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

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College sports now generate billions of dollars every year, yet many of the athletes whose talent and labor sustains this enterprise live beneath the poverty line. In response to this basic inequality, several prominent commentators (and, significantly, college athletes themselves) have recently issued calls for fundamental changes. This Article offers a novel proposal for reform: under the labor law regimes of many states, college athletes are, in fact, “employees” entitled to collective bargaining rights. Prior scholarship has contemplated the status of college athletes under federal labor law. But this work has overlooked the basic fact that most college athletes go to public institutions exempt from coverage under the NLRA, has downplayed significant differences between state and federal labor law, and has disregarded the growing centrality of state law in American labor relations. By offering the first comprehensive state-level survey of relevant labor law, this Article provides a blueprint for college athletes to organize, and proposes that such efforts can be consistent with traditional notions of amateurism.

“March Madness” is the culmination of the National Collegiate Athletic Association (“NCAA”) Division I basketball season, a carefully stage-managed tournament showcasing of 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 dollars for the rights to broadcast the event for the next fourteen years, and advertisers pay networks $1.22 million for a thirty-second opportunity to sell their products during the final

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† Brad Wolverton, NCAA Agrees to $10.8-Billion Deal to Broadcast Its Men’s Basketball Tournament, CHRONICLE OF HIGHER EDUCATION, Apr. 22, 2010.
game. Each victory during the tournament earns schools and their co-conference members approximately $1.5 million from the NCAA, and coaches’ contracts regularly include six-figure performance bonuses rewarding tournament victories. At the center of it all, of 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.” But in mid-1990’s – in a story remains almost entirely untold nearly two decades later – 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 co-chair of the Knight Commission on College Athletics. Rumors of the potential disruptions panicked NCAA official and television executives, 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.” Strike plans were “pretty concrete,” according to University of Massachusetts forward Rigo Núñez, but interventions by coaches and other officials thwarted the effort’s momentum. “If we had Twitter, if we had Facebook, this would

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5 NCAA, 2009-2010 *DIVISION I MANUAL (CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS)*, Bylaw 2.9, The Principle of Amateurism [hereinafter “NCAA BYLAWS”].
7 Telephone Interview with William Friday, Co-Chair of the Knight Commission on College Athletics, in Berkeley, Cal. (Dec. 15, 2011).
8 Id.
9 Telephone Interview with Rigo Núñez, former University of Massachusetts college athlete, in Urbana, Il. (Dec. 20, 2011).
definitely have had an impact on the NCAA tournament,” Núñez suggests, but the boycott ultimately unraveled amidst players’ fears that striking players would be “blackballed” and branded as “troublemakers.”

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 weeks, demanding adequate medical supplies for players, nutritional food, and access to campus jobs. Two years later, the Louisiana State University football team dismissed a player after “he dared to ‘agitate for a union’ of the players.” 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. When university officials balked, the players voted 17-16 to boycott the game. The next fall, sophomores refused to attend pre-season training, striking “in order to settle ‘differences’ with

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. Much to the relief of NCAA officials, the team was unexpectedly ousted early in the tournament. See also Branch, The Shame of the College Sports (reporting same account). Mr. Núñez maintains 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.

11 Howard U. Students Strike, CHICAGO DEFENDER, Nov. 21, 1936, at 1 (noting eighty-five percent of student body participated in one-day solidarity walk-out); Howard-Lincoln Thanksgiving Football Classic Is Called Off: Board Fears New Strike by Players, CHICAGO DEFENDER, Nov. 28, 1936, at 1.


13 RONALD A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM (2010). 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 Oriard, supra note 12, at 247 (discussing Stanford and Arizona player demands); DAVE MEGGYSEY, 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.”)
the Pitt business department . . .”

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. 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.”

College athletics have changed dramatically in the intervening years, but now after seven decades, talk of strikes and player’s unions is returning. In January 2012, the New York Times published a detailed proposal to begin paying student-athletes, including a hypothetical “players’ union” to negotiate with the NCAA. The Chicago Sun-Times’ 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.” But perhaps most significantly, unlike in 1995, college athletes now have a member-driven advocacy group to advance their interests, notably with union backing. During a brief window in October 2011, rank-and-file organizers with the National College Players Association (“NCPA”) gathered signatures from over 300 college football and basketball players at five targeted schools (including the entire UCLA football and basketball rosters) demanding athletes receive a greater share of

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15 Francis Wallace, The Football Laboratory Explodes, 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.” Students rioted in protest of Sutherland’s departure and the University’s refusal to compensate athletes. See ‘High-Pressure’ Football Defended By Sutherland, WASH. POST, Apr. 12, 1939, at 19; Pitt Students Strike; Protest School Policy, CHICAGO DAILY TRIBUNE, Mar. 11, 1939, at 21.


18 Rick Telander, College football players need to go on strike, demand piece of lucrative pie, CHICAGO SUN-TIMES, Jan. 8, 2012.

revenues from the NCAA.\textsuperscript{20} A union of college athletes is no longer a theoretical exercise: cultural momentum and a nascent organizational framework already exist.\textsuperscript{21}

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 petitions, could players compel universities to negotiate over the terms and conditions of their service? Were school officials 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? As college athletes continue to agitate against a recalcitrant NCAA, the future of a multi-billion 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”) should recognize Division I scholarship athletes in revenue-generating sports as “employees” under federal labor law.\textsuperscript{22} These


\textsuperscript{21} 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). 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 Robert A. McCormick and Amy Christian McCormick, The Myth of the Student-Athlete: The College Athlete as Employee, 81 WASH. L. REV. 71, 75-80 (2006) (discussing rationale for treating football and men’s basketball differently than other college sports) [hereinafter “McCormick and McCormick, Myth”]. For reasons discussed in Part I.A., infra, we refer to such individuals as “college athletes” rather than the more common moniker “student-athlete.”

\textsuperscript{22} See Leroy D. Clark, New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue, 36 HOWARD L. REV. 259, 278 (1993) (“much 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 . . . .”); 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 (1996); Nathan McCoy and 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 (2002); 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 (2003); L.H. Nygren, Forcing the NCAA to Listen: Using Labor Law to Force the NCAA to Bargain Collectively with Student-Athletes,
scholars emphasize that, behind the veil of amateurism, student-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 supplemented with up to $2,000 in “stipend” payments, 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 National Labor Relations Act (“NLRA” or “Act”). But practically the entire body of this scholarship has ignored one critical point: the NLRA, which governs labor relations only in the private sector, simply does not govern the majority of student-athletes at public colleges and universities. To the extent that NCAA athletes at


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


25 29 U.S.C.A. § 152(2) (“The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof.”)

26 Many of the articles apparently fail to recognize this point altogether: Hurst and Pressly, supra note 24; Jenkins, supra note 24; Parasuraman, supra note 25; Brighton, supra note 24. Others observe in passing that state labor law governs public institutions, but devote their analyses exclusively on the NLRA: Clark, supra note 22; Ukeiley, supra note 22; Johnston, supra note
public institutions are “employees,” they are public employees, and state labor law dictates whether unionization is a feasible option.

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 student-athlete within this regime. In Part II, 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 re-conceptualizing college athletes as workers. Though some have argued that recognizing athletes as “employees” would fundamentally taint college sports, 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-five schools constituting the main six Division I Bowl Championship Series football conferences, forty-nine are public; of the fifty-five top-ranked basketball programs over the past five seasons, thirty-seven are public. For these student-athletes, federal labor law is all but irrelevant. Second, notwithstanding

22; McCoy and Knox, supra note 22; McCormick and McCormick, Myth, supra note 21. The sole exception is L.H. Nygren’s Forcing the NCAA to Listen, supra note 22, which considers college athletes’ “employee” status under both federal law and the labor law of one state, California.

27 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.

