SHOW *THEM* THE MONEY: THE THREAT OF NCAA ATHLETE UNIONIZATION IN RESPONSE TO THE COMMERCIALIZATION OF COLLEGE SPORTS

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I. INTRODUCTION

"How is that fair? I mean how is that fair? Will you tell me?" Those were the words of University of Michigan basketball standout Chris

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Webber to his friend Shonte Peoples, a defensive back on the Michigan football team.[1] It was late fall 1992 when Webber stopped at an Ann Arbor take-out restaurant only to realize that he did not have enough cash to pay for lunch. On the way out of the restaurant, Webber said to his friend, "I can't believe this shit, man. I gotta put back food, and look at that over there." Webber pointed to a basketball jersey bearing his name hanging in a store window across the street.[2]

Webber's lunchtime experience is indicative of the inequities student-athletes face today in high-stakes college athletics. The National Collegiate Athletic Association (NCAA) has evolved from an organization founded to protect football players from the flying wedge offensive formation[3] to a $422 million operation.[4] Colleges and universities are engaged in an "arms race" to build more successful athletic programs. The arms race is seen in escalating coaches' salaries, athletic facility construction and renovation, athletic endowments, and academic support for student-athletes. In order to afford the costs of competition, athletic programs increasingly seek support from corporate interests. They generate revenue from athletic apparel sponsorships, consumer product advertisements, and television and radio licenses.

While the money changes hands between corporate entities and NCAA member institutions, the student-athletes who generate the athletic revenues compromise their physical and financial well-being in return for a chance to play. In 2001, college athletes organized the Collegiate Athletes Coalition (CAC or Coalition), a collegiate players association, to voice student-athlete concerns. Among the proposals the Coalition has adopted are increased grants-in-aid, elimination of NCAA employment restrictions, and increased safety precautions for student-athletes engaged in practice and competition. The CAC also has enlisted the help of the United Steelworkers of America (USWA), even though it has no intention of seeking protection under federal labor law, since the CAC believes that student-athletes are not "employees" within the meaning of the National

1. MITCH ALBOM, FAB FIVE 214-15 (Warner Books 1993).

2. *Id.* In actuality, Webber probably could have afforded lunch that day. In March 2002, former Michigan basketball booster Ed Martin was indicted for allegedly giving Webber and his Michigan "fab five" teammates more than $600,000 before and during college. Rick Horrow, *College football 2002: In it for the Long Haul*, *at* http://cbs.sportsline.com/b/page/pressbox/0,1328, 5628340,00.html (Aug. 21, 2002).

3. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENERAL INFORMATION BROCHURE 4 (October 2000) [hereinafter NCAA GENERAL INFORMATION BROCHURE], *available at* http://www.ncaa.org/library/general/general_brochure/2000/index.html (last visited Dec. 1, 2002).

4. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *NCAA Proposed Budget: 2002-03*, *at* http://www.ncaa.org/financial/2002-03_budget.pdf (last visited Dec. 1, 2002).

Labor Relations Act (NLRA or Act).

There is, however, a viable argument that student-athletes are employees within the meaning of the Act. After the National Labor Relations Board's (NLRB or Board) recent adoption of the "compensated services" test, student-athletes who receive athletic scholarships in return for NCAA participation might be considered NLRA "employees." Even if the Board were to revert back to its former doctrine, the "primary purpose" test, the athletes might successfully contend that they are employees and not students because their primary purpose as student-athletes is to excel in athletics, on the way to a professional sports career. If the Board were to find that student-athletes are employees covered by the NLRA, the CAC could unionize under traditional methods.

I present these ideas in five parts. Part I provides an overview of NCAA athletics and focuses on the arms race and the increasing commercialization of college sports. Part II states the mission and reform platform of the CAC. Part III analyzes the purpose of the NLRA and traces the NLRB precedent interpreting the meaning of "employee." Part IV offers an argument that NCAA athletes are employees protected by the NLRA. Part V offers potential solutions to the problems in NCAA athletics.

II. NCAA ATHLETICS

A. History and Purpose of the NCAA

The regulation of college athletics dates back to 1905, when at the request of President Theodore Roosevelt, collegiate athletics leaders founded the Intercollegiate Athletic Association of the United States (IAAUS).[5] The IAAUS was founded to remedy the ills of collegiate football – the rugged nature, mass formations, and gang tackling, which often resulted in serious injury and death.[6] In 1910, the IAAUS adopted its current name, National Collegiate Athletic Association (NCAA), and functioned as a discussion group and rule-making body.[7] By 1921, the NCAA held its first national championship, and established its first recruiting and financial aid guidelines following World War II.[8] In response to the growing number of post-season football games and the effects of unrestricted television on collegiate football attendance in the

5. NCAA GENERAL INFORMATION BROCHURE, *supra* note 3, at 4.
6. *Id.*
7. *Id.*
8. *Id.*

early 1950s, the NCAA formalized its structure by appointing a full-time executive director and establishing a headquarters in Kansas City.[9] By 1973, the NCAA created three legislative and competitive divisions – I, II, and III.[10] Today, the NCAA is comprised of all sizes and types of colleges and universities, from large public universities to small, private, church-affiliated colleges.[11] There are 977 active members in the NCAA – 318 in Division I, 264 in Division II, and 395 in Division III.[12] More than 350,000 student-athletes participate in NCAA-organized athletics annually.[13]

The NCAA operates to promote organized athletics at the collegiate level, while also encouraging scholastic and leadership pursuits. The Association's stated purposes include: "To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit," and "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism."[14] Despite these facially-legitimate purposes, critics of the NCAA argue that there is one unstated purpose of the Association – to generate revenue for itself and its member institutions at the expense of student-athletes.[15]

B. NCAA Structure and Administration

While all sizes and types of institutions may qualify as members of the Association, there are, as noted, three distinct divisions – Divisions I, II, and III. The differences among the division institutions include sports-sponsorship minimum criteria, football and basketball scheduling requirements, academic and eligibility standards, and financial aid limitations.[16] The most apparent distinction between divisions is the athletic department's annual budget at member schools. On average, a

9. NCAA GENERAL INFORMATION BROCHURE, *supra* note 3, at 5.
10. *Id.*
11. *Id.* at 7.
12. *Id.*
13. NCAA GENERAL INFORMATION BROCHURE, *supra* note 3, at 7.
14. *Id.* at 6.
15. *See Challenges Facing Amateur Athletics: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the House Comm. on Energy and Commerce*, 107th Cong. 41 (2002) [hereinafter *Hearings*] (statement of Hon. Shelley Berkley).
16. NCAA GENERAL INFORMATION BROCHURE, *supra* note 3, at 9.

Division I member spends $6,425,827 annually in operating expenses.[17] A Division II institution with a football program averages $1,950,000 in annual expenses, but drops to $1,430,000 without football.[18] Division III members average still lower annual expenses – $663,000 for institutions with football programs and $351,000 without.[19] The operating expense differential among the three divisions is due in large part to each division's distinct treatment of allowable student-athlete financial aid.[20]

Penn State is one example of the disparity between Division I and Division III athletics. The Penn State athletic department operates independently on a $42-million annual budget.[21] Division III member Haverford College, in contrast, operates on a budget of $1.3 million and generates no revenue from athletics.[22] The cost of supporting an athlete at Penn State is $44,000 annually, while Williams College, a premier Division III athletic program, spends $1,887 per student.[23] The divisions also differ with respect to participation of students and faculty members. For example, Haverford's coaches are also teachers at the school and often

17. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Division I Facts and Figures*, *at* http://www1.ncaa.org/membership/governance/division_I/fact_sheet_d1.html (last visited Dec. 1, 2002).

18. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Division II Facts and Figures*, *at* http://www1.ncaa.org/membership/governance/division_II/fact_sheet_d2.html (last visited Dec. 1, 2002).

19. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Division III Facts and Figures*, *at* http://www1.ncaa.org/membership/governance/division_III/fact_sheet_d3_2 (last visited Dec. 1, 2002).

20. Division I bylaws establish no upper limit to how much a Division I member may grant in financial aid to its football and basketball players as a team as long as the aid to individual athletes does not exceed the permissible elements of financial aid and the number of student-athletes receiving financial aid do not exceed established limits – thirteen in men's basketball and eighty-five in Division I-A football. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2002-03 DIVISION I MANUAL §§ 15.1, 15.2, 15.5.4.1, 15.5.5.1 (July 2002) [hereinafter NCAA DIVISION I MANUAL], *available at* http://www.ncaa.org/library/membership/division_i_manual/2002-03/. Division II members must comply with the same permissible elements of financial aid as Division I members, but unlike Division I, Division II members are limited in the aggregate amount of financial aid they can grant to individual teams, including football and basketball. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2002-03 DIVISION II MANUAL §§ 15.1, 15.5.2 (July 2002) [hereinafter NCAA DIVISION II MANUAL], *available at* http://www.ncaa.org/library/membership/division_ii_manual/2002-03. Finally, Division III bylaws state that member institutions "shall not consider athletics ability as a criterion in the formulation of the financial aid package." THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2002-03 DIVISION III MANUAL § 15.4.1 (July 2002) [hereinafter NCAA DIVISION III MANUAL], *available at* http://www.ncaa.org/library/membership/division_iii_manual/2002-03/. Thus, there are no athletic scholarships in Division III athletics.

