

UNIONIZING NCAA DIVISION I ATHLETICS: A VIABLE SOLUTION?

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ABSTRACT

This Note considers whether college athletes—specifically Division I football and men’s basketball players—can utilize the protections of the National Labor Relations Act to form unions. The Note examines the history of the National Collegiate Athletic Association, considers whether National Labor Relations Board jurisprudence allows the application of the NLRA to college athletics, and evaluates the potential consequences of the NLRB certifying a union of college athletes. The Note argues that the NLRB should not allow college athletes to unionize, but should instead let Congress decide whether college athletes are “employees” under the NLRA, and, if so, how they should be regulated.

INTRODUCTION

Ramogi Huma, a former college football player at the University of California, Los Angeles, founded the National College Players Association (NCPA) after the National Collegiate Athletic Association (NCAA) suspended his teammate, Donnie Edwards, from participation in college football.¹ The NCAA, which requires

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1. The NCPA, About the President, http://www.ncpanow.org/about_the_chairman.asp (last visited Nov. 27, 2007). The NCAA, in its own words, is “a bottom-up organization” comprised of member “colleges, universities and conferences . . . [that] establish programs to govern, promote and further the purposes and goals of intercollegiate athletics.” NCAA, Overview, <http://www.ncaa.org/> (follow “About the NCAA, Overview”) (last visited Nov. 27, 2007).

college athletes to be “amateurs,”² punished Edwards for accepting free groceries once he had exhausted his scholarship money.³ The NCPA hopes to change what it views as unreasonable NCAA policies that lead to sanctions against athletes such as Edwards. Its goals include an increase in the scholarship amount universities provide to college athletes, the provision of health coverage by universities for all sports-related workouts (including “off-season” workouts, which universities do not have to insure), the elimination of restrictions on the pursuit of employment by college athletes, and the elimination or easing of restrictions on the ability of college athletes to transfer between schools.⁴

The NCPA has yet to achieve many of its objectives, but perhaps it or another group of college athletes could strengthen efforts to bring about change by forming a labor union.⁵ Achieving the status of a “labor organization” under the National Labor Relations Act (NLRA) would provide a group of college athletes with numerous rights enjoyed by unions in other industries, including the rights to bargain collectively⁶ and to strike.⁷ But could a group such as the NCPA be a “labor organization” under the NLRA? Only “employees” can form a valid “labor organization” under the NLRA.⁸ The NCPA could therefore only form a labor organization if college athletes were “employees” and the NCAA or its member institutions were “employers.”⁹

The NLRA itself provides no extensive definition of “employee,” other than the mere indication that an employee is

2. 2006–07 NCAA DIVISION I MANUAL art. 14.01.3.1 (2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf.

3. Steve Springer, *Edwards Suspended for One Game; UCLA: Linebacker Ordered to Pay Restitution for \$150 Worth of Groceries Left at His Apartment, Allegedly by Agent*, L.A. TIMES, Oct. 13, 1995, at C4.

4. The NCPA, Mission & Goals, http://www.ncpanow.org/our_mission.asp (last visited Nov. 27, 2007).

5. The NCPA has enlisted the assistance of the United Steelworkers Union, The United Steelworkers Union supports the NCPA, http://www.cacnow.org/the_united_steelworkers_support_the_ncpa.asp (last visited Nov. 15, 2007), but has not applied for recognition as a “labor organization,” or union, under the National Labor Relations Act. See National Labor Relations Act, 29 U.S.C. § 159(b) (2000) (providing the National Labor Relations Board with the authority to determine the appropriate unity for collective bargaining).

6. 29 U.S.C. § 157.

7. *Id.* § 163.

8. *Id.* § 152(5).

9. *Id.* § 152(3).

something distinct from an “employer.”¹⁰ The National Labor Relations Board (NLRB or Board) has therefore had to elucidate the term “employee” under the NLRA. As part of its efforts, the Board has incorporated the common-law “right of control” test into the definition of “employee.”¹¹ Because it serves to distinguish an “employee” from an “independent contractor,” satisfaction of the “right of control” test is necessary to establish “employee” status.¹² Satisfying the test, however, is not sufficient. In addition to the common-law requirements, the NLRB must certify every potential union proposed under the NLRA, and thus each member of a valid “labor organization” must be an “employee” under NLRA jurisprudence, in addition to satisfying the “right of control” test.¹³

NLRA jurisprudence does not address whether college athletes can be “employees.” By not speaking directly on the issue, Congress empowered the NLRB to apply the NLRA to college athletes in one or more sports, so long as that application is “determined broadly . . . by underlying economic facts.”¹⁴ Were the NLRB to classify some set of college athletes as “employees” under the NLRA, the implications would be drastic, including the possible elimination of many nonrevenue college sports.¹⁵ Given the potential consequences of NLRB action, and the cultural significance of college athletics, the NLRB should refrain from upsetting the structure of college athletics

10. The NLRA definition of “employee” is circular. *See id.* (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer . . .”).

11. *See* *Carnation Co.*, 172 N.L.R.B. 1882, 1887 (1968) (“[T]he decisions of the Board have placed emphasis on the *right of control*, with a distinction being drawn between control over the manner and means by which a result is to be accomplished and control limited to the result sought.”).

12. *See id.* (“Control over the manner and means is indicative of an employee relationship; control restricted to the object or result sought is indicative of independent contractor relationship.”).

13. *See* 29 U.S.C. § 159(b) (outlining how the NLRB shall determine the appropriate bargaining unit); *Brown Univ.*, 342 N.L.R.B. 483, 491–92 (2004) (reaffirming the NLRB’s right to exclude students from a bargaining unit in which nonstudents are represented).

14. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 129 (1944).

15. For the purposes of this Note, revenue sports are those that generate large revenues, specifically Division I men’s football and basketball. *See* NCAA, 2002–03 NCAA REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 13–15 (2005) [hereinafter NCAA REVENUE REPORT] (providing data on revenues generated by sports); Tom Farrey, *NCAA Might Face Damages in Hundreds of Millions*, ESPN, Feb. 21, 2006, <http://sports.espn.go.com/ncaa/news/story?id=2337810> (“The class-action claim was brought on behalf of Division I-A football players and major-college basketball players, whose programs generate the overwhelming amount of revenue that flows into college athletic departments.”).

and instead await guidance from Congress on unionization by college athletes.

This Note discusses the issue of unionizing college athletics from several angles. In Part I, it details the relevant history and structure of the NCAA, with particular attention to the NCAA's relationships with its member institutions and with college athletes. In Part II, it explores the application of federal labor law to college athletics, including whether college athletes are "employees" under labor law and what the appropriate bargaining units might be for college athletes. Finally, in Part III, it discusses the consequences of unionizing college athletes, including potential gains for college athletes and the altered nature of college athletics.

I. THE NCAA: HISTORY AND RELATIONSHIPS WITH INSTITUTIONS AND ATHLETES

NLRB action certifying a group of athletes as a union would force drastic changes in the complex dynamic between athletes, universities, and the NCAA. As the governing organization for college athletics, the NCAA plays an important role in the relationship between athletes and universities: its rules provide the framework under which college athletes participate in their respective sports.¹⁶ To understand the policy implications of unionizing college athletics, one must understand the history and structure of the NCAA.

