

12-19-2016

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Tim Robinson, *Outkicking the Coverage: The Unionization of College Athletes*, 77 La. L. Rev. (2016)
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Outkicking the Coverage: The Unionization of College Athletes

INTRODUCTION

Few industries have experienced the growth that college football has sustained in recent decades.¹ The athletes are bigger, the stadiums are cathedrals, and revenues of major college football programs have soared to unprecedented heights.² This surge in popularity has induced substantial changes to the sport and has given rise to numerous issues that must be addressed if college football is to maintain its meteoric rise.³ The evolving role of student-athletes has created questions regarding how these individuals fit into the modern landscape of college football; in particular, the issue has arisen regarding whether athletes may be considered employees for the purposes of federal labor law. Recently, a group of scholarship football players at Northwestern University attempted to answer this question.⁴

In January 2014, the College Athletic Players Association (“CAPA”) petitioned the National Labor Relations Board (the “NLRB”) to represent a collective bargaining unit consisting of scholarship football players at Northwestern University.⁵ In doing so, the athletes presented a novel question: are college athletes considered employees for purposes of federal labor law standards? If so, then these athletes are entitled to the rights prescribed to all employees under the National Labor Relations Act (“NLRA”), including the right to unionize and collectively bargain; if they are not employees, then they are excluded from coverage under the Act and are not entitled to any of the rights granted therein. Ultimately, the

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1. See Eric Chemi, *The Amazing Growth in College Football Revenues*, BLOOMBERG BUSINESS (Sept. 27, 2013, 12:42 PM), <http://www.bloomberg.com/bw/articles/2013-09-26/the-amazing-growth-in-college-football-revenues> [https://perma.cc/BF4H-SVYX].

2. See *id.*

3. See Kieran McCauley, *College Athletes Shouldn't Be Paid*, DAILY LOCAL NEWS (Apr. 28, 2015), <http://www.dailylocal.com/article/DL/20150428/SPORTS/150429826> [https://perma.cc/53FQ-5WUW].

4. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union [https://perma.cc/B6UL-Y5Z4].

5. *Id.*

NLRB eluded the question for policy reasons.⁶ However, the question remains—what is the status of college athletes under federal labor law?

This Comment attempts to predict the outcome of this important issue. Part I provides background on the administrative domain that will determine the status of college athletes. Discussing factors relevant to this determination, Part II explains the National Labor Relations Board's prior decisions involving college students—specifically, graduate students performing teaching and research duties in return for some form of financial aid. Part III presents the recent petition filed by the Northwestern University scholarship football players and analyzes both the regional director's original decision and the most recent decision issued by the National Labor Relations Board in August 2015. Finally, Part IV offers a two-pronged solution in which the NLRB would recognize scholarship college athletes as employees under the NLRA and subsequently establish a separate class of employees that retains certain rights under the Act but is restricted from collective bargaining.

I. THE NATIONAL LABOR RELATIONS ACT

Congress enacted the National Labor Relations Act⁷ on July 5, 1935, marking the beginning of modern federal regulation of labor relations. The NLRA embodies the national labor policy of the United States and provides the framework by which employers and employees interact, in the context of both union and non-union activity.

A. Background and Purpose of the Act

The primary function of the Act was to promote peace between labor and management.⁸ In response to instability arising from employers' unwillingness to recognize certain rights of employees, Congress sought

6. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrbsays-northwestern-football-players-cannot-unionize.html?_r=0 [https://perma.cc/VYJ5-TLF7].

7. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

8. See 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 27–28 (John E. Higgins, Jr. et al. eds., 6th ed. 2012) [hereinafter THE DEVELOPING LABOR LAW]. There is some discussion among commentators that the purpose of promoting industrial peace has been overstated by the Board and that the Act was actually meant to act as a weapon against the Great Depression. See, e.g., Kenneth Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 320–22 (1987).

to protect those rights by encouraging collective bargaining, and, further, to curtail certain private sector labor and management practices that were harmful to the national economy.⁹

Relevant sections of the NLRA define and protect the rights of employers and employees. Section 2 provides definitions for the entire Act, including “employer” and “employee.”¹⁰ Section 7 expressly lists employee rights that are protected by the Act, and section 8 safeguards these rights by prohibiting “unfair labor practices” by employers.¹¹ Finally, section 9 creates the process by which the National Labor Relations Board conducts representation proceedings.¹² Any inquiry into the status of college athletes necessarily begins with an analysis of these sections of the NLRA.

B. Section 2(3): Employees

The NLRA defines “employee” broadly in section 2(3), declaring, “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.”¹³ The Board generally finds little difficulty in applying the broad definition found in section 2(3).¹⁴ With few exceptions, if an individual is not in an excluded category of employees and works for an employer, the Board will assume that the individual is covered by the Act.¹⁵

The NLRA originally did not plainly exclude independent contractors from coverage. However, as amended by the 1947 Labor Management Relations Act (the “Taft-Hartley Act”), section 2(3) provides that the term “employee” shall not include “any individual having the status of an independent contractor.”¹⁶ The Supreme Court has found that Congress’s purpose for excluding independent contractors was to have the Board and

9. OFFICE OF GEN. COUNSEL, NAT’L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 1 (1997).

10. 29 U.S.C. § 152 (2012).

11. *Id.* §§ 157–158.

12. *Id.* § 159.

13. *Id.* § 152(3).

14. *Id.* § 152(3) (citing as exceptions to the definition of “employee” (1) agricultural laborers; (2) laborers in domestic service of any family or person at his home; (3) individuals employed by his parent or spouse; (4) independent contractors; (5) supervisor; (6) individuals employed by employers subject to the Railway Labor Act; and (7) any individual employed by any other person who is not an employer as defined by the Act).

15. THE DEVELOPING LABOR LAW, *supra* note 8, at 2836.

16. 29 U.S.C. § 152(3).

courts apply the common law agency test in distinguishing between employees and independent contractors.¹⁷

United Insurance is the preeminent guide for the Board to distinguish between employees and independent contractors, and recent Supreme Court decisions have affirmed the use of common law principles as the test for determining employee status.¹⁸ In *NLRB v. Town & Country Electric, Inc.*, the Court explained that when there is doubt as to Congress's intended meaning of a term, courts should infer that Congress intended to incorporate the "established meaning of [the] term."¹⁹ Thus, when Congress uses the term "employee" without defining it, it should be inferred that Congress meant to incorporate the conventional master-servant relationship set forth by common law agency doctrine.²⁰ The NLRB also recognizes the application of the common law agency principles to the determination of employee status and applies the master-servant test.²¹ The Restatement (Second) of Agency defines a "servant" as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."²² Therefore, when questions arise over the employee status of certain individuals, as in the case of scholarship student-athletes, the Board will analyze, among other factors, whether the individual performs services under the control and direction of the employer and whether the individual is compensated for these services.²³

17. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

18. *See Roadway Package Sys., Inc.*, 326 N.L.R.B. 842, 849 (1998); *NLRB v. Town & Country Electric*, 516 U.S. 85, 89 (1995) (explaining that the determination as to employee status under the Act must be based on the ordinary meaning of the term "employee" as reflected in the common law concept of a "master-servant" relationship); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

19. 516 U.S. at 94 (citing *Nationwide Mut. Ins. Co.*, 503 U.S. at 233–23 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40(1989)).

20. *Id.* The common law master-servant relationship exists when "a servant performs services for another, under the other's control or right of control, and in return for payment." N.Y. Univ., 332 N.L.R.B. 1205, 1206 (2000).

21. *See Trustees of Columbia Univ.*, 264 N.L.R.B. No. 90 at *4–5, Aug. 23, 2016 (quoting *Town & Country Electric*, 516 U.S. at 94) ("But it is well established that 'when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning' of the term, with reference to 'common-law agency doctrine.'").

22. *See* RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958).