21. Frank Fitzpatrick & Gilbert M. Gaul, *The Rise of the Major-College Athletic Empires*, PHILADELPHIA INQUIRER, Sept. 10, 2000, A1.

22. *Id.*

23. *Id.*

help run the school's athletic events.[24] A higher percentage of students enjoy athletics at the Division III level than at Division I schools. Nearly half of Haverford's students participate in intercollegiate athletics, as compared to just two percent of Penn State's student body.[25]

Beyond the fiscal chasms separating the divisions, there are also differences in the way each division governs. Not surprisingly, Division I has a robust administrative structure. The bylaws regulating Division I athletics are adopted and amended by the Board of Directors, or the Management Council in areas delegated by the Board of Directors.[26] The Board of Directors is comprised of eighteen athletic conference chief executives – eleven from historically strong athletic conferences (e.g., Atlantic Coast Conference, Big Ten Conference, and Pacific-10 Conference) and seven chosen from a group of less-recognized conferences (e.g., Atlantic 10 Conference, Missouri Valley Conference, and Southwestern Athletic Conference).[27] The Management Council is comprised of forty-nine members, including athletic administrators, faculty athletics administrators, and institutional administrators from institutions across the athletic conference spectrum.[28] Unlike Divisions II and III, which legislate according to a one member, one vote principle,[29] Division I vests its legislative power in its representative bodies, effectively giving control to "big time" athletic schools.[30]

This article focuses on the "big time" college sports of Division I men's basketball and football.[31] This is not to imply that female athletes and athletes in other sports do not encounter the same financial hardships and physical risks that men's basketball and football players incur. However, athletes in the "big time" sports face more pronounced inequities resulting from the commercialization of their sports. The

24. *Id.*

25. Fitzpatrick, *supra* note 21.

26. NCAA DIVISION I MANUAL, *supra* note 20, § 5.3.2.1.

27. *Id.* § 4.2.1.

28. *Id.* § 4.5.1.

29. NCAA DIVISION II MANUAL, *supra* note 20, § 5.1.3.1.1; NCAA DIVISION III MANUAL, *supra* note 20, § 5.1.3.1.1.

30. NCAA DIVISION I MANUAL, *supra* note 20, § 5.3.2.3. The Division I bylaws do provide a check against a potential Board of Directors bias favoring historically strong athletic colleges and universities. *Id.* Division I members may "override" a legislative act taken by the Board of Directors or Management Council if thirty voting-members call for a vote to override the legislation, *and* five-eighths of the total membership votes against the legislation in the ensuing override vote. *Id.*

31. *See Hearings*, *supra* note 15 at 1 (statement of Hon. Cliff Stearns); *see also* A CALL TO ACTION 13-14 (Knight Foundation, 2001) *available at* http://www.ncaa.org/databases/knight_commission/2001_report/ (last visited Dec. 1, 2002).

potential organization of basketball and football players could result in positive changes for *all* athletes.

C. The Growth of NCAA Athletics

1. The "Arms Race"

Big-time college athletics are stuck in an infinite cycle. In order to establish a successful football or basketball program, colleges and universities must attract premier players and coaches. Attracting premier players and coaches requires financial resources to pay the coaches' salaries and provide athletes with high-quality facilities and training staff. But only successful teams are able to establish such a program.[32] Thus the old adage from business, "it takes money to earn money," also applies to the business of collegiate sports.[33] College athletic spending is spinning out of control. The 1990s was a decade of unprecedented growth in college athletics, unlikely to be repeated.[34] The phenomenon has been described as an "arms race" creating "a never-ending, upward-spiraling need for more revenues in order to beat the other guy."[35] While the NCAA member institutions generate annual revenues of $3 billion, they spend $4.1 billion.[36] The arms race has resulted in a dichotomy of "have" and "have-not" programs. More than half of all Division I-A athletic programs operate at a loss averaging $3.3 million, while the forty-eight schools turning a profit averaged $3.8 million.[37]

A visible sign of the arms race is the construction, expansion, and renovation of college athletic facilities. More than fifty-five stadiums have been renovated, enhanced, or constructed in the past five years.[38]

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32. Horrow, *supra* note 2. The University of Oregon football program is one example of how a successful program pays dividends. The recent success of the football team allowed the school to raise $70 million to renovate Autzen Stadium and triggered a fifteen percent increase in athletic donations the past two years. *Id.*

33. *The Rise of the Major-College Athletic Empires*, *supra* note 21. The cost of fielding one student-athlete in intercollegiate athletics in a big-time program is estimated at $90,000 annually. *Id.*

34. Athletic department expenses during the 1990s increased at a rate four times that of inflation. Penn State's athletic department budget doubled in the 1990s and its staff of 287 employees increased twenty-five percent over the same time. *Id.*

35. *Id.* (quoting Gary R. Roberts, Professor of Law, Tulane University). Jim Delaney, Commissioner of the Big Ten Conference, stated, "If you've got $22 million in revenue, you're going to spend $22 million. If you have $38 million, you'll spend $38 million. Right now, all of the effort is to grow the program. Nobody wants to hear that they don't compete nationally." *Id.*

36. A CALL TO ACTION, *supra* note 31, at 17.

37. *Id.*

38. Horrow, *supra* note 2.

After winning the football national championship in 2000, the University of Oklahoma decided to build a "national championship-quality facility."[39] The renovations, estimated at $65 million over two years, will include renovations to all current facilities and increased seating, including 2,200 club seats and twenty-seven sky suites.[40] Ohio Stadium, home to Ohio State football, recently received a $187 million facelift.[41] Among the new features are a new press box, eighty-two luxury suites selling for $40,000-70,000 per season, 2,500 club seats selling at $2,000 per season, and an overall net increase of 7,000 seats.[42] Even Duke University, whose football team had lost twenty-three straight games prior to its season-opening win against East Carolina University in 2002, has built a state-of-the-art $22 million football practice facility and fieldhouse.[43]

The arms race extends beyond physical capital to human capital expenditures, namely, highly-compensated coaches. College football coaches' salaries and benefits increased forty-seven percent from 1997 to 1999,[44] and Division I-A head football coaches averaged $466,000 in the 2000 season.[45] Florida State University coaching legend Bobby Bowden was the first coach to break the million dollar mark in 1995 (he now earns $1.5 million);[46] by 2001, twenty-two football coaches and seventeen basketball coaches were paid over one million dollars.[47] Former University of Florida football coach Steve Spurrier led the class in 2001, earning $2.1 million, trailed by University of Oklahoma coach Bob Stoops who earned $2 million.[48] Basketball coaches enjoy similar salaries. Notables include Rick Pitino of the University of Louisville, whose six-year $12.25 million deal, resulted in a two-dollar per seat increase in basketball ticket prices.[49] Even Duke University's Mike Krzyzewski,

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39. SoonerSports.com, *Helmerich Provides $1 Million For Memorial Stadium Renovation*, at http://soonersports.ocsn.com/sports/m-footbl/spec-rel/080201aaa.html (last visited Dec. 1, 2001).

40. *Id.*

41. Ohio State: Ohio State Renovation, *at* http://www.apo.ohio-state.edu/stadium/stadmod.htm (last visited Dec. 1, 2002).

42. *Id.*

43. Greg Wallace, *College Football '02: BCS creates college football haves, have-nots*, NAPLES DAILY NEWS, *at* http://www.naplesnews.com/02/08/sports/d812894a.htm (Aug. 22, 2002).

44. Steve Wieberg, *Top College Coaches Getting Top Dollar*, USA TODAY, *at* http://www.usatoday.com/sports/college/2001-08-03-coaches-cover.htm (Aug. 3, 2001).
As a comparison, the national average-wage index has been increasing at a rate less than six percent annually. The average salary for university faculty members has risen an average of 3.5 percent per year. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Wieberg, *supra* note 44

49. *Id.*

winner of two national championships, trails Pitino's $2.2 million salary, earning a *modest* $1.6 million.[50] The trend is clear – "The price of poker in college athletics is going up."[51] The price has gone so high that schools must look to outside fundraising organizations – e.g., the Ole Miss Loyalty Foundation at the University of Mississippi – to bear some of the rising costs. Executive Director George Smith says that the "escalating salaries have gotten out of hand. But you have to do it if you want to stay competitive."[52]

While the salaries might seem outrageous to some, athletic directors seem happy to pay the current salaries. In 2000, Spurrier's Florida football program generated nearly two-thirds of the $44 million in athletic revenue, yielding a $21 million profit.[53] At the University of Texas, head football coach Mack Brown receives $1.45 million annually. Brown's high salary is offset by increased season-ticket sales and a fifty percent increase in athletic donations since he was hired in 1998.[54] Texas Athletic Director DeLoss Dodds recognizes that the school is paying big money for Brown to turn around Texas football, but also notes that the coaches market demands that compensation.[55] Today, the market setting coaches' salaries is professional sports.[56] The increasing popularity of college athletics has blurred the differences between professional and college sports.[57] Coaches routinely jump from pro sports to college, and from college to the pros.[58] When Bobby Bowden's total compensation exceeds

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50. *Id.*

51. *Id.* (quoting University of Missouri Athletic Director Mike Alden).