A. *Beginnings*

Football led to the creation of the NCAA. Late in the nineteenth century and early in the twentieth, three problems plagued football: brutality, recruiting, and subsidization.¹⁷ Despite numerous reform

16. NCAA regulations are widespread in college sports, controlling everything from on-field rules, *see, e.g.*, NCAA, 2007 FOOTBALL RULES AND INTERPRETATIONS (2007), to athlete eligibility for participation in sports, *see* 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art. 14 ("Eligibility: Academic and General Requirements"). Because of the pervasiveness of NCAA regulation, NCAA policy decisions have significant consequences for college athletes.

17. JOSEPH N. CROWLEY, IN THE ARENA, THE NCAA'S FIRST CENTURY 37 (2006). Two examples illustrate the prevalence of recruiting and payment to players at the time. First, Fielding Yost, a star football player at West Virginia University, transferred to Lafayette midseason in 1896 under the guise of an interest in engineering, played one game for Lafayette (a victory over rival University of Pennsylvania), and then, "the attraction of engineering apparently having diminished," returned to West Virginia. *Id.* Second, James Hogan, at the age of twenty-seven, played football for Yale:

movements and calls for change, especially from university faculty, misgivings about the lack of amateurism and violence associated with football were not enough to bring about substantial changes, and the sport, growing in popularity all the while, remained largely undisturbed.¹⁸ Real change came about when, in a 1905 meeting with the presidents of Harvard, Yale, and Princeton, President Theodore Roosevelt threatened to abolish football if it was not reformed.¹⁹ This threat provided sufficient impetus, eventually, for college presidents to organize into an association that later became the NCAA.²⁰

Originally, the NCAA operated under a system known as “home rule.” NCAA bylaws established amateurism principles, but the member institutions themselves were the enforcers of the principles.²¹ The choice to use a home rule system “carried with it a built-in tension between the [NCAA]’s commitment to amateurism and its reliance on the member institutions to honor that goal.”²² In essence, the fox was guarding the hen house.

Eventually, as NCAA membership grew and radio and television coverage became more widespread, there were increasing reports of varying degrees of compliance with amateurism principles.²³ In response, the NCAA in 1948 adopted a “Sanity Code” consisting of five principles “covering financial aid, recruitment, academic standards for athletes, institutional control and the principle of amateurism itself,” and enforcement procedures that included expulsion of a university from the NCAA with a two-thirds majority

The institution paid his tuition and gave him a luxurious suite of rooms, free meals at the University Club, a \$100 scholarship and (shared with two others) all profits from game day program sales. He also was made the New Haven agent for the American Tobacco Company, receiving a commission for every packet of cigarettes sold in that city. And, during the fall semester, but after the football season, he was awarded a 10-day vacation in Cuba.

Id.

18. *See id.* at 37, 40 (detailing the efforts by faculty members at some schools to curb the barbarism associated with football and the ensuing backlash against the protesters, particularly at the University of Michigan, where influential alumni disbanded the faculty reform group and replaced it with a group much friendlier to the sport).

19. *Id.* at 44.

20. *Id.* at 10. Change was not immediate. At first, there were competing factions of football rulemaking bodies, and the “Big Three” (Harvard, Yale, and Princeton) were in fact reluctant to make major changes. Only after President Roosevelt used his influence once again was there a unified effort to make change. *Id.*

21. *Id.* at 55.

22. *Id.*

23. *Id.* at 68–69.

vote of its membership.²⁴ Though response from campuses across the country was initially positive, when the NCAA found that seven institutions had committed violations, it was unable to obtain the two-thirds majority vote required for expulsion.²⁵ The sense of lawlessness became more pervasive after the Court of General Sessions in New York found a number of basketball players guilty of point shaving in New York City.²⁶ The probe into the incident led Judge Saul Streit to conclude that college football and basketball were “no longer amateur sports.”²⁷

It took another serious scandal to push the NCAA into a strong enforcement role. Among the guilty in the point-shaving cases were five University of Kentucky basketball players, and Judge Streit had stated that the University of Kentucky’s basketball teams of the late 1940s and early 1950s were “commercialized enterprises.”²⁸ In addition, the Commonwealth of Kentucky hired a consulting firm that reported that the athletic program at the university “ha[d] become professionalized” and recommended that the university return to “an amateur sports basis.”²⁹ The commonwealth ignored these recommendations, but the NCAA, after finding that ten University of Kentucky players had received illegal financial aid, successfully imposed a one-year “death penalty” on the Kentucky basketball team, prohibiting other NCAA institutions from competing with Kentucky for one year.³⁰ The Kentucky case ushered in a new era of the NCAA, one in which the NCAA became a credible enforcer of its rules and took control of many aspects of college sports.³¹

B. The NCAA, Its Member Institutions, and College Athletes

Since initially embracing its role as college sports’ rule enforcer, the NCAA has undergone numerous changes in its membership and

24. *Id.* at 69.

25. *Id.*

26. *Id.* at 70.

27. *Id.*

28. *Id.* at 83 (quoting Judge Streit).

29. *Id.* (quotations omitted).

30. *Id.*

31. The NCAA began exercising a great deal of control over all aspects of athletics, including the negotiation of television contracts in football for all of its members. The Supreme Court, however, struck down that particular NCAA practice as an illegal horizontal restraint of trade. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 86 (1984) (holding the NCAA’s college football television regulations in violation of the Sherman Act).

structure, ultimately segregating its membership into three divisions: Division I, Division, II, and Division III.³² The differences between the divisions are largely economic. This Note focuses on Division I, whose membership rules require that institutions provide financial grants to athletes.³³ The NCAA requires Division I member institutions to follow the rules contained in the NCAA Division I Manual.³⁴ Aside from general provisions, which consist mainly of broad statements supporting amateurism and other goals of the NCAA, the member institutions themselves control specific intradivision rules.³⁵ In this sense, the NCAA is a private, voluntary, member-controlled association.³⁶

The relationships between college athletes and the NCAA result from delegation of certain aspects of athlete participation in sports from universities to the NCAA by way of university membership in the NCAA. At the Division I level, particularly in revenue sports, universities recruit athletes to enroll in classes and participate in athletics. Without the NCAA, the relationship between a university and its athletes would be wholly the business of the university and the athlete. Theoretically, in this scenario, universities could give athletes numerous inducements, including salaries, and may not even require

32. Division I is further subdivided in football into the Bowl Subdivision and the Football Championship Division, formerly known as I–A and I–AA, respectively. NCAA, What’s the Difference Between Divisions I, II, and III?, http://www.ncaa.org/about/div_criteria.html (last visited Nov. 27, 2007).

33. 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art. 20.9. Additional requirements include that qualifying institutions have more sports and more of a public following, including minimum attendance requirements for football, than institutions in the other divisions. *Id.* The contrast between Division I and Divisions II and III is apparent from the NCAA’s own description of the divisions. Whereas Division I institutions must provide “financial aid awards” for their athletics programs, *id.* art. 20.9.1, the NCAA does not require Division II institutions to do so, and Division III institutions cannot provide financial aid to athletes. NCAA, *supra* note 32. The NCAA points out that, in Division III, “the student athlete’s experience is of paramount concern.” 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art. 20.9. The distinction allows the inference that in Division I the “paramount concern” is with something other than “the student athlete’s experience,” and the fact that a Division I requirement is a minimum level of spectator attendance suggests that economic considerations are critical for Division I membership.

34. 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art. 1.3.2.

35. *Id.* art. 4 (providing for election of governing boards by member institutions).