23. *See id.*

C. Section 7: Rights of Employees

The principal concern of the NLRA is the protection of employees' rights, both individually and collectively.²⁴ To effectuate this policy, Congress promulgated section 7, which sets forth the rights afforded to covered individuals.²⁵ The Act offers protection to employees for unionized activities or conduct unrelated to union organizations, as well as the right to abstain from such activities.²⁶ Section 7 further safeguards an employee's right to self-organization and to collectively bargain with an employer.²⁷ The Board has interpreted these protections broadly with the understanding that the underlying purpose of the Act was to suppress workplace disputes arising from employers refusing to bargain with their employees.²⁸

Although security of employee rights under the NLRA is more commonly associated with union activity, section 7 further extends to "other concerted activities for . . . mutual aid or protection."²⁹ The Act lists two types of protected concerted activities—those engaged in for the purpose of collective bargaining and those engaged in for other mutual aid or protection.³⁰ Thus, the protected activity must be both "concerted" in nature and must be aimed at either collective bargaining or other mutual aid or protection. A "concerted activity" does not necessarily require direct group action; rather, the Board will look to the purpose and effect of the activity.³¹ For example, if an individual employee has been designated to act on the behalf of a group of employees, that individual is deemed to be engaging in concerted activities.³² Also, courts have held that the actions

24. *See* 29 U.S.C. § 151 (2012) ("It is hereby declared to be the policy of the United States . . . [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

25. *Id.* § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . .").

26. *See id.*

27. *Id.*

28. *See id.* § 151.

29. *Id.* § 157.

30. *See id.*

31. *See* THE DEVELOPING LABOR LAW, *supra* note 8, at 2836.

32. *Id.*

of a single employee, intended to initiate group activity, meet the concerted activity requirement.³³

In *Eastex, Inc. v. NLRB*, the Supreme Court acknowledged that Congress intended the “mutual aid and protection” clause to broaden the scope of protection beyond actions associated with union activity.³⁴ Section 7 therefore includes concerted activities “in support of employees of employers other than their own,”³⁵ and also efforts “seeking to improve the terms and conditions of employment or to otherwise improve their circumstances as employees through means other than the immediate employee-employer relationship.”³⁶

If scholarship athletes are employees under the NLRA, then they would be entitled to each of these rights listed in section 7, meaning that they would be permitted to form collective bargaining units and engage in non-union concerted activity for their protection. The Act empowers the National Labor Relations Board to resolve federal labor law disputes and therefore empowers the Board to determine the status of college athletes.

D. The NLRB

The NLRB is tasked with administering and enforcing the NLRA and is composed of a five-member panel,³⁷ the General Counsel, and 33 Regional Offices.³⁸ The two primary functions of the Board are remedying unfair labor practices, as defined by the Act, and conducting representation proceedings to determine the status of labor organizations.³⁹

1. Authority of the NLRB

Fundamentally, the NLRB is an administrative agency that obtains its authority from Congress through the NLRA.⁴⁰ Congress’s power to regulate labor-management relations is limited by the Commerce Clause of the Constitution, which restricts Congressional regulation to enterprises

33. See, e.g., *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 186 (2d Cir. 2001).

34. *Eastex v. NLRB*, 437 U.S. 556, 565 (1978).

35. *Id.* at 564; see, e.g., *NLRB v. J.G. Boswell Co.*, 136 F.2d 583 (9th Cir. 1943) (finding a right to express sympathy for striking employees of another employer).

36. *Eastex*, 437 U.S. at 565.

37. Board Members are appointed by the President and approved by the Senate for five-year terms. See THE DEVELOPING LABOR LAW, *supra* note 8, at 2824–25.

38. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 9, at 33.

39. See 29 U.S.C. §§ 159(b)–(c), 160(a) (2012).

40. *Id.* § 153.

whose operations affect commerce.⁴¹ Therefore, the Board's authority is limited to cases in which an employer's operations "affect commerce."⁴²

The NLRB's authority extends only to "employers" under the Act, and section 2(2), which defines the term "employer," excludes "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof."⁴³ Therefore, publicly owned state colleges and universities are not subject to the Board's authority. Rather, only private institutions, like Northwestern University, are governed by the NLRA.⁴⁴

Every case before the NLRB begins in the regional offices, either with the filing of petitions in representation cases or through charges brought against an employer in unfair labor practice cases.⁴⁵ Each regional office is under the immediate direction of a regional director that investigates all petitions and charges, conducts representation hearings and elections, and prosecutes unfair labor practice cases.⁴⁶ Through this procedure, the Northwestern football players began their effort toward unionization by filing a representation petition with the regional director's office in Chicago.⁴⁷

2. Representation Procedure

The Board has delegated its authority in all representation matters to its regional directors.⁴⁸ Section 9(c) of the Act outlines the procedure for representation cases, which begins with the filing of a petition in the appropriate regional office.⁴⁹ Once the petition is filed, the regional staff conducts investigation proceedings to gauge the viability of the individuals'

41. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

42. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 9, at 33. "Commerce" is understood to include "trade, traffic, transportation, or communication within the District of Columbia or any Territory of the United States; or between any State or Territory and any other State, Territory, or the District of Columbia; or between two points in the same state, but through any other State, Territory, the District of Columbia, or a foreign country." *Id.*

43. 29 U.S.C. § 152(2).

44. *Id.*

45. THE DEVELOPING LABOR LAW, *supra* note 8, at 2830.

46. *Id.*

47. Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

48. THE DEVELOPING LABOR LAW, *supra* note 8, at 2841.

49. 29 U.S.C. § 159(c).

claim.⁵⁰ Following the investigation and formal representation hearing, the hearing officer submits a report to the regional director summarizing the issues of the case without making any recommendations.⁵¹ The final decision by the regional director includes a finding of facts, the conclusions of law, and either a direction of election or an order dismissing the petition.⁵² In any case in which the regional director issues a ruling, any party may file a request for the Board to review that decision.⁵³ The NLRB has reviewed the status of numerous potential bargaining units through this procedure, including those composed of certain types of graduate students, which could be analogized to any potential group of college athletes.⁵⁴

II. EARLY NLRB DECISIONS

The National Labor Relations Board recognized that the Northwestern football team's petition presented an issue of first impression, in that the Board had never been asked to determine the status of college athletes under the NLRA.⁵⁵ However, the Board has often been called upon to determine the status of other types of students in the academic arena.⁵⁶ Graduate students frequently perform teaching functions, generally under the direct supervision of faculty members, while receiving financial assistance to attend the university—thus, these graduate students would presumably meet the common law master-servant test for employees.⁵⁷ Nevertheless, for many years, the Board found graduate assistants to be “primarily students” and thus excluded from coverage under the Act.⁵⁸ Then, in 2000, faced with a petition by graduate students at New York

50. THE DEVELOPING LABOR LAW, *supra* note 8, at 2836. Specifically, the staff will determine whether the Board has jurisdiction, whether there is a sufficient showing of interest, whether there exist statutory or policy reasons for precluding an election, and will establish the scope and composition of the collective bargaining unit. *Id.*

51. *Id.* at 2840.

52. 29 C.F.R. §102.67(a)–(b) (2016).

53. *Id.*

54. *See infra* Part II.

55. Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167 (Aug. 17, 2015).

56. *See, e.g.*, Trustees of Columbia Univ., 264 N.L.R.B. No. 90 (Aug. 23, 2016); *see also* Brown Univ., 342 N.L.R.B. 483 (2004); N.Y. Univ., 332 N.L.R.B. 1205 (2000); The Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974); Adelphi Univ., 195 N.L.R.B. 639, 640 (1972).

57. *See* RESTATEMENT (SECOND) OF AGENCY § 2(2) (AM. LAW INST. 1958).

58. *See, e.g.*, *Adelphi Univ.*, 195 N.L.R.B. at 640; *see also The Leland Stanford Junior Univ.*, 214 N.L.R.B. at 623.

University, the Board reconsidered its position and held that certain graduate students were employees under section 2(3).⁵⁹ The Board subsequently returned to its original stance and determined that graduate assistants were not employees within the meaning of the Act.⁶⁰ Recently, the Board returned to its reasoning in *New York University*⁶¹ and applied the master-servant test to a group of graduate students from Columbia University.⁶² The Board ultimately determined that the students were employees under the NLRA.⁶³ Thus, as it stands, graduate students at private universities are covered by the NLRA and are able to avail themselves of the rights granted therein. Were the Board to deliberate on the status of college athletes under the Act, it would likely incorporate, or at least consider, its reasoning in the graduate student cases. A survey of the Board's line of graduate student decisions may reveal how the Board would determine the status of college athletes under the Act.

