

IT'S TIME TO STOP PUNTING ON COLLEGE ATHLETES' RIGHTS: IMPLICATIONS OF *COLUMBIA UNIVERSITY* ON THE COLLECTIVE BARGAINING RIGHTS OF COLLEGE ATHLETES

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The National Labor Relations Board ruled in Columbia University that student assistants who have a common law employment relationship with their university are statutory employees under the National Labor Relations Act, which granted them full bargaining rights and union protection. However, just one year earlier, the Board decided to not address the question of whether college athletes receiving grant-in-aid scholarships should similarly be accorded the protections of the Act as statutory employees. Importantly, the Board noted that it was well-suited to make that determination in the future.

College athletes have been left in legal limbo as the teams, universities, and athletic conferences they work for have continued to profit exuberantly while denying them any substantial rights. The increased commercialization of collegiate sports has paralleled the prohibitive control that athletic conferences and universities exert over the athletic, social, and academic lives of college athletes. Thus, the Act—designed to prevent exploitation of labor—is the legal remedy available to college athletes seeking to reclaim their dignity and achieve equity in bargaining power.

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This Comment argues that the Board's decision in Columbia compels a finding that grant-in-aid athletes, or college athletes, participating in revenue-generating sports at Division I private universities and colleges are employees under the Act. Specifically, Columbia's statutory and common law test, as well as the jurisdictional discretion standard, all require a finding that it is legally unsound to continue to deny—under the veil of “amateurism”—college athletes the protections available to them under federal labor law while conceding that student assistants are deserving of those same protections.

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“[E]very Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and jo[i]ned to, at least where there is enough, and as good left in common for others.”

—John Locke¹

INTRODUCTION

A remarkable feature of American universities is the role that intercollegiate athletics enjoys in the college experience. Not only do athletic programs at universities inspire fervent allegiance, but these programs also generate millions of dollars in profits for their respective schools and leagues.² However, while universities financially compensate numerous student assistants who research or otherwise work for the university in some capacity,³ universities fail to compensate college athletes for their revenue-producing skills and the

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

2. See generally Robert A. McCormick & Amy Christian McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 509–27 (2008) (detailing the enormous profits that the National Collegiate Athletes Association [NCAA] and universities receive directly and indirectly from collegiate athletics); Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is It the Right Game Plan for Revenue Generating Student-Athletes in Their Contests for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051, 1058–60 (2002) (showing the NCAA's massive profits from ticket sales, advertising deals with corporate America, and broadcasting and television contracts for championship games); *60 Minutes: Where's Ours? College Athletes Band Together to Insist on a Cut of Profits Made from Their Sporting Events* (CBS television broadcast Jan. 6, 2002).

3. For example, Columbia University pays its part-time and work-study students \$15 an hour. Catie Edmondson, *Columbia to Pay Student Workers \$15 an Hour*, COLUMBIA SPECTATOR (Mar. 30, 2016, 4:00 AM), <http://columbiaspectator.com/news/2016/03/28/columbia-pay-students-workers-15-hour>.

considerable time they spend training, preparing, and competing.⁴ Although legal scholars have extensively discussed and written about the status of college athletes on university campuses,⁵ the leading enforcer of federal labor laws recently decided a case regarding student assistants that questions the widely held opinion that college athletes are merely students.

On August 23, 2016, the National Labor Relations Board (NLRB or “the Board”) held in *Columbia University*⁶ that student assistants who have a common-law employment relationship⁷ with their university are statutory employees under the National Labor Relations Act (NLRA or “the Act”), which granted them full bargaining rights and union protection.⁸ The Board further held that affording student assistants—graduate or undergraduate—the right to engage in collective bargaining would “further the policies of the Act, without engendering any cognizable, countervailing harm to private higher education.”⁹ This decision overruled the Board’s previous determination in *Brown University*,¹⁰ which held that permitting graduate student assistants to bargain collectively would improperly intrude onto the educational process and would be inconsistent with the purposes and policies of the Act.¹¹

The ruling in *Columbia* is groundbreaking because, in addition to overturning *Brown*, it also abandoned the legal- and policy-based rationale it proffered just one year earlier in *Northwestern University*.¹²

4. NCAA rules do not allow payment to student athletes beyond athletic scholarships, which are generally referred to as “grant-in-aid.” See *infra* note 153 and accompanying text.

5. See generally JOE NOCERA & BEN STRAUSS, *INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA* 53–54 (2016) (discussing the paradox of collegiate sports, where its commercialization has led to both massive profits for the NCAA and its member institutions and continued institutional exploitation of college athletes); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1083 (1997) (suggesting that athletes in Division I revenue-generating sports deserve compensation beyond scholarship and cost of attendance); Michael P. Cianfichi, Comment, *Varsity Blues: Student Athlete Unionization is the Wrong Way Forward to Reform Collegiate Athletics*, 74 MD. L. REV. 583, 596–97 (2015) (arguing that unionization in the educational setting is a slippery slope that would create negative unintended consequences).

6. *Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).

7. See SOCIAL SECURITY ADMINISTRATION, *How to Apply the Common Law Control Test in Determining an Employer-Employee Relationship*, https://www.ssa.gov/section218training/advanced_course_10.htm#4 (last visited Aug. 30, 2017).

8. *Id.* at 13. See generally National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

9. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 13.

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

11. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 12–13.

12. *Northwestern Univ.*, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

Columbia implicitly undermined *Northwestern's* holding, which had discouraged courts from exercising jurisdiction over college athletes and from recognizing them as employees.¹³ The petitioners in *Northwestern*, football players receiving grant-in-aid scholarships, had asked the Board to recognize them as employees under the Act.¹⁴ Such recognition would have afforded them numerous protections under federal labor laws and would have significantly improved their bargaining power.¹⁵ When the Regional Director first heard the case,¹⁶ he ruled that the petitioned-for unit at Northwestern must be accorded employee status because they met the Board's common law test for determining who is an employee under the Act.¹⁷ Yet upon reviewing the regional office's decision, the Board overturned the Regional Director's determination and held that asserting jurisdiction over college athletes would not promote stability in labor relations and would not further the policies of the Act.¹⁸ By not exercising jurisdiction, the Board punted on the specific question of whether college athletes are employees under the Act but, remarkably, noted in the opinion that nothing precluded a *future* determination¹⁹ that college athletes are employees.²⁰

At stake is the status quo, where college athletes have no substantial rights as amateur athletes,²¹ are subjected to prohibitive control at the

13. *Id.* at 1.

14. *Id.*

15. See National Labor Relations Act, 29 U.S.C. § 157 (2012) (listing the triad of rights accorded to employees under the Act).

16. The National Labor Relations Board is comprised of twenty-six regional offices that are authorized to serve their respective regions concerning petitions for elections. NATIONAL LABOR RELATIONS BOARD, *Who We Are*, <https://www.nlr.gov/who-we-are> (last visited Aug. 30, 2017). See generally NATIONAL LABOR RELATIONS BOARD, *The NLRB Process: Representative Election Process Chart*, <https://www.nlr.gov/resources/nlr-process> (last visited Aug. 30, 2017) (illustrating the regional director's role in the representative election process).

17. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *67–68 (Mar. 26, 2014).

18. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 6–7 (Aug. 17, 2015).

19. *Id.* at 6.

20. The Act's employee designations give workers the right to: (1) form, join, and assist labor organizations; (2) bargain collectively through representatives chosen by the workers; and (3) engage in concerted activities such as picketing and strikes to advance and protect their interests. National Labor Relations Act, 29 U.S.C. § 157. Moreover, these rights apply even if the employees are not part of a union. NATIONAL LABOR RELATIONS BOARD, *Employee Rights*, <http://www.nlr.gov/rights-we-protect/employee-rights> (last visited Aug. 30, 2017).

21. Ben Strauss, 'As a College Athlete, You Really Have No Rights', POLITICO (Mar. 16, 2017), <http://www.politico.com/magazine/story/2017/03/congress-ncaa-march-madness-214918>; *infra* note 162 and accompanying text.

hands of their coaches, universities, and respective leagues,²² all the while enduring some of the most laborious work on college campuses.²³ The opportunity for college athletes to gain legal status as employees under federal law—which is likely imminent after *Columbia*—would allow college athletes to caucus for their rights and salvage their dignity. Neither does this issue remain in a vacuum at the Board level. For example, federal courts have already begun to chip away at the National Collegiate Athletes Association’s (NCAA) notion of “amateurism”: litigation has sparked national dialogue concerning college athletes’ rights regarding the lucrative use of their own images and whether they are entitled to minimum wages.²⁴ The Board’s General Counsel and the NCAA itself have also started to revise their guidelines and policies concerning college athletes.²⁵

This Comment argues that the Board’s rationale in the 2015 *Northwestern* decision—which cautioned exercising jurisdiction over college athletes and thereby recognizing them as employees²⁶—ironically relied on the same flawed logic²⁷ that the Board criticized in its 2016 *Columbia* decision overturning *Brown*. The Board in *Columbia* claimed that *Brown* created ill-conceived policy arguments and purported to understand what is best for American intercollegiate sports without any empirical evidence to support such a claim.²⁸ This Comment argues that the Board’s decision in *Columbia* should be applied to *Northwestern*, compelling a finding that grant-in-aid athletes, or college athletes,²⁹ at Division I schools of the NCAA are employees

22. See *infra* notes 236–40 and accompanying text.

23. See *infra* notes 224–32 and accompanying text.

24. See *infra* Section I.D.2(a).

25. See *infra* Sections I.D.2(b)–(c).

26. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 6 (Aug. 17, 2015).

27. See *infra* notes 279–87 and accompanying text (applying *Columbia*’s critique of *Brown* to the Board’s decision in *Northwestern* to refuse to exercise jurisdiction over college athletes).

28. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 12 (Aug. 23, 2016) (Liebman & Walsh, Members, dissenting) (quoting *Brown Univ.*, 342 N.L.R.B. 483, 497 (2004)) (noting that the majority’s decision was not based on policy concerns derived from the Act, but rather, reflected “an abstract view about what is best for American higher education—a subject far removed from the Board’s expertise”).

29. This Comment uses the term “college athlete” instead of “student-athlete,” due to the latter’s insidious origination and almost pejorative place in this discussion. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 73–75 (2006) (highlighting the origin of the term “student-athlete” as NCAA propaganda aiming to obscure the reality that university athletes are employees); see also Mary Grace Miller, Comment, *The NCAA and the Student-Athlete: Reform Is on the Horizon*, 46 U. RICH. L. REV. 1141, 1142 (2012) (“The term ‘student-athlete’ was designed by the NCAA to preserve the amateur ideal . . .

under the Act. Specifically, this Comment's thesis is limited in application only to athletes participating in college athletics in revenue-generating sports.³⁰

Section I.A provides an overview of the role that the Board plays in designating an "employee" under the Act and the significance of that determination for employees. Section I.B outlines the major Board cases that have expanded the "employee" designation in the private university context and that have culminated in *Northwestern* and *Columbia*. Next, Section I.C explains the Board's statutory and common law test in *Columbia* for determining whether an employment relationship exists and the standard for exercising jurisdiction over a particular bargaining unit. Furthermore, Section I.D explores the status of collegiate football in the twenty-first century by looking to the nature and organization of the NCAA and an emerging national trend expanding college athletes' rights as employees and professionals.

Sections II.A–B of this Comment applies the Board's statutory and common law test in *Columbia* for determining who is an employee under the Act to the case of college athletes. Section II.C applies the jurisdictional discretion standard developed in *Columbia* to argue that the Board was mistakenly cautious in refraining from exercising jurisdiction in *Northwestern*. Part III of this Comment concludes that under *Columbia*, college athletes in revenue-generating sports at private, Division I NCAA universities and colleges are employees under the Act and that the Board can and should exert jurisdiction over this question.

[and] to provide an easy defense against workers' compensation claims."); Justin C. Vine, Note, *Leveling the Playing Field: Student Athletes Are Employees of Their University*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 235, 240 (2013) (explaining that the NCAA created the term "student athlete" to disguise any perceived employment relationship between athletes and universities that could cause legal consequences).

30. Most college athletics teams generate little revenue or operate at a loss; they are subsidized by their universities' revenue-generating sports, which are generally men's basketball and football. See Patrick Rishe, *College Football Profiteering a Necessary Evil for Financing Athletics, Long-Term Branding*, FORBES (Sept. 21, 2011, 2:10 PM), <https://www.forbes.com/sites/prishe/2011/09/21/college-football-profiteering-a-necessary-evil-for-financing-athletics-long-term-branding/#7cdae7d152fd> (describing how revenue-generating sports often bear the financial brunt of non-revenue-generating sports). Therefore, universities are likely to financially exploit only those college athletes competing in revenue-generating sports. See McCormick & McCormick, *supra* note 29, at 97–98 (defining "revenue-generating sports" as Division I football and men's basketball).

I. BACKGROUND

A. *The Role of the National Labor Relations Board Under the National Labor Relations Act*

The Act, also known as the Wagner Act, provides the legal structure governing labor relations in the United States.³¹ It also provides employees with bargaining rights to preserve industrial peace and prevent employer exploitation of labor.³² In aiming to achieve equality of bargaining power, the Act “safeguards commerce from the harm caused by labor disputes”³³ and seeks to mitigate concerns that include the amount of compensation, the number of working hours in a given day or week, and the general health and safety of employees.³⁴ However, the Act is more than just a tool for preventing the disruption of labor by labor-management disputes.³⁵ In granting a triad of rights to employees,³⁶ the Act was, as Senator Wagner described, an affirmative vehicle for economic and social progress.³⁷ Truly, Congress designed the Act to shield workers from employers who exploit them by threatening discharge as a self-help tool in combating organizing efforts.³⁸

31. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

32. See § 151 (discussing various findings and policy arguments under the Act and explaining how unequal bargaining power between employers and employees will likely obstruct the flow of commerce).

33. *Seattle Opera Ass’n v. Am. Guild Musical Artists*, 331 N.L.R.B. 1072, 1074 (2000) (internal citation omitted).

34. See César F. Rosado Marzán & Alex Tillet-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 319 (2015) (noting that the concerns driving college athletes toward unionization are precisely the kinds of issues the Act intended to resolve through collective bargaining).

35. See 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 13 (John E. Higgins, Jr., et al. eds., 6th ed. 2012) [hereinafter THE DEVELOPING LABOR LAW] (arguing that the advent of federal labor law and the Act was a result of the judiciary’s unsuccessful attempt to regulate labor disputes and a reflection of Congress’s desire to end the judiciary’s selective suppression of organized labor’s activities).

36. A unit accorded the “employee” designation will have the right to (1) form, join, and assist labor organizations; (2) bargain collectively through representatives; and (3) engage in concerted activities such as picketing, boycotts, and strikes. National Labor Relations Act, 29 U.S.C. § 157.

37. 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner) (“Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity only by cooperation with [other employees].”).

38. THE DEVELOPING LABOR LAW, *supra* note 35, at 29–30. The Act was also conspicuously one-sided, providing no corresponding protections against union action. *Id.* (noting that several “equalizing” amendments were offered to cure the Act’s perceived slant in favor of organized labor—although none passed).