52. Frank Fitzpatrick & Gilbert M. Gaul, *Booster Clubs Feather the Nests of Coaches*, PHILADELPHIA INQUIRER, September 11, 2000, A9.

53. Wieberg, *supra* note 44.

54. *Id.*

55. *Id.* (emphasis added).

56. Frank Fitzpatrick & Gilbert M. Gaul, *Coaches in the Big Time can Break the Bank*, PHILADELPHIA INQUIRER, Sept. 11, 2000, A1. LSU head football coach Nick Saban said, "I think the market gets set in pro ball." Saban signed a five-year, six million dollar contract with LSU in 1999. *Id.*

57. Horrow, *supra* note 2. An August 2002 poll shows that college football is the fourth most popular spectator sport, behind only the NBA, Major League Baseball, and the NFL. *Id.*

58. Louisville Athletics, *Louisville Hires Rick Pitino As Head Men's Basketball Coach, at* http://uoflsports.ocsn.com/sports/m-baskbl/spec-rel/032101aaa.html (Mar. 21, 2001). In March 2001, the University of Louisville hired Rick Pitino as its head basketball coach. *Id.* Pitino had served as President and head coach of the Boston Celtics for three and a half years immediately prior to joining Louisville. *Id.* Prior to coaching the Celtics, Pitino coached the University of Kentucky for eight seasons, once to a national championship. *Id.* Also in 2001, Al Groh left his position as head coach of the New York Jets to become the head football coach at the University of Virginia. ESPN, *Groh Listens to his Heart, Returns to Virginia, at* http://espn.go.com/nfl/news/2000/1230/983694.html (Jan. 5, 2001). Most recently, Steve Spurrier, the highest-paid college football coach in 2001, left the University of Florida to become the head coach of the Washington Redskins. *Id.* Spurrier agreed to a

Haverford College's entire athletic budget of $1.3 million, a strong case can be made that Division I athletics are more akin to professional sports than amateur collegiate athletics.[59]

Today's coaches receive most of their compensation from outside sources, not university funds.[60] One source of outside dollars is the independent booster groups.[61] Revenues from commercial endorsements with athletic apparel companies,[62] and radio and television deals, also fund coaches' salaries. Compensation extends well beyond cash payments to housing loans, luxury cars,[63] country club memberships, free vacations, even golden parachutes, placing college coaches in the same league as corporate executives.[64]

Can the arms race spiral further out of control? Penn State now allows school benefactors to endow positions on the football and women's volleyball teams;[65] UCLA endows three-fourths of the positions on its football team.[66] The arms race even spills over to academic support services for athletes. In the words of one director of academic support program, "It's important to keep up with the Joneses."[67] The University of

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five-year, $25 million contract with the Redskins. ESPN, *Schottenheimer out, Spurrier in for Redskins*, *at* http://espn.go.com/nfl/news/2002/0113/1310774.html (Jan. 13, 2002).

59. *See* Wieberg, *supra* note 44; *see also The Rise of the Major-College Athletic Empires*, *supra* note 21.

60. *Coaches in the Big Time Can Break the Bank*, *supra* note 56. For example, Nick Saban's contract with LSU includes $250,000 base pay from the university plus retirement and benefits, $550,000 in radio, television, and internet payments, and $290,000 from the Tiger Athletic Foundation. *Id.*

61. Nick Saban receives $290,000 of his $1.2 million salary from the Tiger Athletic Foundation, Inc., LSU's booster group. *Id.* The Ole Miss Loyalty Foundation underwrites a substantial portion of University of Mississippi coach David Cutcliffe's $500,000 salary. *Booster Clubs Feather the Nests of Coaches*, *supra* note 52.

62. *Coaches in the Big Time Can Break the Bank*, *supra* note 56. In 2000, Nike paid former Florida football coach Steve Spurrier $950,000, nearly half of his reported $2.1 million total salary. *Id.*

63. *Id.* Tennessee football coach Phillip Fulmer drives a Lexus. Women's basketball coach Pat Summitt drives a Mercedes Benz. *Id.* Tommy Tuberville, football coach at Auburn, has a gold Mercedes. *Id.* The car deals are standard perks at most big-time athletic schools. *Id.* Ohio State has seventy-seven cars for coaches and administrators, Wisconsin has sixty-six, Florida fifty-five, Tennessee fifty, Penn State thirty, and LSU thirty. *Id.*

64. *Id.*

65. *The Rise of the Major-College Athletic Empires*, *supra* note 21. There are currently sixteen endowed positions, including quarterback, middle linebacker, tight end, and tailback. *Id.* Former Penn State quarterback Kerry Collins donated $250,000 to endow the quarterback position. *Id. See also* Frank Fitzpatrick & Gilbert M. Gaul, *Have Some Extra Money? Endow a Football Player*, PHILADELPHIA INQUIRER, Sept. 10, 2000, A23.

66. *Have Some Extra Money? Endow a Football Player*, *supra* note 65.

67. Frank Fitzpatrick & Gilbert M. Gaul, *Efforts at Academic Support are Helping to Win Recruiting Wars*, PHILADELPHIA INQUIRER, Sept. 12, 2000, A21 (quoting Fred Stroock, Director of academic support services at the University of Southern California).

Florida athletic department spends $1.2 million annually on academic support for its student-athletes,[68] while Penn State spends $800,000.[69] In an era when parents of student-athletes ask, "What services do you offer?" a school that lacks a serious academic assistance program faces an uphill recruiting battle.[70]

Not everyone is happy with the increasing price of college athletics. Rob Benford, a sociologist at Southern Illinois University, is afraid that the sharp increases in coaches' salaries send a bad message. He said, "I wish we spent as much time recruiting scholars as we do coaches. The values have been turned upside down, and these staggering amounts paid to coaches are only one part of it."[71] LSU Chancellor Mark Emmert, the man responsible for signing Nick Saban to a six million dollar contract, agrees, saying, "It causes obvious concern if the institution's highest-paid faculty is making one-tenth what the football coach is."[72] The rising costs of college athletics and coaching salaries is further confirmation that colleges and universities view athletics as an independent business.

2. Commercial Revenue

The arms race of college athletics has created a "win at all costs" attitude among athletic administrators and coaches,[73] and the costs are immense. The only way athletic departments can fund such large budgets is to appeal to commercial interests. Thus, colleges and universities seek to generate revenue by contracting with athletic apparel companies, licensing their names and logos for clothing and souvenirs, licensing television and radio rights, and selling advertisements to consumer product companies.

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68. *Id.* Included in this figure is $102,000 paid to eight graduate students who take the athletes' attendance at freshman and sophomore classes. *Id.* Other services include two computer labs, rooms for private tutoring, and eleven full-time staff members, including career counselors and learning-disability specialists. *Id.*

69. *Id.* Penn State's academic assistance program for athletes includes study halls, tutoring in math and science, and sports psychologists. *Id.*

70. *Id.*

71. *Coaches in the Big Time Can Break the Bank*, *supra* note 56.

72. *Id.*

73. "The NCAA's member institutions have designed their competitive athletic programs 'to be a vital part of the educational system.' Deviations from this goal, produced by a persistent desire to 'win at all costs,' have in the past led, and continue to lead to a wide range of competitive excesses that prove harmful to students and institutions alike." *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 121 (1984) (White, J., dissenting) (quoting Constitution and Interpretation of the NCAA, Art. II §2(a) (1982-83)). *See also Hearings, supra note* 15 at 25. (statement by Hon. Tom Osborne) ("The winning at all costs attitude is what the Knight Commission talks about. And what does that mean? That means we must win because if we win, we'll get those big contracts.").