28 See Associated Press NCAA Men’s Basketball Rankings, 2006-2011, http://espn.go.com/mens-college-basketball/rankings (the sample is made up of the fifty-five basketball programs that have appeared in the AP’s year-end “Top 25” rankings for the past five seasons).
language in recent opinions suggesting college athletes may meet the Act’s statutory definition of “employees,” we remain deeply skeptical 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, with even its modest efforts to defend workers’ rights incurring virulent criticism. As numerous labor law scholars have argued, the Board has been largely ineffective in “keep[ing] the Act up to date” and “keeping pace with changes” to vindicate the interests of workers in a 21st-century economy. 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. Our unorthodox state-level approach 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 primarily by the NLRA) than in the public sector (governed primarily by state labor law).

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30 See Steven Greenhouse, Labor Board’s Exiting Leader Responds to Critics, N.Y. TIMES, Aug. 29, 2011 (noting criticisms that Board embodies “Marxism on the march” and that its members are “socialist goons”).
35 In 2010, the Department of Labor’s Bureau of Labor Statistics reported 7.6 million union members in the public sector (36.2% density) compared to 7.1 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
Part 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.\textsuperscript{36} Intercollegiate athletic competitions had blossomed over the past five decades,\textsuperscript{37} and Harper recognized that an acclaimed football squad could be a “[d]rawing card” for the fledgling institution.\textsuperscript{38} 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.”\textsuperscript{39} Department chairs quipped that Harper was “The P.T. Barnum of Higher Education,”\textsuperscript{40} but his marketing strategies worked: Chicago soon built a nationally-renowned football program (despite allegations that Stagg was “employing professional athletes”), and enrollment tripled to 5,500 by 1909.\textsuperscript{41}

Amidst public outcry over the increasingly brutal nature of college football – at least twenty players were killed during the 1904 season\textsuperscript{42} – sixty-two colleges met in 1905 to form what would become the National Collegiate Athletics Association.\textsuperscript{43} From the outset, the NCAA promoted an ethos of strict amateurism, including a ban on all

\begin{footnotes}
\item[37] The first recorded intercollegiate competition is generally thought to be a crew meet between Harvard and Yale in 1852. \textsc{Allen L. Sack and Ellen J. Staurowsky}, \textit{College Athletes for Hire: The Evolution and Legacy of the NCAA’s Amateur Myth} 17 (1998).
\item[38] Lawson and Ingham, \textit{supra} note 36, at 43.
\item[39] \textit{Id.}
\item[40] \textit{Id.} at 41.
\item[41] \textit{Id.} at 44, 39. Notre Dame’s surprise victory over Army in 1913 similarly launched the school, then a “relatively unknown Midwestern college,” into the national spotlight. “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.” \textit{Id.} at 151, fn. 1.
\item[42] Sack and Staurowsky, \textit{supra} note 37, at 32.
\item[43] \textit{Id.} at 33.
\end{footnotes}
forms of monetary incentives like athletic scholarships. But for the first fifty years of its existence the organization lacked meaningful mechanisms to enforce its principles. 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.” 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.”

By the late 1950’s, 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. Such payments to students were already commonplace, of course, but the NCAA hoped formal recognition would sanitize the practice and curb its excesses. 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 Profs. 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. The NCAA’s 1950’s reforms “rationalize[d] the recruitment, distribution, and subsidization of player talent . . . [laying] the foundation for today’s corporate college sport.” 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

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44 Id. (citing Intercollegiate Athletic Association of the United States, Proceedings of the First Annual Convention, Dec. 29, 1906, at 33).
46 Id.
47 Sack and Staurowsky, supra note 37, at 35.
48 Id. at 47.
49 Id.
50 Id. at 49.
51 Id.
“employees” for workers’ compensation purposes. Recognizing that “[h]igher education in this day is a business and a big one,” the courts found that an injured athlete could have “the dual capacity of student and employee . . . . The form of remuneration is immaterial.”

Shaken by the prospect that courts might recognize college athletes as “employees,” the NCAA invented the now-ubiquitous watchword “student-athlete” as a direct response to these legal defeats. Walter Byers, who served as the NCAA’s influential executive director from 1951-1987, recounts in his memoir the panic such cases provoked. The workers’ compensations cases raised the: 

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 . . . .

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.

It worked. Since the 1960’s, the NCAA has repeatedly prevailed in worker’s compensation claims brought by severely injured college athletes. Likewise in the antitrust context, courts have

52 University 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”); Van Horn v. Indus. Accident Comm’n, 219 Cal. Rptr. 457 (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”). See also Scholarship Player an Employe, Coast Compensation Unit Rules, N.Y. TIMES, Nov. 2, 1963, at 18.


54 Van Horn v. Indus. Accident Comm’n, 219 Cal. Rptr. at 466, 465.


56 Id. at 69. This mandate apparently still remains in effect today. An author search for the term “student athlete” on the NCAA website, www.ncaa.org, yielded 8,950 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.”

57 Branch, supra note 45, at 33.

afforded the NCAA considerable deference, accepting NCAA practices as necessary “to preserve the unique atmosphere of competition between ‘student-athletes.’” 59 “Even in the increasingly commercial 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.” 60 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.” 61 College football players are not market participants, the court reasoned, because they are “student-athletes.” 62

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. 63

The exchange, with its shades of Abbot & 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 profitable for the NCAA and its member colleges over the last several decades, as NCAA Div. I basketball and football have evolved into lucrative industries. The NCAA Bylaws

59 Gaines v. NCAA, 746 F.Supp. 738, 744 (M.D.Tenn. 1990) (upholding NCAA eligibility rule barring individuals who “enter[ed] a professional draft,” even where such athletes do not sign professional contracts, against antitrust challenge).
60 Id.
61 Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992).
62 Id. at 1092.
63 Michael Rosenberg, Change is long overdue: College football players should be paid, SPORTS ILLUSTRATED, Aug. 26, 2010.
provide that “student-athletes should be protected from exploitation by professional and commercial enterprises,” but in many ways, the big-time college sports industry is structured to do just that. This subsection explores only briefly what has become, by one 2001 estimate, a $60 billion industry, but it underscores the growing value of the services rendered by college athletes. Given the astronomical dollars figures involved, it comes as little surprise that college athletes are now clamoring for a larger slice of the pie.

While gate receipts, licensing fees, merchandise sales all accrue significant revenues for universities, television contracts have been the greatest engine of commercialization of college sports in recent years. As noted above, the NCAA recently sold the broadcasting rights for the men’s basketball tournament for $10.8 billion dollars over the next fourteen years, generating over $770 million in annual income. 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 1984. The University of Texas, for example, launched its own 24-hour television channel in August 2011, after inking a 20-year deal with ESPN that earns $15 million annually for the school and its marketing partner. More common are package deals negotiated by athletic conferences, like the record-setting $3 billion, 12-year contract the Pacific-12 reached in May 2011 with ESPN and Fox. 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 . . .”

64 NCAA BYLAWS 2.15, supra note 5, at 5.
65 McCormick and McCormick, A Trail of Tears, supra note 22, at 646.
66 Branch, supra note 45, at 7.
67 See Wolverton, infra note 1.
68 NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984). 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.
71 Pete Thamel, In Conference Realignment, Colleges Run to (Pay)daylight, N.Y. TIMES, Sept. 20, 2011, at A1. In 2010, the 68 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
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 15 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 he wears under his helmet—as part of Auburn’s $10.6 million deal with [apparel company] Under Armour.72

New technologies generate novel ways for the NCAA to increase revenues beyond such tradition endorsement deals, however.73 For example, an agreement between the NCAA and Electronic Arts allows the videogame manufacturer to produce and sell a popular title called “NCAA Football.” 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.74 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” receive nothing.75

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 readymade 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 athletic finest programs.76 The team’s success has spurred a four-fold increase in incoming applications – TCU recently now receives 20,000 applicants for 1,600 freshman slots – in just six years.77 Articulating a sentiment with which the University of Chicago’s William Rainey Harper would

72 Branch, supra note 45, at 60.
73 The retail market for official collegiate licensed products is now $4.3 billion per year, according to the NCAA’s Collegiate Licensing Company. Daniel Grant, Free Speech vs. Infringement in Suit on Alabama Network, N.Y. TIMES, Jan. 30, 2012, at B12.
75 Branch, at 45.
76 Joe Drape, The Outsiders: Gary Patterson has assemble a program at Texas Christian that does more than bust the B.C.S., N.Y. TIMES, Aug. 27, 2011, at SP1.
77 Id.
undoubtedly identify, TCU chancellor Victor Boschini Jr. recently boasted, “Our athletic notoriety is worth billions in publicity.”