A. Pre-New York University Decisions

If an individual is not excluded by section 2(3), then the individual is assumed to be an employee. Therefore, under this rule, the Board does not ordinarily face much difficulty in determining whether an individual is an "employee" under the Act.⁶⁴ However, the Board has excluded certain categories of individuals not expressly listed in section 2(3).⁶⁵ In a line of decisions beginning in the 1970s, the Board held that graduate students working in teaching positions are not employees and therefore cannot be included in a bargaining unit because their inclusion would go against the purposes of the Act.⁶⁶

In *Adelphi University*, the Board excluded graduate student assistants from a unit of regular faculty members, finding that the graduate assistants

59. *N.Y. Univ.*, 332 N.L.R.B. at 1206 (reasoning that graduate students are employees, despite also being students, because they are paid to perform services under the direction of faculty supervisors).

60. *Brown Univ.*, 342 N.L.R.B. at 490 (holding that the imposition of collective bargaining on graduate students would intrude on the educational processes and that policy reasons called for excluding the students from coverage).

61. *N.Y. Univ.*, 332 N.L.R.B. 1205.

62. *See Trustees of Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).

63. *Id.* at *12–13.

64. *Id.* at *4.

65. *See Brown Univ.*, 342 N.L.R.B. at 487–88.

66. *See, e.g., Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972); *see also The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974).

were “primarily students.”⁶⁷ The Board emphasized that the students’ employment was entirely dependent on their working toward academic degrees and that they were under the supervision of regular faculty members.⁶⁸ The Board, however, did not determine whether the graduate students were “employees” as defined by the Act and correspondingly whether they had the right to collectively bargain.⁶⁹ Rather, it found that because the individuals were primarily students, they did not enjoy a “community of interest” with the faculty sufficient to warrant inclusion in the bargaining unit consisting solely of regular faculty members.⁷⁰ Two years after *Adelphi*, the Board took the next step and held that graduate research assistants were not employees within the meaning of section 2(3) because they were “primarily students.”⁷¹

The Board reiterated its position on students performing services directly related to an educational program when faced with the status of medical interns, residents, and fellows obtaining medical degrees.⁷² In *St. Clare’s Hospital*, the Board cited its earlier graduate student cases as denying them the right to be represented separately.⁷³ The Board emphasized that the individuals served primarily as students rather than as employees of the teaching hospital.⁷⁴ The “mutual interest” of the students and the educational institution in the service was predominantly educational, rather than economic, making them primarily students and, therefore, outside of the coverage of the NLRA.⁷⁵

In *Boston Medical Center*, the Board overruled *Cedars-Sinai* and *St. Clare’s* and held that medical students performing services in a hospital were employees within section 2(3).⁷⁶ The Board interpreted the breadth of section

67. *Adelphi Univ.*, 195 N.L.R.B. at 640.

68. *Id.*

69. *See id.*

70. *Id.*

71. *The Leland Stanford Junior Univ.*, 214 N.L.R.B. at 621–23 (specifying various factors to show that the individuals were primarily students, including (1) the research assistants were graduate students enrolled as Ph.D. candidates at the university; (2) the research assistants were required to perform research to obtain their degree; (3) the research assistants received academic credit for their work; and (4) the stipend was actually financial aid that was not dependent on the nature or value of their services or the individual skill of the recipients).

72. *See Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976); *St. Clare’s Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977) (attempting to better explain the Board’s decision in *Cedars-Sinai*).

73. *St. Clare’s Hosp. and Health Ctr.*, 229 N.L.R.B. at 1002.

74. *Id.*

75. *Id.*

76. *Bos. Med. Ctr.*, 330 N.L.R.B. 152, 168 (1999).

2(3) expansively and the list of exclusions narrowly—meaning that the medical students were within the meaning of “employee” unless there existed some statutory or policy reasons for exclusion.⁷⁷ However, the Board did not address the status of graduate assistants who had not yet received academic degrees, meaning that *Boston Medical* did not overturn the Board’s decisions in *Adelphi* and *Leland Stanford*.⁷⁸

The decision in *Boston Medical*, although not binding on graduate students, raised the question of whether graduate students were also employees based on similar reasoning. In 2000, the Board revisited the status of graduate students under the NLRA and in doing so, imposed dramatic changes to federal labor law.⁷⁹

B. New York University

In *New York University*, the Board shifted its stance on graduate students, declaring that graduate assistants from New York University (“NYU”) were employees and therefore were entitled to organize and bargain with the university, despite also being enrolled as students.⁸⁰ Relying on similar reasoning as in *Boston Medical Center*, the Board rejected the argument that the graduate students were precluded from coverage simply because they were students.⁸¹ The Board recognized that the term “employee,” as it is used in section 2(3), incorporates common law agency doctrine.⁸² Because the graduate students worked as teachers and researchers under the control of the department administrators, and were paid for their work, they were clearly employees under the common law and section 2(3) of the Act.⁸³

First, the Board rejected NYU’s position that the case was distinguishable from *Boston Medical Center*.⁸⁴ The Board also disagreed

77. *Id.* at 160.

78. *Id.*

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

80. *Id.* at 1209.

81. *See id.* at 1205 (“We reject the contention . . . that, because the graduate assistants may be ‘predominantly students,’ they cannot be statutory employees. . . . [W]e find there is no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students.”).

82. *See id.* at 1205–06 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93–95 (1995)).

83. *See id.* at 1206.

84. *See id.* at 1206–07. The university argued that the students differed from the medical students in three ways: (1) the housestaff in *Boston Medical* spent 80% of their time providing services for the hospital, compared to the graduate

that the amount of time spent working was relevant to the determination that an individual is covered under the Act, citing previous decisions in which it had found that part-time faculty constituted an appropriate bargaining unit.⁸⁵ Next, the Board confirmed that the graduate students were compensated for their work.⁸⁶ The fact that the students did not receive any academic credit for their work underlined the notion that they were performing services in exchange for pay.⁸⁷ Finally, the Board disposed of the argument that the students were performing services in furtherance of their degree, again emphasizing that the duties performed were not rendered as a requirement for obtaining their degree.⁸⁸

NYU alternatively argued that policy reasons required the Board to exclude the students from coverage under the Act even if the graduate students were statutory employees.⁸⁹ In response, the Board compared the relationship between the graduate students and the university to the unquestionably economic relationship between the faculty and the university.⁹⁰ The Board cited its longstanding practice of approving units composed of faculty members at private colleges and universities, without fear of infringing on academic freedom.⁹¹

The Board stressed that its historic interpretation of the Act rejected a narrow reading that bars individuals from coverage simply because they are simultaneously enrolled as students.⁹² The graduate students satisfied

students spending only 15% of their time performing teaching and research duties for the university; (2) the graduate students received financial aid, rather than compensation, for their services, unlike the housestaff; and (3) the graduate students performed their duties as a step toward obtaining their degree, while the housestaff already had their degrees. *Id.*

85. *See id.* at 1206 (citing *Univ. of S.F.*, 265 N.L.R.B. 1221 (1982)).

86. *See id.* at 1206–07.

87. *Id.*

88. *Id.* at 1207 (“[I]t is undisputed that working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments. Nor is it part of the graduate student curriculum in most departments. Therefore, notwithstanding any educational benefit derived from graduate assistants’ employment, we reject the premise of the Employer’s argument that graduate assistants should be denied collective-bargaining rights because their work is primarily educational.”).

89. *Id.*

90. *Id.* at 1208 (“Indeed in some respects the graduate assistants’ working conditions are no different from those of the Employer’s regular faculty.”).

91. *Id.* (“After nearly 30 years of experience with bargaining units of faculty members, we are confident that in bargaining concerning units of graduate students, the parties can ‘confront any issues of academic freedom as they would any other issue in collective bargaining.’”).