The most visible corporate entity in college sports today is Nike, the Oregon-based athletic equipment and apparel manufacturer. Sports fans see the Nike swoosh on players' uniforms, warm-ups, cleats, high-tops, socks, gloves, and sweatbands, and coaches' hats, shirts, pants, jackets, shoes, and clipboards. Nike currently has agreements with 210 colleges nationwide,[74] with the University of Michigan leading its peers with a seven-year sponsorship deal valued at $25-28 million.[75] Just two years ago, the University of Florida and Nike signed what seemed to be a "mega-deal" worth $9 million over five years;[76] now the deal pales in comparison to Michigan's contract. Nike's strategy is simple – "Sign up as many prominent programs as possible and get the Nike logo in front of fans. The more often a school appears on television, the better."[77] Coaches may be the big winners in the Nike deals, receiving millions of dollars by putting their athletes in Nike apparel and shoes.[78]

The commercial arrangements are not limited to athletic equipment and apparel companies. Coca-Cola recently reached an eleven-year, $500 million agreement to become the NCAA's Official Soft Drink.[79] In 2000, Florida Dodge dealers had a contract with the University of Florida worth $400,000, a far cry from their first deal in the early 1990s for $20,000. Even Penn State, with a reputation as pure and traditional as its navy and white uniforms, has gone commercial, adorning its athletic facilities with advertisements for Pepsi, Unimart, AT&T, Hershey Foods, Nike, Mellon Bank, and Toyota.[80] Penn State associate athletic director Budd Thalman explained the switch to commercial sponsors this way: "We've tried to stay as pristine as we could, but the bottom line is, in the year 2000, in

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74. Horrow, *supra* note 2.

75. University of Michigan Athletics, *U-M Signs Footwear, Equipment, Apparel Deal with Nike*, *at* http://www.mgoblue.com/document_display.cfm?document_id=8350 (Jan. 16, 2001). Under the new contract, Michigan will receive annual cash payments of $1.2 million plus ten percent royalties on the sale of University of Michigan licensed Nike products. *Id.*

76. Frank Fitzpatrick & Gilbert M. Gaul, *What was Once Sacred is Now Up for Sale*, PHILADELPHIA INQUIRER, September 14, 2000, A1. Under the agreement, Nike provides the University of Florida more than $1.2 million in cash, $400,000 in Nike products, and an additional $150,000 in cash and products. *Id.* The deal ensures that the Florida football team, and both men's and women's basketball team jerseys will bear the signature Nike swoosh for the next five years. *Id.*

77. *Id.*

78. Former Florida Gators coach Steve Spurrier received $950,000 from Nike. *Id.* In 1993, Mike Krzysewski, Duke's long-time basketball coach, agreed to a fifteen-year deal with Nike in return for a one-million dollar signing bonus and $350,000 annually for the life of the contract. *Id.* Former Georgetown basketball coach John Thompson was given options to purchase four million dollars of Nike stock *and* join Nike's board of directors. *Id.*

79. Horrow, *supra* note 2.

80. *What was once sacred is now up for sale*, *supra* note 76.

order to fund some of these programs, you have to begin to make some compromises."[81]

In recent years, college football programs have realized new revenues by expanding the season, resulting in increased ticket and television revenue. Nearly every Division I-A school extended its regular season from eleven to twelve games in 2002, and twenty teams are guaranteed to play thirteen games.[82] If you add in a conference championship game and a post-season bowl game, Big 12 Conference teams like Nebraska, Texas Tech, and Iowa State could have played as many as fifteen games.[83] At Notre Dame and the University of Michigan, an additional home football game yields ticket revenues of $3 and $4 million respectively.[84] Aside from ticket revenues, big-conference schools generate significant revenue from television,[85] which is not limited to college football. In 1999, the NCAA negotiated an eleven-year, $6 billion contract granting CBS the exclusive rights to televise the NCAA men's basketball tournament beginning in 2002.[86] Virginia Tech maximized its revenues during the 2002 football season. In addition to being tied for the longest regular season in Division I-A,[87] the Hokies' thirteen regular season games included two Sunday games, two Thursday-night games, and one Wednesday-night game – all presumably to generate television revenue.[88] The motive is clearly financial.[89] Unfortunately, the consequences may fall on the student-athletes. Arkansas State football coach Steve Roberts,

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81. *The Rise of the Major-College Athletic Empires*, *supra* note 21.

82. Steve Wieberg, *Big-time football gets even bigger*, THE CINCINNATI ENQUIRER, *at* http://enquirer.com/editions/2002/08/23/spt_big-time_football.html (Aug. 23, 2002).

83. *Id.*

84. *60 Minutes: Where's Ours?* [hereinafter *60 Minutes*] (CBS television broadcast, January 6, 2002). Wieberg, *supra* note 82.

85. Horrow, *supra* note 2. It is estimated that in 2002, athletic conferences with television contracts generated between $55 and $80 million apiece for the six largest conferences. *Id.* In addition to television revenues, each of the Bowl Championship Series (BCS) conferences (ACC, Big East, Big Ten, Big 12, Pac-10, and SEC) received between $11.78 and $14.67 million for participating in post-season bowl games. Bowl Championship Series: About the BCS, *at* http://espn.go.com/abcsports/bcs/about/ (last visited Dec. 1, 2002).

86. NCAA: Executive Summary of CBS Contract, *at* http://www.ncaa.org/databases/reports/exec_comm/200001ec/200001_ec_minutes_a01.html (last visited Dec.1, 2002).

87. Virginia Tech and Fresno State have regular seasons lasting 105 days. Wieberg, *supra* note 82.

88. HokieSports.com: 2002 Football Schedule, *at* http://www.hokiesports.com/football/schedule.html (last visited Dec. 1, 2002).

89. Wieberg, *supra* note 82. Big 12 Conference Commissioner Kevin Weiberg said, "Most of this is driven by a desire to have an extra home game and the revenue associated with it." *Id.* Rep. Tom Osborne, former head football coach at the University of Nebraska, stated that the regular season increase from nine games when he began coaching to twelve games in 2002 is obviously for a profit motive. *Hearings*, *supra* note 15 at 13, 29 (testimony of Hon. Tom Osborne).

whose team will play thirteen games in 2002, said, "Physically, the long season definitely will take its toll on our team."[90] Tennessee football coach Phillip Fulmer agreed, saying, "We cut scholarships in recent years (to a maximum of 85), and now we're asking our players to play another game. I don't see where that's necessarily healthy."[91] Neither do the players. Enter, Collegiate Athletes Coalition.

III. THE COLLEGIATE ATHLETES COALITION

College sports "insiders" knew that there would come a day when student-athletes would attempt to organize. At least one person is surprised it took so long. George Raveling, former basketball coach at the Universities of Iowa and Southern California, told the Pacific-10 Conference athletic directors in 1994 that student-athletes would "rise up" and assert their grievances.[92] Referring to student-athletes, Raveling cautioned the athletic directors, "You won't let them get a stipend. You won't let them work to earn money. Yet they're providing this tremendous income."[93]

The Collegiate Athletes Coalition (CAC or Coalition) is an organization established by UCLA athletes in 2001 to improve the lives of student-athletes.[94] Among the Coalition's concerns is the problem Coach Raveling identified in 1994 – the commercialization of Division I sports resulting in financial benefits for various organizations (and their employees) at the expense of student-athletes who create the revenues. Thus far, the CAC has focused primarily on basketball and football players because they are the "money sports," generating $3.5 billion in annual revenue.[95] The Coalition contends that student-athletes *earn* the opportunity to get a college education, by participating in strength and conditioning workouts, attending mandatory and "voluntary"[96] team

90. Wieberg, *supra* note 82.

91. *Id.*

92. Mark Alesia, *Dodd: Trouble on horizon for NCAA?*, CBS SportsLine.com, *at* http://cbs.sportsline.com/u/ce/multi/0,1329,3384597_56,00.html (Jan. 19, 2001).

93. *Id.*

94. CAC: Our Mission & Purpose, *at* http://www.cacnow.org/mission.htm (last visited Dec. 1, 2002).

95. *Hearings*, *supra* note 15, at 42 (statement of Ramogi D. Huma).

96. "Voluntary" workouts are practices and drills conducted during the sports team's offseason in order to prepare them for the regular season practices and competition. At Mississippi State, the strength coach claims that summer workouts prepare the football team to survive the late-summer football practices. Critics contend that the offseason summer workouts really are not voluntary. At Nebraska, athletes are expected to participate in voluntary workouts and face punishment if they do not. At University of South Carolina, "the reality is that is you don't (participate), you'll be on the scout team next fall." And at BYU, one player said, "The only thing I have to say about the voluntary

practices, enduring physical injury and surgery, and risking permanent physical disability and death.[97] In an interview with *60 Minutes*, Ramogi Huma, former UCLA linebacker and CAC Chairman, stated, "You see all the money changing hands over what you do and then you go home and – and you struggle to make ends meet."[98] Huma knows about the struggle firsthand. Huma's former UCLA teammate Donnie Edwards, strapped for cash one month and without money for food, accepted food from a donor and was suspended by the NCAA.[99] Edwards's situation is not uncommon. Tom Osborne, former head football coach at the University of Nebraska turned Congressman, believes that the majority of college athletes live below the poverty level.[100]

The CAC's founders view their organization as a mechanism "for student athletes to voice their concerns and influence NCAA legislation"[101] and the only *independent* voice for student-athletes.[102] While the NCAA formally includes student-athletes in its legislative process through the Student-Athlete Advisory Committee (SAAC),[103] the CAC contends that there are fatal flaws in this mechanism. The SAAC cannot propose NCAA legislation,[104] and while two student-athlete representatives attend every NCAA Management Council meeting, they are not given voting rights.[105] Furthermore, the SAACs are not independent bodies of student-athletes, but selected by members of the NCAA Management Council.[106] Therefore, outsiders question the extent to which the SAAC members can advocate for student-athletes.[107] The NCAA contends, however, that the student-athlete voice need not be independent.[108]

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part is, it's voluntary whether the coaches put you on the field in the fall. So you'd better be here." The comments by players and coaches suggest a false choice between participating in "voluntary" practices and not playing during the regular season. Wayne Drehs, *Hot Weather has Little Chilling Effect on Workouts*, ESPN.com, *at* http://espn.go.com/ncf/s/2002/0731/1412608.html (last visited Dec. 1, 2002).