To administer and enforce the Act,³⁹ Congress created the Board, a federal administrative agency established to (1) supervise and conduct representative elections and (2) adjudicate allegations of unfair labor practices.⁴⁰ In supervising elections, the Board determines the appropriate “bargaining units,” or groups of employees qualified to vote in union representation elections, which establishes the union that will represent the employees.⁴¹ However, under the Act, unions never impose collective bargaining on employees; instead, the Act simply affords the members of the unit the autonomy to decide whether to seek union representation based on majority support.⁴² Thus, the Act expands employees’ freedom to play a role in their employment relationship while recognizing that satisfied employees may choose not to bargain with their employers.

Pursuant to its power to determine an appropriate bargaining unit, the Board must decide whether an employment relationship exists and, more importantly, who it considers an “employee.”⁴³ However,

39. The Board has jurisdiction over most private sector employers, but the Act explicitly excludes persons employed by the federal, state, or local government. 29 U.S.C. § 152(2); NATIONAL LABOR RELATIONS BOARD, *Jurisdictional Standards*, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Aug. 30, 2017). The Board is also statutorily authorized to determine the scope of bargaining—the issues that are subject to negotiation under federal labor laws—which must include all issues relating to wages, hours, and terms and conditions of employments. 29 U.S.C. § 159(a); *see also* MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 487 (3d ed. 2013) (“Wages include pay, fringe benefits, and bonus payments; hours encompass time spent on the job; and working conditions cover factors influencing the work environment, such as work rules, seniority, and safety.”); GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 527 exhibit 11.1 (4th ed. 2010) (illustrating the mandatory and permissive subjects of bargaining once an employment relationship has been determined to exist).

40. WONG, *supra* note 39, at 523; *see also supra* note 16.

41. A “bargaining unit” is a group of two or more employees represented by a single labor union with a shared, identifiable community interest that allows employees to be grouped together for collective bargaining purposes. NATIONAL LABOR RELATIONS BOARD, *Basic Guide to the National Labor Relations Act* (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf>. Under § 159(b) of the Act, the Board has discretion to determine what an appropriate unit is for such purposes: “to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof” 29 U.S.C. § 159(b); *see also* MITTEN ET AL., *supra* note 39, at 487.

42. 29 U.S.C. § 159(a); *see also* Columbia Univ., 364 N.L.R.B. No. 90, at 2 n.8 (Aug. 23, 2016).

43. Determining whether an employee-employer relationship exists is a statutory pre-requisite to protection under the Act. 29 U.S.C. § 151. The Supreme Court has made clear that Congress authorized the Board to define the term “employee.” *See*

that question has vexed the Board for decades and is subject to much scholarly scrutiny and debate because the Act fails to meaningfully define “employee” or “employer”; instead, it defines one by reference to the other.⁴⁴ Thus, the Board looks to common law doctrines to supplement the statutory meaning of the term “employee” and to incorporate new bargaining units within the fold of the Act’s protections.⁴⁵

B. The Meaning of “Employee” in the Private University Setting

The Board has been inconsistent in defining “employee” since initially asserting jurisdiction over private universities, often reversing its previous determinations within a short span of time.⁴⁶ This inconsistency has led to the Board applying different common law doctrines for determining the meaning of “employee” under the Act in the private university setting.

Section I.B.1 discusses the various Board decisions that have ruled on the statutory meaning of “employee” in the private university setting and how the Board’s common law test has evolved over the years. Section I.B.2 then analyzes the *Northwestern* decision, as well as the role that jurisdictional discretion plays in the Board’s determination of who is an “employee” under the Act.

NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89 (1995) (holding that rights guaranteed by the Act belong only to workers who qualify as “employees” under the Act); *see also* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130 (1944)) (justifying the Board’s considerable deference in constructing the term “employee” by explaining that the task of defining “employee” has been assigned primarily to the agency created by Congress to administer the Act), *superseded by statute*, 8 U.S.C. § 1182(a)(14), *as recognized in* *Patel v. Sumani Corp.*, 660 F. Supp. 1528, 1532 (N.D. Ala. 1987).

44. *See* 29 U.S.C. § 152(2) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly”); *id.* § 152(3) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer”). Although the Act only governs private enterprises, its interpretation is highly influential because numerous state statutes governing the employment relationship among public employers and employees are specifically modeled after the Act and draw on the Board’s interpretations. *See McCormick & McCormick*, *supra* note 29, at 90 (“[T]he statutory language itself fails to distinguish the salient characteristics of either employer or employee from other classes of entities or persons”).

45. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 3–5 (citing *New York Univ.*, 332 N.L.R.B. 1205, 1205–06 (2000)) (noting that the Board has relied on the “breadth of the statutory language, the lack of any statutory exclusion[s] . . . [and the] common-law agency doctrine” when determining whether a bargaining unit is properly accorded employee status).

46. *See, e.g., Adelphi Univ.*, 195 N.L.R.B. 639 (1972); *Cornell Univ.*, 183 N.L.R.B. 329 (1970).

1. *Student assistants and their path to employee status*

The Board's reluctance to exercise jurisdiction over college athletes in *Northwestern* surprised many because the Board has exercised jurisdiction over private universities in some fashion for close to forty-six years.⁴⁷ During those years, it has grappled with the decision to accord the Act's protections to various categories of employees in the university context, relying on numerous different tests to determine who is an "employee." For example, within two years of asserting jurisdiction over private universities for the first time in 1970,⁴⁸ the Board took up the question of how to categorize graduate assistants in *Adelphi University*.⁴⁹ In that case, the Board decided to exclude graduate assistants from a bargaining unit of university faculty members because the graduate assistants did not share a "community of interest" with the faculty.⁵⁰ Similarly, in *Leland Stanford Junior University*,⁵¹ the Board concluded that university research assistants were not statutory employees because they were "primarily students," and as such, their tasks were not controlled by the universities in a manner that is indicative of an employment relationship.⁵²

However, since those decisions in the 1970s, the Board has cautiously expanded the category of workers in private universities who

47. See *Columbia Univ.*, 97 N.L.R.B. 424, 426 n.7 (1951), *overruled by* *Cornell Univ.*, 183 N.L.R.B. at 330–31 (holding that it would best effectuate the policies of the Act to assert jurisdiction over nonprofit, private educational institutions). Additionally, although the expansion of the employee designation has not been confined to the private university context, that context is most germane to this analysis. See *Town & Country Elec.*, 516 U.S. at 98 (holding that the Board's construction of the term "employee" to include paid union organizers employed by a company was lawful); see also *Sure-Tan*, 467 U.S. at 891 (deferring to the Board's determination that undocumented aliens are employees under the Act); *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189–90 (1981) (affirming the Board's treatment of confidential employees as "employees" under the Act).

48. *Cornell Univ.*, 183 N.L.R.B. 329 (1970). See generally Arthur P. Menard & Nicholas DiGiovanni, Jr., *NLRB Jurisdiction over Colleges and Universities: A Plea for Rulemaking*, 16 WM. & MARY L. REV. 599, 599 (1975) (discussing the advent of faculty unionism in the Board's 1970 decision to exercise jurisdiction over institutions of higher learning).

49. 195 N.L.R.B. 639 (1972).

50. *Id.* at 640 (asserting that although the 125 graduate students performed some faculty-related functions, they "[did] not share a sufficient community of interest with the regular faculty to warrant their inclusion in the [bargaining] unit").

51. 214 N.L.R.B. 621 (1974).

52. *Id.* at 623. The Board rejected the notion that the eighty-three research assistants were employees due to receiving grants and stipends because that was compensation to acquire their degrees, rather than payment for specific skills or tasks performed. *Id.* at 621, 623.

are eligible for protection under the Act.⁵³ The Board first held that graduate student assistants were statutory employees under the Act in *New York University*.⁵⁴ In that case, the Board overruled the “primarily students” analysis⁵⁵ that some of its prior decisions had relied on and instead followed the three principles the Board described in *Boston Medical Center*⁵⁶ for determining whether an employment relationship exists. These three principles are (1) the broadness of the statutory language; (2) the absence of any statutory exclusion for students; and (3) the common law agency doctrine of the master-servant relationship.⁵⁷ Relying on these principles, the *New York* Board found that student assistants indubitably fell within that common law doctrine and pronounced that it would not “deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they are also students.”⁵⁸

53. The expansion of collective bargaining in private universities began with *Bradford College*, where the Board held that faculty members were professional employees of the university and not managerial employees; thus, the faculty members were considered employees under the Board’s precedent. *Bradford Coll.*, 261 N.L.R.B. 565, 567 (1982). In spite of the absence of an explicit statutory exception, the Board concluded that managerial employees are not covered by the Act because Congress implied their exclusion. The Board believed it would destroy the traditional distinction between labor and management to have non-managerial employees in the same “camps” as managers, who are presumed to be on the side of the employer. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494–95 (1947) (Douglas, J., dissenting)). Similarly, the Board ruled in *Boston Medical Center* that house staff at a university teaching hospital—interns, residents, and clinical fellows—were employees under the Act. *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999). In that case, the Board voiced that the expansion of the Act’s protections to house staff would advance the policy goals of the Act. *Id.* (holding that students came within the meaning of “employee” as defined in the Act because the exclusions listed in the statute were limited and narrow).

54. 332 N.L.R.B. 1205 (2000), *overruled by* *Brown Univ.*, 342 N.L.R.B. 483 (2004).

55. The “primarily student” analysis focuses on whether a particular group of students perform enough faculty-related tasks to share a sufficient community of interest with the regular faculty so as their inclusion in a bargaining unit for employee status is appropriate. *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

56. 330 N.L.R.B. 152 (1999).

57. *See* *New York Univ.*, 332 N.L.R.B. 1205, 1205–06 (2000) (listing the three principles that guided the *Boston Medical Center* decision and explaining that under the common law agency doctrine of the master-servant relationship, the Board analyzes whether the purported employee performed services under the control and direction of the employer in exchange for compensation).

58. *Id.* at 1209.

However, the Board overruled the *New York* decision just a few years later in *Brown University*.⁵⁹ In *Brown*, the Board retreated from expanding the Act's protections in the university context and reinstated the "primarily students" analysis that *New York* had discarded. Accordingly, *Brown* held that graduate student assistants failed to meet a prerequisite to statutory coverage because they had a "primarily educational" relationship with the university and Congress designed the Act to protect only economic relationships.⁶⁰ In relying on the "primarily student" test explicitly overruled in previous decisions,⁶¹ the Board further held that collective bargaining was ill-suited for educational decision making and would be detrimental to labor and educational policies.⁶²

Nevertheless, *Brown*'s "woefully out of touch" rationale and narrow reading of the statutory language would not remain precedential.⁶³ In yet another twist of the Board's definition of "employee" in the university setting, on August 23, 2016, the Board in *Columbia* boldly rejected *Brown*'s characterization of the harmful effects of collective bargaining in the educational context and explicitly overruled it.⁶⁴ In that case, Columbia University asserted that its student assistants were not common law employees because, as externally funded research assistants, they lacked an economic relationship with the university and could not be employees of a university under the Board's precedent.⁶⁵ The Board, rejecting the university's argument, held that "[w]here student assistants have an employment relationship with their

59. 342 N.L.R.B. 483 (2004).

60. *Id.* at 489.

61. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4 (Aug. 23, 2016) (criticizing the Board's decision in *Brown* for overlooking the fact that graduate-student employment in the educational context was adaptable to collective bargaining, as evinced by experience at public-sector universities and at New York University). Additionally, there are more than thirty collective bargaining units representing more than 65,000 graduate students across the country in mostly public universities. Danielle Douglas-Gabriel, *Are They Students? Or Are They Employees? NLRB Rules that They Are Employees*, WASH. POST (Aug. 23, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/>.

62. *Brown Univ.*, 342 N.L.R.B. at 489.

63. *Id.* at 493 (Liebman & Walsh, Members, dissenting).

64. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 1.

65. *Id.* at 16. *Columbia* relied on the decision in *Leland Stanford*, which held that externally funded research assistants were "primarily students" who lacked an economic relationship with the university and thus could not be common law employees because they worked independently for their own benefit and the university ultimately did not control them. *Id.* at 17.

university under the common law test—which they do here—this relationship is sufficient to establish that the student assistant is a[n] . . . employee for all statutory purposes.”⁶⁶

The decision in *Columbia* was not merely a rehashing of the Board’s original determination that graduate student assistants were employees in *New York*; rather, it went further than the Board ever had. Unlike *New York*, which determined that only graduate students were employees,⁶⁷ the successful bargaining unit in *Columbia* included all student employees who provided instructional or research services to the university, including undergraduate students.⁶⁸ More importantly, the *Columbia* decision reaffirmed the dynamic flexibility of the Act⁶⁹ and proclaimed that the policy aims of the Act are furthered by expanding its protections to workers who meet the Board’s common law test.⁷⁰ *Columbia* was thus an unequivocal endorsement of collective bargaining in the university context.

2. Northwestern: *College athletes as employees and the role of jurisdictional discretion*

One year prior to the Board’s decision in *Columbia*, the Board issued its opinion in *Northwestern*, in which it refused to determine on jurisdictional grounds whether football players receiving grant-in-aid scholarships at Northwestern University were employees under the Act.⁷¹ The issue before the Board, however, was novel: it had never

66. *Id.* at 4. While arguing in front of the Regional Director, the university conceded that if the Board were to apply the common law test for employment, student assistants must be considered employees under the Act. *Id.* at 15. It retracted this position on appeal. *Id.*

67. *See New York Univ.*, 332 N.L.R.B. 1205, 1221 (2000) (referring collectively to the petitioned-for and certified bargaining unit comprised of graduate student assistants as “graduate assistants” under the Act).

68. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 1 n.1 (defining the bargaining unit as “all students . . . including graduate and undergraduate Teaching Assistants . . . [and] Research Assistants”). Additionally, all of the petitioned-for student assistant classifications were found to be an appropriate unit and thus, statutory employees. *Id.* at 13.

69. *Id.* at 9 (highlighting the “historic flexibility of collective bargaining as a practice and its viability at public universities” in countering the argument that collective bargaining will harm the educational process).

70. *See id.* at 12 n.91 (“[I]t is important to note the policy judgment embodied in the Act [It] is designed to lessen conflict . . . and reflects the judgment of Congress that collective bargaining . . . is a right to be accorded broadly and across many industries.”).

71. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 1 (Aug. 17, 2015). Courts have historically been divided on this general question. *See MITTEN ET AL.*, *supra* note 39, at 139. However, some courts have recognized college athletes as employees. *See, e.g.*,

before asserted jurisdiction over college athletes nor received a petition for representation that sought a bargaining unit comprised of a single college team.⁷² Even more, the Board was reviewing a Regional Director's bold determination that grant-in-aid scholarship players for the employer's football team *were* "employees" under the Act.⁷³ Although the Board ultimately failed to resolve the question presented,⁷⁴ the Regional Director's decision was the first time in history that an opinion directed an election for representation of college athletes under the Act.⁷⁵

The Regional Director's opinion analyzed whether college athletes were employees under *Brown's* economic relationship test, which has

Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 466 (1963) (holding that a deceased college athlete had an employment relationship with the university; thus, a worker's compensation claim could be brought to recover for his death), *superseded by statute*, Cal. Lab. Code § 3352(k) (West 2017), *as recognized in* Shepard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 832 (Cal. Ct. App. 2002); Univ. of Denver v. Nemeth, 257 P.2d 423, 430 (Colo. 1953) (finding that an employer-employee relationship existed between a college athlete and the university where he played football).

72. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3. *But see* Big East Conference, 282 N.L.R.B. 335, 342 (1986) (asserting jurisdiction over an NCAA Division I Athletics Conference). Additionally, the Board has asserted jurisdiction in other contexts involving college athletics. *See* Providence Coll., 340 N.L.R.B. 966, 971–72 (2003) (bargaining unit consisted of employees who performed functions in support of college events); Univ. of Bridgeport, 229 N.L.R.B. 1074, 1075 (1977) (bargaining unit included athletic coaches).

73. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *68 (Mar. 26, 2014).

74. *See Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3 (declining to determine whether college athletes are employees under the Act for fear that asserting jurisdiction in the case would fail to promote the policies of the Act).

75. *See Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *68–69 (directing an immediate election of all football players receiving football grant-in-aid scholarship that had not exhausted their playing eligibility to determine if they wanted to be represented by a union). *See generally* Lori K. Mans & J. Evan Gibbs, *Student Athletes as Employees?*, 89 FLA. BAR J. 4 (Apr. 2015), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f-13012b96736985256aa900624829/71147e84b9e8876785257e1400664ec5!OpenDocument> (arguing that the Regional Director's decision would have "potentially sweeping" impact on the viability of athletic programs due to broad, costly protections that would be afforded to college athletes under other federal labor laws); Brennan W. Bolt, *March Madness? NLRB Regional Director Finds Northwestern's Football Players Are Employees Under the NLRA*, LAB. REL. TODAY (Mar. 26, 2014), <http://www.laborrelationstoday.com/2014/03/articles/special-interests/march-madness-nlr-regional-director-finds-northwesterns-football-players-are-employees-under-the-nlra> (characterizing the Regional Director's decision as one "that could forever change collegiate sports as we know it").

now been overruled,⁷⁶ and its right to control test, which is still valid and remains the traditional common law agency test.⁷⁷ The right to control test, further elucidated in *Columbia*, is simply whether (1) the employee works for a statutory employer in return for financial or other compensation and (2) whether the statutory employer has the control or right to control the person in the details of how the work is performed.⁷⁸

The first element of the right to control test required the Regional Director to examine the compensation football players received for their athletic performance and the benefits conferred to their ostensible employer, the university.⁷⁹ The record demonstrated that the university's football program generated revenues of \$235 million between 2003 and 2012 through its participation in the NCAA Division I and Big Ten Conference.⁸⁰ That revenue was generated through ticket sales, television broadcast contracts, merchandise sales, and licensing agreements.⁸¹ Concluding that the university derived an "economic benefit" from the relationship, the Director then examined whether the scholarships were compensation for athletic services.⁸² Although the football players did not receive a physical paycheck, the Regional Director found that irrelevant because each individual scholarship totaled as much as \$76,000 per calendar year.⁸³ Emphasizing that athletes were "sought out, recruited, and ultimately granted scholarships because of their athletic prowess on the football

76. Although the Act is designed to cover an economic relationship, such as an employment relationship, the *Brown* decision's "fundamental error" was failing to frame the issue of statutory coverage in terms of the existence of an employment relationship; but rather, as it did, framing the issue as whether some other relationship between the employee and the employer is the primary one, "a standard neither derived from the statutory text . . . nor from the fundamental policy of the Act." *Columbia Univ.*, 364 N.L.R.B. No. 90, at 5 (Aug. 23, 2016). The threshold necessary to the "economic" dimension in an employment relationship is compensation. *Id.* at 6.

77. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *53–54.

78. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15 n.100 (quoting *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002)); RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958).

79. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *40–41.

80. *Id.* at 41.

81. *Id.* Although Universities will often use the revenue generated from certain collegiate sports to subsidize non-revenue-generating sports, the Regional Director underscored that Northwestern was allowed to utilize the economic benefit provided by the services of the football players in any manner it chose. *Id.* at *38, *41.

82. *Id.* at *41–42.

83. *Id.* at *42.

field,” the Regional Director concluded that the grant-in-aid scholarships were clearly “compensation.”⁸⁴

Next, the Regional Director considered the second element for determining if an employment relationship existed: whether the university had control over the details of the football players’ work.⁸⁵ The university provided daily itineraries delineating how players should spend every hour of their day during the pre-season and demanded that players allot forty to fifty hours per week on football activities during the regular season; moreover, university staff regulated the football players’ private lives prohibitively.⁸⁶ The university’s relentless control even permeated the players’ academic lives.⁸⁷ The Director concluded that players receiving scholarships were under “strict and exacting control by their [e]mployer throughout the entire year,”⁸⁸ ultimately finding that the grant-in-aid scholarship players were employees under the Act.⁸⁹

Needless to say, the Director’s decision was controversial,⁹⁰ and the Board ultimately dismissed the petition and impounded the election,

84. *Id.* at *41–42. In addition, the fact that the players signed a “tender” serving as an employment contract and that the scholarships were subject to immediate cancellation if the player voluntarily withdrew from the team were further evidence that football scholarships (compensation) were tied to the players’ performance (services). *Id.* at *42–44.

85. *Id.* at *45.

86. *Id.* at *45–48 (finding that players have restrictions placed on them and must obtain permission from coaches or risk termination before: (1) making living arrangements; (2) applying for outside employment; (3) driving personal vehicles; (4) traveling off campus; (5) posting on social media; (6) speaking to the media; (7) using alcohol and drugs; and (8) engaging in gambling). Additionally, the NCAA also exerts control over college athletes. *See infra* note 157 and accompanying text (reviewing the NCAA’s restriction on the number of hours college athletes can devote to athletic activities).

87. *See Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *48–49 (discussing how players would often be unable to select certain courses due to conflict with football activities); M. Tyler Brown, Comment, *College Athletics Internships: The Case for Academic Credit in College Athletics*, 63 AM. U. L. REV. 1855, 1866–67 (2014) (explaining how college athletes regularly miss class to attend games, have tutors complete their assignments, attend sham classes that lack academic rigor, and reportedly pass classes they rarely attend).

88. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *45; *see also* Marzán & Tillet-Saks, *supra* note 34, at 311–12 (emphasizing that few principal-agent relationships are characterized by such direct control as that of the Northwestern football players’ relationship with Northwestern University).

89. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *68.

90. *See* Jon Hyman, *Did the NLRB Do More Harm than Good by Permitting Teaching and Research Assistants to Organize?*, WORKFORCE (Aug. 31, 2016), <http://www.workforce.com/2016/08/31/nlrh-harm-good-permitting-teaching->

holding that it “would not effectuate the policies of the Act . . . to assert jurisdiction over th[e] case.”⁹¹ The Board side-stepped the question of whether the college athletes were employees by relying on two overlapping reasons: (1) the nature of sports leagues and (2) the composition and structure of college football.⁹² The Board reasoned that the control exercised by the NCAA over its member institutions and their athletes, coupled with the fact that the overwhelming majority of competitors in the Football Bowl Subdivision (“FBS”) are public colleges and universities outside of the Board’s jurisdiction, made the bargaining unit so unique that asserting jurisdiction would not promote uniformity and stability to labor relations.⁹³

In that conclusion, the Board noted that it was declining to assert jurisdiction “without deciding whether the scholarship players are employees [under the Act].”⁹⁴ The Board’s cautious dismissal of the case on jurisdictional grounds left unresolved the question of whether college athletes could be employees⁹⁵ and went to great lengths to limit the application of its ruling,⁹⁶ hinting at what a successful petition for according the Act’s protections to college athletes might look like.⁹⁷ The Board concluded that it was completely justified in declining to

research-assistants-organize (arguing that the decision will ironically harm the students it aims to protect); Terry Briscoe & Ed Piper, *Northwestern University Football Players Can’t Vote for Union Representation . . . But It’s Not over Until It’s over*, WORLD OF EMP. (Aug. 20, 2015), http://www.stoelrivesworldofemployment.com/2015/08/articles/labor/northwestern-university-football-players-cant-vote-for-union-representation-but-its-not-over-until-its-over/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+WorldOfWork+%28Stoel+Rives+World+of+Employment%29 (stating that on appeal, the Board accepted no less than 100 amicus briefs on the Regional Director’s decision, many of which “vigorously argued” for employee status).

91. Northwestern Univ., 362 N.L.R.B. No. 167, at 6–7 (Aug. 17, 2015).

92. *Id.* at 3.

93. *Id.* The Board’s logic is as follows: football teams have consistently relinquished power to the NCAA, which now exercises a substantial degree of control over the operations of individual teams such that any labor issue directly involving only an individual team would also affect the NCAA and other member institutions. *Id.* at 4–5. Additionally, bargaining as a single unit team would create an inherent asymmetry in labor relations regulatory regimes because the Board would be unable to exert jurisdiction over public universities within the NCAA because they are not “employers” within the meaning of the Act. *Id.*

94. *Id.* at 6.

95. *See id.* (“[S]ubsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today.”).

96. *See id.* (“We emphasize that our decision today . . . is limited to Northwestern’s scholarship football players . . .”).

97. *See id.* (“[W]e therefore do not address what the Board’s approach might be to a petition for all FBS scholarship football players [at private universities] . . .”).

assert jurisdiction, citing the policies of the Act⁹⁸ and the absence of congressional direction on who constitutes an “employee.”⁹⁹

C. *Columbia: Determining Who is an “Employee” Under the Act and A Standard for Asserting Jurisdiction*

One year after the *Northwestern* decision, the Board in *Columbia* was presented with the question of whether students who work at a university in connection with their education are statutory employees under the Act.¹⁰⁰ This basic question of statutory interpretation, however, turned out to be multifaceted because Congress failed to provide a concrete and meaningful definition of the word “employee.”¹⁰¹ This Section thus explores the *Columbia* Board’s analysis by discussing the statutory interpretation, the common law test, and the jurisdictional standard prongs of the Board’s analysis.

1. *The statutory analysis*

The Act does not define with specificity either “employees” or “employers,” so the Board has historically discerned legislative intent by relying on its precedent. Board precedent broadly interprets the

98. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3 (noting that the Board conflates “the policies of the Act” exclusively with “promoting stability in labor relations,” providing not one other policy goal or aim of the Act in its opinion). Moreover, although the Board may decline to assert jurisdiction of a complaint squarely under the Act, it has seldom done so. See *infra* note 123 and accompanying text (showing the available discretionary avenues for declining jurisdiction); see also *Contract Servs., Inc.*, 202 N.L.R.B. 862 (1973) (declining to assert jurisdiction due to foreign relations considerations); *Walter A. Kelley*, 139 N.L.R.B. 744, 746–47 (1962) (declining to assert jurisdiction for the horse-racing industry because it was deemed to be a local activity). And, when the Board has done so, it is not uncommon for it to reconsider its original decision. For example, in *The American League of Professional Baseball Clubs*, the Board reconsidered its initial reluctance to assert jurisdiction over labor relations in the context of professional sports and subsequently recognized the importance of having federal labor law govern the relationship between league clubs and their players. *Am. League of Prof’l Baseball Clubs*, 180 N.L.R.B. 190, 191 (1969); see also *Big East Conference*, 282 N.L.R.B. 335, 341–42 (1986) (asserting jurisdiction over an NCAA Division I Athletics Conference); *N. Am. Soccer League*, 236 N.L.R.B. 1317, 1319–21 (1978) (asserting jurisdiction over the North American Soccer League).

99. “[T]he absence of explicit congressional direction . . . does not preclude the Board from reaching any particular type of employment.” *Id.* at 3 n.7 (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681 (1980)) (stating that nothing in the Act or its legislative history provides explicit direction regarding the Board’s treatment of college football programs).

100. *Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).

101. *Id.* at 4; see also *supra* note 44 and accompanying text (indicating the vagueness of the statute’s definitions).

statutory language to include “any employee” and exclude well-delineated statutory exceptions, or categories of workers legislatively precluded from coverage.¹⁰² For example, the *Columbia* Board noted that the absence of “students” from the Act’s enumerated categories of excluded workers is “strong evidence” of statutory coverage.¹⁰³ The Supreme Court has agreed with the Board’s overall interpretation, emphasizing the “breadth” of the statutory language as “striking” and “squarely” applying to any employee, as long as he or she works for another in return for compensation.¹⁰⁴

In determining whether student assistants meet the statutory definition of “employee,” the *Columbia* Board’s analysis was simple. First, it reasoned that to give effect to precedent means to broadly interpret the term “employee” to encompass student athletes.¹⁰⁵ Second, the Board observed that “private universities” do not fall within any of the specified exceptions and, moreover, that the Board has exercised jurisdiction over private universities since 1970.¹⁰⁶ However, the Board ultimately could not overcome the vagueness of the statute and could not decide whether student assistants were statutory employees based on the plain language of the statute.¹⁰⁷ Instead, the Board found that where Congress uses a term in a statute but does not define it, Congress means to incorporate the “established meaning” of the term with reference to common law agency doctrine.¹⁰⁸

102. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4 (emphasis added); see also National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (“The term employee . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family . . . or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor . . .”).

103. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4; see *supra* note 102 and accompanying text (noting the statutory exclusions for who can be considered an “employee”).

104. *Id.* at 4 (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984)); see also 29 U.S.C. § 152(3) (defining “employee” as “any employee”).

105. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4 (noting that the phrasing of the Act seems to reiterate an ordinary dictionary definition of “employee”: “any person who works for another in return for financial or other compensation”).

106. *Id.* Additionally, the Board pointed out that neither legislative history nor the design of the Act itself indicates support for excluding student assistants or private universities from statutory coverage. *Id.* at 5.

107. *Id.* at 4.

108. *Id.* at 4–5 (citing *Town & Country Elec.*, 516 U.S. at 94).

2. *The common law test*

The *Columbia* decision reaffirmed the importance of the right to control test in determining who is a statutory employee under the Act, and it explicitly overruled the persistent economic relationship test, which focused solely on compensation.¹⁰⁹ In returning to the right to control test,¹¹⁰ the Board held that “common-law employment . . . requires that the employer ha[s] the right to control the employee’s work, and that the work be performed in exchange for compensation.”¹¹¹ The Board declared that it is “unnecessary” to dive into the question of whether the relationship between the purported employees and their employer is primarily economic because of the difficulty of applying that standard.¹¹²

Under the right to control test, the Board ruled that student assistants are indubitably employees under the Act.¹¹³ First, the Board analyzed whether the university had control over the details of the student assistants’ duties.¹¹⁴ The student research assistants were required to perform a litany of tasks normally under the purview of faculty: planning and giving lectures, writing and grading exams, holding office hours, and performing other clerical tasks.¹¹⁵ These tasks, which “frequently take on a role akin to that of faculty,” were required as a condition of each student’s academic requirements and would entail each student to commit at least 20 hours per week.¹¹⁶ Those students who did not adequately perform their duties were subject to corrective counseling or removal.¹¹⁷ The Board concluded that “the fact that students are thrust wholesale into many of the core

109. *Id.* at 3, 15 (“[T]he *Brown University* majority instead relied on what it perceived to be a fundamental tenet of the Act and a prerequisite to statutory coverage: a relationship that is *primarily* economic in character . . .”).

110. Courts also have traditionally adopted the right to control the details of the work test for determining an employment relationship. See *MITTEN ET AL.*, *supra* note 39, at 139 (“The right to control test examines whether the employer possessed the right to control the manner, means, and details of the worker’s performance . . . [factors include] the terms of the employment agreement, the actual exercise of control, the method of payment, the furnishing of equipment, and the right to terminate the worker.”).

111. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15.

112. *Id.* at 15–16; see also *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, *53–54 (Mar. 26, 2014) (noting that the *Brown* “primarily economic” analysis is inapplicable to the college athlete context due to its lack of flexibility).

113. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15.

114. *Id.*

115. *Id.* at 14, 16.

116. *Id.*

117. *Id.* at 15.

duties of teaching,” one of the university’s most important revenue-generating activities, suggests that the university had domineering control of research assistants and was not merely inculcating teaching skills.¹¹⁸

Second, the Board analyzed whether the student assistants performed these tasks in exchange for compensation.¹¹⁹ The students typically received full financial aid in the form of tuition and a stipend, which the university conditioned upon performance of their teaching duties.¹²⁰ Removal from a position for failure to adequately perform the job duties resulted in a loss of financial aid, meaning that the student assistants’ scholarships were conditioned on the performance of their teaching duties—amounting to offering compensation as consideration for their work.¹²¹ After applying the common law right to control test, the Board concluded that it had “no difficulty . . . finding that all the petitioned-for classifications here comprise statutory employees.”¹²²

3. *A standard for asserting jurisdiction*

Although the Board is tasked with enforcing federal labor laws, it has discretionary power to decline jurisdiction.¹²³ The Board in *Columbia* did not provide a clear-cut rule for when it should decline jurisdiction over a petition to recognize a bargaining unit, but instead it suggested

118. *Id.* at 16.

119. *Id.* at 14.

120. *Id.* at 13–15.

121. *Id.* at 15 (“Receipt of a full financial award is conditioned upon their performance of teaching duties. When they do not perform . . . they will not be paid.”).

122. *Id.* at 16. The Board noted that the university had a significant interest in overseeing student assistants’ teaching duties because the students conferred a massive financial benefit to the university: student assistants advanced a key business operation of the school—teaching undergraduate courses—and, in doing so, they subsidized the university’s largest revenue-generating activity by saving the university the need to hire additional faculty. *Id.* at 15.

123. It is important to note that there are two legal avenues of discretion available to the Board for declining jurisdiction: (1) under section 14(c)(1) of the Act to “decline to assert jurisdiction over any labor dispute involving any class or category of employers,” where in the Board’s opinion, “the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction”; and (2) pursuant to *NLRB v. Denver Building & Construction Trades Council*, which recognized its discretion to assert jurisdiction over an individual case. *See* National Labor Relations Act, 29 U.S.C. § 164(c)(1) (2012); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684 (1951) (“Even when . . . the Board [is justified] to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the polices of the Act would not be effectuated by its assertion of jurisdiction in that case.”).

that it should assert jurisdiction whenever doing so would “further the policies of the Act.”¹²⁴ However, the Board stressed that to decline jurisdiction when a category of employee meets the statutory or common law test under the Board’s precedent, there must be “compelling” reasons.¹²⁵

Accordingly, the Board in *Columbia* emphasized two main factors to consider in determining whether to decline jurisdiction: (1) whether asserting jurisdiction would promote the policies and purposes of the Act, and (2) whether the Act is capable of managing labor disputes that would arise in such a context.¹²⁶ For the latter factor, the Board consulted available empirical evidence to show how bargaining rights would either benefit or harm employees and employers.¹²⁷

Analyzing the first factor, the *Columbia* opinion in no uncertain terms proclaimed that the purpose of the Act is to “encourag[e] the practice and procedure of collective bargaining[] and to protect” workers’ full freedom to express a choice for or against collective bargaining representation.¹²⁸ The *Columbia* opinion criticized the *Brown* board for straying from promoting this purpose and basing its decision to decline jurisdiction on theoretical harms¹²⁹ it perceived would result if it permitted collective bargaining in the educational context.¹³⁰ Ultimately, the Board in *Columbia* confidently found that permitting student assistants to choose whether to bargain collectively would clearly promote the purposes and policies of the Act.¹³¹

Under the second factor, the Board wrote a scathing critique of the *Brown* Board’s failure to acknowledge the Act’s resilience in settling labor disputes in lieu of empirical data confirming that an employment

124. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 13.

125. *Id.* at 5.

126. *See id.* at 7 n.56, 9 (stating that “in exercising this discretion, we tread carefully and with an eye toward the Act’s purposes . . .” and asserting that “the historic flexibility of collective bargaining as a practice” is instrumental in dismantling *Brown*’s claims that collective bargaining would not promote the purposes of the Act).

127. *Id.* at 9.

128. *Id.* at 6–7 (internal quotation marks omitted); *see also supra* notes 32–37 and accompanying text (explaining the historical purpose of the Act).

129. The *Brown* Board argued that (1) the education process is personal, in contrast to the collective bargaining process; (2) that the goal of collective bargaining—promoting equal bargaining power—was foreign to the educational context; and (3) that collective bargaining was a threat to traditional academic freedoms. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 3.

130. *See id.* at 7 (criticizing the *Brown* Board for elevating theoretical arguments about harm to the educational context without considering the purposes of the Act or empirical evidence).

131. *Id.*

relationship exists.¹³² The *Columbia* Board explained that the *Brown* Board's conclusions were "entirely theoretical" and "aptly criticized" by leading labor law scholars.¹³³ The Board imported logic from different sectors where collective bargaining had succeeded in the face of dire predictions. Most relevant is the public university context, where graduate student employees' collective bargaining is a fact of American university life.¹³⁴ Although governed by state law, the Board reasoned that the success of collective bargaining in public educational institutions highlights the university's dual role as educator and employer and suggests it need not be an impediment to finding an employment relationship under the Act.¹³⁵

Further, one of the Board's main conclusions in *Brown* was that the student-teacher relationship was based on mutual academic interests, in contrast to the economic interests that characterize the employee-employer relationship.¹³⁶ Thus, the *Brown* Board reasoned, affording student assistants the status of employees under the Act would be antithetical to the educational process.¹³⁷ The Board refuted that notion in *Columbia*, arguing that the Act is flexible and tenable to the student-teacher context because it permits the Board to define the

132. *See id.* at 2 ("[T]he *Brown University* Board's . . . 'fundamental belief that the imposition . . . of collective bargaining on graduate students . . . would be inconsistent with the purposes [of the Act]' . . . is unsupported by legal authority, by empirical evidence, or by the Board's actual experience.").

133. *Id.* at 7; *see also* Michael C. Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 221 (2009) (explaining that in *Brown*, the majority departed from the most pertinent precedent, actively disregarded any available empirical evidence, and diverged from the dissenters and with the majority in the *New York University* decision in a manner that destroyed any claim for deference to its expertise in labor law); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2076-77 (2009) (illustrating that the *Brown* majority offered no empirical support in rejecting the arguments of the dissenters and instead presented unpersuasive arguments).

134. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 9.

135. *Id.* Further, the Board analogized the private university context to the national security, national defense, and acute care hospital sectors, elevating them as a model for sectors able to effectively integrate collective bargaining into their modes of business. *See id.* at 11. The Board noted that some concerns raised by *Columbia* are generic complaints about the statutory requirements inherent in collective bargaining—such as bargaining over staffing levels and the prospective of strikes—and that successful collective bargaining in other industries proves that these problems, "common to nearly all industries in which the Board accords employees bargaining rights," are also resolvable in the private university context. *Id.*

136. *Id.* at 3.

137. *See id.*

scope of bargaining, which is a significant tool for preserving genuine academic freedom and ensuring that these different roles can co-exist.¹³⁸ The *Brown Board* also seemed concerned that finding an employment relationship in the university context would create labor disputes that would harm the educational mission,¹³⁹ but the Board in *Columbia* rejected that claim. It clarified that federal labor law presupposes that conflict will arise once an employment relationship is recognized, but collective bargaining's "historic flexibility" is preferable to the status quo for successfully navigating delicate labor disputes.¹⁴⁰

Thus, the Board will be justified in declining jurisdiction only by looking to the Act's policies and purposes and its ability to manage labor disputes that arise. *Columbia's* statutory and common law tests for determining who is an employee under the Act and its factors for determining whether to assert jurisdiction lead to the conclusion that college athletes should also be accorded the protections under the Act.¹⁴¹

138. *Id.* at 7. Universities have drafted management and academic rights clauses as another tool to resolve problems relating to collective bargaining in educational settings, and those clauses have included language in student assistants' collective bargaining agreements giving management specific rights relating to course content, assignments, exams, class sizes, and methods of grading and instruction. *Id.* at 9.

139. See *Brown Univ.*, 342 N.L.R.B. 483, 498 (2004) (Liebman & Walsh, Members, dissenting) (characterizing the core of the majority's argument as a concern for how imposing collective bargaining will harm academic freedom).

140. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 9, 12 (noting that student assistants are "fervently lobbying" their schools for better representation and that suggests the current model of relations is unresponsive to student assistants' needs).

141. The Board attempted to distinguish its refusal to assert jurisdiction over college athletes in *Northwestern* from the Board's erroneous refusal to assert jurisdiction over student assistants in *Brown* in a cautiously worded footnote:

[I]n exercising this discretion, we tread carefully and with an eye toward the Act's purposes. In Northwestern University, we denied the protections of the Act to certain college athletes—without ruling on their employee status—because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the Act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act.

Id. at 7 n.56 (citations omitted). However, the Board's considerations in *Columbia* for determining whether asserting jurisdiction would advance the purposes of the Act actually suggest that it should do so for collegiate athletes in revenue-generating sports at Division I schools.

D. *Collegiate Football in the Twenty-First Century*

1. *The nature and organization of NCAA football*

The nature and organization of revenue-generating sports at Division I schools can differ by sport or conference. However, because the petitioned-for bargaining unit at Northwestern University consisted of football players, a basic understanding of the nature and organization of Division I athletics and the NCAA is crucial to dismantling the Board's reasons for refusing to assert jurisdiction in *Northwestern*.¹⁴²

The NCAA can be traced back to the early twentieth century, where significant injuries and deaths in college sports led President Theodore Roosevelt to reform college football.¹⁴³ Originally named the Intercollegiate Athletic Association of the United States, the NCAA became an official organization in 1910, representing over sixty member institutions.¹⁴⁴ In 1973, the NCAA began recognizing levels of competition within intercollegiate athletics with Division numbers (I, II, and III),¹⁴⁵ and in 1978, competition within those divisions led to a further partition of college football into subdivisions—later named the Football Bowl Subdivision and the Football Championship Subdivision.¹⁴⁶ At its core, the NCAA seeks to advance nine goals to promote its main purpose: keeping amateurism in intercollegiate athletics.¹⁴⁷ The NCAA thus exercises a great deal of control over member institutions and college athletes to ensure that college athletes' amateur status is preserved.¹⁴⁸

142. See *supra* notes 87–94 and accompanying text (explaining the Board's logic for declining to assert jurisdiction).

143. *National College Athletic Association (NCAA)*, INTERNET FAQ ARCHIVES, <http://www.faqs.org/sports-science/Mo-PI/National-Collegiate-Athletic-Association-NCAA.html>; accord Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Oct. 6, 2013, 5:12 AM), http://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html.

144. Mary Kate Bird, Comment, *Northwestern University: Opening the Door for Unionization in Collegiate Athletics*, 84 UMKC L. REV. 423, 427 (2015).

145. *Id.*

146. *Id.*

147. See NAT'L COLLEGIATE ATHLETIC ASS'N DIV. I MANUAL § 1.3.1 (2016–17) [hereinafter NCAA DIV. I MANUAL] (“A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”).

148. See Bird, *supra* note 144, at 430 (detailing the responsibilities that each member institution and each college athlete must fulfill to maintain their amateur status and eligibility to participate in collegiate sports). Additionally, college athletes can forfeit their amateur status in myriad ways: entering into an agreement with an agent or entering a professional draft, receiving payment for using athletic skill in his or her

The NCAA has grown to be a hundred-million-dollar industry¹⁴⁹ and is considered the “oldest, wealthiest, and most powerful of the national associations, governing the largest, richest, and most popular sports programs in higher education.”¹⁵⁰ The NCAA has grown increasingly commercial throughout its history, delving into an array of different sports and fostering lucrative partnerships with sponsors.¹⁵¹ The commercialization of collegiate sports contrasts sharply with the limited financial benefits available to college athletes, whose scholarships are limited to grant-in-aid.¹⁵² The NCAA restricts a college athlete’s scholarship to the amount required to cover tuition, housing, books, and food plans; moreover, the scholarship is provided “solely on the basis of athletic ability.”¹⁵³ Although the NCAA prohibits scholarship award cancellation or reduction based on the athletic performance of an athlete,¹⁵⁴ many universities are able to circumvent the cancellation clause by reducing or cancelling awards for purported reasons outside the scope of athletic performance.¹⁵⁵

Lastly, the NCAA’s control over its member institutions permeates into the competitions and practice schedules of intercollegiate

sport, receiving any financial assistance from a sports organization on the basis of skill, and accepting a contract or making a promise to play professional sports after college. See NCAA DIV. I MANUAL, *supra* note 147, §§ 12.1.2 (a)-(g).

149. See Treadway, *supra* note 143 (stating that the NCAA accrued over \$800 million dollars in revenue in 2011).

150. Ronald Waicukauski, *The Regulation of Academic Standards in Intercollegiate Athletics*, 1982 ARIZ. ST. L.J. 79, 81 (1982).

151. See Brown, *supra* note 87, at 1863–64 (noting that the NCAA signed a \$10.8 billion agreement with CBS Sports for broadcasting rights to the NCAA Division I Men’s Basketball Tournament and a \$500 million contract with ESPN for broadcasting rights to other NCAA championships, while only incurring about \$100 million per year for all of its NCAA championships’ operating costs).

152. See NCAA DIV. I MANUAL, *supra* note 147, §§ 15.1–15.2 (listing prohibitions on college athletes’ compensation).

153. McCormick & McCormick, *supra* note 29, at 78, 100, 109. This often results in many full-scholarship athletes living below the national poverty line. *Id.* at 78–79, 79 n.30. As of 2015, however, schools in five Division I conferences voted to give athletes the full cost of attendance as part of a full athletics scholarship. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships>. A full scholarship will now also include “academic-related supplies, transportation and other similar items.” *Id.*

154. NCAA DIV. I MANUAL, *supra* note 147, § 15.3.4.3.

155. Kathleen Megan, *Legislators Hear Testimony on Need to Spell Out Details on Athletic Scholarships, Medical Expenses*, HARTFORD COURANT (Feb. 9, 2011), http://articles.courant.com/2011-02-09/news/hc-college-sport-scholarships-0209-20110208_1_athletic-scholarship-athletic-recruiters-national-college-players-association.

athletics.¹⁵⁶ The NCAA tracks “[c]ountable athletically related activities (‘CARA’),” which include any required college athletic activity that is at the direction or supervision of one of the institution’s coaching staff.¹⁵⁷ Each college athlete is prohibited from participating in more than four hours of CARA-related activities each day and twenty hours per week.¹⁵⁸ The goal of these daily and weekly limitations is to ensure that academics do not take a backseat to athletics; however, the efficacy of the CARA restrictions is highly questionable.¹⁵⁹

2. *A movement toward recognizing the rights of college athletes*

In recent years, the NCAA and its member institutions have faced major legal challenges covering the gamut of issues. Scholarship amounts, player health, player pay, and amateurism rules were all at stake in pending lawsuits across the United States.¹⁶⁰ At the same time, the NCAA and the Board have issued new proposals and decisions aiming to curb the exploitation of college athletes and expand protections on college campuses.¹⁶¹ These forces have converged to create a movement toward recognizing the rights of college athletes¹⁶² that parallels the *Columbia* Board’s expansion of employment rights to students in the private university context.

a. Federal litigation against the NCAA: O’Bannon and Berger

Litigation across the country has placed the NCAA on the defensive, forcing the institution to acknowledge that, at least in federal court, college athletes are deserving of many of the same rights as professionally employed athletes. Though college athletes have had

156. See NCAA DIV. I MANUAL, *supra* note 147, § 17.01.1.

157. *Id.* § 17.02.1.