92. *See id.* at 1209.

the common law master-servant test and were therefore entitled to the rights enumerated in the Act.⁹³ Under cases such as *Adelphi University* and *Leland Stanford*, graduate students were excluded from coverage under the National Labor Relations Act.⁹⁴ After *New York University*, graduate students were recognized as employees and therefore granted section 7 rights provided to all employees, marking a major shift in employees' rights under the Act.⁹⁵

C. Brown University

Four years after *New York University*, the Board was again presented with a question regarding the status of graduate students.⁹⁶ In a three to two decision, the Board overturned *New York University*, concluding that it had been decided incorrectly and returning to its previous rule of excluding graduate students from the Act.⁹⁷ The policy reasons cited by the majority opinion provide some insight into the Board's interpretation of the scope of the NLRA.

1. Majority Opinion

The Board's decision in *Brown* advocated consistency with the overall purpose of the NLRA—to reduce industrial strife and unrest resulting from an inequality in bargaining power between employers and employees.⁹⁸ The fundamental premise of the Act envisioned an economic relationship between the opposing parties, which is why the Board had historically declined to assert jurisdiction over relationships that were “primarily educational.”⁹⁹

The majority considered the graduate students' relationship with the university and determined that they were primarily students because the bulk of their time was committed to obtaining a degree and their service as graduate assistants was part of their degree requirement.¹⁰⁰ The fact that

93. *Id.*

94. *See supra* Part II.A.

95. *N.Y. Univ.*, 332 N.L.R.B. 1205.

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

97. *See id.* at 483 (“[*NYU*] reversed more than 25 years of Board precedent. That precedent was never successfully challenged in court or in Congress. In our decision today, we return to the Board's pre-*NYU* precedent that graduate students are not statutory employees.”).

98. *See id.* at 487–88.

99. *See id.* at 488.

100. *Id.*

their status as graduate assistants was contingent on their enrollment as students further convinced the Board members that the overall relationship between the graduate assistants and the university was primarily educational rather than economic.¹⁰¹

In contrasting the student-teacher relationship with the employer-employee relationship, the Board contended that the Act was not meant to cover relationships between the students and the university.¹⁰² In the majority's opinion, applying the collective bargaining process to educational decisions "would be of 'dubious value' because educational concerns are largely irrelevant to wages, hours, and working conditions."¹⁰³ The Board further distinguished the personal nature of the educational process, in which students work individually with teachers on a daily basis, from collective bargaining, which is predicated on the collective treatment of represented individuals.¹⁰⁴

For these reasons the Board concluded that the collective bargaining process would have a detrimental effect on the educational process, which is why predominantly educational relationships were traditionally not covered by the Act.¹⁰⁵ The Board reverted to its longstanding precedent that graduate students are outside the definition of "employee" under the NLRA.¹⁰⁶

2. *Dissenting Opinion*

The dissenting members argued that the Board should continue to apply common law agency principles to determine that graduate students are employees within the meaning of section 2(3).¹⁰⁷ The dissent's reasoning, which was recently relied upon by the Board to overturn *Brown*, provides insight into how the Board characterizes graduate students, and potentially college athletes, today.

The dissenting members found two major flaws in the majority's conclusion that the Act could not be "imposed blindly on the academic world."¹⁰⁸ First, the majority failed to acknowledge the statutory principles that governed the case, namely, the plain, expansive language of section

101. *Id.* at 489.

102. *See id.*

103. *Id.* (citing *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977)).

104. *See id.* at 489–90.

105. *Id.* at 493.

106. *See id.*

107. *See id.* (anticipating scenarios where students are bargaining with their teachers over how many tests to administer per semester, for example).

108. *Id.* at 494.

2(3).¹⁰⁹ The dissent cited *New York University* for the proposition that the Board must give effect to the plain meaning of the language in section 2(3) and apply the master-servant test to the graduate students.¹¹⁰ According to the dissent, the majority's decision effectively excluded individuals who meet the statutory definition of employees.¹¹¹ Second, the majority rested its decision on "fundamental misunderstandings of contemporary higher education" that minimized the economic relationship between the graduate students and Brown.¹¹² Given the evolving nature of universities, which has become a workplace for many, including students, the dissent maintained that the policies of the Act should apply to the academic setting as well.¹¹³

In sum, the dissent claimed that the Board had overstepped its authority by ignoring the broad statutory language of the Act and had overruled *New York University* without any valid rationale for doing so.¹¹⁴ The issues that brought the graduate students before the Board did not fade and were again addressed by the Board in 2016.¹¹⁵

D. Still Up for Debate

If Heisman Trophy-winning running back Herschel Walker and the National Labor Relations Board have one thing in common, it is the ability to keep the public on its toes.¹¹⁶ Throughout his career, Walker bewildered defenses by shifting and spinning his way into the end zone.¹¹⁷ The Board

109. *Id.* at 494–95.

110. *Id.* at 495 (citing N.Y. Univ., 332 N.L.R.B. 1205 (2000)).

111. *Id.* at 495–96.

112. *Id.* at 494, 497.

113. *Id.*

114. *Id.* at 500.

115. *See* Trustees of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

116. *See* Michael Luck, *Happier Times: When the Dogs Had Herschel Walker*, DAWGNATION.COM, <https://www.dawgnation.com/football/happier-times-when-the-dogs-had-herschel-walker> [<https://perma.cc/ZVP2-7Y2S>] (last visited Sept. 5, 2016); *see also* Scott Jaschik, *NLRB Returns to Grad Student Unions*, INSIDEHIGHERED.COM (Oct. 23, 2015, 10:17 AM), <https://www.insidehighered.com/news/2015/10/23/nlr-returns-issue-graduate-student-unions-private-institutions> [<https://perma.cc/9LFX-MDUG>].

117. Herschel Walker won the 1982 Heisman Trophy, which is awarded to the top college football player in the country. In his college and professional career, Walker totaled 113 touchdowns. *See Herschel Walker*, NAT'L FOOTBALL LEAGUE, <http://www.nfl.com/player/herschelwalker/2503506/careerstats> [<https://perma.cc/CDN6-XQ52>] (last visited Sept. 5, 2016); *Herschel Walker*, SPORTS-REFERENCE.COM,

has displayed similar light-footedness when it comes to establishing the status of graduate students under the NLRA. In 2016, the Board revisited *Brown University* and ultimately overruled the decision, holding that graduate students “who have a common-law employment relationship with their university are statutory employees under the Act.”¹¹⁸

Relying largely on the dissenting members’ reasoning in *Brown University*, the Board found that the *Brown University* Board had erred by determining that graduate students could not be treated as employees.¹¹⁹ Rather, given the breadth of section 2(3), students could be employees of a university while also being students.¹²⁰ In fact, the absence of graduate students from the excluded categories of individuals was a strong indication of coverage.¹²¹ The Board rejected the claim in *Brown University* that finding graduate students to be statutory employees is incompatible with the “underlying fundamental premise of the Act” and held that, where an employment relationship exists, there should be compelling reasons for excluding a group of workers from coverage.¹²² In this regard, the Board noted that the extent of the economic aspect of an employment relationship has always been “the payment of tangible compensation.”¹²³ Accordingly, the *Columbia University* Board overruled *Brown University* and held that graduate students are entitled to the full panoply of section 7 rights granted to employees when there exists a common law employment relationship between the students and their university.¹²⁴

<http://www.sports-reference.com/cfb/players/herschel-walker-1.html> [https://perma.cc/U557-8PNX] (last visited Sept. 5, 2016).

118. *Brown Univ.*, 364 N.L.R.B. No. 90, at *2 (Aug. 23, 2016).

119. *Id.* (“Where student assistants have an employment relationship with their university under the common law test [...] this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes.”).

120. *Id.* (citing *Town & Country Electric*, 516 U.S. 85, 90 (1995)) (“The ‘phrasing of the Act,’ as the Court has pointed out, ‘seems to reiterate the breadth of the ordinary dictionary definition’ of the term, a definition that ‘includes any person who works for another in return for financial or other compensation.’”).