36. Professional sports leagues such as the National Football League are analogous in structure, although the members of the professional leagues are for-profit enterprises and NCAA member institutions are nonprofit organizations.

athletes to enroll in classes.³⁷ Indeed, with no NCAA regulation, “amateurism” could exist at one university and not at another, or college sports could be de facto professional.³⁸ By becoming members of the NCAA, however, universities agree to subject themselves to NCAA rules, which member institutions collectively formulate, including rules regarding relationships between universities and athletes.³⁹ Thus, athletes become indirectly bound to the NCAA. Although a solitary university or group of universities could conceivably disassociate itself from the NCAA, most universities would likely refuse to break NCAA rules to participate in athletics with “separatist” universities, because to do so they would have to largely forgo interuniversity athletic competition with the remaining NCAA schools.⁴⁰ As a result, athletes must abide by NCAA rules if they want to compete.⁴¹

37. Such was essentially the state of affairs before the NCAA successfully took on a strong enforcement role. *See supra* Part I.A.

38. Scrutiny of major college athletics by the media probably constrains some “renegade” behavior by universities. Absent NCAA regulation, media scrutiny could possibly prevent widespread disregard of the principles of amateurism. More likely, however, the “renegade” university would at some point cease to be a “renegade,” and, to compete with each other, universities would have to continuously mimic and one-up each other, moving farther away from an amateur model and closer to a professional, competitive market model. Indeed, some argue that, even with the presence of NCAA regulation, many college sports are professional or at least quasi-professional. *See, e.g.,* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 41 (2000) (“A person employed to play sports cannot truly be called an amateur.”).

39. *See* 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art 1.3.2.

40. Presumably, the NCAA would impose a “death penalty” on a “separatist” university. For an example of this type of penalty, see the NCAA’s treatment of the University of Kentucky basketball program, *supra* notes 28–31 and accompanying text.

41. In basketball and football, the rules of professional leagues confine athletes to college. National Football League rules require players to be three years out of high school to be eligible for the draft. Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, Article XVI, Section 2(b) (Mar. 8, 2006). National Basketball Association rules require that players be at least nineteen years of age to be eligible for the draft. Collective Bargaining Agreement between the National Basketball Association and the NBA Players Association, Article X, Section 1(b)(i) (July 29, 2005). Thus, in most cases, athletes in these sports must play college sports, an arrangement that allows universities to attain top talent.

II. FEDERAL LABOR LAW AND COLLEGE ATHLETES

Federal labor law is applicable to employer-employee relationships that affect interstate commerce.⁴² Previous decisions of both the NLRB and the United States Supreme Court have found that a university is an “employer” under the NLRA in certain situations.⁴³ No decision, however, has spoken to whether the relationship between universities and college athletes amounts to one of an employer and employee under the NLRA. If, under the NLRA, college athletes are “employees” and universities are “employers,” then other provisions of the NLRA apply to the relationship, and college athletes have numerous rights, including the right to unionize.⁴⁴

The question of whether college athletes are “employees” under the NLRA is complex, and the NLRB should not be the body to impose unionized labor on college sports. This Part will first discuss NLRB jurisprudence in the graduate assistant context, the most closely analogous field in which the NLRB has refereed. It will next explore the murky issue of whether the NLRA applies to the relationship between universities and college athletes.

A. *Employer-Employee Relationship: The Graduate Assistant Precedent*

For athletes to have the right to unionize under the NLRA, universities must be employers, and athletes must be employees. It is settled that universities can be employers under federal labor law.⁴⁵ Thus, the important consideration in the athletics context is whether

42. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2000).

43. *See, e.g.*, NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980) (disapproving of faculty union not because university was not an employer, but because faculty had managerial jobs); Long Island Univ., C.W. Post Ctr., 189 N.L.R.B. 904, 904 (1971) (referring to the university as an “Employer”).

44. Athletes could also strike and engage in similarly protected collective actions. 29 U.S.C. §§ 157–59.

45. The Supreme Court in one instance held that faculty members of universities are managerial employees, and thus cannot form a unit appropriate for collective bargaining. *Yeshiva*, 444 U.S. at 672. In somewhat different factual situations, however, courts have suggested that faculty are in fact not managerial employees and thus can form a collective bargaining unit. *See, e.g.*, *Stephens Inst. v. NLRB*, 620 F.2d 720 (9th Cir. 1980) (distinguishing faculty with no policy role at start-up art school from faculty in *Yeshiva*). In either scenario, the fact that universities are not by definition exempt from employer status under labor law is taken as a given.

athletes can be “employees.” Neither the NLRB nor the federal courts have spoken directly on this matter, but the NLRB has found that graduate teaching assistants are “employees” in certain contexts. Although not directly applicable, NLRB jurisprudence with respect to graduate teaching assistants provides some insight into how the Board may treat college athletes.

The NLRB has struggled to delineate policy in the graduate assistant area and has changed its treatment of graduate assistants as “employees” several times. When first faced with the question in *Adelphi University*,⁴⁶ the Board held that graduate teaching assistants are “primarily students who do not share a sufficient community of interest with the regular faculty” to be included in a collective bargaining unit with faculty.⁴⁷ In *Leland Stanford Junior University*,⁴⁸ the NLRB faced the question of whether research assistants could, instead of interspersing themselves in a bargaining unit consisting of regular university faculty, form a separate employee collective bargaining unit.⁴⁹ The Board further foreclosed from graduate assistants the rights afforded “employees” under the NLRA, concluding that graduate research assistants “are not employees within the meaning of Section 2(2) of the [NLRA]” and thus not entitled to the protections of the NLRA afforded to employees, including the right to form a union.⁵⁰

In 1999, while considering the situation of medical interns and residents, the NLRB modified its position on the “employee” status of individuals whose pursuits were ostensibly academic in nature. In *Boston Medical Center*,⁵¹ the Board ultimately found that medical residents are employees under the NLRA despite recognizing that a central purpose of medical residency programs is to train doctors.⁵² Pointing to Supreme Court precedent, the NLRB emphasized that

[t]he “breadth of § 2(3)’s definition is striking. The Act specifically applies to ‘any employee.’” The exclusions listed in the statute are

46. *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

47. *Id.* at 640.

48. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

49. *Id.* at 621.

50. *Id.* at 623.

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

52. *See id.* at 159 (“[We] conclude that house staff are employees as defined by the Act, and find that such individuals are therefore entitled to all the statutory rights and obligations that flow from our conclusion.”).

limited and narrow, and do not, on their face, encompass the category “students.” Thus, unless there are other statutory or policy reasons for excluding house staff, they literally and plainly come within the meaning of “employee” as defined in the Act. We find no such reasons.⁵³

In this manner, the NLRB broadened the extent to which it gave “employee” status to individuals whose fundamental relationship with a university is arguably educational.

In 2000, the NLRB applied the rationale behind *Boston Medical Center* to the graduate teaching assistant context previously addressed in *Leland Stanford Junior University*. In *New York University*,⁵⁴ the NLRB decided that graduate student assistants were employees, and, unlike the graduate assistants in *Leland Stanford Junior University*, they could form a union and enjoy the other privileges and protections of the NLRA.⁵⁵ This time, the Board started with the premise, established by *Boston Medical Center*, that “unless a category of workers is among the few groups specifically exempted from the [NLRA]’s coverage,” or there is no relationship between the workers and the purported employer reflecting common-law agency, the workers, by default are “employees” under the NLRA.⁵⁶ Despite differences in working conditions, compensation structure, and academic standing, the NLRB refused to distinguish the *New York University* situation from the situation in *Boston Medical Center*.⁵⁷ Instead, the Board held that the controlling similarity was that in both cases the workers in question “perform[ed] work for their employer, under their employer’s control”—not the relative amounts of time spent working for employers.⁵⁸ The NLRB also refused to embrace

53. *Id.* at 160 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92 (1984)) (citation omitted).

