island (“URI”) officials prior to holding a union election.<sup>288</sup> While applicable precedent is limited, each of these states’ expansive definitions of “employee” under state law, coupled with state labor boards’ past recognition of student-workers, may favor college athletes.<sup>289</sup>

3. *States with Undergraduate Unions (Oregon, Massachusetts).* Graduate students in Oregon and Massachusetts also enjoy “employee” status, but—significantly for college athletes—labor boards in these states (like Michigan) have also explicitly recognized *undergraduate* students as employees of their universities. When the Oregon Public Employee Relations Board (“PERB”) first formed in 1970, its first opinion was a “direct[ion] that [a union representation] election be held for part-time student employees” working as dining hall staff at the University of Oregon.<sup>290</sup> The university signed a contract with the union of 250 undergraduates eighteen months later, which was “believed to be [] the first negotiated by an all-student group within AFSCME.”<sup>291</sup> Five years later, in a case establishing the “employee” status of most graduate

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288. Univ. of Rhode Island, R.I.S.L.R.B., Case No. EE-3649 (Apr. 22, 2002). See R.I. GEN. LAWS § 28-7-3(3) (defining “employees”); see also *Agreement Between Rhode Island Board of Governors for Higher Education and Graduate Assistants United / American Association of University Professors (GAU / AAUP) 2007–2010*, 5 (2007–2010), [http://www.uri.edu/union/gau/content\\_uploads/contract.pdf](http://www.uri.edu/union/gau/content_uploads/contract.pdf) (“The Board recognizes the GAU, URI/AAUP as the sole and exclusive representative of all Graduate Assistants and Graduate Research Assistants employed at the University of Rhode Island, as certified by the Rhode Island State Labor Relations Board on April 22, 2002.”).

289. The graduate student union at the University of Iowa was also formed by stipulation of the parties, but because of Iowa’s unique statutory approach to defining “employee,” we address it separately below. University officials at the University of Wisconsin similarly “voluntarily” recognized the country’s first graduate student union in 1969, though only after a bitter, month-long strike. See Arlen Christenson, *Collective Bargaining in a University: The University of Wisconsin and the Teaching Assistants Association*, 1971 WIS. L. REV. 210, 210-11 (1971).

290. BNA, *Oregon PERB Issues Initial Decision, Directing AFSCME Election for University Student Food Service Workers*, GOV’T EMP. REL. REP., GERR No. 345, B-2 (Apr. 20, 1970).

291. BNA, *University of Oregon, AFSCME Sign Pact For Part-Time Student Workers*, GOV’T EMP. REL. REP., GERR No. 415, B-26 (Aug. 23, 1971).

teaching fellows, the Employee Relations Board (the successor to PERB) concluded that the central factor in distinguishing students from employees was whether the “activities are [or are not] required for [the graduate students’] advanced degree[s].”<sup>292</sup> Athletic labor of undergraduate college athletes is, of course, no more essential to the completion of an academic degree than the services provided by undergraduate dining hall workers.

The single most promising case for college athletes, however, may be a unanimous 2002 opinion issued by the Massachusetts Labor Relations Commission (“MLC”) allowing 350 undergraduate “resident assistants” (“RAs”) to unionize at the University of Massachusetts-Amherst.<sup>293</sup> While college athletes and RAs provide very different types of services to their university, the two groups’ employment relationships share significant similarities. Only enrolled undergraduate students are permitted to serve as Ras;<sup>294</sup> they undergo a mandatory training program before the start

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292. Univ. of Oregon Graduate Teaching Fellows Fed’n, 2 P.E.C.B.R. 1039 (Feb. 1977).

293. Bd. of Tr. of the Univ. of Massachusetts, Case No. SCR-01-2246, at 39 (Jan. 18, 2002); *see also* Bd. of Trs., 20 MLC 1454, 1462-64 (1994) (recognizing graduate teaching and research assistants as “public employees” under “broad and encompassing” definition provided in M.G.L. c.150E); City of Quincy Library Dep’t, 3 MLC 1517, 1518 (1977) (“full-time students who perform part-time work for an employer separate and apart from their educational responsibilities are not precluded from exercising collective bargaining rights because of their student status or because their turnover rate may be higher than that of other employees.”); MASSACHUSETTS LABOR RELATIONS COMMISSION, A GUIDE TO THE MASSACHUSETTS PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAW IV-8, IV-9 (2002) (“The Commission has broadly interpreted the terms ‘employee’ or ‘public employee’ to encompass all individuals employed by a public employer, except those specifically excluded. The Commission has defined “employee” to include: regularly employed part-time employees, part-time reserve police officers, per diem substitute teachers, call fire fighters, visiting lecturers, full-time students [citing Quincy Library Department], graduate teaching and research assistants, and undergraduate resident assistants . . . .”) (citations omitted).

294. *Compare* Bd. of Tr. of Univ. of Massachusetts, Case No. SCR-01-2246, at 8 (Jan. 18, 2002), *with* NCAA, 2009-10 NCAA DIVISION I MANUAL 127 (2009) (providing the academic eligibility requirements), *available at* <http://www.ncaapublications.com/productdownloads/D110.pdf>.

of the fall semester;<sup>295</sup> and RAs must “maintain at least a 2.2 cumulative GPA” to remain eligible for their positions.<sup>296</sup> On paper, RAs are expected to work approximately twenty hours per week,<sup>297</sup> though in reality the demands of the position may consume far more of the students’ time.<sup>298</sup> RAs serve pursuant to one-year agreements, which the university generally renews “[b]arring . . . poor performance” or failure by the student to “maintain[] the minimum GPA.”<sup>299</sup> And in exchange for these services, RAs’ chief form of compensation is “a waiver of the charge for [dormitory housing], valued at \$3,286;” the students also receive a waiver of certain computer fees (\$36), a waiver of a gym membership fee (\$100), and a “cash stipend” of \$1709.86.<sup>300</sup> In each of these regards, undergraduate RAs strongly resemble college athletes.