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. 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. Of the fifty-eight basketball coaches participating in the 2011 tournament for whom salary information is available, total pay exceeded $1,000,000 per year for thirty-one. In 2011, at least sixty-four college football coaches also earned more than $1 million. 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).

Public university presidents in 1986 slightly out-earned head football coaches; now coaches earn almost four times as much as university presidents. When reporters recently asked Ohio State President E. Gordon 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.”

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,” “room and board,”

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78 Id.
79 The NCAA previously attempted to restrict coaches’ salaries as well, limiting entry-level assistant coaches’ salaries to $16,000 per year. Basketball coaches brought as 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. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), cert. denied, 525 U.S. 822 (1998).
80 See Clotfelter, supra note 6, at 116.
81 Jodi Upton, Salary analysis: NCAA tournament coaches cashing in, USA TODAY, Mar. 30, 2011.
82 Erik Brady, et al., Salaries for college football coaches back on rise, USA TODAY, Nov. 17, 2011.
83 Clotfelter, at 106, 266.
84 Id.
86 NCAA BYLAWS 15.2.1, supra note 5, at 174.
87 NCAA BYLAWS 15.2.2, at 175.
academically required books, medical and life insurance, and now (for some athletes) up to $2,000 for miscellaneous expenses. The NCAA requires institutions to “make general academic counseling and tutoring services available to all student-athletes.” 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 represents a valuable professional development opportunity. 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 institution, and $35,000 at a private institution. 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.

As NCAA critics frequently point out, however, a full athletic scholarship often fails to cover basic expenses that college athletes incur. A recent study conducted by the NCPA and Drexel University pegged the average “scholarship shortfall” – the gap between a “full”

88 NCAA BYLAWS 15.2.3, at 176
89 NCAA BYLAWS 16.4, at 199.
90 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 $2,000, whichever is less.” After significant protest from member institutions, the NCAA agreed in January 2012 to temporarily suspend the initiative until 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 2012. The NCAA is expected to formally approve the stipend plan moving forward when reconvenes in April 2012. See Brad Wolverton, “Athletes Inch Closer to $2,000 Stipend, Multiyear Awards,” CHRONICLE OF HIGHER EDUCATION, Jan. 14, 2012.
91 NCAA BYLAWS 16.3, at 199.
94 NCAA BYLAWS 15.1, at 174.
NCAA scholarship and the actual cost of attendance—of a Division I football player at $3,222 per year.\textsuperscript{96} At some institutions, the annual scholarship shortfall totals more than $6,000.\textsuperscript{97} According to the study, this leaves approximately 85% of “full” scholarship athletes living below federal poverty thresholds.\textsuperscript{98} 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.\textsuperscript{99} The NCAA responded to these criticisms in late 2011, enacting legislation that allows individual institutions (if authorized by their athletic conference) to provide student-athletes additional grants “up to the full cost of attendance or $2,000, whichever is less.”\textsuperscript{100} While the measure will help reduce the scholarship shortfall for many players, this language (“whichever is less”) implicitly concedes that even an additional $2,000 may not cover the “full cost of attendance.”

Once promising I basketball and football athletes sign scholarship agreements, university officials exercise extensive control over the daily lives (a factor that, as we shall see in Parts II and III, is often relevant in determining “employee” status).\textsuperscript{101} 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.\textsuperscript{102} College basketball athletes face a similarly rigorous, and highly regimented, schedule.\textsuperscript{103} During the off-season, athletes in both sports remain “under the regular direction and control of their coaches,” with compulsory early-morning conditioning sessions, weightlifting sessions, team meetings, video review sessions, and other grueling practice sessions.\textsuperscript{104} To an extent far exceeding that

\textsuperscript{96} Id. at 4.
\textsuperscript{97} Id. at 3.
\textsuperscript{98} Id. at 16.
\textsuperscript{99} NCAA BYLAWS 15.2.2.5 (“Food Stamps”), supra note 5, at 176.
\textsuperscript{101} See McCormick and McCormick, Myth, supra note 21, at 99.
\textsuperscript{102} Id. at 98-101. NCAA rules purport to limit student-athletes’ “to a maximum of four hours per day and 20 hours per week.” 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 BYLAWS 17.1.6, at 216; 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.
\textsuperscript{103} McCormick and McCormick, Myth, at 106-109.
\textsuperscript{104} Id. at 101.
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 round.”

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. During the 2010-2011 year, black athletes constituted 59.3% of Division I basketball players and 47.6% of Football Championship Series players, more than any other racial group. The comfortable majority of head basketball coaches (72.8%), head football coaches (83.7%), and athletic directors (83.3%), however, were white. 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.”

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,” but many of the NCAA’s academic standards are “formulated to serve universities’ commercial interests rather than bona fide academic values.” Low academic expectations are, in fact, ensconced 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. College athletes must select course

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105 McCormick and McCormick, A Trail of Tears, supra note 22, at 649.
106 See also id. at 660-665 (discussion “The Racial Implication of NCAA Amateurism Rules”); Branch, supra note 45, at 14 (“College athletes are not slaves. Yet to survey the scene . . . is to catch a whiff of the plantation.”)
107 Erin Irick, NCAA Race and Gender Demographics, 1995-2011, available online at: <http://web1.ncaa.org/rgdSearch/exec/saSearch>. White athletes, by comparison, constituted 28.8% and 41.4% of basketball and football players, respectively.
110 NCAA BYLAWS 14.1.8.2, supra note 5, at 132.
111 McCormick and McCormick, Myth, supra note 21, at 135.
112 NCAA BYLAWS 14.3.1.1.2, at 144. Freshman athletes are 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.
schedules consistent with team practices, and athletic responsibilities regularly require them to miss classes.\textsuperscript{113} Studies have found that college athletes generally enter college with considerable optimism, carrying high aspirations and “idealistic expectations about their impending academic experience”;\textsuperscript{114} as the practical realities of athletic obligations set in, however, they became “increasingly cynical about and uninterested in academics.”\textsuperscript{115} Low graduation rates predictably reflect this sense of detachment: while the NCAA boasts that “student-athletes,” as a whole, academically out-perform non-athletes,\textsuperscript{116} football and men’s basketball players’ graduation rates are 17.7% and 34.3% lower, respectively, than other male full-time students at their schools.\textsuperscript{117}

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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.\textsuperscript{118} Even in its early decades, when the NCAA adhered to a far stricter understanding of amateurism, the organization actively fostered college athletics as a burgeoning commercial spectacle.\textsuperscript{119} Today, with the economic stakes dramatically higher, the NCAA continues to assert the compatibility of these two impulses:

L.A. L. REV. 1213, 1240, fn. 226 (noting lax treatment of promising athletes “as early as junior high school” to boost students’ GPA).
\textsuperscript{113} McCormick and McCormick, \textit{Myth}, at 142.
\textsuperscript{114} \textsc{Peter Adler} and \textsc{Patricia A. Adler}, \textsc{Backboards and Blackboards: College Athletes and Roll Engagement}, xi, 62 (1991) (discussing ten years of participant-observations of college basketball players at five universities).
\textsuperscript{115} \textit{Id.} at 189.
\textsuperscript{117} E. Woodrow Eckard, \textit{NCAA Athlete Graduation Rates: Less Than Meets the Eye,} 24 J. OF SPORTS MANAGEMENT 45, 53-54 (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 Widberg, \textit{NCAA football grad rates at all-time high, but top schools falter,} USA TODAY, Oct. 27, 2011.
\textsuperscript{118} Sack and Staurowsky, \textit{supra} note 37, at 79.
\textsuperscript{119} \textit{Id.}
Some fans believe that institutional relationships with corporate entities somehow tarnish the amateur status of those who play the game. [But] `amateur` describes intercollegiate athletics participants, not the enterprise.\textsuperscript{120}

But with billions of dollars now generated by the (non-)labor of “those who play the game,” 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 (an extraordinarily lucrative) status quo.