54. *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000).

55. *Id.* at 1205.

56. *Id.*

57. *Id.* at 1206. Specifically, *New York University* argued that

(1) the Regional Director ignored evidence that the house staff spent 80 percent of their time providing services (patient care) for the hospital, while graduate assistants spend only 15 percent of their time performing graduate assistants’ duties for the Employer; (2) graduate assistants do not receive compensation for their teaching and other duties as did the *Boston Medical Center* house staff; and (3) graduate assistants perform this work in ‘furtherance’ of their degree, while the house staff already had their degrees.

Id.

58. *Id.*

policy considerations favoring that graduate assistants were not “employees.” Specifically, the Board rejected the notion that allowing graduate assistants to invoke the protections afforded “employees” by the NLRA would infringe on university “academic freedom,” explaining that, “[a]fter nearly 30 years of experience with bargaining units of faculty members,” academic freedom could be handled effectively as “any other issue in collective bargaining.”⁵⁹ The Board concluded that “[it could not] say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act [would] result in improper interference with the academic freedom of the institution they serve.”⁶⁰

The result in *New York University* lasted all of four years. When faced with the issue in 2004, the Board once again reversed itself and reverted to pre-*New York University* jurisprudence. In a 3-2 decision in *Brown University*,⁶¹ the NLRB decided that “graduate student assistants are not statutory employees.”⁶² The graduate assistants in *Brown University* were essentially the same as the graduate assistants in *New York University*. Deviating from its *New York University* holding, the NLRB majority held in *Brown University* that the money received by students is not “consideration for work” but simply “financial aid.”⁶³ This finding was part of an overall effort by the Board to move away from the *New York University* holding and rely instead on previous holdings, such as *Leland Stanford Junior University*.⁶⁴ After concluding that “the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one,”⁶⁵ the Board emphasized that, if graduate assistants were considered employees, then “[NLRB] involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away.”⁶⁶ The NLRB specifically noted:

59. *Id.* at 1208.

60. *Id.* at 1209.

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

62. *Id.* at 483.

63. *Id.* at 488.

64. *Id.* at 489.

65. *Id.* at 487 (noting that the “Board’s 25-year pre-NYU principle of regarding graduate students as nonemployees was sound and well reasoned”).

66. *Id.* at 490 (quoting *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1003 (1977)). Thus, the NLRB majority moved away from its explicit refusal in *New York University* to deny “employee” status to graduate assistants on policy grounds. *N.Y. Univ.*, 332 N.L.R.B. 1205,

(1) the petitioned-for individuals are *students*; (2) working as a TA, RA, or proctor, and receipt of a stipend and tuition remission, depends on continued enrollment as a *student*; (3) the principal time commitment at Brown is focused on obtaining a degree, and, thus, being a *student*; and (4) serving as a TA, RA, or proctor, is part and parcel of the core elements of the Ph. D. degree, which are teaching and research. Although the structure of universities, like other institutions, may have changed, these facts illustrate that the basic relationship between graduate students and their university has not.⁶⁷

Thus, since 2004, the Board has maintained that, unlike medical interns and residents, graduate teaching assistants are not employees under the NLRA.

B. Are College Athletes “Employees” under the NLRA?

But what do NLRB decisions in the graduate assistant context mean for college athletes and the potential for them to form unions? At least one analysis argues that, under *Brown University*, college athletes in revenue-generating sports are entitled to “employee” status under the NLRA but the NCAA and its member institutions have deliberately and successfully evaded such classification for decades.⁶⁸ To assess this analysis and, more generally, the status of

1208–09 (2000). The dissent in *Brown University* pointed to situations in which graduate assistant unions and academic institutions had reached collective bargaining agreements without infringing on “academic freedom.” See *Brown*, 342 N.L.R.B. at 499 (“How can it be said that the terms and conditions of graduate-student employment are not adaptable to collective bargaining when collective bargaining over these precise issues is being conducted successfully in universities across the nation? . . . The NYU agreement neatly illustrates the correctness of the NYU [NLRB’s] view that the institution of collective bargaining is flexible enough to succeed in this context, as it has in so many others, from manufacturing to entertainment, health care to professional sports.”). The *Brown University* majority responded that

inasmuch as graduate student assistants are not statutory employees that is the end of the inquiry. Nevertheless, . . . [e]ven if some unions have chosen not to intrude into academic prerogatives, that does not mean that other unions would be similarly abstemious. The certification sought by the Petitioner here has no limitations. . . . [T]he broad power to bargain . . . would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process.

Id. at 492.

67. *Brown*, 342 N.L.R.B. at 492.

68. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 86 (2006) (“The NCAA purposely created the term ‘student-athlete’ as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities’ legal responsibilities as

college athletes under the law, it is necessary to analogize between the posture of college athletes and that of graduate assistants, the most similarly situated group for which NLRA jurisprudence exists. After understanding the daily lives of men's college football and basketball players, it is questionable whether the NLRB would adopt *Brown University* in the college athletic context, and, assuming that the NLRB were to adopt *Brown University* for the college athletic context, it is uncertain whether the NLRB would classify college athletes as employees.

1. *The Daily Lives of Division I Football and Men's Basketball Athletes*. To assess whether the graduate assistant cases are relevant in the college athlete context, a general understanding of the demands on Division I college football or men's basketball players is necessary. Relying on interviews conducted with four different male athletes who participated in either Division I college football or basketball, Robert A. McCormick and Amy Christian McCormick detail the daily lives of these athletes, both in and out of season.⁶⁹ The football season can last anywhere from fourteen to nineteen weeks, and during the season, players devote on average roughly fifty-three hours per week to football.⁷⁰ The time includes practice, training, and the travel and sequestration time that coaches impose on the days surrounding actual games.⁷¹ In addition, coaches require players to spend minimum amounts of time in study hall, and in some cases, they even compel players to enroll in certain courses or sit in certain seats in class.⁷² After the season, coaches still exert a great degree of control over the players' lives, requiring "vigorous" workouts, weight lifting, and spring practice, which itself entails "an even more demanding set of workouts."⁷³ During the academic year, outside of the season, "players' lives are essentially regulated from 5:30 a.m. to

employers [and] [i]n the ensuing fifty years, the NCAA, colleges, and universities have profited immensely from the vigorous defense and preservation of this myth.").

69. *Id.* at 97.

70. *Id.* at 98–99.

71. *Id.* at 100–01.

72. *Id.* at 100 ("[A]lthough the primary job of the players is to win football games, even studying has become part of their jobs as universities and the NCAA seek to deflect criticism over low graduation rates.").

73. *Id.* at 101–02.