121. *See id.*

122. *Id.* at *5 (“The Act is designed to cover a particular type of ‘economic relationship’ – an employment relationship – and where that relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act’s coverage.”).

123. *Id.* at *6 (“Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer’s control, suffices to establish an employment relationship for purposes of the Act.”).

124. *Id.* at 13.

In assessing the Northwestern players' representation petition, the NLRB specifically addressed the similarities and differences between the claims made by the athletes and those previously set forth by the graduate students.¹²⁵ Although the Board's decisions regarding graduate students are not perfectly applicable to scholarship athletes, the decisions provide some insight into the Board's reasoning and motivation for determining whether certain individuals are, or are not, employees under the Act.

III. NORTHWESTERN TACKLES THE ISSUE

Northwestern University is a private institution with its main campus in Evanston, Illinois.¹²⁶ The university is a member of both the National Collegiate Athletic Association ("NCAA") and the Big Ten Conference ("Big Ten").¹²⁷ These organizations dictate the regulations under which the athletes compete, such as the maximum number of scholarships a school may award and the minimum academic requirements for athletes.¹²⁸ Northwestern's football team competes in the NCAA Football Bowl Subdivision ("FBS"), which consists of approximately 125 institutions, only 17 of which are private colleges or universities, including Northwestern.¹²⁹ Northwestern is the only private school in the 14-member Big Ten.¹³⁰

During the 2012–2013 academic year, the school's football team consisted of 112 athletes, 85 of whom received a grant-in-aid scholarship valued at roughly \$61,000 per academic year.¹³¹ This amount is based on tuition, fees, room, board, and books; the scholarship funds are directly applied to those expenses.¹³² Before receiving the grant-in-aid scholarship, each player receives a "tender" from the university specifying that the scholarship is subject to compliance with the policies and regulations of Northwestern, the NCAA, and the Big Ten.¹³³ After accepting the scholarship, players are required to devote substantial hours to football activities, while simultaneously remaining full-time students.¹³⁴

125. Northwestern Univ. & Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167, at *3–4 (Aug. 17, 2015).

126. *Id.* at *2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

Because these athletes are subject to such rigorous expectations, they believed that they were entitled to certain rights awarded to traditional employees. In January 2014, Ramogi Huma, president of the National College Players Association, filed a petition for representation in Region 13 of the NLRB in Chicago on behalf of scholarship football players at Northwestern University who sought to form a collective bargaining unit under the NLRA.¹³⁵

A. Touchdown for the Players

On March 26, 2014, the director of Region 13 of the NLRB held that the Northwestern scholarship football players were employees under section 2(3) and ordered an election to be conducted by all eligible players.¹³⁶ Decided prior to the Board's decision in *Columbia University*, the director held that the standard set forth in *Brown University* was not applicable to the scholarship athletes and instead employed common law principles.¹³⁷ The director found that the scholarship players performed services for Northwestern under a contract of hire, subject to Northwestern's control, in return for payment and therefore met the standard for employee status under section 2(3).¹³⁸

Accordingly, the director ordered an immediate election to be conducted by all eligible scholarship football players.¹³⁹ By allowing players a seat at the bargaining table for the first time, the decision had the potential to change the landscape of college football. Under the regional director's decision, scholarship athletes were given coverage under the National Labor Relations Act and consequently all of the rights afforded to employees under section 7.

B. Northwestern Throws the Challenge Flag

On April 24, 2014, the Board granted Northwestern's request for review of the regional director's decision, finding that it "raise[d] substantial issues

135. See Farrey, *supra* note 4.

136. *Northwestern Univ.*, 362 N.L.R.B. No. 167, at *7. Players deemed eligible to vote in the election were all football players receiving football grant-in-aid scholarships that had not yet exhausted their playing eligibility at Northwestern University. *Id.*

137. *Id.* at *13.

138. *Id.* For a comprehensive analysis of the application of the common law test to scholarship college athletes see *infra* Part.IV.B.3.

139. See *Northwestern Univ.*, 362 N.L.R.B. No. 167, at *23.

warranting review.”¹⁴⁰ The Board invited the parties and any interested *amici* to address the issues raised in the case, specifically requesting that the parties and *amici* address certain issues that it deemed central to the case.¹⁴¹ First, the Board inquired as to the appropriate standard for determining whether the scholarship players are employees under the Act and the proper result applying that standard to the scholarship players.¹⁴² Second, the Board asked whether *Brown University* was applicable to the case and whether the Board should adhere to, modify, or overrule *Brown*.¹⁴³ Parties were also invited to raise any policy considerations relevant to the determination of the players’ status under the Act.¹⁴⁴ Finally, assuming that the scholarship players were employees under the Act, the Board questioned whether it should consider the existence of “outside constraints” that would alter the players’ ability to collectively bargain.¹⁴⁵

C. After Further Review

Almost 18 months after Northwestern appealed the regional director’s decision, the Board announced its much-anticipated ruling.¹⁴⁶ A decision affirming the regional director would have profound ramifications on college football and would verify what many had been arguing for years—that college athletes are employees of their respective universities. Alternatively, a reversal would render a significant blow to the campaign for athletes’ rights in the ever-evolving world of college football.

In a unanimous decision, the Board declined to assert jurisdiction over the Northwestern scholarship football players, contending that a decision on the merits “would not effectuate the policies of the Act.”¹⁴⁷ The Board

140. Northwestern Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167 (Apr. 24, 2014) (order).

141. See Northwestern Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167 (May 24, 2014) (notice and inv. to file briefs).

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.* The Board also asked for feedback on an alternative in which it would recognize the scholarship athletes as employees, but preclude them from being represented in any bargaining unit, similar to the exception the Board has made for confidential employees. *Id.*

146. See Farrey, *supra* note 4.

147. Northwestern Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167, at *1, *3 (Aug. 17, 2015) (“After carefully considering the arguments of the parties and interested amici, we find that it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3).”).

emphasized the nature and control exercised by sports leagues—here, the NCAA and the Big Ten—over individual teams.¹⁴⁸ Further, the structure of FBS football, which is overwhelmingly composed of public institutions, meant that the Board’s decision would apply only to a small minority of teams competing in the relevant market.¹⁴⁹

Given the novelty of the players’ petition, the Board was unsure of the standard to apply to the athletes, since the players “d[id] not fit into any analytical framework that the Board ha[d] used in cases involving other types of students or athletes.”¹⁵⁰ In this regard, the Board distinguished the scholarship football players, whose football activities were unrelated to their educational endeavors, from the graduate students in *Brown* and *New York University*.¹⁵¹

The Board declined to consider the college athletes as conventional professional athletes in undisputedly professional leagues, given the additional academic requirements and NCAA regulations placed on the players.¹⁵² Moreover, even if the Board were to consider college athletes as analogous to professionals for purposes of collective bargaining, the Board had never been faced with a bargaining unit consisting of a single team’s players competing against teams completely outside of the Board’s jurisdiction.¹⁵³

The Board also addressed characteristics of college football, specifically, the FBS, which made it unlikely that a decision on the merits would promote labor stability.¹⁵⁴ The Board indicated that the “symbiotic relationship” between FBS universities and the NCAA meant that conducting college football games requires direct interaction between the various institutions.¹⁵⁵ From this highly interdependent relationship among the FBS teams and the NCAA, the Board envisioned a ripple effect that its decision would have

148. *Id.* at *3.

149. *See id.*

150. *Id.*

151. *See id.* at *3–4, *3 n.10 (“The fact that the scholarship players are students who are also athletes receiving a scholarship to participate in what has traditionally been regarded as an extracurricular activity (albeit a nationally prominent and extraordinarily lucrative one for many universities, conferences, and the NCAA) *materially sets them apart from the Board’s student precedent.*”) (emphasis added).

152. *See id.* at *4.