**Part II: College Athletes & the NLRA**

The principle 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 worker’s compensation purposes, the question of whether college athletes are “employees” under existing labor law statutes requires a separate analysis.

The National Labor Relations Act, 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 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 fare 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. 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 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.” Thus, even where “a group of employees perform[ed] tasks functionally identical to those performed by employees in private industry” – clerical workers, maintenance personnel, laboratory technicians, dining hall workers, etc. – “the employer’s [educational] purpose” was sufficient grounds to deny employees collective bargaining rights.

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. 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

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121 See 29 U.S.C. § 152(2) (defining term “employer” for NLRA purposes).
122 Columbia University, 97 NLRB 424, 426 (1951). 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 non-profit trade school that made and repaired tools for the Ford Motor Company, Henry Ford Trade School, 58 NLRB 1535 (1944), a profitable research center within a non-profit university, Illinois Institute of Technology, 82 NLRB 201 (1949), and a college-owned commercial radio station, Port Arthur College, 92 NLRB 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 SOCIAL TEXT 13 (1996).
which are commercial in character.” Education was “still the primary goal of such institutions,” the Board explained, but non-profit universities’ educational purpose was no longer sufficient to justify treating them any differently than other “employers” under the Act.

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 Romantic Reviews,” the Board observed, and “$21,150 from the sale of radio and television rights to its football games.” 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.” 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 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. Unhelpfully, though, the NLRA provides a circular definition of “employee” (“[t]he term ‘employee’ shall include any employee . . .”) with several categorical exceptions.

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125 Id. at 332.
126 Id.
127 Columbia University, 97 NLRB 424, fn. 2 (1951).
128 Cornell University, 183 NLRB at 330.
130 29 U.S.C. § 152(2) (“Definitions”) (“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 by
seventy-five later, as several cases brought by students claiming “employee” status have shown, the precise contours of this statutory definition are still in dispute.\textsuperscript{131}

\textit{i. 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.\textsuperscript{132} This standard, based on the feudal “master-servant relationship” described in Blackstone’s \textit{Commentaries},\textsuperscript{133} uses traditional agency principles to determine if a cognizable employment relationship exists.\textsuperscript{134} As the Restatement (Second) of Agency explains, a “servant” is “a person employed to perform services in the affairs of another who[,] with respect to the physical conduct in the performance of the services[,] is subject to the other’s control or right of control.”\textsuperscript{135}

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 unionize as statutory “employees.”\textsuperscript{136} First, in \textit{Boston Medical Center}, the Board reversed twenty-three years

\begin{itemize}
\item an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.”
\end{itemize}


\textsuperscript{132} See Steinberg & Co., 78 NLRB 211 (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); \textit{NLRB v. United Insurance Co. of America}, 390 U.S. 254 (1968) (“[T]here is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.”); Teamsters Nat’l Auto. Transp. Indus. Negotiation Comm., 355 NLRB 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.”).

\textsuperscript{133} WILLIAM BLACKSTONE, COMMENTARIES 410-420.

\textsuperscript{134} See \textit{NLRB v. Town & Country Elec., Inc.}, 516 U.S. 85, 93-95 (defining “employee” by reference to Restatement (Second) of Agency).

\textsuperscript{135} Restatement (Second) of Agency § 220.

\textsuperscript{136} \textit{Boston Medical Center}, 330 NLRB 152, 160 (1999); see also \textit{New York University}, 332 NLRB 1205 (2000) (same).
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, education.” 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. Thus, it must extend to any “person who works for another in return for financial or other compensation,” or any “person in the 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.” 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.

The following year, the Board similarly found graduate students serving as teaching and research assistants to be statutory “employees” in New York University. 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.” 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. Next the Board considered two proffered “policy reasons” why (despite finding graduate assistants to be “employees”) it might be preferable to

137 Boston Medical Center, 330 NLRB at 160.
138 Id. (emphasis in Board opinion)
139 Id. (citing AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992) and BLACK’S LAW DICTIONARY 525 (6th ed. 1990)).
140 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. 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, 161.
141 332 NLRB 1205 (2000).
142 Id at 1206.
143 Id. at 1206-1207.
exclude graduate students from coverage under the Act.\textsuperscript{144} The University argued 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 on the Employer’s academic freedom.”\textsuperscript{145} 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.”\textsuperscript{146}

College athletes meet the criteria of this basic “common law test” as set forth in \textit{Boston Medical Center} and \textit{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 multi-billion 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.\textsuperscript{147} 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.”\textsuperscript{148} 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.\textsuperscript{149}

Finally, college athletes receive “payment” for these services in the form of tuition, room and board, and now, for some, unrestricted $2,000 stipends. While the NCAA may characterize such compensation as “financial aid” or “scholarships” (as with the graduate assistants in \textit{New York University}) they represent a form of

\begin{footnotes}
\item[144] Id. at 1207.
\item[145] Id. at 1207-1208.
\item[146] Id. at 1205.
\item[147] See McCormick and McCormick, \textit{Myth, supra} note 21, 97–117 (documenting in extensive detail the degree of control exercised over student athletes in their daily lives).
\item[148] Id.
\item[149] Id.
\end{footnotes}
valuable consideration for services rendered. Profs. 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). 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.”

ii. 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. 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.” As such, the petitioners were found to be “nonemployees” under the Act.

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, 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. Second, the Board discussed “the role of [the labor] in graduate education.” 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”) and the extent to which the required labor “is part

150 Id. at 78.
152 342 NLRB 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, fn. 4.
153 342 NLRB at 487.
154 Id.
155 Id. at 488.
156 Id. at 489.
157 Id. at 488.
and parcel of the core elements” of the degree program.\textsuperscript{158} 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.”\textsuperscript{159} 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”).\textsuperscript{160} 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.”\textsuperscript{161}

The “primary purpose” test articulated in \textit{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 employees “must first be enrolled [as students],” 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’ case. Likewise, the Board’s attention to the \textit{form} of financial remuneration is significant: compensation that helps pay for tuition and is characterized as “financial aid,” 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 \textit{Brown University} appears to ignore, or reject, the helpful insight that individuals can be \textit{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.”\textsuperscript{162}

\textsuperscript{158} \textit{Id.} See also \textit{id.} at 483 ("supervised teaching or research is an integral component of [graduate students'] academic development").
\textsuperscript{159} \textit{Id.} at 489.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 497 (Members Liebman and Walsh, dissenting)
Ironically, however, because of its focus on the academic relevance of the services rendered, the Board’s effort to strip graduate assistants of the right to unionize may bolster college athletes’ claim to “employee” status. In its lengthy discussion of the “role of [the labor] in graduate education,”163 the Board noted that the assistantship labor consumes only a “limited” amount of the students’ time,164 and that “supervised teaching or research is an integral component of [graduate students’] academic development.”165 In Brown University, “it [was] beyond dispute that [the students’] principal time commitment . . . [was] focused on obtaining a degree,”166 but for college athletes, the exact opposite is true. Similarly, the Board emphasized that, for the vast majority of graduate students at Brown University, serving as a graduate teaching or research assistant was a graduation requirement for their academic program. 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.”