97. CAC: Free Ride, *at* http://www.cacnow.org/freeride.htm (last visited Dec. 1, 2002).

98. *60 Minutes*, Interview by Lesley Stahl with Ramogi Huma, Chairman, Collegiate Athletes Coalition, *supra* note 84.

99. *Id.*

100. *Hearings*, *supra* note 15, at 21 (testimony of Hon. Tom Osborne).

101. *Id.* (statement of Ramogi D. Huma, Founder, Collegiate Athletes Coalition).

102. CAC: Commercialization, the NCAA, and Student-Athletes, *at* http://www.cacnow.org/news/021302CACWrittenCongressionalTestimony.htm (last visited Dec. 1, 2002).

103. NCAA DIVISION I MANUAL, *supra* note 20, § 21.6.7.5.

104. CAC: Commercialization, the NCAA, and Student-Athletes, *supra* note 102.

105. NCAA DIVISION I MANUAL, *supra* note 20, § 21.6.7.5.3.

106. *Id.* § 21.6.7.5.1. *See also Hearings*, *supra* note 15 at 53 (testimony of Mr. Michael Aguirre, member of Division I Student-Athlete Advisory Committee).

107. *Hearings*, *supra* note 15, at 53 (statement of Hon. Edolphus Towns).

108. *60 Minutes*, *supra* note 84, Interview by Lesley Stahl with Brit Kirwan, Chairman, NCAA Board of Directors.

Despite the Coalition's spotlight on the commercialization of college athletics and revenue-generation for the NCAA, schools, and coaches, the protections sought by the CAC are focused on both the financial *and* physical well-being of student-athletes. First, the CAC proposes that the NCAA should "[i]ncrease full grant-in-aid scholarships to an amount that is equal to the cost of attendance at each school."[109] Under the current Division I bylaws, a member institution may grant a student-athlete a full grant-in-aid scholarship equal to the cost of tuition, fees, books, and room and board.[110] The "cost of attendance" at a college or university, however, is an amount calculated by the institution's financial aid office for *all* students, and includes transportation and other expenses not included in the grant-in-aid calculation.[111] For example, a total athletic scholarship at UCLA is valued at $12,156, while the cost of attendance is $16,020.[112] Thus, a student-athlete's maximum financial aid from the institution is less than the maximum financial aid a non-athlete could receive. The Coalition has proposed that the NCAA distribute the revenue from its NCAA basketball tournament contract with CBS[113] to member institutions in order to close the gap between a total grant-in-aid and the cost of attendance.[114] The Coalition estimates that approximately $34.4 million annually would cover the shortfall incurred by Division I football and basketball players.[115] Additionally, the CAC proposes that the NCAA match the amount given to Division I basketball and football student-athletes, and distribute those funds to member institutions to be given to student-athletes in other sports or to establish new sports at each institution.[116]

In a related matter, the Coalition has urged the NCAA to amend its regulations to eliminate current employment restrictions placed on athletes.[117] Division I regulations limit a student-athlete's semester earnings from employment to the difference between the value of a full grant and the athlete's actual financial aid grant, plus $2,000.[118] If a student-athlete receives $5,000 per semester in the form of an athletic scholarship, but a full grant-in-aid at the institution is $6,000 per semester,

109. CAC: Commercialization, the NCAA, and Student-Athletes, *supra* note 102.

110. NCAA DIVISION I MANUAL, *supra* note 20, § 15.2.

111. *Id.* § 15.02.2.

112. *CAC: Commercialization, the NCAA, and Student-Athletes*, *supra* note 102.

113. *See supra* text accompanying note 86.

114. CAC: New Proposals, *at* http://www.cacnow.org/news/102102complete.htm [hereinafter *October Proposal*] (last visited Dec. 1, 2002).

115. *Id.*

116. *Id.*

117. *CAC: Commercialization, the NCAA, and Student-Athletes*, *supra* note 102.

118. NCAA DIVISION I MANUAL, *supra* note 20, § 15.2.6.1.

he *could* earn an additional $3,000 per semester in outside employment. Even a student-athlete receiving a *full* grant-in-aid could earn $2,000 per semester in outside employment. While time constraints such as classes, practices, and voluntary workouts may interfere with an athlete's ability to work even part-time, the NCAA regulations do allow academic year employment.

The CAC has also proposed reforms to protect the health and safety of student-athletes during team-related workouts. In response to the deaths of football players Eraste Autin, Devaughn Darling, and Rashidi Wheeler during team workouts in 2001, the CAC proposed that the NCAA and its institutions "identify and enforce critical safety guidelines to prevent workout-related deaths."[119] Autin, Darling, and Wheeler died after participating in "voluntary" off-season conditioning workouts.[120] The Coalition hopes to prevent what happened to Florida State linebacker Devaughn Darling. His family alleges that Darling "'experienced exhaustion, dizziness and other signs of extreme fatigue that were ignored by trainers and/or coaches' and that he was 'deprived of water and/or other fluids during these drills' leading to his collapse and death."[121] In response to the three football-related deaths, and possibly the CAC's public outrage, the NCAA Football Oversight Committee endorsed a model off-season conditioning program that is intended to minimize health and safety risks, reduce student-athlete time commitments, and provide for adequate preparation for the season.[122] The CAC has recognized the attempt the NCAA has made to increase student-athlete safety, but continues to push for more reforms.[123]

The Coalition has also proposed changes to the NCAA's death benefit program. In February 2002, the CAC proposed that the NCAA should "allow families access to the NCAA death benefit if their child is either a current or prospective student-athlete who dies as a result of a university-facilitated workout."[124] Under the NCAA's Catastrophic Injury Insurance

119. *CAC: Commercialization, the NCAA, and Student-Athletes*, *supra* note 102.

120. Wayne Drehs, *supra* note 96. Travis Stoffs, *Florida FB Eraste Autin passes*, Gator Country, *at* http://www.gatorcountry.com/print.php?sid=403 (last visited Dec. 1, 2002).

121. Bob Thomas, *Darling family to sue Florida State*, THE FLORIDA TIMES-UNION, *at* http://www.jacksonville.com/tu-online/stories/082901/col_7086258.html (quoting Aug. 8, 2001 letter from Darling's family to Florida State University).

122. *NCAA Football Oversight Committee Endorses Model for Out-of-Season Conditioning*, NCAA, *at* http://www.ncaa.org/releases/makepage.cgi/divi/2002080201d1.htm (Aug. 2, 2002).

123. *October Proposal*, *supra* note 114. The CAC requests that, "Safety guidelines should be enforced in other NCAA sports; Every school should have to submit an emergency response plan that is subject to NCAA approval; and establish a system for players and staff to anonymously report breaches in these new NCAA guidelines." *Id.*

124. *CAC: Commercialization, the NCAA, and Student-Athletes*, *supra* note 102.

Program, the immediate family of a student-athlete who dies as a result of competition or school-sponsored practice is entitled to a $10,000 death benefit.[125] However, if the athlete dies as result of a practice not sponsored by the institution (e.g., Eraste Autin and Rashidi Wheeler during summer practice), the family receives no death benefit.[126] Therefore, the CAC demands that the $10,000 insurance proceeds be paid to families who lose their student-athlete during a voluntary, off-season workout. In October 2002, the CAC amended its proposal and requested an increase to the $10,000 death benefit provided by the NCAA policy, claiming that the $10,000 benefit was insufficient to cover the associated costs.[127] The NCAA has since acknowledged that its policy of not distributing the death benefit to families of athletes who die in "voluntary" workouts is "a flaw in [the NCAA] system" and "something that needs to be worked out."[128]

In October, the Coalition also made a proposal to prohibit NCAA institutions from discontinuing a student-athlete's scholarship after sustaining a sports-related injury that precludes them from future participation in athletics.[129] The CAC was informed of this discontinuation practice after students at Ohio University were denied scholarship funds because injuries prevented further competition.[130] The current Division I bylaws prohibit member institutions from granting financial aid for more than a one-year period, but members are allowed to tell student-athletes of their intention to recommend renewal of the one-year scholarship for the following four years.[131] The CAC proposes that the NCAA allow member institutions to guarantee multiple-year scholarship offers in writing, and prohibit member institutions from "using injury as justification for the reduction, elimination or non-renewal of athletic scholarships."[132]

If the demands of the Collegiate Athletes Coalition do not convey the group's seriousness of purpose, perhaps its affiliation with the United Steelworkers of America (USWA) will.[133] In a statement of support, USWA International President Leo Gerard stated, "It is clear to us that the

125. *NCAA: Catastrophic Injury Insurance Program, at* http://www.ncaa.org/insurance/catastrophic_insurance_info.pdf (last visited Dec. 1, 2002).