The legal rationale for recognizing the RA union—and the university’s arguments that the MLC rejected—is highly applicable to undergraduate college athletes, as well. The commission acknowledged that undergraduate RAs undoubtedly “acquire some important life skills as a result of holding this position,” yet expressed no reservations about recognizing RAs’ “fee waivers” as a form of compensation for services rendered.<sup>301</sup> University officials

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295. Compare *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 10, with McCormick & McCormick, *Myth*, *supra* note 22, at 102-03 (describing pre-season training requirements).

296. Compare *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, with NCAA, *supra* note 294, at 127-28 (providing the requirements for good academic standing).

297. Compare *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 11, with NCAA, *supra* note 294, at 216 (establishing a “20 hour” rule).

298. Compare *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 11, with McCormick & McCormick, *Myth*, *supra* note 22, at 98-101 n.127 (detailing actual time commitments of Division I athletic competition).

299. *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 15. Under new NCAA guidelines, universities may provide four-year athletic scholarships, though these may be revoked for poor academic performance or other violations of university rules. Most college athletes, however, like RAs, receive one-year renewable agreements that can also be rescinded for poor performance. See Bennett, *supra* note 159.

300. *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 11. *But cf. supra* Part I.C. (describing forms of compensation for college athletes).

301. *Bd. of Tr. of Univ. of Massachusetts*, *supra* note 294, at 25, 28.

argued “that, because RAs’ hiring and continued employment is dependent upon their student attributes, i.e. maintaining a minimum GPA and otherwise acting as exemplary student role models, it would be impossible to separate its student relationship with them from its employment relationship.”<sup>302</sup> But the MLC ultimately dismissed this argument, emphasizing that “the actual work performed” was “not primarily educational and therefore not as inextricably tied in with their student status as the University contends.”<sup>303</sup> “The fact that one must be a student to obtain and maintain employment does not vitiate the student’s legitimate interest in his or her terms and conditions of employment,” the commission concluded, “particularly where, as here, the vast majority of those terms and conditions are totally divorced from the student’s academic endeavors.”<sup>304</sup>

4. *States Favoring Graduate Assistants, But Disfavoring College Athletes (Minnesota, Washington)*. Not all states recognizing graduate assistants as “employees” will be as favorable to undergraduate attempts to unionize, however. Minnesota’s Public Employment Labor Relations Act, for example, explicitly allows “all graduate assistants who are enrolled in the graduate school and who hold the rank of research assistant [or] teaching assistant” to collectively bargain with the university.<sup>305</sup> Included in the list of categorical exclusions, however, are “full-time undergraduate students employed by the school which they attend under a work-study program or in connection with the receipt of financial aid, irrespective of number of hours of service per week.”<sup>306</sup> This provision would appear to bar any attempt by athletes to unionize at the University of Minnesota.

College athletes would face similar challenges in Washington. There, in response to a contentious and disruptive organizing campaign,<sup>307</sup> the Washington

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302. *Id.* at 27.

303. *Id.* at 27-28.

304. *Id.* at 32.

305. MINN. STAT. § 179A.11(1)(10) (2006).

306. § 179A.03(14)(i).

307. See Gordon Lafer, *Graduate Student Unions: Organizing in a Changed Academic Economy*, 28 LAB. STUD. J. 25, 36-37 (2003); Jane Hadley, *TA strike*

Legislature passed a law conferring bargaining rights on certain “employees enrolled in an academic program” at the University of Washington.<sup>308</sup> While a colorable argument could be made that the graduate assistants were already “employees” entitled to collectively bargain before the legislation,<sup>309</sup> subsequent decisions by the Washington Public Employment Relations Commission (“PERC”) have rejected this argument. On several occasions, PERC has since explained that the 2002 bill “extend[ed] statutory collective bargaining rights (for the first time) to student/employees . . . .”<sup>310</sup> This understanding of the pre-existing status quo is critical for college athletes, since it means that only students whose “duties and responsibilities are substantially equivalent to those employees in” specified academic labor positions may join statutorily authorized bargaining units.<sup>311</sup> Washington’s scheme thus establishes a unique standard: whereas in many states college athletes may be able to unionize precisely because their labor is divorced from academics, in Washington, this fact likely precludes their union eligibility.

5. *Other Approaches (Iowa, Pennsylvania, Montana).*  
Iowa’s Public Employment Relations Act of 1974 (“PERA”)

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*ending with quarter at UW: But union says walkout could resume in fall*, SEATTLE POST-INTELLIGENCER, June 14, 2001, at B1.

308. WASH. REV. CODE § 41.56.203 (2006); *see also* WASH. REV. CODE ANN. § 41.56.205(1) (West 2008) (later extending similar rights Washington State University students). On the effective date of the new law, graduate students at the University of Washington successfully petitioned for a union election. *See* Graduate Student Emp. Action Coal., *UAW v. Univ. of Washington*, Case No. 16288-E-02-2699 (Dec. 16, 2003), *available at* [http://www.perc.wa.gov/databases/rep\\_uc/08315.htm](http://www.perc.wa.gov/databases/rep_uc/08315.htm) [hereinafter PERC Decision 8315].