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)167 and the D.C. Circuit (in 2002)168 held that the choristers’ were “employees” under the NLRA.

The employment relationships of the 200 “auxiliary choristers” – a pool of talented opera aficionados occasionally called upon to

163 Id. at 489.
164 Id. at 488.
165 Id. at 483.
166 Id. at 488.
167 Seattle Opera Association, 331 NLRB 1072 (2000).
168 Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002).
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.\(^{169}\) 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.”\(^{170}\) In exchange for their participation, the choristers received ten tickets to dress rehearsal performances\(^{171}\) 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.\(^{172}\)

The “choristers provide[d] a service to the community and presumably derive[d] pleasure and satisfaction from performing,” the Board conceded, but the opera’s “reimbursements” also constituted a form of material compensation for the choristers’ “labor or services.”\(^{173}\) This created an “economic relationship,” however rudimentary, making the choristers “employees” under §2(3) of the NLRA.\(^{174}\) Though the Seattle Opera and college athletics plainly cater to different audiences, in many significant respects – a prestigious non-profit employer, informal employment agreements, codified behavior guidelines, controlled and directed performances, disputed subjective motivations, and minimal (though artfully characterized) compensation – the labor of their indispensible 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 athletes are “employees” under the NLRA. Whether the NLRB remains with the “primary purpose” test or returns to the laxer 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

\(^{169}\) 331 NLRB at 1072.
\(^{170}\) 292 F.3d at 765.
\(^{171}\) 331 NLRB at 1072. Compare NCAA BYLAWS 16.2.1.1, supra note 5, at 198 (“An institution may provide four complimentary [and non-resalable] admissions per home or away intercollegiate athletics event to a student-athlete . . . .”)
\(^{172}\) 292 F.3d at 773.
\(^{173}\) 331 NLRB at 1072.
\(^{174}\) Id.
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.”

**Part 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, but the NLRA specifically exempts from its definition of employer “any State or political subdivision thereof.” This statutory exemption leaves collective bargaining rights for public employees, including those at public universities (athletic or otherwise), contingent on state law.

Unions of public sector workers have existed throughout the twentieth century, 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. 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. Generally, these laws mirrored federal labor law: “[m]any [state] statutes dr[ew]...
heavily on the NLRA in their definitions—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. And as a result, most previously scholars have simply assumed that student-athletes would therefore be treated comparably under federal and state labor law regimes. Profs. 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.

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 student-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

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182 McCormick and McCormick, Myth, supra note 21, at 88.
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’ Council – urging the NCAA and college presidents to share a portion of the millions of dollars in recently acquired TV revenues with student-athletes.\(^1\) 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 $3,488 and $4,461 per year.\(^2\) In announcing the petition, the California-based NCPA promised that the petition drive was “the beginning of this strategy, not the end.”\(^3\)

   If college athletes were to attempt to unionize, there is a strong possibility they would be successful under existing California law. In 1979, 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.\(^4\) Unlike the NLRA, HEERA explicitly recognizes that, under certain circumstances, UC and CSU students may qualify as union-eligible employees.\(^5\) In two landmark cases in

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\(^{1}\) Zagier, *supra* note 20.

\(^{2}\) Huma and Staurowski, *supra* note 95 (accompanying dataset). Total revenues ($31.4 million) and “scholarship shortfalls” ($3,482 – $4,044) for UC-Berkeley’s programs were similar.

\(^{3}\) Zagier, *supra* note 20.


\(^{5}\) Cal. Gov. Code § 3562(e) (“‘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
1998, the California Public Employee Relations Board (PERB) ruled that groups of students at two UC campuses – readers, tutors, and teaching “associates” at UC-San Diego and graduate student instructors, readers, tutors, and part-time learning skills counselors at UCLA – met this statutory definition. Today, the United Auto Workers represents thousands of members at UC and CSU campuses throughout the state.

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.” First, the Board asks whether employment is contingent upon the students’ status as enrolled students. If not, the students are immediately recognized as “employees” under HEERA. Where employment is contingent upon student status, however, the inquiry proceeds to Step Two. At this stage, “the Board must determine whether the services provided by student employees are related to their educational objectives.” If the Board finds the labor provided “to be unrelated to [the students’] educational objectives, [the students] are employees under HEERA.”

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. The board explained that:

[...]

these educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.”

188 Regents of the University of California and Association of Student Employees, UAW, 22 PERC ¶ 29084, PERB No. 1261-H (Apr. 23, 1998), 1998 WL 35394392 [hereinafter “Regents of the University of California (ASE-UCSD)”].
189 Regents of the University of California and Student Association of Graduate Employees, UAW, 23 PERC ¶ 30025, PERB No. 1301-H (Dec. 11, 1998), 1998 WL 35395605 [hereinafter “Regents of the University of California (SAGE-UCLA)”].
190 Regents of the University of California (ASE-UCSD) (page cites unavailable).
191 Id.
192 Id.
193 Id.
employees under HEERA, affirmative determinations must be made under both prongs.\footnote{Id.}

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

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

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.”

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. 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.

“Even if all the student employees [in a group] concurred that their purpose in taking the job was to further their education objectives, [PERB] could still determine that those educational objectives were subordinate to the value of the services provided.” Recognizing the considerable objective value of the student-employees’ services to the university, and declaring that the “extension of collective bargaining rights [to be] consistent with, and in furtherance of, the expressed purpose of HEERA,” California allowed students at public universities to unionize.

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 student-athletes’ educational pursuits. This is a threshold

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\[197\]
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issue: where students provide services to universities unrelated to their educational objectives, they are “employees” under California labor law.  

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” – 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 student-athletes would not.

B. Florida

Florida is another state where several large public universities operate big-time college sports programs. The University of Florida boasts the largest program, by a comfortable margin, with a football team that reported over $68.7 million in revenues and $44.3 million in profits in 2009-2010. 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.

As a “right-to-work” state with a paltry 3.1% unionization rate

200  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 Division I sports could be deemed “related to [a student’s] educational objectives.” However, as a class, it is exceedingly hard to argue that college athletes’ labor meaningfully relates to their educational goals.

201 See NCAA BYLAWS 1.3.1, supra note 5, at 1.

202 The University of Florida, Florida State University, University of South Florida, University of Central Florida, Florida Atlantic University, and Florida International University are all public universities with NCAA Div. I programs in both football and men’s basketball.

203 Huma and Staurowski, supra note 95 (accompanying dataset). The men’s basketball and football programs at Florida State University and the University of South Florida generated an additional $45 million in combined revenues in 2009-2010.

204 Isidore, supra note 74.

205 Id.
in the private sector, 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, and in the public sector, a full 27.8% of Florida workers are covered by union contracts. 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 student-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” – and perhaps, by analogy, student-athletes – “are now more secure in Florida than in any other state.”

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

perform 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

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207 Fla. Const. art. I, § 6 (“The rights of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged on account of membership or nonmembership 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 . . .”)
208 Hirsch and Macpherson, supra note 206.
210 United Faculty of Florida, FEA/United and Board of Regents, 3 FPER 304, (Case No. 8H-RC-765-0131, 77E-472)(Nov. 18, 1977), aff’d Board of Regents v. Public Employees Relations Commission, 368 So.2d 641 (Fla. Dist. Ct. App. 1979)
211 Id. at 305
work. A more classic example of an employer-employee relationship can hardly be imagined.\textsuperscript{212}

The Board of Regents countered that graduate assistants were “primarily” students and “secondarily” employees, but PERC strongly rejected the relevance of this analysis. 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.”\textsuperscript{213}

In response to the PERC decision, the Florida Legislature hastily amended the definition of “public employee” to exclude students.\textsuperscript{214} 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.\textsuperscript{215} Emphasizing the constitutional protections for public sector collective bargaining in Florida, the court of appeal 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.”\textsuperscript{216}

The court, at length, rejected the Regents’ argument that the legislature was justifiably concerned about the economic impact of allowing graduate assistants to unionize.\textsuperscript{217} 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.”\textsuperscript{218}

\textsuperscript{212} Id. Section 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.