126. *Id. See also CAC: Commercialization, the NCAA, and Student-Athletes, supra* note 101.

127. *October Proposal, supra* note 114.

128. *60 Minutes, supra* note 84, Interview by Lesley Stahl with Brit Kirwan, Chairman, NCAA Board of Directors.

129. *October Proposal, supra* note 114.

130. *Id.* .

131. NCAA DIVISION I MANUAL, *supra* note 20, § 15.3.3.1.

132. *October Proposal, supra* note 114.

133. *CAC: The United Steelworkers of America & CAC, at* http://www.cacnow.org/uswa.htm (last visited Dec. 1, 2002).

NCAA is exploiting today's student-athletes at every turn. We do not understand how an organization as powerful and wealthy as the NCAA, which is supposed to be operating with the student-athletes' best interest in mind can so blatantly be ignoring the safety, health care, catastrophic insurance, death benefits, and basic cost of living questions of the very athletes they profess to care about."[134] Despite its affiliation with the USWA, the CAC does not view itself as a labor union, is not engaging in traditional unionizing activities, and does not intend to interfere with team activities or strike.[135] Gerard says that the USWA and the CAC are not trying to form a union because "[t]he athletes and universities are not in what you would consider to be the standard employee/employer relationship."[136] The next section addresses that issue.

IV. THE NATIONAL LABOR RELATIONS ACT

A. Purpose and Application

At the turn of the twentieth century, Congress recognized that the growth of capitalism and the aggregation of capital necessitated the aggregation of laborers.[137] In the absence of labor groups, the individual worker was defenseless against the interests of industrialists. Congress viewed labor organization as a means of creating democracy in the workplace, by encouraging workers to take part in determining the conditions in which they work.[138] In 1935, Congress passed the National Labor Relations Act, 29 U.S.C § 151 et seq. (NLRA or Act), to equalize the bargaining and economic power between employers and employees.[139] To accomplish this objective, the Act guarantees employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage

134. *Id.*

135. *CAC: Message to All Coaches*, *at* http://www.cacnow.org/message_coaches.htm (last visited Dec. 1, 2002).

136. Scott Robertson, *Putting Steel in College Athletes' Voices*, American Metal Market (Jan. 21, 2002).

137. FINAL REPORT OF THE INDUSTRIAL COMMISSION CREATED BY ACT OF CONGRESS 800 (Government Printing Office 1902).

138. *Id.* at 805.

139. *See* 29 U.S.C. § 151 (2000) ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce. . .by restoring equality of bargaining power between employers and employees."); *see also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984)); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965); *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 506-07 (1960); *Hill v. Florida*, 325 U.S. 538, 559 (1945).

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."[140] Thus, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed"[141] or to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[142]

Congress entrusted the power of enforcement of the NLRA to the National Labor Relations Board (NLRB or Board).[143] The Board may enforce the Act's employee protections when its jurisdictional requirements are met and the parties satisfy the NLRA's definitions of "employer" and "employee." The Act grants the Board jurisdiction over questions of representation or unfair labor practices "affecting commerce."[144] Private universities and colleges are subject to the NLRB's jurisdiction when they generate at least $1 million gross annual revenue from all sources (excluding contributions not available for operating expenses because of limitations imposed by the grantor).[145] Since 1970, the Board and courts have consistently found colleges and universities to affect interstate commerce,[146] as does their participation in NCAA athletics.[147] While the NLRA's definition of "employer" is extremely broad, Congress excluded from protection "any State or political division thereof."[148] Therefore, student-athletes at a state college or university could not successfully claim protection under the Act. However, for the

140. 29 U.S.C. § 157 (2000).

141. 29 U.S.C. § 158(a)(1) (2000).

142. 29 U.S.C. § 158(a)(3) (2000).

143. *See* 29 U.S.C. §§ 159(c)(1), 160(a) (2000).

144. *See* 29 U.S.C. §§ 159(c)(1), 160(a) (2000).

145. National Labor Relations Board Rules and Regulations, 29 C.F.R. § 103.1 (2002).

146. *See, e.g.*, Howard Univ., 224 N.L.R.B. 385 (1976); Yeshiva Univ., 226 N.L.R.B. 1141 (1976); Northeastern Univ., 218 N.L.R.B. 247 (1975); Univ. of Miami, 213 N.L.R.B. 634 (1974); Point Park College, 209 N.L.R.B. 1064 (1974); Tulane Univ., 195 N.L.R.B. 329 (1972); Cornell Univ., 183 N.L.R.B. 329, 331 (1970); *Yale Univ.*, 184 N.L.R.B. 860 (1970).

147. *See, e.g., NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (finding that the NCAA is engaged in interstate commerce and subject to antitrust regulation); *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1150 (5th Cir. 1977) (finding that NCAA member institutions' competition and travel across state lines constitutes interstate commerce); *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 378 (D. Ariz. 1983) (finding that the NCAA requires teams to travel across state lines for competition and athlete recruiting is a nationwide activity); *see, e.g., English v. Nat'l Collegiate Athletic Ass'n*, 439 So.2d 1218, 1224 (La. Ct. App. 1983) (finding that the NCAA's regulation of relationships between colleges and student-athletes constitutes interstate commerce).

148. 29 U.S.C. § 152(2) (2000). "The term 'employer' includes *any* person acting as an agent of an employer, directly or indirectly. . . ." 29 U.S.C. § 152(2) (2000) (emphasis added).

purposes of this article, it is assumed that student-athletes are attempting to organize at a private institution subject to the Act.[149]

B. Meaning of "Employee" Under the NLRA

1. NLRA Section 2(3)

Assuming that the Board may exercise jurisdiction over colleges and universities and those institutions are "employers" within the NLRA definition, the remaining inquiry is whether student-athletes are "employees" under the Act. The NLRA defines "employee" in broad and circular language: "The term 'employee' shall include *any* employee, and shall not be limited to the employees of a particular employer. . . ."[150] From this broad definition, Congress explicitly excluded agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, individuals employed by an employer subject to the Railway Labor Act, and individuals employed by any other person who is not an "employer."[151] In the absence of textual guidance from the NLRA, the Board has interpreted the meaning of "employee" with respect to post-secondary students.

2. "Primary Purpose" Test

The NLRB first addressed the issue of whether students are employees within the meaning of the NLRA in *Leland Stanford Junior Univ.*[152] In that case, the petitioner-organization sought to improve the wages and working conditions of research assistants ("RAs") in the university's physics department.[153] Each RA was a Ph.D. candidate in physics, which required participation in research.[154] In concluding that the RAs were

149. While it is clear that state colleges and universities are not subject to the NLRA, student-athlete organization at private institutions would likely create a market effect within collegiate athletics. The market would force a public institution to provide its student-athletes with the same benefits and protections received by athletes at private universities in order to stay competitive during the recruiting process. It is also likely that the private-institution members of the NCAA would propose and support NCAA legislation governing *all* member institutions, private and public alike, thus bringing NCAA regulations in line with the privately-negotiated terms and conditions and leveling the field for all NCAA members. However, these possibilities would effectively allow what the Act has prohibited – organized labor organizations determining the terms and conditions of employment within a state entity.

150. 29 U.S.C. § 152(3) (emphasis added).

151. *Id.*

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

153. *Id.* at 621.