10:00 p.m. four days per week.”⁷⁴ Once the academic year is complete, players still do not have complete freedom. In many cases, coaches require players to remain on campus from Monday through Friday, unless players receive permission from a coach to leave.⁷⁵ Players are also “strongly encouraged” to attend daily weight lifting and running sessions.⁷⁶ Sometimes there are restrictions on the private lives of athletes as well, such as the prohibition of tobacco or alcohol use.⁷⁷

Division I men’s basketball players face similar restrictions. During the season, basketball players “are required to spend four to five hours per day, six days a week, wholly devoted to basketball.”⁷⁸ The typical day, which includes “running, weight training, . . . cardiovascular conditioning, . . . practices and watch[ing] film of past games or future opponents’ games,” was termed by one player as “pure misery.”⁷⁹ In addition, because basketball games take place during the week and on weekends (unlike football games, which take place primarily on Saturdays), basketball players must miss class time to travel to and from games away from campus.⁸⁰ Outside of the season, basketball players “are required to stay in shape and in contact with the coaching staff.”⁸¹ In most cases, this requires minimum workouts of “three hours per day, seven days a week.”⁸²

74. *Id.* at 102. Note that participation in workouts, training, practice, and study hall is anything but voluntary, according to Professors McCormick and McCormick. Players are faced with sanctions such as “additional running, weightlifting, or other exercises, . . . demotion to a lower string . . . [or] outright dismissal from the team and withdrawal of the grant-in-aid . . .” *Id.* at 100. Thus, for football players, the very ability to attend the university is contingent upon satisfying whatever rules are prescribed by coaches, as long as those rules are not so stringent as to violate NCAA rules.

75. *Id.* at 102.

76. *Id.* (noting that players may not take summer classes “during the second summer session because those classes conflict with official practices, which begin in the first week of August”).

77. *Id.* at 105.

78. *Id.* at 106.

79. *Id.*

80. *Id.* at 107 (quoting one player stating that it is “impossible not to miss class,” and noting that another “estimated that he is typically absent from fifteen to twenty percent of his classes”).

81. *Id.* at 108.

82. *Id.* For Professors McCormick and McCormick, the experiences of college football and basketball players show that they are common-law employees. *Id.* (“[I]f any group of persons may be called ‘employees’ based upon the degree of control exercised by a university, it must be the employee-athletes enrolled there.”); *id.* at 108–09 (“The common law definition of employee requires that the employer compensate the alleged employee for services rendered, and the athletic grant-in-aid fulfills this role. The athletic grant-in-aid is unquestionably a transfer of economic value to the employee-athlete in return for his athletic services.”). In

2. *Would the NLRB Adopt Brown University in the College Athlete Context?* *Brown University* is the NLRB holding most closely related to the college athletics context. Nevertheless, it is unclear whether the NLRB would be willing to apply that decision's analytical framework in the college athlete context. Because the NLRB has been unable to formulate and maintain a policy with respect to whether graduate assistants are "employees," it likely would also have much difficulty formulating a policy for college athletes. Although the NLRB might use *Brown University* for guidance, it might also distinguish *Brown University* by seizing on certain differences between college athletes and graduate research assistants.⁸³

Two differences between college athletes and graduate teaching assistants stand out. First, unlike the graduate students in *Brown University* and the medical interns and residents in the *Boston Medical Center* line of cases, college athletes are generally undergraduate students. In distinguishing *Boston Medical Center* from *Brown University*, the NLRB noted that the individuals in question in *Boston Medical Center* "were interns, residents, and fellows who had already completed and received their academic degrees. . . . In [*Brown University*], the graduate assistants [were]

addition, McCormick and McCormick present analysis under the NLRB's *Brown University* holding with respect to whether college athletes (common-law employees in their minds) are also "employees" under the NLRA. *Id.* at 120. They argue that, unlike the relationship at issue in *Brown University*, the relationship between colleges and athletes in Division I football and men's basketball is an economic rather than an educational one. *See id.* at 130 ("The relationship between employee-athletes and their universities . . . is nearly exclusively economic, or commercial, and is decidedly not predominantly academic."). According to McCormick and McCormick, this reality is symbolized by the fact that graduate students are supervised by faculty whereas athletes are supervised by coaches. *See id.* at 125–26 ("Faculty have no supervisory role whatsoever over the athletic services athletes provide. . . . The fact that coaches, not faculty members, supervise athletes' services demonstrates that players' work as athletes is not educational in nature."). To demonstrate that the relationship between college athletes and their universities is primarily economic and not academic, McCormick and McCormick provide an extensive discussion of the commercial nature of college athletics. Particularly, they discuss: the large revenues generated from television and attendance at games, academic standards that allow athletes who are not legitimate students to matriculate, freshmen eligibility as an indication of disinterest in athletes' academic success, demands on player time that make it impossible for them to function effectively as students, curricula for athletes that are worthless academically, higher frequency of academic probation by revenue sport athletes, the presence of academic fraud to maintain athlete eligibility, NCAA requirements that allow athletes to fall short of attaining a degree, and low graduation rates. *Id.* at 130–55.

83. Indeed, the Supreme Court has mandated that the NLRB not mechanically follow legalistic rules when determining employee status. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 129 (1944).

seeking their academic degrees and, thus, [were] clearly students.”⁸⁴ The vast majority of college athletes, in contrast to both the individuals in *Brown University* and *Boston Medical Center*, are undergraduate students who have completed less education than the graduate assistants in *Brown University*.⁸⁵

Second, the NLRB has reversed field and now frowns upon granting “employee” status to graduate assistants. In doing so, it has indicated that it is loathe to interfere with the affairs of colleges and students. The NLRB has stated: “the first prerequisite to becoming a graduate student assistant is being a student. Being a student, of course, is synonymous with learning, education, and academic pursuits.”⁸⁶ Similarly, NCAA rules require college athletes to be students before they can participate in athletics, which, according to the NLRB, would bring them at least peripherally into the realm of “academic pursuits.” Once a matter is within this realm, *Brown University* indicates the NLRB’s strong reluctance to impose on the affairs of a university. In *Brown*, the NLRB cited with approval the opinion of Justice Frankfurter in *Sweezy v. New Hampshire*,⁸⁷ which noted that “[a]cademic freedom includes the right of a university ‘to determine for itself . . . who may be admitted to study.’”⁸⁸ The NLRB couched much of its analysis in terms of the historical roots of the NLRA.⁸⁹ Should the NLRB determine that academic institutions best resolve the issues arising from the relationship between athletes and universities, rather than turning to national labor law for a resolution, it may choose to develop no framework at all for the analysis of “employment” in the college athletic context.

84. *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004).

85. With respect to time commitment, college athletes fall somewhere between medical interns and graduate assistants. Based on the interviews conducted by Professors McCormick and McCormick, college football and basketball players spend approximately fifty-three and thirty hours per week, respectively, on their athletic activities. McCormick & McCormick, *supra* note 68, at 98–99, 100. By contrast, medical interns work between sixty and one hundred hours per week, *Boston Med. Ctr.*, 330 N.L.R.B. 152, 184 (1999), and graduate research assistants work about twenty hours per week, *N.Y. Univ.*, 332 N.L.R.B. 1205, 1213 (2000). The combination of the differing time commitments and the fact that college athletes are undergraduate students may carry enough weight to dissuade the NLRB from concluding that college athletes are “employees.”

86. *Brown*, 342 N.L.R.B. at 488.

87. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

88. *Brown*, 342 N.L.R.B. at 490 n.26.

89. *See id.* at 487 (“[P]rinciples developed for use in the industrial setting cannot be imposed blindly on the academic world.” (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680–81 (1980))).