\textsuperscript{213} Id. at 306.

\textsuperscript{214} United Faculty of Florida, Local 1847 v. Board of Regents, 417 So. 2d 1055, 1057-58 (Fla. Dist. Ct. App. 1982).

\textsuperscript{215} Id. at 1056.

\textsuperscript{216} Id. at 1059.

\textsuperscript{217} Id. at 1059-1060.

\textsuperscript{218} Id.
The appellate court also revisited the question of whether students could be “public employees,” approving of a standard even more favorable to student-athletes. 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.  

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.” 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.

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.” 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 student-athletes as “public employees,” it would be exceedingly difficult to overturn this holding legislatively. Because 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.

C. Michigan

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219 *Id.* at 1058 (emphasis added).
220 *Id.* at 1059 (distinguishing *St. Clare’s Hospital*, 229 NLRB 1000 (1997)).
221 *Id.* Later Florida labor cases have built on this language, and shown even more skepticism toward efforts to curtail public employees’ bargaining rights. *See* Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030 (Fla. 1999) (“In order to survive a constitutional challenge, [a restriction on collective bargaining] ‘must serve that compelling state interest in the least intrusive means possible.’”)
222 *Id.*
College athletes might also receive favorable treatment in a state with a much stronger pedigree of cutting-edge unionism: Michigan.\textsuperscript{223} At both the University of Michigan and Michigan State University, college athletics are major industries. During the 2010-2011 season, the two schools' football programs netted a combined $74 million in profits; their men’s basketball programs brought in another $11 million. During the 2011 season, an average of 112,179 spectators packed Michigan Stadium each Saturday to watch the football squad compete.\textsuperscript{224}

The Michigan Employment Relations Commission (MERC) and Michigan courts have repeatedly ruled on labor disputes involving student-workers, and have 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.\textsuperscript{225} 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 Legislature had intended to exclude students/employees . . . they could have written such an exception into the law.”\textsuperscript{226}

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.\textsuperscript{227} 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


\textsuperscript{226} Id. at 225. See also Regents of the University of Michigan and Graduate Employees Organization, 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.”).

\textsuperscript{227} Regents of the University of Michigan, 1981 MERC Lab Op 777.
the “specific services [they] rendered” revealed them to be “employees” under Michigan law.\textsuperscript{228} The labor of research assistants, on the other hand, was almost always “academically relevant” 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.\textsuperscript{229}

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” of their labor is critical. Plainly, college athlete’s on-the-field exertions have only the most tangential relevance to their academic pursuits.

Additionally promising for Michigan college athletes is MERC precedent holding that undergraduate students may be “public employees” under PERA, too.\textsuperscript{230} In 1976, a group of undergraduate students employed part-time through Michigan State University’s “student employment office” petitioned MERC for recognition.\textsuperscript{231} 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.”\textsuperscript{232} Nevertheless, MERC held that the students were employees under PERA, “even though their principal vocation is that of a student.”\textsuperscript{233} 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.

\textit{D. 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.\textsuperscript{234} 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.\textsuperscript{235} 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. In order to purchase season tickets, for example, Nebraska alumni must make an additional “donation” to the school, ranging from $500 per seat (for obstructed-view tickets) to $3,500 per seat (for a 50-yard-line vantage).\textsuperscript{236} 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.\textsuperscript{237}

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 35 years ago that individuals may be “both students and employees of the University of Nebraska” for unionization purposes.\textsuperscript{238} Without specifying the precise test that would govern for Nebraska law, the court noted that Nebraska’s statutory definition of

\begin{itemize}
\item \textsuperscript{236} 2012 Nebraska Football Season Ticket Application, www.huskers.com/pdf8/770907.pdf?DB_OEM_ID=100. 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 game, though this sum fell dramatically in subsequent years along with the team’s on-field success. See Clotfelter, \textit{supra} note 6, at 100.
\item \textsuperscript{237} Huskers Athletic Fund, “2012 Football Ticket Waitlist,” available online at: http://huskersathleticfund.com/2012-football-ticket-waitlist/?DB_OEM_ID=100
\item \textsuperscript{238} House Officers Ass’n v. University of Nebraska Medical Center, 255 N.W.2d 258, 261 (Neb. 1977).
\end{itemize}
public “employee” is broad, 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 . . . .” 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 Nebraska’s decision in its Boston Medical Center opinion discussed in Part II.B.

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.” 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.” Without setting a specific dollar amount, the law declared that, “in the same manner that nonathlete students are compensated for performing various tasks while a student, football players shall be entitled to fair financial compensation for playing football.” The final version of the bill, which passed 26-9 and was signed by the governor, 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

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239 Id. at 262 (“Employee shall include any person employed by any [public] employer . . . .”) (citing Section 48.801, R.R.S. 1943).
240 Id.
241 Boston Medical Center, 330 NLRB 152, 163 (1999).
243 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, LB 688, Ninety-Eighth Legislature, First Session, 2003, Feb. 10, 2003.
244 Id.
several states appear prepared to support recognition of college athletes as “employees.”

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” under the state’s collective bargaining law in 1994. Like California’s PERB, the Kansas board applies an intricate, multi-part balancing test to “resolve the student/employee issue.” This inquiry similarly looks to


247 Under Kansas law, a “public employees” is “any person employed by any public agency, except those persons classed as supervisory employees, professional employees of school districts, as defined by subsection (c) of K.S.A. 72-5413, elected and management officials, and confidential employees.” Kan. Stat. Ann. § 75-4322 (West).


249 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
whether the students’ “educational objectives [are] subordinate to the services they perform.” If so, the student must also establish that “granting collective bargaining rights . . . would further the purposes of the Act.” In the alternative, the Kansas PERB suggested, the board might also apply a “guiding purpose” test with similar result. 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.

For reasons outlined in the discussion of California’s statute, student-athletes – like Kansas’ 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. 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.” Through a creative 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. The central inquiry, IELRB explained, is

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

Id.

Id.

Id. at 22-23 (emphasis in original).

See 115 ILCS 5/2(b) (“‘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 . . . . ’”)

whether the students’ labor is “significantly connected to their status as a student.”

This “significant connections” test, which the Illinois courts have endorsed, focuses on the degree to which the work performed is related to a student’s 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.” 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.”

Illinois’ 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.

2. Voluntary Recognition States

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 fewer precedents to guide determinations on student-athletes. In New Jersey, for example, Rutgers University

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255 Id.
256 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 considered “students” (and thus be ineligible for collective bargain) where “the primary purpose of [their work], as established through objective evidence, was in furtherance of their educations.” The “significant connections” 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.
257 Id. at 765.
258 Board of Trustees and Graduate Employees Organization, 4-5, Case No. 96-RC-0013-S, March 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.
voluntarily recognized its graduate assistants soon after the passage of the New Jersey Employer-Employee Relations Act in 1968. Likewise in New York, when SUNY graduate assistants and teaching assistants petitioned for recognition under the Public Employees’ Fair Employment Act, “the State concede[d] that an employment relationship exist[ed] between the GAs and TAs and the State.” And when graduate students in Rhode Island first organized 2002, students reached a “consent agreement” with URI officials prior to holding a union election. While applicable precedent is limited, each of these states’ expansive definitions of “employee” under state law, coupled


260 N.J. Stat. §34:13A-3(d) provides that “[t]he term "employee" shall include any employee . . . . This term 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 “public 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, The State University and Association of Residence Counselors of Rutgers College, P.E.R.C. No. 82-55; Docket No. RO-79-187, 1981 NJ PERC Lexis 325 (December 17, 1981).