154. *Id.*

"primarily students," the Board focused on the value generated and time spent by the students. The stipend amount received by an RA did not depend on the services rendered, the student's intrinsic value, or the number of hours spent on research.[155] The Board also found persuasive the absence of traditional benefits (e.g., vacation, sick leave, retirement) and the tax-exempt treatment of the stipend.[156] Finally, the NLRB reasoned that the relationship of the RAs and Stanford was not one in which the performance of assigned tasks was closely supervised or monitored by Stanford.[157] The research assistants were therefore "primarily students" and not employees within the meaning of the Act.[158]

With the basic "primary purpose" test established, the Board extended its application to medical interns, residents, and clinical fellows in *Cedars-Sinai Med. Ctr.*[159] There, the petitioner represented interns, residents, and clinical fellows ("house staff") who worked at Cedars-Sinai Medical Center while pursuing a medical degree and physician's license.[160] The house staff was responsible for patient care and educational activities aimed at developing the student's clinical judgment and skills.[161] Patient care included "taking medical histories, performing examinations, preparing medical records and charts, and developing diagnostic and therapeutic plans," as well as participating in service rounds and assisting in surgical procedures.[162] In return, the house staff received an annual stipend, scaled on the basis of education level, and such fringe benefits as medical and dental care, annual vacation and paid holidays, meals during work hours, and malpractice insurance.[163] The Board found that the house staff were "primarily engaged in graduate educational training" at Cedars-Sinai, and thus, were students and not employees.[164] The Board looked to the purpose of the house staff employment, finding:

> They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for

155. *Id.* at 622.
156. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 622.
157. *Id.* at 623.
158. *Id.*
159. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).
160. *Id.* at 251-52.
161. *Id.* at 252.
162. *Id.*
163. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 252.
164. *Id.* at 253.

> the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties.[165]

Finally, the NLRB focused on the purpose of compensation. The Board concluded that payments were not compensation for services rendered because compensation was determined independent of the hours worked and the quality of care provided by the house staff.[166] In sum, the Board found the interns, residents, and clinical fellows were "primarily students," and therefore, not employees within the meaning of Section 2(3).[167]

In *San Francisco Art Inst.*,[168] the Board extended the "primary purpose" reasoning from *Leland Stanford* and *Cedars-Sinai* to students employed by their own educational institution in a capacity unrelated to their course of study. The student-employees in that case worked as janitors, cleaning and maintaining the Institute's buildings; they received tuition scholarships or compensation on a monthly or hourly basis.[169] The NLRB distinguished these students from regular employees – the students worked less time, were paid less, and were not eligible for fringe benefits available to regular employees.[170] The Board concluded that an all-student bargaining unit was inappropriate because of the "brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned *primarily with their studies* rather than with their part-time employment."[171] In dissent, Members Fanning and Jenkins argued that, "the sufficiency of the student janitors' interest in their employment conditions is not diluted by their primary interest in their studies. . . ."[172]

The NLRB attempted to clarify its position on student-employee status in *St. Clare's Hosp.*,[173] ultimately relying on the established "primary purpose" doctrine. At the outset of the opinion, the Board described four general categories of student-employees.[174] The Board determined that the

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165. *Id.*
166. *Id.*
167. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 253.
168. *San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976).
169. *Id.*
170. *Id.*
171. *Id.* at 1252 (emphasis added).
172. *San Francisco Art Inst.*, 226 N.L.R.B. at 1254 (Fanning, M., Jenkins, M., dissenting).
173. *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977).
174. The categories include: (1) "students employed by a commercial employer in a capacity unrelated to the students' course of study;" (2) students "employed by their own educational institutions in a capacity unrelated to their course of study;" (3) students "employed by a commercial employer in a capacity which is related to the student's course of study;" and (4) students who "perform services at their educational institutions which are directly related to their educational

petitioning house staff should be classified under the fourth category, "students who perform services at their educational institutions which are directly related to their educational program."[175] The NLRB dismissed the students' organization petition, reasoning that the services rendered by the individuals "are directly related to – and indeed constitute an integral part of – their educational program," and thus, "are serving *primarily as students* and not primarily as employees."[176] The Board found that, "...this is a very fundamental distinction for it means that the mutual interests of the students and the educational institutions in the services being rendered are predominantly academic rather than economic in nature."[177] Academic interests are foreign to the typical employment relationship, and thus, improper for the collective-bargaining process.[178] Rather, the collective-bargaining process is inherently economic and divisive, pitting the adversarial interests of the employer and employees against one another.[179] The Board noted that traditional collective-bargaining was intended to promote equality of bargaining power among the parties, a concept foreign to higher education, where teachers assume a power role because of their expertise and knowledge.[180] In rejecting the house staff members' claim that they were "employees" within the meaning of the Act, the Board found those individuals to be "primarily students" because "the individual's interest...is more academic than economic."[181]

3. "Compensated Services" Test

The NLRB's "primary purpose" test defined the Board's jurisprudence regarding student "employee" status under the Act during the 1970s. The Board reversed course during the 1999-2000 period. In two major decisions, *Boston Med. Ctr. Corp.*[182] and *New York Univ.*,[183] the NLRB held that hospital house staff and university graduate assistants were in fact "employees" within the meaning of Section 2(3) of the Act. The

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program." *Id.* at 1000-02.

175. *Id.* at 1002.

176. *Id.* (emphasis added).

177. *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1000.

178. *Id.*

179. *Id.*

180. *Id.*

181. *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1003.

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

183. *New York Univ.*, 165 L.R.R.M. 1241 (N.L.R.B. 2000).

Board relied on the reasoning of Member Fanning's dissenting opinion in *Cedars-Sinai*[184] to forge new precedent.

In *Cedars-Sinai*, Member Fanning initially focused on the textual definition of "employee" and the exclusions found in the Act. Fanning argued that in the absence of an express exclusion in the NRLA for students and explicit policy reasons underlying non-statutory exclusions (e.g., managerial and confidential employees with a special relationship with management), the status of "student" and "employee" are not mutually exclusive.[185] Thus, an individual who is "primarily a student" but also an "employee," is an "employee" for purposes of the NLRA.[186] Member Fanning traced the meaning of "employee" to the common-law concept of "servant," finding that an employee "implies someone who works or performs a service for another from whom he or she receives compensation."[187] In determining that the house staff members were "employees," Fanning noted that the hospital charged fees for the services the house staff provided.[188] In return, the hospital provided the house staff a stipend, withheld federal and state taxes, contributed to social security, provided health insurance, vacation, and sick leave.[189] Member Fanning also noted that the house staff members did not receive a degree, grades, or examinations in return for the services provided at the hospital.[190] In conclusion, Fanning argued that the educational purpose of the house staff programs did not change the fact that interns, residents, and fellows perform a service for compensation, and thus, could not overcome a finding of a traditional employment relationship between the house staff and hospital.[191] This line of reasoning provided the foundation for the Board's policy change in *Boston Med. Ctr.* and *New York Univ.*

In *Boston Med. Ctr.*, the NLRB overruled *Cedars-Sinai* and *St. Clare's*, concluding that hospital interns, residents, and fellows, despite their primarily educational focus, are "employees" within the meaning of Section 2(3) of the NLRA.[192] Boston Medical Center (BMC) operated a teaching hospital serving Boston University School of Medicine; the house staff was comprised of interns, residents, and fellows.[193] House staff

184. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).
185. *Id.* at 254 (Fanning, M., dissenting).
186. *Id.* (Fanning, M., dissenting).
187. *Id.* at 254-55 (Fanning, M., dissenting).
188. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 255 (Fanning, M., dissenting).
189. *Id.* at 255-56 (Fanning, M., dissenting).
190. *Id.* at 256 (Fannin, M., dissenting).
191. *Id.* (Fanning, M., dissenting).
192. 330 N.L.R.B. 152.
193. *Id.* at 152-53.

responsibilities included general patient care, ordering X-rays, starting intravenous lines (IVs), intubating patients, writing "do not resuscitate" (DNR) orders, and filling prescriptions.[194] At the end of each rotation period, a faculty member who had worked closely with the student filled out an evaluation, rating the student on various criteria (e.g., medical knowledge, technical skills, clinical judgment, humanistic qualities).[195] House staff members received annual compensation ranging from $34,000 to $44,000, paid vacation, sick, parental, and bereavement leave, and health, dental, and life insurance.[196] In addition, BMC treated the house staff as employees, maintaining a workers compensation policy and applying state and federal employment laws (e.g., Family and Medical Leave Act and the Americans with Disabilities Act).

The Board began its analysis in *Boston Med. Ctr.* by focusing on the breadth of the statutory language in Section 2(3), finding that the Act applies to "any employee."[197] Without an explicit exclusion for "students" from the definition of "employee," and absent any obvious policy reasons for excluding house staff, the interns, residents, and fellows "literally and plainly come within the meaning of 'employee' as defined by the Act."[198] Like Member Fanning in *Cedars-Sinai*, the NLRB compared the employer-employee relationship to that of master-servant. The employer's right of control over the employee and consideration (i.e., payment) for services are indicative of an employment relationship.[199] The Board also relied heavily on *NLRB v. Town & Country*, where the United States Supreme Court invoked dictionary definitions to define "employee."[200] The Court in *Town & Country* cited approvingly the definition of "employee" as "any 'person who works for another in return for financial or other compensation.'"[201] *Town & Country* also emphasized that the broad, literal interpretation of "employee" is "consistent with. . .the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference,' . . . and 'encouraging and protecting the collective-bargaining process."[202] In the Board's view, the Court's adoption of a broad interpretation suggested that "close-call" cases of

194. *Id.* at 153-54.
195. *Id.* at 155.
196. 330 N.L.R.B. at 156.
197. *Id.* at 160 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984)).
198. *Id.* at 160.
199. *Id.*
200. *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995).
201. *Id.* (quoting American Heritage Dictionary 604 (3d ed. 1992)).
202. *Id.* (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945) and *Sure-Tan, Inc.*, v. NLRB 467 U.S. 883, 892 (1984)).

coverage by the Act (and thus NLRB jurisdiction) should be decided in the employees' favor. Only this approach would further the policies underlying the Act.