3. *NLRB Analysis of College Athletes under Brown*. Although the NLRB could distinguish its holding in *Brown University* from the context of college athletics, the language of the decision is broad enough to apply to college athletes.⁹⁰ Even if it adopted this broad interpretation, an NLRB friendly to the notion of “academic freedom” may nevertheless give wide latitude to universities in determining what constitutes an educational program and how students are admitted to those programs.

For example, what if the NLRB were to consider sport—like science, business, the arts, or other traditionally academic disciplines—a primary educational pursuit? If the NLRB were to view participation in sports as part of the academic experience, the NLRB might then find that an athlete is a student rather than an “employee.” This notion seems less fanciful if one crudely distills the purpose of a college education to the advancement into some vocation at a professional level. In that context, the pursuit of athletic skill to enable competition in professional sport is only superficially different than the pursuit of medicine or law as a profession. If this is the case, then despite the fact that athletes spend most of their time being athletes, as opposed to being students, they would still be “students” of the games they play, and the time spent on athletics would essentially be time spent learning.⁹¹

Perhaps such reasoning would require a minor leap of faith, but the NLRB may be willing to make such a leap. After all, the NLRB denied “employee” status to graduate assistants in *Brown University* partly because “collective bargaining would unduly infringe upon traditional academic freedoms . . . involving traditional academic decisions, including course length and *content*”⁹² Thus, if an institution determines that football, with all of its strategies and

90. *See id.* (“It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university.”). In contrast to graduate assistants, college athletes, as demonstrated by Professors McCormick and McCormick, have an economic relationship with their universities. *See McCormick & McCormick, supra* note 68, at 130–55 (“Employee-Athletes Are Not Primarily Students and Their Relationship with Their Universities Is an Economic One.”).

91. *Contra McCormick & McCormick, supra* note 68, at 120–30. Professors McCormick and McCormick extract a four-factor framework from *Brown University*—status of graduate assistants as students, role of graduate-student assistantships in education, the relationship between graduate student assistants and faculty, and the financial support graduate student assistants receive to attend school—and contrast its actual application in *Brown University* to graduate students, who are nonemployees, with its hypothetical application to athletes. *Id.*

92. *Brown*, 342 N.L.R.B. at 490 (emphasis added).

complexities, is an “academic” pursuit, the NLRB may treat football as any other academic field rather than trammel on the “academic freedom” of the institution to determine course content.

Equating athletic participation to academic participation would significantly change the posture of college athletics. Athletic services provided by athletes would become an essential part of the athlete’s education. Under the NCAA’s existing framework, athletes do not necessarily receive academic credit for their participation in sports; if sports, however, became part of an athlete’s education, then participation in sports activities could be considered “required elements” of an athlete’s educational program.⁹³ By similar reasoning, the supervision of athletes by coaches rather than faculty would be cast in a different light, as coaches would then be the primary purveyors of knowledge in the athletes’ educational experiences.⁹⁴

Although it is difficult to reconcile the big-money college sports of Division I football and men’s basketball with traditional notions of academic study and educational mission, it is not outside the realm of possibility that the NLRB would take such a step. The NLRB has had a difficult time elucidating labor policies in multiple areas, including with respect to universities and graduate assistants. It would almost certainly face difficulties when grappling with the issue of college athletes as “employees.”

III. CONSEQUENCES OF COLLEGE ATHLETES BEING “EMPLOYEES” UNDER THE NLRA

The remainder of this Note will analyze the possible ramifications of an NLRB finding that college athletes participating in Division I men’s football and basketball were “employees” under the NLRA. Because of the complex issues involved in imposing labor law on college athletics, if a change as drastic as unionizing college athletes were to occur, it should come about by an act of Congress, and not by the whim of a federal agency such as the NLRB.

93. McCormick & McCormick, *supra* note 68, at 122–25. Institutions may decide to grant academic credit for sports-related activities, and some already have done something similar. See Mark Schlabach, *Varsity Athletes Get Class Credit; Some Colleges Give Grades for Playing*, WASH. POST, Aug. 26, 2004, at A1 (“[N]early three dozen universities award academic credit for participation on intercollegiate sports teams.”).

94. See generally McCormick & McCormick, *supra* note 68, at 125 (discussing how athletes are primarily supervised by coaching staffs).

A. *The Appropriate Bargaining Unit*

Ostensibly, employee status ought to be limited to Division I football and men's basketball, as at least two scholars have argued, because these are the sports that generate large revenues.⁹⁵ If the NLRB did decide that a college athlete should be treated as an employee, it would probably limit its holding to the facts before it. For example, if the first successful claim for "employee" status came from a football player, perhaps the NLRB would limit its holding to football. If that were to occur, a men's basketball player would undoubtedly bring a challenge. But why stop there? What about women's basketball, which generates significant revenues, especially at certain universities?⁹⁶ Where should the line be drawn?

These questions reveal the difficulty of addressing the college athlete as "employee" question in the first place. The only available model for unionizing college sports is that of professional sports, which has labor unions and collective bargaining agreements in each sport between team owners and player unions. Universities present an entirely different animal, one in which multiple sports are housed under one administration. Thus, the "employer" is the same for the men's basketball team, the football team, the women's basketball team, and the women's swim team. By contrast, in professional sports, a league of owners in a single sport forms a multiemployer bargaining unit to deal with a union of players of that sport.⁹⁷ This arrangement highlights certain economic differences between a university system and professional sports. Any successful professional sports team or league will be self-sustaining, with revenues generated by league games, events, and television-licensing contracts sufficient to compensate players and turn a profit. The collective bargaining process simply determines how much of total revenues or profits

95. *See id.* at 74 n.9.

96. *See* Robert W. Brown & R. Todd Jewell, *The Marginal Revenue Product of a Women's College Basketball Player*, 45 INDUS. RELATIONS 96, 100 (2006) ("[A] premium women's college basketball player generates \$241,337 annually for her school . . .").

97. *See, e.g.* Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, Preamble (Mar. 8, 2006) ("This Agreement . . . is made and entered into . . . by and between the National Football League Management Council . . . , which is recognized as the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League . . . , and the National Football League Players Association.").

players will receive in the form of salary.⁹⁸ In college sports, however, most sports are not self-sustaining. Although college football and men's basketball may be profitable at some universities, many universities operate at a loss for those and other sports.⁹⁹ This presents a number of difficult questions. What criteria should the NLRB use to determine if a given university's athletes in a given sport can unionize? And what athletes should be grouped into a bargaining unit? With respect to the "employer," what is the appropriate unit—the universities individually or the NCAA as a sort of multiemployer bargaining unit?

There are several possible solutions, most of which would involve some sort of initial line drawing among athletes to determine whether they qualify for "employee" status. The most rudimentary solution on the "employee" side would be a Board decision that college athletes are eligible to be treated as "employees" under the NLRA, with no further instruction. Athletes could then organize themselves however they saw fit. Perhaps football players at one university would form a union and begin a dialogue with their university. Alternatively, they could form a union with other football players at universities in their conference or throughout the country and attempt to effect change at a broader level.¹⁰⁰ The NLRB could stay above the fray until presented with a specific issue, probably something along the lines of certifying a given bargaining unit. In this manner, athletes who want to form a union would unionize, and athletes who do not would not.