261 N.Y. Civ. Serv. Law § 201(7)(a) defines “public employee” as “any person holding a position by appointment or employment in the service of a public employer . . .”

262 Communications Workers of America / Graduate Student Employees Union and State of New York, No. C-2894, 24 PERB ¶ 3035, 1991 WL 11750982 (Oct. 8, 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 College Hospital, 33 NY SLRB 161 (1970) (recognizing medical house staff as employees).

263 University of Rhode Island and University of Rhode Island, AAUP (Certificate of Representatives), Case No. EE-3649, Apr. 22, 2002. See Rhode Island Code, § 28-7-3(3) (defining “employee”).
with state labor boards’ past recognition of student-workers, may favor college athletes.264

3. States with Undergraduate Unions

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[i]on that [a union representation] election be held for part-time student employees’” working as dining hall staff at the University of Oregon.265 The university signed a union contract with the 250 undergraduates eighteen months later, which was “believed to be the first negotiated by an all-student group within AFSCME.”266 Five years later, in a later cases establishing the “employee” status of most graduate 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].”267 Athletic labor of undergraduate student-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 Massachusetts’ Labor Relations Commission (MLC) allowing 350 undergraduate “resident assistants” (RAs) to unionize at the University of Massachusetts–Amherst.268 While college athletes and RAs provide very different

264 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 (1971).
268 Board of Trustees and UAW Local 2322, Case No. SCR-01-2246 (Jan. 18, 2002). See also Board of Trustees, 20 MLC 1454, 1562-64 (1994)
types of services to their university, the two groups’ employment relationships share significant similarities. Only enrolled undergraduate students are permitted to serve as RAs; they undergo a mandatory training program before the start of the fall semester, and RAs must “maintain at least a 2.2 cumulative GPA” to remain eligible for their positions. On paper, RAs are expected to work approximately twenty hours per week, though in reality the demands of the position may consume far more of the students’ time. 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.” 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

(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 Department, 3 MLC 1517, 1518 (1977) (“full-time student 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 (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).

269 Board of Trustees and UAW Local 2322, Case No. SCR-01-2246 (Jan. 18, 2002), at 8. Compare NCAA BYLAWS Article 14, at 127-170 (academic eligibility requirements).
270 Id. at 10. Compare McCormick and McCormick, Myth, supra note 21, at 102 (describing pre-season training requirements).
271 Id. at 8. Compare NCAA BYLAWS Article 14, at 127-170 (academic eligibility requirements).
272 Id. at 11. Compare NCAA BYLAWS 17.1.6, at 216 (establishing “20 hour” rule).
273 Id. Compare McCormick and McCormick, Myth, supra at 98-101 (detailing actual time commitments of Division I athletic competition).
274 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 151.
fee ($100), and a “cash stipend” of $1709.86.\footnote{Id., 11. Compare supra Part I.C. (describing forms of compensation for college athletes).} In each of these regards, undergraduate RAs strongly resemble college athletes.

The legal rationale for recognizing 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.\footnote{Id. at 25.} University officials 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.”\footnote{Id. at 25-26.} 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.”\footnote{Id. at 27-28.} “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.”\footnote{Id. at 32.}

4. States Favoring Graduate Assistants, But Disfavoring College Athletes

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.\footnote{Minn. Stat. Ann. § 179A.11(1)(10).} 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.”\footnote{Minn. Stat. Ann. § 179A.03(14)(i).}
This provision would appear to bar any attempt by athletes to unionize at the University of Minnesota.

College athletes would face a similarly uphill fight in Washington. There, in response to a contentious and disruptive organizing campaign, the Washington legislature passed a law conferring bargaining rights on “certain employees enrolled in an academic program” at the University of Washington. While a colorable argument could be made that the graduate assistants were already “employees” entitled to collectively bargain before the legislation, 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 . . . .” 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. 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 for academics, in Washington, this fact likely precludes their union eligibility.

5. Other Approaches


283 R.C.W. 41.56.203. See also R.C.W. 41.56.205 (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 University of Washington, Case No. 16288-E-02-2699, Decision 8315 (PECB, 2003), Dec. 16, 2003.

284 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.


286 University of Washington, Decision 11139 (PECB, 2011).
Iowa’s Public Employment Relations Act of 1974 (PERA) similarly permits collective bargaining by graduate students who are “engaged in academically related employment as a teaching, research, or service assistant”; in contrast to Washington, however, Iowa’s statute also contemplates collective bargaining by (at least some) other student-workers. Under PERA, among those excluded from the definition of “public employee” are:

“4. 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.”

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. In other contexts, 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.”

Lastly, there are two states 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).

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288 Id.
289 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.” See State of Iowa and Campaign to Organize Graduate Students, Case No. 4959, Bargaining Unit Determination, Jan. 31, 1994; University of Iowa and UE, Local 896 (COGS), Case No. 5463, Order of Certification, May 6, 1996.
290 Iowa Ass’n of Sch. Boards v. Iowa PERB, 400 NW 2d 571 (Iowa 1987) (citations omitted).
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.”\(^{291}\) 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 out-growth of the common law concept of the ‘servant.’”\(^{292}\) PERB subsequently re-emphasized:

> “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.”\(^{293}\)

These basic dynamics hold – indeed, are even plainer – in the case of college athletes.\(^{294}\)

**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.”\(^{295}\) 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,”\(^{296}\) includes graduate assistants.\(^{297}\)

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\(^{291}\) Employees of Temple University, 32 PPER ¶ 32044 (Oct. 17, 2000), 2000 WL 35899093.

\(^{292}\) Boston Medical Center, 330 NLRB 152, 159 (1999).

\(^{293}\) Employees of Temple University, 32 PPER ¶ 32164 (Aug. 21, 2001), 2001 WL 36365345 (providing Final Order of Certification).

\(^{294}\) 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 capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.” *Id.*

\(^{295}\) Graduate Employee Organization, MEA-MFT vs. Montana State University, Final Order, Unit Determination No. 4-2011 (Nov. 2012).

\(^{296}\) Mont. Code Ann §39-31-103(9).

\(^{297}\) Graduate Employee Organization, MEA-MFT vs. Montana State University, Findings of Fact; Conclusions of Law; and Recommended Order, Unit Determination No. 4-2011 (July 27, 2011), 17). Montana’s Board of Personnel Appeals adopted these findings in relevant part several months later.
“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.”

A unique aspect of the Montana case relevant to college athletes is the university’s use of pre-appointment “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, 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 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.

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.” The provision was thus deemed void under state law.

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.

298 Id.
299 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. [W]e suggested [to schools] that 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 55, at 75.
300 Graduate Employee Organization, MEA-MFT vs. Montana State University, Findings of Fact; Conclusions of Law; and Recommended Order, Unit Determination No. 4-2011 (July 27, 2011), 3.
limiting the rights of student-employees.\textsuperscript{301} In at least a dozen states, collective bargaining with college athletes may be permissible, but neither faculty or graduate student unions have established footholds at public schools.\textsuperscript{302}

At the other end of the spectrum, thirteen states do not extend collective bargaining rights to \textit{any} public employees.\textsuperscript{303} Several others allow only a narrow class of public safety employees to unionize.\textsuperscript{304} In these jurisdictions, even the most traditional of employees at public universities lack collective bargaining rights. College athletes, therefore, would be unable to unionize absent some change in state law.