153. *See id.*

154. *Id.*

155. *Id.*

throughout the FBS.¹⁵⁶ Given the high degree of association required of member universities, labor issues involving only one team would likely affect other teams, making it unlikely that a Board decision on the Northwestern players' case would promote labor stability.¹⁵⁷

The Board also determined that the structure of FBS football made it difficult for the Board to promote stability.¹⁵⁸ Because the Board's jurisdiction is limited to private institutions, a decision on the merits would affect only a small fraction of the schools competing in FBS football,¹⁵⁹ unlike any of the Board's prior decisions involving professional sports.¹⁶⁰ Since Northwestern is the only private institution in the Big Ten, the Board would be unable to assert jurisdiction over the school's primary competitors.¹⁶¹ This inconsistency could lead to circumstances in which schools that directly compete against each other are governed by inconsistent laws, as some states permit collective bargaining by public employees and others prohibit or limit it.¹⁶² The Board concluded that a decision on the merits in the context of this case would lead to an "inherent asymmetry" not present in other cases in which the Board had asserted jurisdiction.¹⁶³ Therefore, to assert jurisdiction would not promote stability in labor relations.¹⁶⁴

Although a decision on the merits was not reached, the Board insisted that its decision was limited to the facts in this particular case.¹⁶⁵ The Board declined to address the potential for another set of facts meeting the jurisdictional requirement of promoting labor stability; specifically, a

156. *See id.* at *4–5 ("Many terms applied to one team therefore would likely have ramifications for other teams.").

157. *Id.* at *5.

158. *See id.*

159. As of October 2015, the FBS consists of 128 member schools, 17 of which are private institutions that are subject to the Board's jurisdiction. *See* NAT'L COLLEGIATE ATHLETICS ASS'N, <http://web1.ncaa.org/onlineDir/exec2/sponsorship?sortOrder=0&division=1A&sport=MFB> [https://perma.cc/2CZJ-9TFD] (last visited Sept. 20, 2016).

160. *See Northwestern Univ. & Coll. Athletes Players Ass'n*, 362 N.L.R.B. No. 167, at *5 ("This too is a situation without precedent because in all of our past cases involving professional sports, the Board was able to regulate all, or at least most, of the teams in the relevant league or association.").

161. The Board provides two examples in which state law specifically restricts scholarship athletes from being labeled "employees" for labor law purposes. *See id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.* at *1 ("Our decision today is limited to the grant-in-aid scholarship football players covered by the petition in this particular case . . .").

petition brought by football players at all 17 private colleges and universities in the FBS.¹⁶⁶ So, as the saying goes, when the National Labor Relations Board closes a door, it leaves every other door and window in the house open and forgets to set the alarm.

IV. RETURNING THE PUNT

By punting in the *Northwestern* case, the Board declined to resolve the issue of college athletes' status under the NLRA. Still, the Board was careful to leave the issue open for future groups of athletes to petition for representation. Arguably, some hypothetical group of college athletes exists that could compel the Board to assert jurisdiction. Based on this possibility, this Comment proposes a two-part solution for the Board to resolve the issues surrounding the employment status of college athletes. First, the Board should employ its reasoning in cases like *Trustees of Columbia University* and *New York University* and apply the common law test to college athletes, as well as graduate students. Second, after recognizing the employee status of these individuals, the Board should create a separate category of employees composed of scholarship college athletes that meet the definition of "employee" under the Act.

A. Apply the Common Law Test to Both College Athletes and Graduate Students

As the Board noted in *Columbia University*, the nature of the modern academic setting, as well as the plain language of the NLRA, has rendered the "primarily student" standard applied by the Board in cases like *Adelphi University* and *Brown University* no longer viable.¹⁶⁷ Largely for the reasons set forth by the dissent in *Brown University* and the majority in *Columbia University*, the Board should apply the common law definition of "employee" to college athletes.¹⁶⁸ Application of the common law master-servant standard leads to the conclusion that these scholarship athletes are in fact employees under the Act.

166. *Id.* at *6.

167. *Adelphi Univ.*, 195 N.L.R.B. 639 (1972); *Brown Univ.*, 342 N.L.R.B. 483 (2004).

168. *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000); *Brown Univ.*, 342 N.L.R.B. at 483.

1. *Contemporary Academic Reality*

The landscape of colleges and universities is much different than when the Board first considered the status of graduate students under the Act.¹⁶⁹ The academic setting has taken on a different role for many students, operating as both a workplace and an educational environment.¹⁷⁰ Therefore, it is no longer practical to perceive colleges and universities as predominantly academic, and thus exclude students from coverage under the NLRA.¹⁷¹

One commentator has discussed the conversion of the academic landscape, considering the development of student bargaining units, and the dissenting members in *Brown University* quoted him at length.¹⁷² This transformation has resulted in individuals who were once unquestionably students taking on the duties once devoted to tenured professors.¹⁷³ By restricting individuals who perform similar functions as traditional employees of the university simply because they also happen to be students, the Board took an arcane viewpoint of the educational institution that is no longer the norm of present-day higher education. In *Columbia University*, the Board updated its approach and now embraces this contemporary role of educational institutions, at least as it applies to graduate students.¹⁷⁴

2. *Clear Statutory Language*

In *Brown University*, the majority excluded graduate students based on the fact that their relationship with the university was “primarily educational.”¹⁷⁵ In *Columbia University*, the Board held that excluding individuals from coverage under the Act purely based on their simultaneous status as students is inconsistent with the broad interpretation of section 2(3) that both the Board and the Supreme Court have adhered to for decades.¹⁷⁶ For the purposes of the National Labor Relations Act, an employee is “any

169. See *Brown Univ.*, 342 N.L.R.B. at 497.

170. See *Trustees of Columbia Univ.*, 364 N.L.R.B. No. 90, at *4 (Aug. 23, 2016).

171. See, e.g., *The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

172. See *Brown Univ.*, 342 N.L.R.B. at 498 (quoting Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REV. HIGHER EDUC. 187, 191, 196 (2002)).

173. Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REV. HIGHER EDUC. 187, 191, 197 (2002).

174. *Trustees of Columbia Univ.*, 364 N.L.R.B. No. 90.

175. *Brown Univ.*, 342 N.L.R.B. at 487.

176. *Trustees of Columbia Univ.*, 364 N.L.R.B. No. 90, at *4–6; see also *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Seattle Opera Ass’n*, 331 N.L.R.B. 1072 (2000).

employee” not specifically excluded by Congress in section 2(3).¹⁷⁷ The Act does not exclude statutory employees on the basis that their employment relationship is not the principal relationship with their employer, and accordingly, the Board is restricted from unilaterally making such exclusions.¹⁷⁸

In *NLRB v. Town & Country Electric, Inc.*, the Supreme Court found that the broad interpretation of the Act’s definition of employee seemed to echo the scope of the ordinary dictionary definition.¹⁷⁹ In *Sure-Tan, Inc. v. NLRB*, the Court found the scope of section 2(3) “striking” and “squarely appl[ying] to ‘any employee’” with the exception of the specific exclusions listed in the Act.¹⁸⁰ The Board has followed the Court’s interpretation and given a broad reading of the definition of employee.¹⁸¹ In *Sundland Construction Co.*, the Board reiterated that the statute applied in the absence of express exclusion.¹⁸² Because the Act does not expressly exclude college athletes, and because the Board now recognizes that graduate students can be employees under the Act, the Board should adhere to the plain language of section 2(3), which reflects the common law master-servant relationship.

B. Under the Common Law, Scholarship Athletes Are Employees

Commentators have applied the common law master-servant test to college athletes and have almost invariably found that scholarship athletes are employees under the common law.¹⁸³ In *Northwestern University*, the

177. See 29 U.S.C. § 152(3) (2012).

178. See *Trustees of Columbia Univ.*, 364 N.L.R.B. No. 90, at *6 (“The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one [...]”); see also *Brown Univ.*, 342 N.L.R.B. at 496 (“Absent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act’s coverage for a category of workers who meet the literal statutory definition of employees.”).

179. *Town & Country Elec., Inc.*, 516 U.S. at 90 (quoting the dictionary definition of employee as including “any person who works for another in return for financial or other compensation”).

180. *Sure-Tan, Inc.*, 467 U.S. at 891.