Despite the apparent simplicity of an NLRB holding that college athletes qualify for "employee" status under the NLRA, at some point the NLRB will almost certainly have to engage in more complex line drawing. For example, suppose the Duke University men's basketball team forms a union and votes to go on strike if the players do not receive an increase in their financial aid packages that

98. In many cases the division of revenues or profits is explicit. For example, the National Football League collective agreement stipulates that at least 50 percent of revenues be used for player salaries. Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, Article XXIV, Section 3 (Mar. 8, 2006).

99. See NCAA REVENUE REPORT, *supra* note 15, at 14 ("In Division I–A, [68] percent of schools reported a profit . . . for their football programs and [70] percent reported profits from men's basketball . . . The remaining Division I–A schools lost . . . [money] on these programs.").

100. One possibility would be an expansion of the National College Players Association. See generally The NCPA, Mission & Goals, http://www.ncpanow.org/our_mission.asp (last visited Nov. 27, 2007) (stating its mission "[t]o provide the means for college athletes to voice their concerns and change NCAA rules").

compensates them for their full cost of attendance.¹⁰¹ If Duke complies with the demands of the players, it will violate NCAA rules and jeopardize NCAA membership.¹⁰² If it does not comply, then it faces the possibility of a strike by its basketball players. Thus, although the NLRB could decide to limit the employer-employee relationship to the university-athlete context, the presence of the NCAA bylaws and the significance of NCAA membership make the NCAA a vital party to this dispute.¹⁰³ The NLRB would therefore have to decide whether to order the NCAA to form multiemployer bargaining units, similar to those of professional sports leagues, and if so, how to structure them.

One possibility is to allow units for different sports at different levels: all Division I basketball universities could be part of a unit, for example, and the NLRB could order the players at those universities to form their own complementary unit. Alternatively, all athletes at Division I universities could be part of a unit. This arrangement would limit the number of different bargaining units, but would likely cause representation problems in trying to sort out the different interests of different athletes.¹⁰⁴ In any case, there is bound to be a misalignment of interests at some level, a reality that brings to light the issue of the autonomy of universities over their athletic programs.

B. The Impact of Unionization on College Athletics

Most Division I athletic programs operate at a loss, despite the strong economic success of their football or basketball programs. In

101. A class action antitrust lawsuit was filed jointly by Jason White and Brian Polak, former college football players at Stanford University and the University of California, Los Angeles, respectively, and Jovan Harris and Chris Craig, former college basketball players at the University of San Francisco and the University of Texas at El Paso, respectively, in the Federal District Court for the Central District of California, Western Division, making this very demand. *See* Complaint for Violation of Sec. 1 of the Sherman Act, 15 U.S.C. § 1, *White v. NCAA*, No. CV 06-8999 (C.D. Cal. Feb. 17, 2006) (on file with the *Duke Law Journal*). The suit asks for certification of a class consisting of all recipients of athletic-based grants-in-aid from any “major” college football or basketball program, and seeks unspecified damages and injunctive relief against the NCAA. *Id.*

102. *See* 2006–07 NCAA DIVISION I MANUAL, *supra* note 2, art. 3.2.1.2 (“The institution shall administer its athletics programs in accordance with the constitution, bylaws and other legislation of the Association.”).

103. *See supra* Part I.B.

104. Under this scenario, the NLRB would also have to draw some sort of line between athletes who are “employees” and can unionize and those who are not and cannot. For example, the interests of Division I college football players and Division I college men’s lacrosse players are likely to be quite divergent on many issues.

2002–03, 68 percent of Division I-A universities reported a profit from their football programs, averaging \$9.2 million, and 70 percent reported a profit from their men’s basketball programs, averaging \$3 million.¹⁰⁵ Despite the strong financial performances in these sports, Division I-A universities report an average financial loss of \$600,000.¹⁰⁶ Without the redistribution of profits earned by football and men’s basketball, virtually all universities would face increased financial difficulty in maintaining athletic programs in other sports.

Given this reality, consider the previous example involving the Duke University men’s basketball team. Assume that the NLRB certifies Duke’s men’s basketball players as a valid collective bargaining unit, and the NCAA changes its rules to allow all institutions to grant aid up to the full cost of attendance. The Duke men’s basketball union starts by demanding that the grant-in-aid from Duke cover the full cost of attendance. Duke subsequently increases the value of the scholarships it grants to men’s basketball players. But the men’s basketball players remain unsatisfied. In recognition that their efforts contribute more revenues to Duke athletic programs than any other Duke sport¹⁰⁷ and that their head coach garners enormous compensation¹⁰⁸ because of their collective success, the men’s basketball players threaten to strike unless a set percentage of the revenues they generate are distributed to them in various forms, including salary and pension. Assuming the NCAA does not modify its rules to make such concessions permissible, Duke is faced with the dilemma of either breaking NCAA rules or watching its men’s basketball team go on strike. If Duke pays its men’s basketball

105. NCAA REVENUE REPORT, *supra* note 15, at 14. The remaining Division I-A universities reported average losses of \$1.1 million and \$400,000 in football and basketball, respectively. *Id.*

106. *Id.* at 23. This figure is determined by subtracting expenses and “institutional support” from revenues. “Institutional support” refers to amounts invested from general university funds into athletic programs. The purpose of subtracting this amount is to determine the standalone net impact of athletic programs without any outside assistance. *See id.* at 13 (“[Including institutional support] may be misleading when attempting to determine the extent to which athletics programs contribute to or detract from institutions’ coffers.”).

107. Duke University, Equity in Athletics 2007: Screening Questions 1, 11 (on file with the *Duke Law Journal*) (stating that Duke’s men’s basketball program earns \$13,410,114, more than any other Duke sports program). This information is also available at Equity in Athletics, U.S. Dep’t of Educ., Office of Postsecondary Educ., <http://ope.ed.gov/athletics/search.asp> (search “Name of Institution” for “Duke University”).

108. IRS Form 990, Duke Univ., Return of Org. Exempt from Income Tax (May 11, 2006), available at http://tfcny.fdncenter.org/990_pdf_archive/560/560532129/560532129_200506_990.pdf (showing Mike Krzyzewski, men’s basketball coach, earns an annual salary of \$1.2 million).

players, not only does it likely have to balance the increased expenses incurred in men's basketball by cutting expenses or entire sports elsewhere, but it would also violate NCAA rules and face numerous sanctions, including possible banishment from the NCAA.¹⁰⁹ If Duke stands firm against its players, it risks the viability of its men's basketball program and the negative publicity that labor strife would bring.

If the NCAA modified its rules to allow universities the autonomy to negotiate employment terms with their athletes, the economics of college athletics would be so recalibrated as to make only high revenue-generating sports financially independent. Men's basketball and football would essentially become professional sports.¹¹⁰ Other sports, however, could face elimination. In this way, unionization of college athletes could reduce university athletic departments to a handful of teams—that is, men's basketball, football, and the lucky women's programs salvaged for Title IX compliance.¹¹¹

C. *The Proper Forum for Unionizing College Sports: Congress*

Faced with the stark reality of what unionizing college athletes would mean for the college sports landscape, would the NLRB ever allow college athletes to be classified as “employees” under the NLRA? The domino effect of such a decision would transform college athletics into something different, but perhaps that is a desirable result. If college athletics is truly a commercial endeavor,

109. The NCAA would be unlikely to allow one member to essentially pay its athletes while other members abided by NCAA rules.