158. *Id.* § 17.1.7.1.

159. *Id.* § 17.01.1; see Bird, *supra* note 144, at 432–33 (discussing how football players devote an average ranging from thirty to sixty hours per week on athletic-related activities and reporting that coaching staff and players actively get around CARA rules).

160. *Infra* Section II.D.2(a). See generally Patrick Vint, *Ranking the NCAA’s 5 Biggest Legal Battles, from Least to Most Threatening*, SB NATION (Mar. 20, 2014, 9:00 AM), <http://www.sbnation.com/college-football/2014/3/20/5528032/ncaa-lawsuits-obannon-kessler-union> (discussing prominent lawsuits that are a threat to the status quo of college amateurism in collegiate sports).

161. *Infra* Sections II.D.2(b)–(c).

162. See Marcy Tracy & Ben Strauss, *Court Strikes down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html?_r=0 (noting that the *Northwestern* decision was decided in the midst of a national movement that has “generally turned toward the expansion of athletes’ rights”).

varying degrees of success in asserting their rights, the courts' willingness to address these issues and the decisions themselves are simply another crack in the conventional notion promoted by the NCAA and its member institutions that college athletes are merely students, underserving of legal rights afforded to professional athletes.

Though at the frontlines of the various legal battles against the NCAA are health-related concerns,¹⁶³ the NCAA has faced its most direct threats to college athletes' amateur status in the antitrust realm. The NCAA was playing defense on the antitrust front as it fought a federal court ruling in 2014 blocking the NCAA from enforcing its rules that prevent marketers from paying college athletes for use of their names, images, and likenesses in *O'Bannon v. NCAA*.¹⁶⁴ As the "first serious legal challenge to the [NCAA's] amateurism rules," *O'Bannon* is heralded as the piece of litigation that brought national attention to the legal fight over amateurism and player

163. The first concussion case brought against the NCAA was *Arrington v. NCAA*, a class action lawsuit filed in 2011. In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig., 314 F.R.D. 580 (N.D. Ill. 2016); see also *Arrington v. NCAA* (In re NCAA Concussion Injury Litig.), 988 F. Supp. 2d 1373 (J.P.M.L. 2013) (centralizing *Arrington* litigation into two related pending actions); Vint, *supra* note 160. The lawsuit targeted the NCAA's disregard for countless studies chronicling the high incidence of concussions among athletes and the risk of brain defects from sustained concussions. 314 F.R.D. at 585. The NCAA and *Arrington* ultimately settled the lawsuit. *Id.* at 608. Although the settlement did not contain a cash payment for the plaintiffs, it mandated a new national protocol for head injuries sustained by players that includes a \$70 million commitment to a monitoring fund for former athletes and a \$5 million fund for concussion research. See, e.g., Ben Strauss, *Judge Approves Settlement in Head Injuries Suit Against N.C.A.A.*, N.Y. TIMES (Jan. 26, 2016), <http://www.nytimes.com/2016/01/27/sports/ncaafotball/judge-approves-settlement-in-head-injuries-suit-against-ncaa.html>; John Keilman and Michelle Manchir, *NCAA Reaches \$75 Million Settlement in Concussion Lawsuit*, CHI. TRIBUNE (July 29, 2014, 7:33 PM), <http://www.chicagotribune.com/news/local/breaking/chi-ncaa-reaches-75-million-settlement-in-concussion-lawsuit-20140729-story.html>. Additionally, the *Arrington* court refused to give the NCAA blanket immunity, opening up the NCAA to future liability for personal injuries and paving the way for new lawsuits. Strauss, *supra*. For example, football players from various public and private universities filed a total of six health-related class-action lawsuits against the NCAA in 2016 as it finalized the settlement in *Arrington*. See, e.g., Jon Solomon, *Next Wave of Concussion Lawsuits Hits Conferences, and for Penn State, Schools*, CBS SPORTS (May 18, 2016, 7:49 PM), <http://www.cbssports.com/college-football/news/next-wave-of-concussion-lawsuits-hits-conferences-and-for-penn-state-schools>.

164. 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014), *rev'd in part*, 802 F.3d 1049, 1079 (9th Cir. 2015).

compensation.¹⁶⁵ The lawsuit was initially brought against the NCAA for television footage and EA Sports' NCAA video games that used players' images, names, and likenesses.¹⁶⁶ A group of former and current Division I football and basketball players requested that a portion of those revenues be placed aside for the players whose images made the television revenues so lucrative.¹⁶⁷

The district court agreed with the players and ruled that the NCAA violated the Sherman Antitrust Act and stated that restraining member schools' ability to compensate Division I men's basketball and football players for use of their names, images, and likenesses is an unlawful "restraint of trade."¹⁶⁸ The appeal, however, left both sides wanting more. The Ninth Circuit affirmed part of the lower court's opinion, holding that the "NCAA is not above the antitrust laws" and that barring payments to athletes would violate the Sherman Act. Yet the Ninth Circuit also reversed in part, and held that the NCAA could limit colleges from offering college athletes as little as \$5,000 per year in deferred compensation in exchange for commercial use of their names, images, and likenesses.¹⁶⁹

O'Bannon was thus monumental because it was the first college athlete's challenge against the NCAA to gain any traction in court, and it forced reporters and commentators to scrutinize the college sports establishment, placing the NCAA on its heels.¹⁷⁰ In particular, because antitrust laws apply fully to both private and public schools, antitrust cases like *O'Bannon* offer a distinct legal path for college athletes at Division I institutions attempting to vindicate their rights.¹⁷¹ Although the Supreme Court denied review of the case in 2016, *O'Bannon* is a harbinger for the NCAA.

165. Joe Nocera, *O'Bannon Ruling Stands, but NCAA's Status Quo May Yet Collapse*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html?_r=0.

166. *O'Bannon*, 7 F. Supp. 3d at 965.

167. Vint, *supra* note 160.

168. *O'Bannon*, 7 F. Supp. 3d at 988, 1007–08. The court also enjoined the NCAA from enforcing any rules preventing its member schools from depositing a portion of its licensing revenue in trust for college athletes, payable when they leave school or their eligibility expires. *Id.* at 1008.

169. *O'Bannon*, 802 F.3d at 1078–79. Additionally, the court affirmed the lower court's injunction prohibiting the NCAA from permitting its member schools to provide up to the cost of attendance to their college athletes. *Id.* at 1079.

170. Nocera, *supra* note 165.

171. Sean Gregory, *Here's the Road Ahead for College Athletes After Union Setback*, TIME (Aug. 18, 2015), <http://time.com/4002245/after-union-setback-heres-the-road-ahead-for-college-athletes>.

The case has sparked a national dialogue around the plight of college athletes under NCAA rules¹⁷² and has inspired a myriad of lawsuits against the NCAA.¹⁷³ *Berger v. NCAA*,¹⁷⁴ a 2016 class action lawsuit naming as defendants the NCAA and more than one hundred Division I schools, is one of the latest challenges to the amateur status of college athletes.¹⁷⁵ Mirroring the petitioners' claim in *Northwestern*, the plaintiffs alleged that as college athletes, they were employees under the Act and were entitled to minimum wages under that statute.¹⁷⁶ The players argued that determining employee status was a

172. In the wake of *O'Bannon*, there was an increased focus on health concerns and the amount of time athletes devote to sports; in response, some schools decided to award four-year scholarships instead of the traditional one-year scholarship, and athletic conferences increased benefits to college athletes to cover the full cost of attendance—a measure the NCAA voted down in 2011. Nocera, *supra* note 165; *see also* Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan 18, 2005), http://www.espn.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins (highlighting the “historic change” that came of the 2015 NCAA convention after the Power 5 conferences voted for increased stipends, a college-athlete assistance fund as part of a concussion safety protocol, and the full cost-of-attendance legislation that would prevent college athletes from losing their scholarships due to injury).

173. *See* Nocera, *supra* note 165 (arguing that the complaint brought by Shabazz Napier, a star guard for Connecticut, and the complaint filed by Kain Colter, the Northwestern quarterback, would not have been brought were it not for Ed O'Bannon, the basketball player at the University of California, Los Angeles, paving the way in his lawsuit challenging the NCAA's amateurism rules). Moreover, the *O'Bannon* decision paved the way for two additional lawsuits in 2015 targeting the NCAA's amateurism rules: the *Jenkins* case alleging that the NCAA's compensation limits violate antitrust laws, and the *Alston* case, seeking damages for all the years in which athletes were not compensated for the full cost of attendance. Marc Tracy, *Case that Could Erode Amateur Model Takes a Small Step*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/sports/case-that-could-erode-amateur-model-takes-a-small-step.html>; *see also* Scooby Axson, *Ex-Northwestern Basketball Player Sues NCAA, School over Transfer*, SPORTS ILLUSTRATED (Nov. 15, 2006) <https://www.si.com/college-basketball/2016/11/15/ex-northwestern-basketball-player-sues-ncaa> (detailing a 2016 lawsuit by a Northwestern University basketball player, Johnnie Vassar, alleging that the NCAA's transfer regulations violate antitrust laws); Jon Solomon, *Judge Denies Request by NCAA, Conferences to Dismiss Jeffrey Kessler Case*, CBS SPORTS (Aug. 5, 2016), <http://www.cbssports.com/college-football/news/judge-denies-request-by-ncaa-conferences-to-dismiss-jeffrey-kessler-case> (highlighting a federal court's decision to deny the NCAA's request to dismiss a lawsuit filed by Jeffrey Kessler, a high-profile sports labor attorney, arguing that the NCAA has unlawfully capped player compensation in violation of antitrust laws).

174. 162 F. Supp. 3d 845 (S.D. Ind. 2016).

175. *Id.* at 847.

176. *Id.* Under the Department of Labor guidelines, the players reasoned, it was indisputable that athletes in Division I conferences deserved minimum wage and overtime pay under the Act. *Id.*

fact-intensive inquiry and that athletes are more deserving of employment status than other university-employed students because athletes perform more rigorous work over longer hours, all while under stricter university supervision.¹⁷⁷ Ultimately, however, the complaint had significant procedural difficulties that contributed to the court's dismissal for lack of jurisdiction.¹⁷⁸

Since then, at least one other former college athlete has filed a case against the NCAA. In 2016, a former linebacker for the University of Southern California, Lamar Dawson, filed a similar class action against the NCAA for alleged minimum-wage violations in a federal district court in California.¹⁷⁹ Simply put, the NCAA is facing an unprecedented challenge to its mission of promoting amateurism in college athletics, the likes of which it has not seen before.

b. The Board

Not only have *O'Bannon* and other lawsuits led to increased judicial scrutiny on the NCAA's potentially unlawful restrictions over college athletes, but the Board has also focused on the NCAA and its member institutions in response to complaints filed in its regional offices. The most glaring example is the Regional Director's monumental decision in *Northwestern*,¹⁸⁰ and its subsequent appeal in which the Board never refuted the notion that college athletes competing in revenue-generating sports at Division I schools are employees under the Act.¹⁸¹ Even more remarkable, however, is the memorandum that the General Counsel of the Board issued on January 31, 2017.¹⁸²

177. *Id.* at 849; see Matthew Perlman, *Ex-NCAA Athletes Tell 7th Circ. FLSA Suit Wrongly Tossed*, LAW360 (Mar. 17, 2016, 5:10 PM), <http://www.law360.com/articles/772651/ex-naaa-athletes-tell-7th-circ-flsa-suit-wrongly-tossed> (summarizing the players' argument in their brief on appeal to the Ninth Circuit).

178. Perlman, *supra* note 177.

179. Travis Waldron, *Former USC Football Player Sues NCAA over 'Unpaid Wages'*, HUFFINGTON POST (Sept. 29, 2016, 2:22 PM), http://www.huffingtonpost.com/entry/usc-naaa-college-athlete-lawsuit_us_57ebd3eee4b024a52d2bb092.

180. *Supra* note 73 and accompanying text (discussing the significance of the Regional Director's opinion).

181. *Supra* notes 94–97 and accompanying text.

182. Memorandum from Richard F. Griffin, Jr., General Counsel, National Labor Relations Board, to all Regional Directors, Officers-in-Charge, and Resident Officers (Jan. 31, 2017). The Board consists of two branches: the five members of the Board and the General Counsel, an independent prosecutor responsible for overseeing unfair labor practice complaints. WONG, *supra* note 39, at 523. Additionally, the General Counsel has the autonomy to prosecute a complaint, and his or her determination to not issue a complaint is not reviewable by either the Board or a federal court. *Id.*

The General Counsel is imbued by statute with unreviewable “final authority” with respect to the investigation of unfair labor practices charges under section 3 of the Act.¹⁸³ Pursuant to this authority, the General Counsel’s office issues memoranda directly to regional field offices to provide policy guidance with respect to its investigations.¹⁸⁴

In 2017, the General Counsel issued a memorandum to regional directors to explain how the General Counsel’s office would apply the Board’s recent decisions in *Columbia* and *Northwestern* in the unfair labor practice arena.¹⁸⁵ The General Counsel’s memorandum, however, proved to be more than a mere summary of Board precedent. The General Counsel decided to directly address the question of whether scholarship football players at NCAA Division I private schools are employees under the Act.¹⁸⁶

In answering that question, the General Counsel first applied the Board’s “expansive” statutory definition of “employee” and then turned to *Columbia*’s common law test.¹⁸⁷ Ultimately, the General Counsel proclaimed that “the application of the statutory definition of employee and the common-law test lead to the conclusion that Division I FBS scholarship football players are employees under the NLRA.”¹⁸⁸

The General Counsel’s memorandum was the first time that the Board directly ruled on the question of whether college athletes are

183. National Labor Relations Act, 29 U.S.C. § 153(d) (2012); NATIONAL LABOR RELATIONS BOARD, *Reports & Guidance*, <https://www.nlr.gov/reports-guidance> (last visited Aug. 30, 2017); see also WONG, *supra* note 39, at 520 (detailing the procedures in the Act for unfair labor practice cases and highlighting the General Counsel’s role).

184. NATIONAL LABOR RELATIONS BOARD, *Reports & Guidance*, <https://www.nlr.gov/reports-guidance> (last visited Aug. 30, 2017).

185. Memorandum from Richard F. Griffin, Jr., *supra* note 182, at 1 (explaining that because the Board’s decisions in *Columbia* and *Northwestern* were representation cases that “did not directly address the right of the workers in those cases to seek protection against unfair labor practices,” the memorandum serves as a guide for employers, labor unions, and employees).