309. The union, in fact, made this argument before passage of the 2002 legislation, but University of Washington officials and the state’s attorney general strongly disputed their interpretation. *See* Ruth Schubert, *Legal opinion increases chances of strike at UW*, SEATTLE POST-INTELLIGENCER (May 16, 2001, 10:00 PM), <http://www.seattlepi.com/local/article/Legal-opinion-increases-chances-of-strike-at-UW-1054940.php>.

310. PERC Decision 8315, *supra* note 308, at 6. *See also* UAW Local 4121 v. Univ. of Washington, Case No. 22639-C-09-1411 (Aug. 22, 2011), [http://www.perc.wa.gov/databases/rep\\_uc/11139.htm](http://www.perc.wa.gov/databases/rep_uc/11139.htm) [hereinafter PERC Decision 11139] (“In 2002, the Washington State Legislature *extended* statutory collective bargaining rights to student/employees working in specific classifications at the University of Washington.”) (emphasis added).

311. *See* PERC Decision 11139, *supra* note 310, at 3 (quoting § 41.56.203).

similarly permits collective bargaining by graduate students who are “engaged in academically related employment as a teaching, research, or service assistant.”<sup>312</sup> In contrast to Washington, however, Iowa’s statute also contemplates collective bargaining by (at least some) other student-workers.<sup>313</sup> Under PERA, among those excluded from the definition of “public employee” are:

Students working as part-time public employees twenty hours per week or less, except graduate or other postgraduate students in preparation for a profession who are engaged in academically related employment as a teaching, research, or service assistant.<sup>314</sup>

The exclusion thus contemplates that “students” who are not “graduate students” (presumably undergraduates) may be public employees, but not those who work “part-time . . . twenty hours per week or less.” As discussed in Part I, the college athletes at the University of Iowa and Iowa State University almost certainly satisfy this time-requirement threshold. But this, of course, still does not resolve the meaning of “public employee” under Iowa law. Because PERA expressly allows graduate students to unionize, Iowa’s Public Employee Relations Board (“PERB”) and courts have had limited opportunity to elaborate on the question in the university setting.<sup>315</sup> In other contexts,

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312. IOWA CODE § 20.4 (2011).

313. *Id.* (exempting some graduate students—those not engaged in academically related positions—from the definition of public employees that are granted collective bargaining rights).

314. *Id.*

315. The Campaign to Organize Graduate Students (COGS) first organized at the University of Iowa in the mid-1990s, and PERB approved a “Stipulation of Bargaining Unit” agreed to by both the students and the university. Excluded from the union-eligible group were those whose:

appointments are (a) primarily a means of financial aid which do not require the individuals to provide services to the University, or (b) which are primarily intended as learning experiences which contribute to the students’ progress toward their graduate or professional program of study, or (c) for which the students receive academic credit.

Univ. of Iowa Bd. of Regents and Campaign to Organize Graduate Students, Case No. 4959, Bargaining Unit Determination, 1, 1 (Jan. 31, 1994); Univ. of Iowa and United Elec., Radio & Machine Workers of Am., Local 896 (COGS), Case No. 5463, Order of Certification, 1,2 (May 6, 1996).

however, the Supreme Court of Iowa has held that PERA “is written in broad language so as to allow a large number of public employees to be eligible for coverage under the Act . . . We will read the exclusions under section 20.4 narrowly to promote the Act’s broad application.”<sup>316</sup>

Lastly, there are two states, Pennsylvania and Montana, where, although it is difficult to discern a precise “test” applied in dealing with student-workers, state labor boards appear to emphasize the “literal” or “plain” meanings of the term (i.e., some version of the common law right-of-control test). In first recognizing graduate assistants at Temple University as “employees” in 2000, the Pennsylvania Labor Relations Board (“PLRB”) announced that it “subscribe[d] to the analysis set forth in the NLRB’s decision in *Boston Medical Center*.”<sup>317</sup> As discussed in Part II.B, the NLRB in that case emphasized the “broad . . . [literal]” definition of “employee,” and explained that the term in § 2(3) of the Act should be understood as “an outgrowth of the common law concept of the ‘servant.’”<sup>318</sup> PERB subsequently reemphasized:

There is no requirement [here] that a graduate student perform graduate assistant work in order to obtain a graduate degree. The graduate assistants receive no academic credit for their performance of graduate assistant work . . . [G]raduate assistants receive compensation from the Employer in the form of stipends/pay and tuition and book allowances and are required to perform services for the Employer in exchange for that compensation, evidencing an employer-employee relationship.<sup>319</sup>

These basic dynamics hold—indeed, are even plainer—in the case of college athletes.<sup>320</sup>

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316. *Iowa Ass’n of Sch. Bds v. Iowa P.E.R.B.*, 400 N.W. 2d 571 (Iowa 1987) (citation omitted).

317. *Emps. of Temple Univ.*, No. P.E.R.A.-R-99-58-E, 2000 WL 35899093 (Pa. Labor Relations Bd. Oct. 17, 2000).

318. *See Boston Med. Ctr.*, 330 N.L.R.B. 152, 159 (1999).

319. *Emps. of Temple Univ.*, No. P.E.R.A.-R-99-58-E, 2001 WL 36365345 (Pa. Labor Relations Bd. Aug. 21, 2001) (providing Final Order of Certification).