181. See, e.g., *Sundland Constr. Co.*, 309 N.L.R.B. 1224, 1226 (1992).

182. *Id.* (“Under the well settled principle of statutory construction—*expressio unius est exclusio alterius*—only these enumerated classifications are excluded from the definition of ‘employee.’”).

183. See, e.g., Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97–117 (2006) (finding that certain college athletes meet the common law

regional director explained that, “[u]nder the common law definition, an employee is a person who performs services for another under a contract of hire, subject to another’s control or right of control, and in return for payment.”¹⁸⁴ Applying this definition to scholarship athletes in revenue-generating sports at FBS institutions yields the conclusion that these individuals are employees under the common law: they perform services for the obvious benefit of their university under an agreement setting forth their responsibilities and compensation and are subject to the control of their coaches and the university virtually every day while they are employed by the school.¹⁸⁵

1. The Players Perform Services for their Respective Universities

From 2003 to 2012, Northwestern’s football program generated revenues of approximately \$235 million through ticket sales, television contracts, merchandise sales, and licensing agreements.¹⁸⁶ During the 2012–2013 academic year, the football program generated approximately \$30 million in revenue, while incurring close to \$22 million in expenses.¹⁸⁷ That revenue was derived from ticket sales, Big Ten broadcast contracts, stadium rights, and merchandise sales.¹⁸⁸ The substantial revenue and profits that FBS universities generally collect from fielding a football team demonstrates that scholarship athletes clearly provide services for the benefit of their university.

2. The Daily Lives of Scholarship Athletes Are Subject to Strict Control of the University

The degree of control that FBS universities exercise over scholarship athletes is also detailed in the regional director’s opinion in the

standard for “employee”); *see also* William B. Gould IV et al., *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014) (arguing that scholarship college football players are under the control of the universities and therefore meet the common law definition of employee).

184. Northwestern Univ. & College Athletes Players Association, No. 13-RC-121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014), *review granted*, 362 N.L.R.B. No. 167 (Apr. 24, 2014) (order).

185. *See id.* at *14.

186. *Id.* at *11 (also finding that the university incurred \$159 million in expenses during this period, for a profit of approximately \$76 million).

187. *Id.*

188. *Id.*

Northwestern case.¹⁸⁹ One could argue that the athletes are subject to more control by their universities than any other “traditional” employees of the university, such as faculty members or student library workers. For instance, the players at Northwestern begin training camp approximately six weeks prior to the start of the academic year.¹⁹⁰ From that point until the end of the football season, the players are required to attend anywhere from 40 to 60 hours of football-related duties per week and are usually provided with daily itineraries from the coaching staff.¹⁹¹

In addition to football-related activities, the coaches have control over nearly every other aspect of the players’ private lives through various rules and regulations, which the players must follow under threat of discipline and loss of scholarship.¹⁹² In just one illustration of such exacting control, players are required to remain within a six-hour radius of campus, even during discretionary weeks, and must submit travel information to their coaches before departing.¹⁹³ Commentators have found that scholarship athletes at other FBS institutions are subject to largely similar standards as the players at Northwestern.¹⁹⁴ Based on the facts established in the Northwestern football players’ case, one would be hard-pressed to find any other individual on campus whose living arrangements, travel plans, and general day-to-day activities are so closely monitored by university officials.

3. *The Athletes’ Grant-in-Aid Functions as Compensation*

The grant-in-aid scholarship is provided to the players in return for their athletic services and acts as compensation provided by the university-employer. The regional director in *Northwestern University* found that the players typically received approximately \$61,000 in scholarship aid per academic year.¹⁹⁵ On top of that, upperclassmen electing to live off-campus were provided a monthly stipend between \$1,200 and \$1,600 to

189. *Id.* at *15–17.

190. *Id.* at *13.

191. *See id.* at *13–14 (detailing the daily itineraries provided to the players, “which set forth, hour by hour, what football related activities the players are to engage in from as early as 5:45 a.m. until 10:30 p.m.”).

192. *See id.* at *14.

193. *See id.* at *4, *14.

194. *See* McCormick & McCormick, *supra* note 183, at 109 (surveying scholarship athletes from multiple FBS institutions and determining that the players are subject to strict control by their universities, similar to the regional director’s finding in *Northwestern*).

195. *Northwestern Univ.*, 2014 WL 1246914, at *2.

cover their living expenses.¹⁹⁶ Although the grants-in-aid are not provided in the traditional form of a paycheck, the scholarship money nonetheless constitutes substantial economic benefit for the players.¹⁹⁷

Scholars have debated whether the athletic scholarship acts as a form of compensation that meets the common law requirement.¹⁹⁸ At least one commentator has compared the grant-in-aid scholarship to a contract of employment, as the terms of the scholarship set forth the obligations of the athletes and define the resulting economic compensation to be provided.¹⁹⁹ Recent litigation in the Ninth Circuit representing the campaign for the payment of college athletes could also result in major changes to the structure of college athletics.²⁰⁰ Finally, the fact that the grant-in-aid scholarships are renewable one-year athletic scholarships, rather than guaranteed for four years, establishes the quid-pro-quo nature of this compensation.²⁰¹ The valuable services provided by these individuals and the unquestioned control exercised by the coaches and universities, coupled with the compensatory nature of the athletic scholarship, strongly indicates that scholarship college athletes meet the common law master-servant test, as applied by the National Labor Relations Board.

C. Modernization of the “Employee”

The Board declined to rule on the status of the Northwestern players because any decision would only apply to a small fraction of the relevant labor market.²⁰² The Board’s concern is a legitimate one because the granting of employee status to college athletes would allow the athletes to form unions and collectively bargain with their universities over any number of issues.

1. Collective Bargaining is Not Suited for College Athletics

There are several compelling reasons to preclude college athletes from joining collective bargaining units. As the Board emphasized, granting

196. *Id.*

197. *Id.* at *12.

198. *See* McCormick & McCormick, *supra*, note 183, at 108–11.

199. *See id.* at 108–09; *see also* *Northwestern Univ.*, 2014 WL 1246914, at *13 (detailing the tender offer received and signed by the scholarship athletes when committing to Northwestern).

200. *See* Samuel M. Keller v. Elec. Arts Inc., 724 F.3d 1268 (9th Cir. 2013).

201. *Northwestern Univ.*, 2014 WL 1246914, at *14.

202. *Northwestern Univ. & Coll. Athletes Players Ass’n*, 362 N.L.R.B. No. 167, at *5 (Aug. 17, 2015).

college athletes the right to unionize and collectively bargain would put them at an extraordinary advantage compared to their counterparts at public universities in states where athletes are expressly excluded under state labor law.²⁰³ Moreover, college athletes, by definition, are employees of their university only so long as they remain in college—the maximum period that a player could be a member of the union is five years, with many scholarship players leaving much sooner.²⁰⁴ At the very least, the union would experience a 100% turnover rate in membership every five years. This high turnover rate does not lend itself to collective bargaining, as the demands of union membership could theoretically change every year. Finally, the composition of college football teams in general makes it difficult for any collective bargaining unit to represent the players effectively. The NCAA limits FBS institutions to 85 scholarship players per team.²⁰⁵ However, teams will often field “walk-on” players who do not receive athletic scholarships, but are nonetheless held to largely similar standards as the scholarship athletes.²⁰⁶ It is not uncommon for these walk-on players to receive substantial playing time alongside scholarship players.²⁰⁷ Because walk-ons do not receive athletic scholarships, they do not receive compensation for their services and would not meet the common law standard for employees. Consequently, any bargaining unit consisting of college athletes would necessarily exclude walk-ons, who are intimately connected to union members and who would likely be affected by union activities. For these reasons, allowing college athletes to join bargaining units and collectively bargain with their universities would not effectuate the policies of the NLRA.

However, to contend that these individuals are not at all engaged in an employment relationship with their universities would be to turn a blind

203. *Id.* at *5–6 (addressing the variance in federal labor law governing Northwestern University compared to state labor law of Ohio and Michigan, which controls public institutions in direct competition with Northwestern).