186. *Id.* at 2. “[I]t is clear that nothing in *Northwestern* precludes the finding that *Northwestern* (or other private college/university) scholarship football players are employees under the Act . . . [s]ince the issue was raised but left unresolved in *Northwestern*, it is important that these individuals know whether the Act’s protection extends to them.” *Id.* at 17.

187. *Id.* at 18–22.

188. *Id.* at 23. Notably, the Board’s Associate General Counsel, Barry J. Kearney, in an “advice memorandum” to a regional director on September 22, 2016, similarly concluded that, “*Northwestern*’s scholarship players are statutory employees [under the Act].” Advice Memorandum from Barry J. Kearney, Associate General Counsel, National Labor Relations Board, to Peter Sung Ohr, Regional Director Region 13 (Sept. 22, 2016) at 1 n.1.

employees under the Act.¹⁸⁹ Although historic, the memorandum had a muted effect because General Counsels' memoranda do not carry the force of law like a full Board decision, and the 2017 memorandum does not affect the Board's decision in *Northwestern* to refuse to assert jurisdiction over college athletes.¹⁹⁰ Nonetheless, the General Counsel's memorandum represents yet another building block toward recognizing legal rights for Division I college athletes in revenue-generating sports and illustrates that this legal question will likely spur further litigation.

c. The NCAA

In response to these developments, the NCAA itself has instituted new rules and protocols that expand opportunities for its member institutions to implement pro college-athlete policies.¹⁹¹ In 2014, the NCAA Division I Board of Directors restructured how schools and conferences govern themselves, ensuring that college athletes will be represented at every decision making level.¹⁹²

NCAA President Mark Emmert praised the adoption of the new governance model, calling it a "compromise on all sides that will better

189. See Jake New, *NLRB Chips Away at Athlete Amateurism*, INSIDE HIGHER ED (Feb. 2, 2017) (quoting the Executive Director of the National College Players Association, Ramogi Huma, stating that the 2017 memoranda is "a major milestone" for declaring that the General Counsel's Office is "committed to protecting college athletes' employee rights under the labor laws").

190. See Ben Strauss, *N.L.R.B. Lawyer Sees Some College Football Players as Employees, with Rights*, N.Y. TIMES (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/sports/ncaafootball/nlr-lawyer-sees-some-college-athletes-as-employees-with-rights.html?_r=0 (explaining that the General Counsel's memorandum does not carry the force of law); see also Hassan A. Kanu, *NLRB Counsel Has Significant Authority but Little Time*, BLOOMBERG (May 18, 2017) (arguing that the NLRB General Counsel who issued the 2017 memorandum is "unlikely to take actions that would have a substantial influence on labor policy" because his term expires October 31, 2017, and the balance of the Board is going to shift toward a Republican majority that is less sympathetic to organized labor).

191. See *infra* note 206 and accompanying text (discussing the NCAA's and its member institutions' recent policy changes and the concerns that prompted change).

192. Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014, 11:49 AM), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure>. The new governance model, heralded as a "significant step into a brighter future for Division I athletics," was adopted in a 16-2 vote and includes three significant changes that are likely to positively impact college athletes across the United States: (1) the model expanded the Division I Board of Directors to include a college athlete and a faculty representative; (2) the model created a new body, called the Council, which will have two seats for college athletes; and (3) the model grants flexibility to schools in certain dominant conferences to change rules for themselves. *Id.*

serve . . . our student-athletes.”¹⁹³ Although there is evidence that growing scrutiny and perceptions that college athletes are being financially exploited influenced the new governance model,¹⁹⁴ the model has afforded NCAA member institutions more autonomy to improve conditions for college athletes. For example, in 2015, the “autonomy group,” comprised of five conferences—the Atlantic Coast, the Big Ten, the Big 12, the Pac-12, and the Southeastern Conference—utilized its newfound autonomy under the new governance model to make several significant changes: the group voted to (1) give college athletes the full cost of attendance as part of a full athletics scholarship; (2) end the revocation of scholarships for athletic reasons; (3) implement more strict concussion management requirements; and (4) allow college athletes to borrow against their future earnings to purchase loss-of-value insurance.¹⁹⁵ In implementing these new protections for college athletes, the NCAA and its member institutions have implicitly recognized the need to address the plight of college athletes and have, ironically, contributed to a national trend recognizing the legal rights of Division I college athletes in revenue-generating sports.¹⁹⁶

193. *Id.*

194. The governance model was adopted within a month of a U.S. Senate hearing regarding how the NCAA is “fulfilling its stated mission” and “whether the commercial operation of college athletics is unfairly exploiting the talents and services of college athletes.” *Promoting the Well-Being and Academic Success of College Athletes: Hearing Before the S. Comm. on Com., Sci., and Transp.*, 133th Cong. (2014); see also Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015, 11:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073> (noting that the new governance model was instituted just five months after a federal district judge ruled against the NCAA in the *O'Bannon* lawsuit).

195. Berkowitz, *supra* note 194. Moreover, the autonomy group’s new changes were also conveniently timed. See Sherman, *supra* note 172 (noting that the changes were “long overdue” and occurred after a “turbulent past year” where the NCAA’s model of amateurism was challenged by the *Northwestern* case).

196. The autonomy group vote followed several recent changes aimed at improving conditions for college athletes. See *NCAA to Pay for Family Travel Under Pilot Program*, NCAA (Jan. 6, 2015, 2:31 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-pay-family-travel-under-pilot-program> (showing a NCAA program providing up to \$3,000 in travel, hotel, and meal expenses for family members of each college athlete who competes in a Final Four semifinal basketball game); Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014, 4:25 PM), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules> (highlighting the NCAA’s new program providing for unlimited meals and snacks in conjunction with athletics participation to address nutritional needs of college athletes).

II. ANALYSIS

In light of its opinion in *Columbia*, the Board can no longer stand by its wavering decision¹⁹⁷ in *Northwestern* to decline jurisdiction over college athletes.¹⁹⁸ This Part applies the *Columbia* Board's statutory analysis, common law test, and jurisdictional standard to the case of college athletes to argue that *Columbia* compels a finding that college athletes are statutory employees under the Act. The next time a case like *Northwestern* comes before the Board, the Board can and should assert jurisdiction over this question.

A. Applying *Columbia's* Statutory Analysis to College Athletes

The Board in *Columbia* could not rely on the plain meaning of the Act to discern whether student assistants were "employees" because Congress failed to define the statutory terms of "employee" and "employer" with any specificity.¹⁹⁹ As a result, the Board looked to other aspects of the statute's language to detect legislative intent, including its own precedent that broadly interpreted the term "any employee" and the well-delineated statutory exceptions of workers precluded from the Act's coverage.²⁰⁰ Those considerations applied favorably to the context of student assistants because, after all, the statutory exceptions never mention "students" or "private universities," and the breadth of the language is "striking" in that it applies to numerous categories of workers.²⁰¹

In the case of college athletes, the application of the Board's statutory analysis in *Columbia* is virtually identical and uncontentious. First, it is hard to refute that the broadness of the term "any employee"

197. See *supra* notes 90–94 and accompanying text (showing the Board's trepidation in declining to assert jurisdiction).

198. Indeed, the Seventh Circuit should take notice and the case should be heard on appeal. See George Leef, *The NLRB Cannot Stop Northwestern's Football Players from Unionizing*, FORBES (Aug. 21, 2015, 3:15 PM), <http://www.forbes.com/sites/georgeleef/2015/08/21/the-nlrbs-cannot-stop-northwesterns-football-players-from-unionizing/#7b7813e1e666> (noting the possibility that *Northwestern* be reviewed by the Seventh Circuit); see also Cianfichi, *supra* note 5, at 618 (noting that on review, the Seventh Circuit would apply a deferential look at the agency's interpretation of "employee" under *Chevron* to see if it is a reasonable construction).

199. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4 (Aug. 23, 2016); see also *supra* note 44 and accompanying text (highlighting the lack of specificity in the statutory definitions for "employee" and "employer").

200. See *supra* Section II.C.1 (establishing a meaning by deferring to precedent and observing private universities do not fall under an exception).

201. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4. Moreover, the expansive language of section 2(3) of the National Labor Relations Act has been extended to cover paid union organizers, undocumented aliens, and confidential employees. *Id.* at 5.

in the statute and the ordinary dictionary definition of “employee” do not apply with equal force to college athletes.²⁰² To illustrate, both categories of workers are students at private universities charged with certain duties for which each will receive financial aid.²⁰³ Additionally, the statutory exclusions’ failure to preclude “athletes,” “students,” or “universities” from statutory coverage similarly applies with equal force to the case of college athletes.²⁰⁴ Consequently, the statutory analysis employed in *Columbia*, although not dispositive,²⁰⁵ cuts in favor of finding statutory coverage for college athletes.

B. Applying *Columbia*’s Common Law Test to College Athletes

As the Board has made clear, Congress’s failure to meaningfully define a term in the Act signals that the Board ought to interpret the meaning in accordance with common law agency doctrine.²⁰⁶ To that end, the Board in *Columbia* clearly indicates the right to control test is the appropriate common law test for determining who is an employee under the Act.²⁰⁷

It is unlikely that the Board in its current composition—which remains mostly unchanged since the *Northwestern* decision—would disagree that college athletes meet the common law right to control test for determining whether a particular bargaining unit should be accorded the protections of the Act as employees.²⁰⁸ First, the Board

202. See *supra* note 105 and accompanying text (comparing constructions of “employee” that encompass student athletes).

203. See *infra* Sections III.B.1–2 (arguing that college athletes in revenue-generating sports in Division I institutions work for their universities in exchange for compensation).

204. See National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (identifying exclusions).

205. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 4–5 (cutting in favor of statutory coverage when using common law agency doctrine).

206. See *supra* note 108 and accompanying text (referencing common law agency doctrine due to the lack of specificity in the statutory definition of “employee”).

207. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15 (holding that the right to control test is the applicable test for determining common law employment).

208. The only member of the five-person quasi-judicial body who is not currently serving since the opinion in *Northwestern* was unanimously decided in 2015 is Board Member Johnson. See NATIONAL LABOR RELATIONS BOARD, *Members of the NLRB Since 1935*, <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Aug. 30, 2017). Of the four remaining members, only Member Miscimarra dissented in *Columbia*, disagreeing with the majority that student assistants are employees. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 22, 34 (Miscimarra, Member, dissenting). However, although Member Miscimarra criticizes the use of the right to control test (“My colleagues apply a distorted and highly selective lens . . . [d]ismissing everything as ‘not dispositive’ [in favor of the right of control test] . . .”), his analysis focuses on

did not decide on that issue in *Northwestern*, relying on its jurisdictional discretion to abstain from resolving the merits of the petition.²⁰⁹ Thus, there is no opinion to the contrary.²¹⁰ Second, *Columbia* explicitly overruled the economic relationship test that the *Brown* Board used to determine that student assistants were not employees under the Act. There is therefore no opinion finding that college athletes are *not* employees under the right to control test.²¹¹ Third, the Regional Director's application of the right to control test to college athletes in *Northwestern* remains legally sound because the Board used that same test in *Columbia* with university student assistants.²¹² Thus, the Board's application of the right to control test to college athletes will be largely uncontroversial because it is the precedential test.

1. *The first element: College athletes work in exchange for compensation*

To satisfy the first element of the right to control test, college athletes participating in revenue-generating sports at Division I universities must work in exchange for compensation.²¹³ In lieu of the Board's decision in *Columbia* finding that student assistants (*including* undergraduate students) are employees under the Act,²¹⁴ it follows as

the economic relationship test disavowed by the majority. *See id.* at 32–33 (finding that research assistants are primarily students, furthering the relevance of the economic relationship test). Thus, even Member Miscimarra, who joined the Board's decision in *Northwestern*, might agree that college athletes would meet the majority's right to control test. *See Northwestern Univ.*, 362 N.L.R.B. No. 167, at 6 (Aug. 17, 2015) (“[T]he Board’s decision not to assert jurisdiction does not preclude [future] reconsideration of this issue in the future. For example, if the circumstances of Northwestern’s players or FBS football change such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area.”).

209. *See supra* Sections II.B.1–2 (discussing the majority's decision not to assert jurisdiction in *Northwestern*).

210. As of today, there is no opinion, controlling or otherwise, by any Regional Director or Board Member, finding that college athletes are not employees under the Act. In fact, the Board—through its General Counsel—has explicitly found that college athletes are employees under the Act. Memorandum from Richard F. Griffin, Jr., *supra* note 182, at 23.

211. The only opinion applying the right to control test to student athletes is the Regional Director's opinion in *Northwestern*, which answered that question in the affirmative. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *68 (Mar. 26, 2014).

212. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15.

213. *Id.* at 15 n.100 (citing *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002)); *accord Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004) (quoting *NLRB v. Town Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

214. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 13.

a corollary that all similarly situated students at universities working for a comparable number of hours and compensation would also satisfy the first element of the test. In comparison to the graduate and undergraduate student assistants at issue in *Columbia*, a bargaining unit of college athletes in revenue-generating sports at Division I schools more appropriately establishes that they work in exchange for compensation.²¹⁵ By extension, the *Northwestern* Regional Director's analysis of the compensated work that college athletes provide for their universities is a perfect framework for the right to control analysis because the conditions of the *Northwestern* football players parallel the general conditions of Division I college athletes in revenue-generating sports.²¹⁶

First, federal courts consider college athletes' scholarships to be compensation.²¹⁷ The college athletes in *Northwestern* received grant-in-aid scholarships averaging \$76,000 per year, which were used to pay for their educational and living expenses.²¹⁸ University rules prohibited any additional compensation to college athletes related to their athletic abilities, meaning that college athletes were further dependent upon the university.²¹⁹ The athletes did not receive traditional paychecks but, as the Regional Director noted, that was

215. Compare *id.* (holding the “petitioned-for bargaining unit”—including graduate students, terminal Master’s degree students, and undergraduate students—is the “appropriate unit”), with *supra* notes 71–75 and accompanying text (illustrating that student athletes are best situated to assess grant-in-aid scholarships).

216. Compare *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *45–47 (holding that every aspect of college athletes’ lives at *Northwestern*—social, academic, athletic—is in some way controlled by the university), with McCormick & McCormick, *supra* note 29, at 97–108 (describing a composite view of the daily life of Division I men’s basketball and football athletes at different universities and concluding that they are under constant control of university officials), and McCoy & Knox, *supra* note 2, at 1074–75 (finding that “coaches and athletic departments exercise a disproportionate amount of control over student-athletes”).

217. See *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 293 (1985) (holding that food, shelter, and transportation are types of wages); McCormick & McCormick, *supra* note 29, at 129–30 (arguing that compensation in the form of in-kind benefits like tuition, books, and room and board, are compensatory under federal income tax principles).

218. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *42.