320. PERB also approvingly quoted from *Boston Medical Center* in responding to university officials’ arguments that traditional labor law was ill-suited for student-workers. “If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions

Montana became the latest state to recognize graduate assistants as “employees” under state law in November 2011, and similarly announced an expansive interpretation of the word “employee.”<sup>321</sup> Like Pennsylvania’s PERB, Montana’s Board of Personnel Appeals (“BPA”) found that “the plain meaning of the statute,” which defines “public employee” as “a person employed by a public employer in any capacity,”<sup>322</sup> includes graduate assistants.<sup>323</sup> “In every common meaning of the term,” the hearing officer’s opinion explained, graduate assistants “are employees of the university when they are performing their GA duties.”<sup>324</sup>

A unique aspect of the Montana case relevant to college athletes is the university’s use of preappointment “Agreement Forms” signed by all graduate assistants. Just as NCAA officials deliberately revised language in grant-in-aid agreements to downplay their similarity to employment contracts,<sup>325</sup> Montana State University officials required graduate assistants to sign a statement reading:

This appointment is NOT A CONTRACT OF EMPLOYMENT. For this appointment to remain in force, the Graduate Assistant must be in good standing (GPA>3.0) . . . [T]he University reserves the

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capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.” *Id.*

321. Graduate Emp. Org., MEA-MFT v. Montana State Univ., Case No. 1020-2011 (Nov. 2012), *available at* [http://dli.mt.gov/hearings/decisions/2011/cbdec1020\\_2011.pdf](http://dli.mt.gov/hearings/decisions/2011/cbdec1020_2011.pdf) [hereinafter Unit Determination No. 4-2011].

322. MONT. CODE ANN. § 39-31-103(9) (2007).

323. *See* Unit Determination No. 4-2011, *supra* note 321, at 5, 22. Montana’s Board of Personnel Appeals adopted these findings in relevant part several months later.

324. *Id.* at 4.

325. Former NCAA director Walter Byers’ memoir recounts how, after the early worker’s compensations cases, the NCAA worried

[t]hese oral and written commitments were perilously close to employment contracts. [We] suggested [to schools] such language be avoided and the following text be used. ‘This award is made in accordance with the provisions of the Constitution of the [NCAA] pertaining to the *principles of amateurism* [emphasis added], sound academic standards, and financial aid to student athletes . . . Your acceptance of the award means that you agree with these principles and are bound by them.’

BYERS, *supra* note 59, at 75.

right to terminate this appointment at any time upon the occurrence of the following . . . c) unsatisfactory academic performance by the assistant; d) failure of the assistant to comply with all University conduct and/or academic regulations; e) changes in University programs and/or plans which cause assistant services under this agreement to be no longer needed.<sup>326</sup>

The BPA found that the portion of this clause “defining [students] out of employment and thereby taking away [their collective bargaining] rights” to be “manifestly an adhesive contract provision.”<sup>327</sup> The provision was thus deemed void under state law.<sup>328</sup>

### C. *Remaining States*

Because of the absence of past organizing campaigns by undergraduate and graduate student-employees, relevant precedent in the remaining thirty-four states is limited. Most promising may be six states (Alaska, Connecticut, Delaware, Maine, New Hampshire, South Dakota, and Vermont) where flagship public universities presently recognize faculty unions, and state laws contain no exemptions limiting the rights of student-employees.<sup>329</sup> In at least a dozen states, collective bargaining with college athletes may be permissible, but neither faculty nor

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326. See Unit Determination No. 4-2011, *supra* note 321, at 3-4.

327. *Id.* at 18.

328. *Id.*

329. Nat'l Ctr. for the Study of Collective Bargaining in Higher Educ. and the Professions, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education* (2011 ed.). See ALASKA STAT. § 23.40.250(6) (2006); CONN. GEN. STAT. ANN. § 5-270(b); 14 DEL. CODE ANN. tit. 14, § 4002(h), (p) (2007); ME. REV. STAT. ANN. tit 26, § 1022(10)-(11) (2010); N.H. REV. STAT. ANN. § 273-A:1(IX)-(X) (2001); VT. STAT. ANN. tit. 3, § 902(4)-(5) (2003). South Dakota's labor law, like Iowa's, excludes students “working as part-time employees twenty hours per week or less.” S.D. CODIFIED LAWS §3-18-1(3); see § B.5, *supra*, at 58-59; cf. IOWA CODE § 20.4 (2011) (exempting certain students). As explained above, this limitation should not pose any hurdle for college athletes. See § B.5, *supra*, at 58-59. Faculty at the University of Hawai'i also have a recognized union, but state law specifically excludes “students” from those eligible for collective bargaining. See HAW. REV. STAT. § 89-6(g) (2007) (“The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter: (14) Inmate, kokua, patient, ward, or student of a state institution; (15) Student help.”).

graduate student unions have established footholds at public schools.<sup>330</sup>

At the other end of the spectrum, thirteen states do not extend collective bargaining rights to *any* public employees.<sup>331</sup> Several others allow only a narrow class of public safety employees to unionize.<sup>332</sup> In these jurisdictions, even the most traditional of employees at public universities lack collective bargaining rights. College athletes, therefore, would be legally prohibited from unionizing absent some change in state law.

#### IV. IMPLICATIONS

##### A. *A Promising Game-Plan for Student-Athletes*

However clear existing state labor statutes and board precedent may be, it would undeniably take some degree of courage for a state labor board to recognize college athletes as “employees.” The systemic uncertainty that would necessarily attach to such a ruling, and the reaction it might provoke from the NCAA, alumni, and state legislatures would loom heavily over such deliberations. Yet arguments against recognizing a college players’ union based on such concerns run contrary to the fundamental objectives of collective bargaining law: anticipated retaliatory acts by a private third-party have little place in legal determinations of who is, and who is not, entitled to statutory protections. And courageous states have long served as laboratories for “novel social and economic

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330. Those states include Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, West Virginia, and Wyoming.