\section*{Part IV: Implications}

\textbf{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

\textsuperscript{301} National Center for the Study of Collective Bargaining in Higher Education and the Professions, \textit{Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education} (2011 Edition). See Alaska Stat. § 23.40.250(6); Conn. Gen. Stat. Ann. § 5-270(b); 14 Del.C. § 4002; 26 Maine Rev. Stat. Ann. § 1022(11); N.H. Rev. Stat. § 273-A:1(IX); 3 V.S.A. § 902(4), (5). South Dakota’s labor law, like Iowa’s, excludes students “working as part-time employees twenty hours per week or less.” As explained above, this limitation should not pose any hurdle for college athletes. Faculty at the University of Hawai‘i also have a recognized union, but state law specifically excludes “students” from those eligible for collective bargaining. \textit{See} Hawai‘i Rev. Stat. § 89-6(f) (“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”);

\textsuperscript{302} Those states include Georgia, Idaho, Indiana, Kentucky, Maryland, Missouri, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, West Virginia, and Wyoming.


uncertainty that would necessarily attach to such a ruling, and the reaction it might provoke from the NCAA, 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 experiments” in American history.\textsuperscript{305} 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,\textsuperscript{306} 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.\textsuperscript{307}

Much of this success has come as a result of state labor boards’ heightened sensitivity to the new economic realities of the

\textsuperscript{305} See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).


\textsuperscript{307} 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. 330 NLRB at 163. See also Brown University, 342 NLRB at 493, 499 (dissenting opinion) (“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.”)
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 partially, “as a backlash against higher education trends . . . where universities have increasingly sought to contain costs and function more like businesses.” 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. 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 radical 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.

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 that fix total athlete compensation as a percentage of league and club revenues.


310 See Brown University, at 491 (“[T]he dissent theorizes how the changing financial and corporate structure of universities may have give rise to graduate student organizing . . . [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.”)

311 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,
Assuming revenue splits similar to their professional counterparts, the “market value” of the average FBS 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.\(^{312}\) At the biggest programs, an equitable revenue split would entitle student-athletes to considerably larger sums.\(^{313}\)

But the issue of unionization is distinct from the issue of professionalization, and to illustrate this, we offer a counterintuitive suggestion: legal recognition of student-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.\(^{314}\) On one view, unions’ raison d’être is to win monopoly wage gains for their members – a purpose that oddly out of place in the context of “amateur” competition.\(^{315}\) An alternative approach, however, recasts the debate in political, rather than strictly economic, terms.\(^{316}\) Per this “industrial democracy” analysis, 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].\(^{317}\)

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

\(^{312}\) Huma and Staurowsky, supra note 95 (assuming a 45% revenue split for college football players and a 50% split for college basketball players).

\(^{313}\) 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.

\(^{314}\) 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)

\(^{315}\) Id.


\(^{317}\) Id.
commitment to the “basic principles” that student-athletes should be “involved . . . in matters that affect their lives,” and that athletic competition should remain “an avocation” for students. 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.” Yet in practice, the NCAA’s governance structure almost entirely divests athletes of the ability to participate in decisions, both large and small, that dictate their existence. Unionization presents a vehicle for challenging this fundamental power imbalance.

What might an NCAA with an institutionalized student-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 the season (particularly during exam periods), additional time-off during the holidays, or stricter enforcement of the NCAA’s “20-hour limit” rule. Collective bargaining agreements today generally contain “just cause” discipline provisions, and a union of student-athletes could negotiate stronger

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318 NCAA Bylaws 2.2.6, 2.9, supra note 5, at 3, 4.
319 Sack and Staurowsky, supra note 37, at 14.
320 See, e.g., NCAA Div. I Proposal 2011-78 (Aug. 1, 2012), amending NCAA Bylaw 16.5.2(h) to allow student-athletes to receive “traditional bagel spreads [butter, peanut butter, jelly, and cream cheese] in conjunction with the bagels [they are] already permitted to [receive]” from their schools.
321 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. See NCAA Bylaws 21.7.6, at 337; NCAA Bylaws 4.2, at 21; NCAA Bylaws Figure 4-1, Division I Governance Structure, at 26.
322 Compare Steve Wieberg, Division II schools cut back on length of seasons, practice time, USA TODAY, Jan. 16, 2010 (noting Division II schools’ rejection of “the excesses of bigger-time Division I”).
323 See McCormick and McCormick, Myth, supra note 21, 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.”)
324 See NCAA Bylaws 17.1.6, at 216.
procedural safeguards for students navigating the NCAA’s byzantine justice system.\(^{325}\) 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.\(^{326}\) 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.\(^{327}\) In the past decade, twenty-one student-athletes have suffered sports-related deaths, and many more have been seriously injured.\(^{328}\) Under NCAA rules, universities have no obligation to provide medical coverage for such injuries under NCAA rules. Individuals incurring catastrophic injuries during practices or games are sometimes left shouldering the long-term economic burden of their injuries on their own.\(^{329}\) Unionization would provide student-athletes 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 contest economic issues, 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 student-athletes payable upon graduation. Students struggling with their academic responsibilities


\(^{326}\) Sack and Staurowsky, College Athletes for Hire, 83-84.

\(^{327}\) See, e.g., Thanh Tan, State Tries to Reduce Head Injuries in a Rough Game, N.Y. TIMES, Sept. 17, 2011 (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. Adam Schefter, Union visits Browns to probe staffs, ESPN.COM, Dec. 12, 2011, http://espn.go.com/nfl/story/_/id/7345282/nflpa-sent-reps-investigate-cleveland-browns-colt-mccoy-handling.


\(^{329}\) See Branch, supra note 45, at 34-35 (discussing case of Kent Waldrep, permanently paralyzed during a TCU football game).
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 re-prioritize 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). College athletes are already subject to such agreements, as we noted in Part I, but only coaches and universities presently receive the profits. Just as Olympic athletes are now permitted to sign individual endorsement deals, college athletes could negotiate for the right to benefit from their celebrity without unduly tarnishing their status as amateurs.330

Finally, universities would receive a tremendous ancillary benefit from collective bargaining: 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.331 If such litigation proves successful – a prospect made more plausible now that schools are actually paying athletes limited cash stipends – universities could be legally obligated to compete with one another on an open market to lure promising talent. 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.332 (This judicially-fashioned exception to the Sherman Act is what allows professional sports teams to negotiate “salary caps” with player’s unions). 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.

330 Id. at 54-56.
C. Conclusion: Taking a Step Back

In emphasizing the legal status of college athletes under presently-existing law, this Article admittedly presents a 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 avered 1995 wildcat strike during March Madness, or the recent organizing successes of the National College Player’s 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.” 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. So, too, is the January 2012 proposal in the New York Times’ Sunday Magazine to “start paying college athletes,” a plan that included support for collegiate collective bargaining. Even top coaches have jumped on the bandwagon. 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 performers.”

The popular recognition of big-time student-athletes as employees is already well underway.

333 Benjamin Levin, Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim, 75 ALBANY L. REV. (forthcoming 2012) (discussing conspiracy doctrines as lens for exploring historical intersection of legal and cultural conceptions of unionism)
334 See Branch, supra note 45.
335 See Nocera, supra note 17.
The basic problems at the root of this Article – what does it mean “to labor”? 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. These interventions have increasingly looked beyond waged productive labor (the centerpiece of past scholarship on “work”), emphasizing instead themes of dispossessions and expropriations, emotional labor, “immaterial” labor, or other categories of activity omitted from traditional labor histories’ gaze. Alongside this vast and probing literature, 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.

wants to give players money . . . from his own pocket, SPORTS ILLUSTRATED, Jun. 1, 2011.


338 Michael Denning, “Wageless Life,” 66 NEW LEFT REVIEW 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.”)


340 Michael Hardt and Antonio Negri, MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE (2004), 108 (“[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 . . . .”)

341 Schwartz-Weinstein, at 290 (“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 labor, and how the subjects who perform it have become knowable as ‘workers,’ both within and outside of wage labor.”)