110. Because women's basketball is a revenue sport at many universities, *see supra* note 96, in some instances it may also become de facto professional, or at least remain financially independent.

111. Perhaps Title IX's presence provides another reason to leave to Congress the balancing of factors involved in applying the NLRA to college sports. Title IX requires equal funding for men's and women's sports. *See* 20 U.S.C. § 1681(a) (2000) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”). If all sports other than football, men's basketball, and women's basketball were eliminated, then, for Title IX purposes, women's basketball could offset men's basketball. Football would still dramatically upset the Title IX balance, which would require the retention of other women's sports in addition to basketball. Alternatively, proposals have been made to exclude football and men's basketball from Title IX's reach. *See* Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1113–14 (2002) (describing previously proposed amendments to Title IX that would exempt “revenue” sports such as football and men's basketball from the law's requirements).

then perhaps it should be treated as a business, and market forces should determine the fate of individual sports.

The role of the NCAA in college athletics is simultaneously regulatory and commercial. In *NCAA v. Board of Regents of the University of Oklahoma*,¹¹² the Supreme Court grappled with the NCAA's dual role in the antitrust context. It held that despite the NCAA's educational goals and nonprofit status, it was subject to antitrust scrutiny.¹¹³ The Court, however, realized that "horizontal restraints on competition are essential if the product," intercollegiate football, is to be available at all.¹¹⁴ The Court also looked favorably upon the notion that the NCAA deserves deference to regulate college athletics because it "plays a critical role in the maintenance of a revered tradition of amateurism in college sports."¹¹⁵ In his dissent, Justice White seized upon the idea of the NCAA's role as steward of college athletics to argue that the NCAA should be able to engage in horizontal restraints with respect to football television contracts, just as it is able to engage in restraints with respect to scholarships and eligibility, among myriad other areas, through its vast set of rules.¹¹⁶

The proper roles of the NCAA and the NLRA are dictated by policy choices regarding the nature of college sports. If the

112. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

113. *See id.* at 100–01 (stating that the decision to scrutinize horizontal price fixing by the NCAA "is not based . . . on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics").

114. *Id.* at 101.

115. *Id.* at 120.

116. *See id.* at 122–23 (White, J., dissenting) ("In pursuing th[e] goal [of integrating amateur athletics into the college educational system], the [NCAA] and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market. . . . [The NCAA] has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games played, and many other aspects of intercollegiate athletics. One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives. . . . I do not believe that the . . . television plan differs fundamentally for antitrust purposes from other seemingly anticompetitive aspects of the organization's broader program of self-regulation." (citations omitted)).

maintenance of amateur college sports is desirable, the NCAA's regulatory function is of paramount importance. If college sports, however, are an essentially commercial endeavor, then college sports ought to fall under the jurisdiction of the NLRA.¹¹⁷ There are numerous lines that can be drawn between these two outcomes.

Ultimately, Congress should draw those lines. Congress is in a unique position to balance the commercial characteristics of college sports against the qualities that distinguish college sports from professional sports.¹¹⁸ Although the NLRB is capable of determining the application of the NLRA to various industries, it has never before made that determination for college athletics. In other industries, unionization does not fundamentally alter the character of the industry itself. By contrast, allowing college athletes to unionize would change the very nature of college sports. Furthermore, Congress did not contemplate "employee" rights for college athletes when it first formulated the NLRA. Thus, Congress, not the Board, ought to be the actor to decide whether to unionize college athletics. Such action would both radically change the original understanding of the NLRA and fundamentally alter the nature of college sports.

117. In the labor context, once college athletes are considered "employees," then all NCAA rules that affect athletes are subject to collective bargaining and can be changed. As discussed by the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*, NCAA regulations are horizontal restraints and antitrust violations, and could successfully be challenged. *Id.* at 101 (majority opinion). In other sports contexts, the interplay between antitrust law and labor law has yielded the nonstatutory labor exemption to antitrust law. *See, e.g., Brown v. Pro Football, Inc.*, 518 U.S. 231, 235 (1996). Professional sports leagues have taken advantage of the exemption, and, via collective bargaining agreements, sports leagues can control overall salary levels and maintain competitive balance. *See, e.g., Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association*, Article XXIV (Mar. 8, 2006). Thus, one possible outcome of the ingress of labor law into college athletics is that NCAA regulations could be saved from antitrust scrutiny by the nonstatutory labor exemption. If, for instance, the athletes' unions were weak, the NCAA could negotiate collective bargaining agreements that incorporate by reference NCAA rules and their restrictive regulations. Or, similarly, athletes' unions may recognize that amateurism or the semblance thereof is vital to the commercial success of college athletics, and thus agree to maintain principles of amateurism to keep college sports viable. If either of these outcomes occur, perhaps the NCAA would consider the cloud of unions in college athletics to have a silver lining.

118. Congress regulates labor markets by exercising its constitutional power to regulate commerce. Thus, although it has delegated much of its regulatory power over labor markets to the NLRA, it can still restrict or withdraw the NLRA's power in select industries. For example, Congress has implemented industry-specific restrictions on the regulation of health care institutions under the NLRA. *See National Labor Relations Act*, 29 U.S.C. § 158(d) (2000) ("Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified.").

CONCLUSION

The NCAA has never publicly espoused commercial success as one of its goals. Nevertheless, it has overseen an era in which college sports have increasingly become an economic force. At a time when, because of the efforts of college athletes, large sums of money are changing hands,¹¹⁹ and many coaches at top Division I schools receive multimillion dollar compensation packages,¹²⁰ athletes are bound to demand a bigger piece of the college sports pie. Antitrust law is the most common avenue pursued to gain the bigger piece, but labor law is also a viable, though yet untrodden, path to the money. Indeed, according to NLRB precedent and given the large revenues college sports generate, college athletes in Division I football and men's basketball may be "employees" under the NLRA, capable of unionization.

Although this route is perhaps legally viable, the foreseeable consequences of unions of college athletes will completely alter college sports and raise critical issues in the realms of antitrust law, amateurism, and fairness. As the Supreme Court explained in *Board of Regents*, the amateur status of the athletes who play college sports is part of what makes college sports such an attractive product and serves to distinguish them from other sports, such as minor league baseball.¹²¹ Ultimately, different factors must be balanced, and the public must decide what role it wants college sports to play in society. Congress, which provided collective labor rights in the first place, should be the venue through which this balance is struck.

119. CBS is paying the NCAA \$6 billion to televise the NCAA Men's Basketball Tournament over a period of eleven years, News Release, NCAA, NCAA Reaches Rights Agreement with CBS Sports (Nov. 18, 1999), and the Bowl Championship Series pays out over \$100 million per year in revenue to participating teams and their conferences, see BOWL CHAMPIONSHIP SERIES, 2007-2008 MEDIA GUIDE 9 ("The share to each conference . . . is approximately \$17 million.").

120. For example, in January 2007, head coach Nick Saban left the NFL's Miami Dolphins to take a *higher* overall salary to become head football coach for the University of Alabama. Saban's reported \$4 million salary would set a new standard for college coaches. Not only may a college football player or two raise an eyebrow at the magnitude of Saban's contract, but it may draw congressional interest as well. David King, *Coaches Mixed on Saban's Deal*, SAN ANTONIO EXPRESS-NEWS, Jan. 9, 2007, at 5D.

121. See *Bd. of Regents*, 468 U.S. at 101-02 ("The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.").