331. See *The Haves and the Have-Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Rights*, AMERICAN RIGHTS AT WORK, 11, <http://www.americanrightsatwork.org>, (citing Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and Utah). Wisconsin also recently enacted legislation that technically still permits public-sector unions, but sharply limits the scope of collective bargaining. See Monica Davey, *Wisconsin Senate Limits Bargaining by Public Workers*, N.Y. TIMES, Mar. 9, 2011, at A1.

332. JON O. SHIMABUKURO, CONG. RESEARCH SERV., R40738, THE PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT, 8-10 (providing table compiling all state collective bargaining laws).

experiments” in American history.<sup>333</sup> State labor law, with its ability to incubate new ideas and its historic sympathy for student-employees, represents the most promising vehicle for such an experiment to occur in college sports.

Indeed, as the experience of academic student-employees has demonstrated, exemption from the National Labor Relations Act is likely to be a boon (not an obstacle) for college athletes at public universities. Whereas teaching assistants and research assistants at private universities continue to struggle for recognition under the NLRA,<sup>334</sup> many of their counterparts at public universities have enjoyed mature collective bargaining relationships for several decades. State labor law has provided a foothold for these student-workers, allowing them to make organizing headway decades before the NLRB even considered recognizing them as “employees” under federal labor law.<sup>335</sup>

Much of this success has come as a result of state labor boards’ heightened sensitivity to the new economic realities of the contemporary university, a point that will be central for any claims brought by college athletes. In the graduate assistant context, the move to unionize emerged, at least

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333. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

334. See Josh Eidelson, *The Fall NLRB Season*, AMERICAN PROSPECT, Sept. 6, 2011, <http://prospect.org/article/fall-nlr-season>; *Labor Activists Fear NLRB Won't Restore Graduate Employees' Union Rights*, CHRON. OF HIGHER EDUC., (Dec. 7, 2011, 12:26 PM), <http://chronicle.com/blogs/ticker/labor-activists-fear-nlr-wont-restore-graduate-employees-union-rights/38910>.

335. Indeed, success at the state level may prove a necessary precursor for subsequent recognition of college athletes before the NLRB. In previous cases dealing with student-employees, the success of unionization efforts at public universities has provided important support for expansions of the Act. In *Boston Medical Center*, for example, the Board noted that “collective bargaining by public sector house staff has been permitted and widely practiced,” and cited decisions from ten states recognizing the right of house staff to organize without any noticeable degradation of educational quality or service to patients. See *Boston Med. Ctr.*, 330 N.L.R.B. 152, 163 (1999); see also *Brown Univ.*, 342 N.L.R.B. 483, 493, 499 (2004) (Liebman, dissenting) (“Collective bargaining by graduate student employees is increasingly a fact of American university life. Graduate student unions have been recognized at campuses from coast to coast, from the State University of New York to the University of California . . . . To be sure, most [established collective bargaining relationships with students] involve public universities, but there is nothing fundamentally different between collective bargaining in public-sector and private-sector universities.”).

partially, “as a backlash against higher education trends . . . where universities have increasingly sought to contain costs and function more like businesses.”<sup>336</sup> These enormous “sea changes”—a phenomenon scholars have dubbed “the rise of the corporate university”—engendered a new reliance on undercompensated graduate students’ labor in the basic teaching and research functions of university life.<sup>337</sup> Just as these economic imperatives have remade the role of graduate students within the academy, the skyrocketing economic stakes of college athletics have transformed the meaning and importance of today’s college athletes’ labor. The rise of the “corporate university” has impacted not just classroom education, but all aspects of university life, including (perhaps *especially*) college athletics. To the extent that graduate assistants and college athletes can be considered “employees,” it is a result of the same evolving reorganization of basic economic structure of today’s universities. Time and again, state labor boards have taken notice of these dynamics, while the NLRB has not.<sup>338</sup>

#### B. *A Union of Amateurs?*

The relative merits of paying college athletes have been fiercely contested, both in the scholarly and popular presses. The potential unionization of college athletes is, of course, closely tied to this debate: a more equitable distribution of the tremendous revenues college athletics generates would likely be a primary focus of any collective bargaining. While it is difficult to speculate what a “market wage” for today’s college athletes might be, one method of estimating is to imagine an NCAA revenue-sharing agreement like those negotiated by unions in professional football and basketball. In both sports, player’s associations have salary agreements

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336. Neal H. Hutchins & Melissa B. Hutchins, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZAGA L. REV. 105, 126 (2003).

337. See STEAL THIS UNIVERSITY 4 (Benjamin Johnson et al. eds. 2003).

338. See *Brown Univ.*, 342 N.L.R.B. at 492 (“[But] [c]ontrary to the dissent, the ‘academic reality’ for graduate student assistants has not changed, in relevant respects, since our decisions over 25 years ago . . . . [T]he dissent theorizes how the changing financial and corporate structure of universities may have give rise to graduate student organizing.”).

that fix total athlete compensation as a percentage of league and club revenues.<sup>339</sup> Assuming revenue splits similar to their professional counterparts, the “market value” of the average Football Bowl Subdivision football player would be \$121,048 per year; the “market value” of the average basketball player at those schools would be \$265,027 per year.<sup>340</sup> At the biggest programs, an equitable revenue split would entitle college athletes to considerably larger sums.<sup>341</sup>