219. *Id.* at *6; see also Eric Carlson, Comment, *Unsportsmanlike Conduct: Why the NCAA Should Lose its Tax-Exempt Status if Scholarship Athletes Are Considered Employees of Their Universities*, 66 SYRACUSE L. REV. 157, 170 (2016) (explaining that the NCAA protects its definition of amateurism by preventing compensation of college athletes in its bylaws); McCoy & Knox, *supra* note 2, at 1075 (finding that college athletes’ education is often dependent on athletic scholarships because they would often be unable to pay for their education or living expenses while attending school).

irrelevant²²⁰ because financial aid constituted payment for services rendered—evinced by the fact that scholarships were terminated when an athlete stopped participating in collegiate sports.²²¹ Additionally, the fact that the university heavily recruited the players for their athletic skills²²² and that player participation in Northwestern’s football program was a term of a player’s scholarship offer flies in the face of the university’s claim that scholarships should not be considered compensation in exchange for playing football.²²³

In like manner, Columbia University funded most of the Ph.D. student assistants’ education, typically providing tuition and a stipend for their first five years of study.²²⁴ Master’s degree students received compensation for teaching duties and undergraduate students received compensation for the clerical tasks performed.²²⁵ The university compensated all students comprising the bargaining unit in *Columbia*, whether monetary or otherwise, only after the students

220. The Supreme Court has also supported this notion that compensation need not be in money, but can be “financial or other compensation.” *See* NLRB v. Town & Country Elec. Inc., 516 U.S. 85, 90–91 (1995) (defining employee as another who works in return for financial or other compensation); *Seattle Opera v. NLRB*, 292 F.3d 757, 762–65 (D.C. Cir. 2002) (holding that a group of 100 to 200 auxiliary choristers were employees even though they only performed occasionally and were paid with dress rehearsal performance tickets and \$214 to cover parking and transportation expenses).

221. *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *17–18. However, college athletes’ scholarships can no longer be terminated for athletic performance. NCAA DIV. I MANUAL, *supra* note 147, § 15.3.4.3 (stating that decreasing a prospective student-athlete’s financial aid is prohibited, from the time the student signs the award letter until the conclusion of the financial aid agreement). But, there is evidence that university staff can get around that restriction. *See supra* note 155 and accompanying text (illustrating that universities may reduce scholarships by citing anything other than athletic performance). Moreover, grant-in-aid scholarships can be seen as inadequate and resemble “scrips,” or coupons given to workers as consideration for work, to be used solely in company stores where the workers could buy things at an inflated price. *See* McCormick & McCormick, *supra* note 29, at 78 n.27 (noting that college athletes’ scholarship money eventually trickles back into the university coffer after tuition, room and board, and food is deducted).

222. *See supra* note 79 and accompanying text.

223. Employer-Appellant’s Brief to the Board on Review of Regional Director’s Decision and Direction of Election at 34, *Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221 (Mar. 26, 2014); *see also* McCormick & McCormick, *supra* note 29, at 128 (finding that athletic scholarships are never given without the requirement of athletic services, even for third- or fourth-string athletes, whereas scholarships awarded based on merit require no services in exchange). Once the decision to offer a scholarship becomes contingent on a player’s performance on the field, the less the scholarship looks like an incentive and the more it looks like compensation for work.

224. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 13–14 (Aug. 23, 2016).

225. *Id.* at 14.

completed their respective tasks. Failure to perform those tasks resulted in termination of their compensation.²²⁶

Second, it is undisputed that college athletes “work” gruelingly throughout the academic year, as well as seasonal periods.²²⁷ By comparison, the student assistants in *Columbia* generally worked up to 20 hours a week, a considerably less amount of time, while also expending less energy than most college athletes.²²⁸ In contrast to undergraduate students at *Columbia*, who are responsible for grading homework and overseeing laboratory sections,²²⁹ the college football players at Northwestern provide a more compelling case because they toil year-round,²³⁰ risk serious bodily harm to themselves,²³¹ and provide a massive economic benefit to their school.²³² Additionally, the teaching responsibilities of student assistants are relevant to their academic pursuits and may count toward earning academic credit or as a prerequisite for completing their degrees.²³³ Whereas for college athletes, athletics is completely separate from academics because athletes do not receive credit for participating in collegiate athletics.²³⁴ This suggests that student assistants’ “work” is an aspect of their role as a student, while college athletes’ “work,” devoid of an educational component, is more properly characterized as an aspect of their role as an employee.²³⁵

226. *See supra* notes 120–21 and accompanying text (explaining that full financial aid was conditioned upon a student’s performance of his or her teaching duties and that failure resulted in termination of aid).

227. *See supra* notes 86–89 (explaining the laborious work that football players at Northwestern perform as part of their athletic duties).

228. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 14.

229. *Id.*

230. *See infra* note 239 and accompanying text (illustrating the control coaches and the university have over players’ itineraries).

231. McCormick & McCormick, *supra* note 29, at 77 nn.25–26 (discussing the risks to long-term physical health associated with participation in college football: “From 1977 through 2004, thirty-one college football players received cervical cord injuries, and from 1984 through 2004, ten received cerebral injuries from which they never completely recovered”).

232. *See supra* notes 2, 80–81 and accompanying text (describing the profits that the NCAA and universities generate through the various intercollegiate athletics programs).

233. *See Northwestern Univ.*, 2014 N.L.R.B. LEXIS 221, at *56 (Mar. 26, 2014) (relating graduate assistants’ duties to educational requirements).

234. *See id.* at *36 (finding that athletes at Northwestern do not receive any academic credit for playing football and that none of the coaches are members of the faculty).

235. *See Marzán & Tillet-Saks, supra* note 34, at 317 (arguing that the work college athletes perform is akin to that of cafeteria workers—since it is devoid of an academic

Accordingly, in comparison to a bargaining unit already afforded employee status under the Act, college athletes provide a stronger case for employee status under the first element of the right to control test because the work they perform is substantially more demanding and laborious and the compensation they receive is comparable to what student assistants receive. Thus, the Board should have no qualm in finding that college athletes work for their universities in return for compensation.

2. *The second element: Universities control the details of college athletes' work*

College athletes participating in revenue-generating sports at Division I universities meet the second element of the right to control test²³⁶ because, as the Regional Director's thorough examination of the Northwestern football players' lives illustrates, universities exert pervasive control over college athletes.²³⁷ Scholarship on this matter further demonstrates that Northwestern's control over its athletes is typical of collegiate athletics nationally, where teams, universities, athletic conferences, and athletic associations subject absolute control over college athletes.²³⁸ Admittedly, the university's supervision of athletic performance is understandable and to be expected, but control over college athletes' personal lives off the field rises to an incomparable level.²³⁹ In fact, one would be hard-pressed to find a

character—who are indubitably employees of the university and work for compensation).

236. See *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15 n.100 (Aug. 23, 2016) (citing *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002)) (holding that the second element of the right to control test is “[if] the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed”). Also, universities derive their control from “tender” agreements that college athletes sign. See *Marzán & Tillett-Saks*, *supra* note 34.

237. See *supra* notes 85–89 (relating how officials at Northwestern controlled the football players' athletic activities, their recreational and social autonomy, and even their academics).

238. See *McCormick & McCormick*, *supra* note 29, at 97–116 (describing in excruciating detail the daily life of college athletes participating in football and men's basketball at three different Division I universities and concluding that “employee-athletes are subject to more control by their universities than is any other employee or group of employees at their institutions”); see, e.g., *Nocera & Strauss*, *supra* note 5; *Miller*, *supra* note 29, at 1145, 1150. Additionally, the NCAA has significant control over college athletes. See generally *supra* Section I.D.1 (describing the restrictions that college athletes are placed under, including, but not limited to, receiving only enough scholarship compensation to cover tuition, housing, books, and food plans, and having their daily schedules planned for them by the university).

239. On the field, coaches mandate “what positions the college athletes will play, how they will play the game, how they will train for the game, and how they will stay in

more illuminating example of a category of employees under the Act where the employer has such a degree of control over the details of the work the employees perform.²⁴⁰

College athletes' excessive control at the hands of the NCAA and university officials is particularly evident in comparison to universities' control over student assistants. In *Columbia*, the Board's twenty-two-page opinion devoted a mere three sentences to the application of the second element of the right to control test to student assistants. It stated:

Here, the University directs and oversees student assistants' teaching activities. Indeed, the University possesses a significant interest in maintaining such control, as the student assistants' work advances a key business operation of the University: the education of undergraduate students. The record shows that teaching assistants who do not adequately perform their duties to the University's satisfaction are subject to corrective counseling or removal.²⁴¹

This succinct and slightly vapid analysis highlights the low threshold for "control" that the test requires and how squarely college athletes fit under this application. By comparison, universities do not exert control over the personal and recreational lives of student assistants outside of demanding their satisfactory completion of academic responsibilities.²⁴² Although *Columbia* shows that the details of Ph.D. students' work is more closely controlled than the work of undergraduate students,²⁴³ the Board still held that all the petitioners in the bargaining unit in *Columbia* were appropriate and therefore employees under the Act.²⁴⁴

Consequently, *Columbia* set a benchmark for how much control an employer needs to exert over an employee to satisfy the second element of the right to control test. It only needs to match the control that Columbia University exerted over undergraduate students—the employees in the bargaining unit with the least demanding

shape during the off-season." Marzán & Tillett-Saks, *supra* note 34, at 311. Off the field, the university controls the players' use of alcohol and drugs, use of social media accounts, ability to garner additional income through outside employment, ability to drive personal vehicles, and even autonomy to travel off campus. *Id.* The players' itineraries often control their schedule from sunrise to sunset, during seasonal play and off-season, and demands well over the traditional forty-hour week. *Id.*

240. McCormick & McCormick, *supra* note 29, at 97 n.123 ("What other university employee is subject to such control by his supervisor that he must lift weights at 5:30 a.m., run in the summer sun, and seek permission to leave campus during summertime off hours, or risk termination?").

241. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 15.

242. *Supra* note 114 and accompanying text.

243. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 19.

244. *Id.* at 2.

restrictions. The biggest element of control the university exerted over undergraduate students in *Columbia* was removal for failure to adequately perform required duties.²⁴⁵ Universities similarly threaten college athletes with discharge for failing to perform athletic responsibilities, but universities control athletes even more because they can be removed for failing to adhere to a litany of expectations imposed on them.²⁴⁶ For example, a college athlete will forfeit his or her amateur status—the catalyst for participation in collegiate sports—if he or she receives financial assistance from a sports organization, enters into an agreement with an agent, or contracts to play professional sports after college.²⁴⁷ This, coupled with the pervasive control mentioned above that college athletes experience year-round in all facets of their lives, indicate that if the Board asserts jurisdiction over college athletes, it should have no difficulty recognizing them as statutory employees under the right to control test.²⁴⁸

C. *Applying Columbia's Jurisdictional Standard to College Athletes*

The Board asserts jurisdiction over cases when doing so would further the purposes and policies of the Act.²⁴⁹ The Act's history demonstrates that Congress sought to establish collective bargaining to avert workplace unrest, which may occur in the absence of a process for employees to choose representation.²⁵⁰ More importantly, however, the Act sought to prevent the exploitation of labor by giving workers the opportunity to bargain for their rights.²⁵¹ It is the premise of this Comment that extending the Act's protections to college athletes would promote these policies of the Act. Therefore, *Northwestern* was incorrectly decided and is irreconcilable with the Board's opinion in *Columbia* recognizing an employment relationship between student assistants and universities.

245. *Id.* at 15.

246. *See generally* Bird, *supra* note 144 and accompanying text.

247. *Id.*

248. *See Columbia Univ.*, 364 N.L.R.B. No. 90, at 17 (“[W]here a university exerts the requisite control . . . [and where] specific work is performed as a condition of receiving the financial award,” the worker should be properly treated as an employee under the Act).

249. *Id.* at 13; *see also supra* note 123 and accompanying text (showing the avenues the Board may pursue in exercising its discretion to decline jurisdiction).

250. *Supra* note 32 and accompanying text.

251. *Supra* notes 35–38 and accompanying text (discussing Senator Wagner's remarks during the congressional debate of the Act, where the senator professed that employees could only gain freedom and dignity through coordination and cooperation with one another).

The *Columbia* and *Northwestern* decisions each approached the question of whether to assert jurisdiction from different vantage points. Both began with the same question: whether asserting jurisdiction furthers the purposes and policies of the Act.²⁵² Subsequently, however, the cases diverged. On the one hand, *Northwestern* insisted on exploring whether asserting jurisdiction would promote stability in “labor relations,” which it heralded as the main purpose of the Act and thus the ultimate harbinger of whether the Board should assert jurisdiction.²⁵³ On the other hand, *Columbia* did not explicitly explore whether asserting jurisdiction over student assistants would promote stability in labor relations,²⁵⁴ but rather, whether asserting jurisdiction would promote collective bargaining and protect workers’ freedoms to express a choice.²⁵⁵ *Columbia*’s jurisdictional standard should control because it is the most recent precedent concerning discretion to assert jurisdiction in the private university context and is thus more persuasive than *Northwestern*.

1. *Northwestern’s jurisdictional analysis is not controlling and is unpersuasive*

The Board in *Northwestern* concluded that asserting jurisdiction over college athletes would not promote the Act’s policy to promote stability in labor relations.²⁵⁶ For that conclusion, the Board relied on two considerations: (1) the nature of collegiate sports leagues and (2)

252. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 6–7; *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3 (Aug. 17, 2015).

253. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3 (“[I]t would not effectuate the policies of the Act to assert jurisdiction. Our decision is primarily premised on a finding that . . . it would not promote stability in labor relations to assert jurisdiction in this case.”).

254. Notably, the legal analysis of whether asserting jurisdiction would promote stability in “labor relations” does not appear in *Columbia*’s twenty-two-page opinion once; whereas, in *Northwestern*’s seven-page opinion, “labor relations” in such a context is invoked at least ten times. See generally *Columbia Univ.*, 364 N.L.R.B. No. 90, at 1; *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 1, 3, 5, 6.

255. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 6–7. It is significant—although puzzling—that the *Columbia* Board pivoted away from its jurisdictional discretion analysis in *Northwestern* because the decisions were issued within a year of one another and the composition of the Board was identical in both opinions. See NATIONAL LABOR RELATIONS BOARD, *Members of the NLRB Since 1935*, <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Aug. 30, 2017). The only exceptions are that Member Miscimarra dissented in *Columbia* and Member Johnson held the Madden seat in *Columbia*. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 22–34 (Miscimarra, Member, dissenting).

256. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 3.

the composition and structure of FBS football.²⁵⁷ The first consideration refers to the “control” that is exercised by the league over individual teams, while the second consideration refers to the fact that the majority of competitors in the NCAA are public universities or colleges beyond the Board’s jurisdiction.²⁵⁸

Under the first consideration, the Board reasoned that because organizing football games required cooperation, universities collaborated to create the NCAA and subsequently relinquished a substantial degree of control to the NCAA.²⁵⁹ As a result of this necessary arrangement, labor issues directly involving only an individual team would also affect the NCAA and other member institutions.²⁶⁰ This is problematic in the Board’s view because single-team bargaining units would disrupt uniformity and stability in labor relations.²⁶¹

Regarding the second consideration, the Board reasoned that asserting jurisdiction would not promote labor relations because the composition and structure of FBS football is mostly public, meaning the Board’s decisions would not reach most teams within the NCAA or the Big Ten Conference.²⁶² To assert jurisdiction would thus create an “inherent asymmetry” of labor relations regulatory regimes within the same conference because state labor law would govern public universities and federal labor law would govern private universities.²⁶³

The Board’s first consideration in *Northwestern* speaks to its concern about the dilution of the NCAA and member institutions’ power vis-à-vis college athletes. What the Board characterized as a lack of

257. *Id.*

258. *Id.* Northwestern is the only private school in the NCAA’s Big Ten division, and one of seventeen private universities nationwide out of over 125 schools in the NCAA’s Division I FBS. *Id.* at 2; see also *About the Conference*, BIG TEN, <http://www.bigten.org/school-bio/big10-school-bio.html> (last visited Aug. 30, 2017) (describing the “Big Ten Conference” as one of “intercollegiate sports’ most successful undertakings” and listing the fourteen schools in the Big Ten); Times Editorial Board, *Why Can’t College Athletes Unionize?*, L.A. TIMES (Aug. 26, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-ncaa-20150826-story.html>. Additionally, five of the schools in the Big Ten Conference are in right-to-work states, and two others are in states that passed laws declaring that college athletes are not employees. *Id.*

259. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 4 (finding that the NCAA now enjoys a substantial degree of control over the operations of athletic programs of member teams and the conditions in which college athletes practice and compete).