204. Dennis Dodd, *Near-Disastrous Number of Early Entries Declaring for 2016 NFL Draft*, CBS SPORTS (Jan. 18, 2016), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/25453509/near-disastrous-number-of-underclassmen-declaring-for-2016-nfl-draft> [https://perma.cc/Z3GQ-QD8F].

205. Bylaw 15.5.6.1, *reprinted in* NAT'L COLLEGIATE ATHLETIC ASS'N, 2015–16 NCAA DIVISION I MANUAL 203 (2015), <http://www.ncaapublications.com/product/downloads/D116.pdf> [https://perma.cc/AHB4-FP2B].

206. Michael Felder, *Examining the Process of Being a College Football Walk-On*, BLEACHER REP. (Apr. 13, 2013), <http://bleacherreport.com/articles/1591099-examining-the-process-of-being-a-college-football-walk-on> [https://perma.cc/Y4DF-UL35].

207. *Id.*

eye to the state of present-day college athletics. As outlined above, scholarship athletes in revenue-generating sports meet the common law definition of employee as applied by the NLRB and the Supreme Court.²⁰⁸ Withholding protection under the NLRA from these individuals would effectively strip them of their rights as employees. College athletes should not be penalized for the nature of their labor market. Instead of taking an “all or nothing” approach to section 7 rights, the Board should recognize a middle ground in which individuals determined to be employees are granted certain protections under the Act, even if they are precluded from joining labor unions and collectively bargaining with their employer.

2. *A New Group of Employees*

College athletes possess certain characteristics that distinguish them from traditional employees covered under the Act, making it difficult for the Board to recognize their status as employees.²⁰⁹ In light of these differences, college athletes should be isolated and incorporated into a separate category of employees. These athlete–employees would be given coverage under the NLRA; however, because of their unique position, athlete–employees would be restricted against forming bargaining units and engaging in collective bargaining with their universities. If athlete–employees were barred from collective bargaining and union activities, then they would not be given an advantage over their opponents at public universities, concerns over high turnover among the employees would be extinguished, and scholarship athletes would not be treated substantially different than their teammates who are not on scholarship. This constraint would thus circumvent many of the Board’s policy concerns over granting NLRA coverage to college athletes.²¹⁰

Although restricted from collective bargaining, athlete–employees would possess the remaining rights granted by section 7—specifically, the protection of concerted activity for mutual aid and protection.²¹¹ This right would protect athlete–employees against discharge and other retaliatory

208. *See supra* Part.IV.B.

209. *See supra* Part.IV.C.1 (arguing against unionization of college athletes).

210. *See* Northwestern Univ. & Coll. Athletes Players Ass’n, 362 N.L.R.B. No. 167, at *5 (Aug. 17, 2015).

211. *See* 29 U.S.C. § 157 (2012).

actions for activities such as work stoppages,²¹² walkouts,²¹³ strikes,²¹⁴ and protests over working conditions.²¹⁵ Under this proposal, athlete-employees would be in a better position to protect themselves as statutory employees, while simultaneously avoiding policy concerns of allowing college athletes to collectively bargain.

There are some additional considerations arising from this proposed solution. First, one must consider whether the NLRB even has the authority to make such a change. Then, if the NLRB does have the authority, one must consider by what mechanism this change would be carried out. Because the National Labor Relations Board is an independent agency created by Congress, administrative law will generally govern any action taken by the Board.²¹⁶ An administrative agency is generally given broad discretion when reasonably interpreting its own enabling statute.²¹⁷ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court provided a two-step approach to an agency's interpretation of its enabling statute.²¹⁸ First, the reviewing court should determine "whether Congress has directly spoken to the precise question at issue."²¹⁹

212. See *Halstead Metal Prods. v. NLRB*, 940 F.2d 66, 70 (4th Cir. 1991) (finding employees who collectively refuse to work in protest over wages, hours, or other working conditions are engaged in concerted activities for mutual aid or protection within meaning of the NLRA and are protected from retaliatory actions taken by employers for participation in or instigation of such activity).

213. See *Charge Card Ass'n v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981) ("A walkout of unorganized employees is a protected activity under the Act . . .").

214. See *NLRB v. Rubatex Corp.*, 601 F.2d 147, 149 (4th Cir. 1979) (finding that a strike is concerted activity within the provision of the NLRA, declaring it an unfair labor practice for an employer to interfere with right of employees to engage in concerted activities for purpose of collective bargaining or other mutual aid or protection); see also *NLRB v. Imperial Bedding Co.*, 519 F.2d 1073, 1074-75 (5th Cir. 1975) (finding a strike in protest of suspension of fellow employee is a protected activity).

215. See *NLRB v. Long Beach Youth Ctr., Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979) (finding work stoppages in protest of working conditions, even by unorganized employees, are protected activities); see also *Vic Tanny Inter., Inc. v. NLRB* 622 F.2d 237, 240-41 (6th Cir. 1980) (finding four unorganized employees who jointly participated in walkout to present job-related grievances to management were engaged in protected activity and employer violated this section when it discharged them, at least in part, because of their walkout).

216. See 29 U.S.C. § 153 (2012).

217. See, e.g., *NLRB v. Hearst Publ'ns., Inc.*, 322 U.S. 111, 131 (1944) ("[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.").

218. 467 U.S. 837, 842 (1984).

219. *Id.*

Then, if the enabling statute's language is unambiguous, the agency must defer to Congress. However, Congress has a history of granting agencies interpretive leeway by writing relatively ambiguous enabling statutes. Under *Chevron*, if Congress is unclear in its intent, an agency is allowed to essentially fill in the gaps of its own enabling statute.²²⁰ If it is determined that Congress was either silent or unclear, the reviewing court will then determine whether the agency's mandate is reasonable.²²¹ If so, the court must defer to the agency's action.

Because this proposal requires an interpretation of the NLRA by the Board, any action taken by the NLRB will be reviewed in light of *Chevron*.²²² It could be argued that Congress was unambiguous in section 7 where it identified the rights that all employees "shall have" under the Act.²²³ Further, the use of the conjunctive "and" supports the inference that Congress intended to provide an individual with *all* of the rights listed in section 7, provided that the individual was found to be an employee.²²⁴ If a court were to determine that Congress was unambiguous in section 7, this solution would require a congressional amendment to the NLRA.²²⁵ However, if a court found that section 7 was unclear on whether the rights could be divided and parsed, as this solution proposes, then the Board would be given broad deference to take reasonable steps to implement this solution, either through rulemaking or adjudication.²²⁶

Opponents may also question the substantive influence of this proposal—specifically, whether this solution actually provides the athlete–employee with any rights of significance, considering that the primary benefit of the Act is meant to encourage collective bargaining.²²⁷ Although a prominent benefit of employee protection under the NLRA is the right to self-organization and to collectively bargain, the protections established by this solution should not be discounted. By allowing athlete–employees to engage in concerted activities for their mutual aid and protection, the Board would be providing these individuals with a right that they do not currently possess—the right to walk out. Although under the current structure athletes could conceivably unite for a collective cause, nothing protects these athletes from recourse for doing so. Under this proposal, an athlete's scholarship and position on the team would be

220. *See id.* at 843.

221. *Id.* at 844.

222. *See id.*

223. *See* 29 U.S.C. § 157 (2012).

224. *See id.*

225. *See* *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

226. *See id.*

227. *See supra* Part I.

protected if he or she were to engage in these types of protected, concerted activities under the Act.

CONCLUSION

The growth of college athletics has necessitated a modernization of the understanding of the rights granted to individuals under the NLRA. To safeguard the rights of college athletes while continuing to promote the policies of the Act, either the Board or Congress must take steps toward reform. Instead of taking an all or nothing approach where college athletes are excluded based on the perceived problems with imposing collective bargaining on college athletics, the Board should take a more practical approach. Whether by administrative procedures or, if necessary, legislative amendment, the Board should recognize that scholarship college athletes are employees under the National Labor Relations Act and should tailor the section 7 rights of employees to fit the labor market of college football. If the industry of college football is to continue on its exceptional trajectory, it must adapt to the unique environment in which it exists, beginning with how it recognizes scholarship student-athletes.

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