But the issue of unionization is distinct from the issue of professionalization, and to illustrate this, we offer a counterintuitive suggestion: legal recognition of college athletes as “employees” might actually serve to *promote* the values of amateurism. The conceptual difficulty in reconciling unionization with amateurism stems, in part, from dueling understandings of what it is that unions ultimately *do*.<sup>342</sup> On one view, unions’ *raison d’être* is to win monopoly wage gains for their members—a purpose that is oddly out of place in the context of “amateur” competition.<sup>343</sup> An alternative approach, however, recasts the debate in political, rather than strictly economic, terms.<sup>344</sup> Per this

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339. A ten-year collective bargaining agreement negotiated by the NFL Players’ Association in July 2011 establishes a salary cap giving players “55 percent of national media revenue, 45 percent of NFL Ventures revenues, and 40 percent of local club revenue.” *Highlights of the Agreement*, N.Y. TIMES (July 26, 2011, 12:46 AM), <http://fifthdown.blogs.nytimes.com/2011/07/26/highlights-of-the-agreement/>. The new agreement between the NBA and the NBPA, finalized in November 2011, creates a 50-50 revenue split, though players may receive between forty-nine percent and fifty-one percent of league revenues depending on the league’s success. Howard Beck, *N.B.A. Reaches Tentative Deal to Save Season*, N.Y. TIMES, Nov. 27, 2011, at SP4.

340. Huma & Staurowsky, *supra* note 101 (assuming a 45% revenue split for college football players and a 50% split for college basketball players).

341. *See id.* at 16. At the University of Texas, the largest (and most profitable) football program in the country, the average football player would receive \$513,922 per year; at Duke University, the country’s most profitable basketball program, the “fair market value” of basketball players is estimated at \$1,025,656 per year.

342. *See* RICHARD FREEMAN AND JAMES MEDOFF, WHAT DO UNIONS DO? 19 (1984) (describing dueling “monopoly face” and “collective voice / institutional response face” conceptions of labor unions).

343. *Id.*

344. *See* Bruce E. Kaufman, *The Early Institutionalists on Industrial Democracy and Union Democracy*, 21 J. LAB. RES. 189, 206 (2000).

“industrial democracy” understanding of collective bargaining, the role of the union “is to democratize the employment relationship by balancing power, providing employees a voice in the determination of the terms and conditions of employment, and insuring that due process of law is followed in [the workplace context].”<sup>345</sup>

These values of democratic participation, voice, and fair play are not just consistent with the traditional view of amateurism, they lie at its very core. The NCAA itself acknowledges as much, professing its commitment to the basic principles that college athletes should be “involve[d] . . . in matters that affect their lives,” and that athletic competition should remain “an avocation” for students.<sup>346</sup> Such “player-centered” values are at “the heart of the amateur ideal,” which traditionally contemplated athletic competition “organized by and for the recreation of the players themselves.”<sup>347</sup> Yet in practice, the NCAA’s governance structure almost entirely divests athletes of the ability to participate in decisions, both large and small,<sup>348</sup> that dictate their existence.<sup>349</sup> Unionization presents a vehicle for challenging this fundamental power imbalance.

What might an NCAA with an institutionalized college athlete “voice” at the bargaining table look like? Aside from strictly economic demands, players could seek reductions in workload, like limits on the number of games played during

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345. *Id.*

346. NCAA DIVISION I MANUAL, *supra* note 5, arts. 2.2.6, 2.9, at 4.

347. SACK & STAUROWSKY, *supra* note 41, at 14.

348. *See, e.g.*, NCAA Division I Proposal 2011-78 (Aug. 1, 2012), amending NCAA Bylaw 16.5.2(h) to allow college athletes to receive “bagel spreads [e.g., butter, peanut butter, jelly, cream cheese]” in conjunction with the bagels they are already permitted to receive from their schools.

349. The NCAA has established a “Student-Athlete Advisory Committee” consisting of students “selected by the Administration Cabinet from a pool of three nominees from each of the represented conferences.” The Student-Athlete Advisory Committee then designates a single student who is allowed to attend meetings of the Leadership Council and Legislative Council, each made up of 31 members, but only “in an advisory capacity.” The Leadership Council and Legislative Council report, in turn, to an 18-member Board of Directors, which again contains no students. NCAA DIVISION I MANUAL, *supra* note 5, art. 21.7.6 at 337; *id.* Figure 4-1, Division I Governance Structure, at 26.

the season (particularly during exam periods),<sup>350</sup> additional time off during the holidays,<sup>351</sup> or stricter enforcement of the NCAA's "20-hour limit" rule.<sup>352</sup> Collective bargaining agreements today generally contain "just cause" discipline provisions, and a union of college athletes could negotiate stronger procedural safeguards for students navigating the NCAA's byzantine justice system.<sup>353</sup> Or a union might press for the mandatory use of four-year scholarship offers, which would give students greater security in planning their academic futures.<sup>354</sup> Each of these reforms would further college athletes' interests as amateurs—helping insulate students from the pressures wrought by NCAA-driven commercialization—but are unlikely to be secured absent the sort of concerted pressure a union could bring to bear.

A recognized union of college athletes could also promote the health and safety interests of its members—again without offending NCAA regulations—a particularly salient issue given the recent attention on the effects of head injuries in competitive sports.<sup>355</sup> In the past decade,

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350. Cf. Steve Wieberg, *Division II schools cut back on length of seasons, practice time*, USA TODAY (Jan. 16, 2010, 7:32 PM), [http://www.usatoday.com/sports/college/2010-01-16-division-II-convention\\_vote\\_N.htm](http://www.usatoday.com/sports/college/2010-01-16-division-II-convention_vote_N.htm) (noting Division II schools' rejection of "the excesses of bigger-time Division I").