260. *Id.*

261. *Id.* at 4–5.

262. *Id.* at 5; see also NATIONAL LABOR RELATIONS BOARD, *Jurisdictional Standards*, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Aug. 30, 2016) (explaining that the Board has jurisdiction over private sector employers whose activity in interstate commerce meets the minimum standard).

263. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 5.

“stability” in labor relations, however, is essentially a euphemism for a world in which collective bargaining on college campuses tips the scales of bargaining power and results in the NCAA and member institutions having diminished control over college athletes.²⁶⁴ Indeed, effective integration of collective bargaining must require some initial instability in labor relations to change the dynamics of the employee-employer relationship.²⁶⁵ Moreover, *Northwestern* fails to consider that there is ample evidence suggesting that the Act was intended to do just that: bring workers under the fold of the Act’s protections to prevent exploitation and promote equity in bargaining power.²⁶⁶

The Board’s second consideration in *Northwestern* can be boiled down to one basic premise: that the arrangement of college football is too complex for the Act’s model of collective bargaining.²⁶⁷ This premise is not only insidious,²⁶⁸ but also unpersuasive because it flies in the face of empirical evidence showing the resilience of collective bargaining in several different sectors that are as complex and hierarchical as NCAA football.²⁶⁹ The Board in *Columbia* admonished the *Brown* Board for failing to consider empirical evidence showing the effective integration of collective bargaining in the public university context, the national security sector, and the acute care hospital sector.²⁷⁰ *Northwestern* similarly fails to consider collective bargaining’s “historic flexibility” as a practice, choosing instead to focus on

264. *Id.* at 4–5 (detailing the Board’s decision not to assert jurisdiction because it would not promote “stability” in labor relations, but denying student-athletes the opportunity to collectively bargain and suggesting that the broader implication would diminish the power of the NCAA and member institutions).

265. See Marzán & Tillet-Saks, *supra* note 34, at 332 (noting that the Congressional intent of the Act was to create a significant change in labor relations by “compelling employers to bargain with employees” through the use of collective bargaining and other similar techniques).

266. *Supra* notes 34–38 and accompanying text (contextualizing the advent of federal labor as a result of the judiciary’s unsuccessful attempts in the past to regulate labor disputes and Congress’s desire to check the judiciary’s suppression of organized labor activities).

267. Marzán & Tillet-Saks, *supra* note 34, at 342.

268. However sincere the Board’s rationale is, it is evidence of a historical anachronism where courts treat sports law with “kid gloves.” See McCormick & McCormick, *supra* note 2, at 497 (identifying three areas of law—labor, antitrust, and taxation—where the myth of amateurism shields the NCAA from regulation and are examples of how amateurism provides “unwarranted and improper exemption from the law at the expense of the athletes, the public, and justice itself”).

269. *Supra* note 135 and accompanying text.

270. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 7–8, 11–12 (Aug. 23, 2016).

conjectural claims of harm to the NCAA as a result of private universities instituting collective bargaining.²⁷¹

Even if the Board is persuasive in finding that the structure of college football is unique, the Board's rationale makes a flawed assumption. It assumes that implementing collective bargaining in the private university context would create an "inherent asymmetry" of labor relations regulatory regimes within the same conference because the status quo will not change as state governments refuse to recognize college athletes as employees.²⁷² However, this ignores reality. Some governments have moved toward recognizing college athletes as employees,²⁷³ as have state and federal courts.²⁷⁴ More importantly, the Board's assumption is even more apparent when viewed in light of the national zeitgeist: where increased scrutiny to the commercialization of collegiate sports at the expense of college athletes has increased to a breaking point.²⁷⁵ The Board should recognize that asserting jurisdiction would not only promote the Act's purposes, but it would also encourage state governments to follow suit.

To be sure, *Northwestern's* concern about instability in labor relations has some merit.²⁷⁶ However, that concern does not arise from the policies of the Act nor does it constitute "compelling reasons" for the Board to exclude a category of workers that meet the Board's statutory test for recognition as employees under the Act.²⁷⁷ Moreover, even if *Northwestern* identified realistic concerns about instability in labor relations, those concerns must be more pressing than those present in allowing student assistants to bargain collectively. Accordingly, the Board's jurisdictional discretion analysis in *Northwestern* is unpersuasive and should be afforded as little deference as the *Columbia* Board applied in overruling the *Brown* decision.²⁷⁸

271. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, at 4 (Aug. 17, 2015) (finding that the NCAA's "degree of control" would be threatened if individual teams were able to collectively bargain).

272. *Id.* at 5.

273. In 2015, the Connecticut State Legislature proposed a bill that would designate college athletes in revenue-generating sports in public universities as employees with collective bargaining rights. H.B. 5485, Jan. Sess. (Conn. 2015).

274. *Supra* note 71.

275. *Supra* Section II.D.2 (discussing some major lawsuits against the NCAA as of 2014 contesting NCAA policies governing college athletes' scholarship amounts, health, pay, and the continued role amateurism plays in college sports).

276. Hyman, *supra* note 90 (arguing that the Board's decision in *Columbia* has "upended decades of precedent" and has led to deleterious effects, such as the invalidation of rules barring profanity, which promote civility).

277. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 5 (Aug. 23, 2016).

278. *Id.* at 1, 4.

2. *Columbia's jurisdictional standard requires the Board to assert jurisdiction over college athletes*

The Board in *Columbia* considered two factors in creating a standard for asserting jurisdiction. First, *Columbia* makes clear that no matter the reason for declining jurisdiction, the Board's reasons *must* be grounded in promoting the policies and purposes of the Act.²⁷⁹ Thus, in the case of college athletes, the Act's main purpose that encourages the practice of collective bargaining and protects workers' choice for or against collective bargaining representation must be the first factor the Board uses in determining whether to decline jurisdiction.²⁸⁰

The Board made that abundantly clear when it admonished the *Brown* opinion for relying on what it perceived was a "fundamental tenet" of the Act: whether an economic relationship existed.²⁸¹ In fact, the Board noted that the policy concern justifying excluding student assistants from statutory coverage was "neither derived from the statutory text . . . nor from the fundamental policy of the Act."²⁸² The Board concluded that it could "discern no such policies" and rejected *Brown's* focus on whether student assistants have a "primarily educational" employment relationship with their university.²⁸³

In the case of college athletes, asserting jurisdiction would certainly promote the policies and purposes of the Act. The Act was intended as a vehicle for economic and social progress, to promote collective bargaining, and to shield workers from exploitation by employers.²⁸⁴ College athletes in today's world do not have the right to profit off of their images, likenesses, or names,²⁸⁵ are subjected to prohibitive control at the

279. *Supra* note 123 and accompanying text.

280. *See supra* notes 31–38 and accompanying text (explaining the historical purpose of the Act).

281. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 3.

282. *Id.* at 3, 5. Although the Board in *Brown* did specifically conclude that student assistants were not employees, the *Columbia* Board found that declining statutory coverage must be premised on either the statute or the fundamental policy of the Act. *Id.* at 5–6. This suggests that a decision to decline jurisdiction should either be premised on the statutory exclusions or, alternatively, for reasons that would not promote the policies of the Act.

283. *Id.* at 6. Similarly, the Board should reject *Northwestern's* jurisdictional analysis proclaiming stability in labor relations as the purpose of the Act because it is a "vague notion of a statute's 'basic purpose'" not derived from the statute or its policies. *Id.* (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)).

284. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 6–7; *supra* notes 32–37 and accompanying text (explaining the historical purpose of the Act).

285. *Supra* note 169 and accompanying text.

hands of their universities and conferences;²⁸⁶ and are at risk for serious bodily injury in the course of their work.²⁸⁷ Because they have the most to gain from the Act's protections, college athletes are thus uniquely suited for collective bargaining rights. This suggests that collective bargaining would have a certain permanency on college campuses because college athletes would seriously value their bargaining rights. Consequently, asserting jurisdiction over college athletes would encourage the vitality of the practice and procedure of collective bargaining.

In addition to promoting the policies and purposes of the Act, the second factor that the *Columbia* Board considered in determining whether to decline jurisdiction over a particular bargaining unit is whether the Act is capable of managing labor disputes in that context.²⁸⁸ The Board in *Columbia* found that collective bargaining's "historic flexibility" as a practice and pugnacity in successfully navigating delicate topics that arise during collective bargaining suggest that student assistants and their purported employers—the private universities—could rely on the Act to manage conflict.²⁸⁹ For instance, the Board noted the tools available to universities to ensure collective bargaining would not be harmful to the educational context and pointed out several sectors where the Act's resilience has allowed collective bargaining to succeed.²⁹⁰

All of these considerations apply with equal force to college athletes. The NCAA and member institutions will retain the same tools the Board identified as sufficient for universities to use in bargaining with school assistants. Although collegiate sports are generally centralized and hierarchical,²⁹¹ they are nevertheless not so different from labor sectors in which bargaining has thrived sufficiently enough to justify exclusion. More importantly, collective bargaining has already proven to work on public university campuses, where collective bargaining is "increasingly a fact of American university life."²⁹² All in all, collective bargaining is not a magic wand that college athletes will waive when

286. *Supra* notes 238–47 and accompanying text (describing the control that universities have over college athletes' living, working, and recreational activities).

287. *Supra* note 163 (citing a lawsuit against the NCAA in 2011 that details the high incidence of concussions and other athletic injuries among college athletes and alleges that the NCAA's inaction increased the risk of long-term injury and illness); *supra* note 231 and accompanying text (citing to examples of athletes who suffered severe injuries and even death directly resulting from playing or practicing football).

288. *Supra* note 126 and accompanying text.

289. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 9.

290. *Supra* note 135 and accompanying text.

291. *See supra* Section II.D.1 (examining the organization and nature of the NCAA).

292. *Columbia Univ.*, 364 N.L.R.B. No. 90, at 9.

feeling aggrieved or overworked; rather, it is a regimented process with a mandatory scope of bargaining that is more appropriate for managing labor disputes in the private university context than the status quo.²⁹³ Therefore, *Columbia's* jurisdictional standard is not only controlling as the most recent Board precedent, but it also provides a persuasive justification for asserting jurisdiction that is grounded on the Act's historical purposes and ability to solve labor disputes.

CONCLUSION

Although Columbia University has yet to determine whether it will appeal the Board's decision in federal court, there is some evidence that the university is dragging its feet following a recent graduate student vote.²⁹⁴ Columbia University did issue a statement asserting that it disagrees with the Board's conclusion in *Columbia* that found that student assistants are employees under the Act.²⁹⁵ This statement demonstrates that affording student assistants or athletes the designation of "employee" under the Act is still controversial.

The Board has admittedly never before extended the Act's protections to college athletes, but the Board's opinion in *Columbia* leaves little room to doubt that college athletes participating in revenue-generating sports at NCAA Division I colleges and universities are employees under the Act. First, the Board's statutory analysis suggests that the lack of statutory exclusions for "students" and

293. See *id.* at 12 (noting that the more a worker engages in "fervent[] lobbying" for better representation, the more the action suggests that the current model of labor relations is unresponsive to those workers' needs and that collective bargaining may be appropriate).

294. See *Columbia Delays Again; Meeting Next Thursday*, GWC-UAW Local 2110: A Union for Research & Teaching Assistants at Columbia Univ. (Mar. 20, 2017), <https://columbiagradunion.org/2017/03/20/columbia-delays-again-meeting-next-thursday> (describing the December vote in favor of unionization won by an "overwhelming" margin); Colleen Flaherty, *'Running Out the Clock' on Grad Unions?*, INSIDE HIGHER ED (May 4, 2017), <https://www.insidehighered.com/news/2017/05/04/graduate-student-union-bids-private-institutions-have-succeeded-flopped-and-been> (citing the 1602 to 623 graduate student vote in support of unionization and Columbia's appeal of the election, claiming that there were irregularities and inconsistencies at polling sites); Tyler Larkworthy, *Columbia University Begins Legal Battle to Prevent Graduate Student Union*, DAILY PENNSYLVANIAN (Mar. 31, 2017, 4:20 PM), <http://www.thedp.com/article/2017/03/columbia-graduate-students-unionize-administration-opposes> (asserting that the objection filed by Columbia begins a legal battle that could last for years).

295. Richard Gonzales, *NLRB Rules Graduate Students Are Employees with the Right to Unionize*, NPR (Aug. 23, 2016, 4:37 PM), <http://www.npr.org/sections/twotwo-way/2016/08/23/491090762/nlr-rules-graduate-students-are-employees-with-the-right-to-unionize>.

“universities,” as well as the Board’s precedent in broadly interpreting the definition of “employee,” plainly bring college athletes under the folds of the Act.²⁹⁶ Next, the Board’s common law right to control test supports bringing college athletes under statutory coverage because college athletes work in exchange for compensation and universities control the details and manner of their work.²⁹⁷ Lastly, the Board’s jurisdictional discretion standard undeniably supports the notion that in asserting jurisdiction over college athletes, the Board would promote the practice of collective bargaining and support athletes’ freedom of choice in representation—the actual purposes of the Act.²⁹⁸

The Board has the authority to assert jurisdiction over college athletes, as is evident from its tumultuous history overturning former decisions.²⁹⁹ In light of *Columbia*, to decline jurisdiction where a category of workers are entitled—under the Board’s statutory test for determining who is an employee—to recognition as employees requires compelling policy justifications.³⁰⁰ Although the Board in *Columbia* did not expand on what constitutes compelling justifications, those justifications cannot be found in the structure of the NCAA or in the Board’s limited jurisdiction extending only over private universities.³⁰¹

Moreover, in contrast to the pontificated policy reasons for declining jurisdiction in the case of college athletes, there stands a national movement scrutinizing the NCAA and universities’ commercialization and exploitation of college athletes. Within the last five years, the courts, the Board, and public opinion have criticized the NCAA for its exorbitant profits on the backs of college athletes; its negligent procedures failing to provide for athletes’ welfare; and its prohibitive control of college athletes’ athletic, social, and academic lives.³⁰² It is apparent that the status quo as concerns college athletes is changing. The Board should take this opportunity to use the Act as it was intended—a vehicle for social and economic change³⁰³—and oversee the effective integration of collective bargaining for college athletes in the private university context, recognizing that college athletes in revenue-generating sports at NCAA Division I colleges and universities are statutory employees under the Act.

296. *Supra* Section III.A.

297. *Supra* Section III.B.

298. *Supra* Section III.C.2.

299. *Supra* Section II.B.1.

300. *Supra* Section II.C.3.

301. *Supra* Section III.C.1.

302. *Supra* Sections II.D.2(a)–(c).

303. *Supra* Section II.A.