351. See McCormick & McCormick, *Myth*, *supra* note 22, at 107 ("The holiday season revolves around basketball. Indeed, for one player, Thanksgiving dinner is at the coach's house. . . . In all cases, players play in tournaments during the holidays, some at very long distances from home. Players have little time to spend with family during the holidays and are assured only two days off, Christmas Day and New Year's Day. During this holiday period, when they are not competing, players are required to lift weights in the morning and practice in the afternoon for two hours, followed by film sessions and meetings.").

352. See NCAA DIVISION I MANUAL, *supra* note 5, art. 17.1.6, at 216.

353. See, e.g., Joe Nocera, *N.C.A.A.'s 'Justice' System*, N.Y. TIMES, Jan. 7, 2012, at A21 (criticizing NCAA investigation procedures); see also Joe Nocera, *More N.C.A.A. 'Justice'*, N.Y. TIMES, Jan. 14, 2012, at A21.

354. See SACK & STAUROWSKY, *supra* note 41, at 83-84.

355. See, e.g., Thanh Tan, *State Tries to Reduce Head Injuries in a Rough Game*, N.Y. TIMES, Sept. 18, 2011, at A27A (discussing "new rules passed by the [Texas] Legislature to protect student athletes from concussion injuries"). In professional football, the NFL Player's Association has assumed an active role in ensuring that athletes suffering head injuries receive proper medical care. See, e.g., Adam Schefter, *Union visits Browns to probe staffs*, ESPN (Dec. 12, 2011), [http://espn.go.com/nfl/story/\\_/id/7345282/nflpa-sent-reps-investigate-cleveland-browns-colt-mccoy-handling](http://espn.go.com/nfl/story/_/id/7345282/nflpa-sent-reps-investigate-cleveland-browns-colt-mccoy-handling).

twenty-one student-athletes have suffered sports-related deaths, and many more have been seriously injured.<sup>356</sup> Under NCAA rules, universities have no obligation to provide medical coverage for such injuries. Individuals incurring catastrophic injuries during practices or games are sometimes left shouldering the long-term economic burden of their injuries on their own.<sup>357</sup> Unionization would provide players with a greater voice to advocate for health and safety reforms, including comprehensive medical coverage, and could allow students a participatory role in ensuring compliance with negotiated standards.

Of course, a union built around an “industrial democracy” model might still bargain for additional economic benefits, but a negotiated compensation scheme could still preserve some version of amateur values. For example, a player’s union could demand that a percentage of television revenues be set aside for college athletes payable upon graduation. Students struggling with their academic responsibilities would be permitted to withdraw from competition for a year, receive a partial early disbursement to replace their athletic scholarship, and apply that money toward tuition. The graduation award would constitute a form of payment, of course, but it would create strong incentives for college athletes to reprioritize academics, and would delay placing unrestricted cash in students’ hands.

Alternatively, a union might drop salary demands, but negotiate for the right of players to sign their own commercial endorsement deals, either individually or collectively (as teams).<sup>358</sup> College athletes are *already* subject to such agreements, but only coaches and universities presently receive the profits.<sup>359</sup> Just as olympic athletes are now permitted to sign individual endorsement

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356. Dennis Dodd, *Offseason workouts need changes before the next funeral*, CBSSPORTS.COM (Jan. 26, 2011), <http://www.cbssports.com/collegefootball/story/14604719/offseason-workouts-need-changes-before-the-next-funeral>.

357. See BRANCH, *supra* note 49, at 33-36 (discussing case of Kent Waldrep, permanently paralyzed during a TCU football game).

358. For other proposals, see, e.g., Huma & Staurowsky, *supra* note 101, at 26 (recommending “lift[ing] restrictions on all college athletes’ commercial opportunities by allowing the Olympic amateur model”); BRANCH, *supra* note 49, at 53-57 (same).

359. See *supra* notes 40-126 and accompanying text.

deals, college athletes could negotiate for the right to benefit from their celebrity without unduly tarnishing their status as amateurs.<sup>360</sup>

Finally, collective bargaining would endow universities with an ancillary benefit: potential insulation from antitrust litigation. In recent years, several lawsuits have claimed that NCAA practices—including the rule capping grants-in-aid at the cost of attendance—constitute unlawful restraints on commercial activity.<sup>361</sup> If such litigation proves successful—a prospect made more plausible now that schools are considering paying athletes limited cash stipends—universities could be legally obligated to compete with one another on an open market to lure promising talent.<sup>362</sup> By agreeing to such stipend restrictions in the context of collective bargaining, however, universities would be shielded under the non-statutory labor exemption from antitrust laws.<sup>363</sup> Such an exemption could allow universities to maintain relatively modest stipend levels and thereby preserve the non-professional character of college sports. Ironically, recognizing college athletes as “employees” may be the best (or only) way for universities to avoid paying the exorbitant market salaries the NCAA fears most.

### C. Conclusion: Taking a Step Back

In emphasizing the legal status of college athletes under presently existing law, this Article admittedly presents a

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360. *See id.* at 53-57.

361. In 2008, the NCAA reached a major settlement—agreeing to make \$10 million available to former athletes and over \$200 million in educational support to present and future athletes, without admitting liability—in an antitrust challenge to scholarship limits. Thomas A Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS OF SPORT 75, 77 (2011); Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 550-56 (2010) (discussing the difficulty courts have in evaluating the NCAA with respect to the Sherman AntiTrust Act).

362. *See supra* Part I.C.

363. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 235 (1996) (holding non-statutory labor exemption for NFL remains during bargaining impasse). This judicially-fashioned exception to the Sherman Act is what allows professional sports teams to negotiate “salary caps” with player’s unions.

narrow vision of how labor law traditionally operates in America. In most of the states discussed in Part III, students organized and agitated (and often went on strike) prior to having any formal protection from or recognition under state law. Labor law did not expand on its own accord, nor did labor boards “come to recognize” student-workers simply by way of analogy and disinterested reason. Rather, recognition of graduate students’ “employee” status came in response to the threat of disorderly labor relations with an organized and economically powerful group. The extent to which college athletes’ organizing efforts pose a credible economic threat—like the averted 1995 wildcat strike during March Madness, or the recent organizing successes of the National College Players Association—may ultimately dictate whether the law regards their activity as a cognizable category of labor.

Equally as important is the growing social recognition that big-time college athletes are, in some basic sense, a type of worker. As labor law scholars have argued, along the historical arc of American labor relations, “the courts, the legislature, and the law have often lagged behind the general zeitgeist.”<sup>364</sup> Pulitzer Prize-winning historian Taylor Branch’s monumental expose of the NCAA in *The Atlantic* in October 2011—which characterized the paternalism and exploitation inherent in the refusal to pay college athletes as a form of “colonialism”—is significant in this regard.<sup>365</sup> So, too, is the January 2012 proposal in the *New York Times*’s Sunday Magazine to “start paying college athletes,” a plan that included support for collegiate collective bargaining.<sup>366</sup> Even top coaches have jumped on the bandwagon. For example, South Carolina football coach Steve Spurrier, with the backing of six other SEC coaches, recently proposed that coaches be allowed to pay players from their own salaries: “We need to get more [money] to our players . . . . They bring in the money. They’re the

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364. Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALBANY L. REV. 559 (2012) (discussing conspiracy doctrines as lens for exploring historical intersection of legal and cultural conceptions of unionism).

365. See BRANCH, *supra* note 49, 12-15.

366. See Nocera, *Here’s How to Pay Up Now*, *supra* note 18, at 33.

performers.”<sup>367</sup> The *popular* recognition of big-time college athletes as employees is already well underway.

The basic problems at the root of this Article—what does it mean “to labor” and who do we recognize as “workers”?—are hardly confined to the sphere of labor law. In other disciplines—from history to sociology to cultural studies—“the broader theoretical and social understandings of what constitutes ‘work’ have also been thoroughly challenged and profoundly troubled” in recent decades.<sup>368</sup> These interventions have increasingly looked beyond waged productive labor (the centerpiece of past scholarship on “work”), emphasizing instead themes of dispossession and expropriation,<sup>369</sup> emotional labor,<sup>370</sup> “immaterial” labor,<sup>371</sup> or other categories of activity omitted from traditional “labor history’s gaze.”<sup>372</sup> Alongside this vast and probing literature,

367. Dave Zirin, *Saluting a Sick System: ‘Sports Illustrated’ Honors Duke Coach Mike Krzyzewski*, THE NATION (Dec. 5, 2011, 3:07 PM), <http://www.thenation.com/blog/164975/saluting-sick-system-sports-illustrated-honors-duke-coach-mike-krzyzewski>; Andy Staples, *Spurrier wants to give players money . . . from his own pocket*, SPORTS ILLUSTRATED (June 1, 2011, 5:53 PM), [http://sportsillustrated.cnn.com/2011/writers/andy\\_staples/06/01steve-spurrier-players-stipend/index.html](http://sportsillustrated.cnn.com/2011/writers/andy_staples/06/01steve-spurrier-players-stipend/index.html). Recently, Spurrier proposed paying players \$3500-\$4000 per year, more than the \$2000 stipend that the NCAA approved in 2011. See *Spurrier wants college players to earn as much as \$4,000 a year*, CBSSPORTS.COM (May 31, 2012, 12:48 PM), <http://www.cbssports.com/collegefootball/story/19216265/spurrier-wants-college-players-to-earn-as-much-as-4000-a-year>.

368. Zachary Schwartz-Weinstein, *The Limits of Work and the Subject of Labor History*, in RETHINKING U.S. LABOR HISTORY: ESSAYS ON THE WORKING-CLASS EXPERIENCE, 1756-2009, 289, 289 (Donna T. Haverty-Stacke & Daniel J. Walkowitz eds., 2010).

369. Michael Denning, *Wageless Life*, 66 NEW LEFT REV. 79, 81 (“You don’t need a job to be a proletarian: wageless life, not wage labour, is the starting point in understanding the free market.”).

370. ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 147-53 (1985).

371. MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE 108 (2004) (“[I]ndustrial labor [has] lost its hegemony and in its stead [has] emerged ‘immaterial labor,’ that is, labor that creates immaterial products, such as knowledge, information, communication, a relationship, or an emotional response.”).

372. Schwartz-Weinstein, *supra* note 368, at 289. Further, “Labor historians could and should continue to document the ‘laboring’ of particular activities and groups, the way particular activities have become recognizable as work and

American labor law's reliance on anachronistic formulas for delineating who constitutes an "employee" seems shallow, at best.

Yet despite these shortcomings, labor law has articulated theoretical frameworks (in certain jurisdictions, at least) that would likely encompass college athletes as "employees." In at least a dozen states, we believe college athletes would be among those individuals entitled to certain basic statutory protections, should they collectively undertake to alter the conditions under which they labor. Recognizing that college athletes who perform on the college gridiron or basketball court are both students *and* workers is not just descriptively honest, but in the final analysis, the fair thing to do. Those whose talents and efforts generate millions of dollars for others are entitled to basic collective rights with respect to the labor they provide.

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labor, and how the subjects who perform it have become knowable as 'workers,' both within and outside of wage labor." *Id.* at 290.