The NLRB, in determining that an employer-employee relationship existed, identified several essential elements of the house staff's relationship with BMC. First, house staff worked for a NLRA "employer."[203] Second, house staff received a stipend as compensation for their services.[204] The stipend was taxable under the Internal Revenue Code, and BMC withheld state and federal income taxes and social security contributions from their salary disbursements.[205] Furthermore, the house staff received fringe benefits and participated in programs indicative of employee status.[206] Third, house staff provided patient care on behalf of the hospital, spending eighty percent of their time engaged in direct patient care.[207] The Board further distinguished house staff from other students in the academic setting in that house staff do not pay tuition or student fees, take typical examinations in a classroom setting, receive grades, or register in a manner typical to regular students.[208] The Board concluded in *Boston Med. Ctr.*: "If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to the new and changing work contexts and demands in every sector of our evolving economy."[209] The Board's decision in *Boston Med. Ctr.* replaced the "primary purpose" test with the "compensated services" test to determine the "employee" status of students.

The NLRB extended the "compensated services" analysis to teaching assistants, graduate assistants, and research assistants ("graduate assistants"), in *New York Univ.*[210] There, the Board rejected the contention that because graduate students are "predominantly students" they cannot be statutory employees.[211] As in *Boston Med. Ctr.*, the NLRB focused on the breadth of the definition of "employee" in Section 2(3) and the Supreme Court's traditionally broad and literal reading of the Act.[212]

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203. *Boston Med. Ctr.*, 330 N.L.R.B. at 160.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Boston Med. Ctr.*, 330 N.L.R.B. at 160.
208. *Id.* at 161.
209. *Id.* at 165.
210. *New York Univ.*, 2000 NLRB LEXIS 748 (2000).
211. *Id.* at 4.
212. *Id.* at 5 (citing *NLRB v. Town & Country*, 516 U.S. 85, 91-92 (1995); *Sure-Tan, Inc. v. NLRB*, 467 NLRB 883, 891-892 (1984); *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186 (1941)).

The Board also focused on the services provided by graduate students.

> . . .graduate students perform services under the control and direction of the Employer, and they are compensated for these services by the Employer. . . . Graduate assistants are paid for their work and are carried on the Employer's payroll system. The graduate assistants' relationship with the Employer is thus indistinguishable from a traditional master-servant relationship.[213]

New York University argued that the case before the Board was distinguishable from *Boston Med. Ctr.*;[214] however, the Board methodically dismissed each of the employer's arguments. In rejecting NYU's claim regarding the graduate students' time spent providing services, the Board found that the smaller percentage of time devoted to providing services makes them no less "employees" than part-time employees.[215] Second, the Board dismissed the employer's argument that graduate students did not receive compensation because they receive financial aid. The Board made clear that the graduate students, unlike students receiving financial aid, "perform work, or provide services, for the Employer under terms and conditions. . .controlled by the Employer."[216] The Board further reasoned that the absence of academic credit for graduate assistant work bolstered its conclusion that the work was performed in exchange for pay.[217] Therefore, the important inquiry for "employee" status is whether there is "performance of work, controlled by the Employer, and in exchange for consideration."[218]

Finally, the NLRB rejected the Employer's third contention, that graduate assistant work is primarily educational because it is done in order to obtain a degree.[219] The fact that students "obtain educational benefits from their employment" is not inconsistent with employee status under the Act.[220] Furthermore, working as a graduate assistant is not a requirement for receiving a graduate degree, nor is it part of the graduate school

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213. *Id.* at 7.

214. *New York Univ.*, 2000 NLRB LEXIS at 8. NYU claimed that: "(1) the Regional Director ignored evidence that the house staff spent 80 percent of their time providing services (patient care) for the hospital, while graduate assistants spend only 15 percent of their time performing graduate assistants' duties for their employer; (2) graduate assistants do not receive compensation for their teaching and other duties as did the *Boston Medical Center* house staff; and (3) graduate assistants perform this work in "furtherance" of their degree, while the house staff already had their degrees." *Id.*

215. *Id.* at 9 (citing *Univ. of San Francisco*, 265 N.L.R.B. 1221 (1982)).

216. *Id.* at 10.

217. *Id.*

218. *See New York Univ.*, 2000 NLRB LEXIS at 748.

219. *Id.* at 11-12.

220. *Id.* at 12 (quoting *Boston Med. Ctr.*, 330 N.L.R.B. at 161).

curriculum.[221] Even if both of these factors were true, a student who derives educational benefit from employment is not precluded from coverage as an "employee" within the meaning of the NLRA. In summary, the Board in *New York Univ.* extended the reasoning of *Boston Med. Ctr.* to graduate assistants and gave some clarity to the new "compensated services" test. Students are "employees" within the meaning of Section 2(3) when there is "performance of work, controlled by the Employer, and in exchange for consideration."[222]

V. STUDENT-ATHLETES ARE "EMPLOYEES" WITHIN THE MEANING OF THE NLRA

A. The Inequities of Collegiate Athletics

The Collegiate Athletes Coalition should take note of the NLRB's message in *Boston Med. Ctr.* – ". . .unionism and collective bargaining are dynamic institutions capable of adjusting to the new and changing work contexts and demands in every sector of our evolving economy."[223] Student-athletes may not look like traditional organized labor, but the protections they need are the same. Congress believed that the aggregation of power on the employer side required the aggregation of laborers.[224] In an era when forty-eight Division I-A athletic programs produce an average annual profit of $3.8 million,[225] the time is right for the aggregation of student-athletes. What the athletes do on the playing fields and courts generates extraordinary revenues. One recent study estimates that a college athletic program generates annual marginal revenue of $400,000 from a premium college football player and over $1 million from a premium basketball player.[226] Yet, athletes still lack an independent voice in NCAA governance. Organizing under the protection of the NLRA would allow student-athletes to achieve the workplace democracy Congress envisioned.[227]

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221. *Id.* at 12.

222. *New York Univ.*, 2000 NLRB LEXIS at 10.

223. *Boston Med. Ctr.*, 330 N.L.R.B. at 165.

224. *See supra* Part III.A.

225. *See supra* text accompanying note 37.

226. Robert Brown & R. Todd Jewell, *Measuring Marginal Revenue Product in College Athletics: Updated Estimates*, forthcoming in ADVANCES IN COLLEGE SPORTS ECONOMICS (Rodney Fort & John Fizel eds., Praeger Publishers).

227. *See supra* note 139 and accompanying text.

The NLRA was intended to equalize the bargaining power between employees and employers.[228] The relationship between an NCAA member institution and its athletes is inherently unequal.[229] First, all NCAA bylaws governing member institutions are enacted by the member institutions or their representatives. Any provision governing the allowable amount of financial aid to student-athletes, the amount of a death benefit, and health and safety measures taken by member institutions is self-legislated by the members. Second, student-athletes have no meaningful input in the NCAA legislative process.[230] Lastly, student-athletes need the stage, the place to perform, that is college athletics. For basketball and football players especially, intercollegiate athletics provides an opportunity to develop their physical skills, and most importantly, a forum to showcase their talents for professional scouts. In sum, the athletes *need* NCAA competition to attain a professional athletic career. These three elements create an unequal bargaining and economic relationship that the NLRA was intended to prevent.

B. "Compensated Services" Test

If the NLRB continues to apply the "compensated services" test to determine whether students are "employees" within coverage of the Act, there is a persuasive argument that athletes who receive athletic scholarships are covered employees. Under the test, students are statutory employees within the meaning of Section 2(3) when there is "performance of work, controlled by the Employer, and in exchange for consideration."[231] In reaching this definition, the Board has relied on dictionary definitions to define "employee" as "any 'person who works for another in return for financial or other compensation.'"[232] Student-athletes fall within both definitions. Student-athletes practice, work out, study

228. *Id.*

229. *See Gulf South Conference v. Boyd*, 369 So. 2d 553, 558 (Ala. 1979) ("The college athlete agrees to participate in a sport at the college, and the college in return agrees to give assistance to the athlete. The athlete also agrees to be bound by the rules and regulations adopted by the college concerning the financial assistance. Most of these rules and regulations are promulgated by athletic associations whose membership is composed of the individual colleges. The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field. Thus in some circumstances the college athlete may be placed in an *unequal bargaining position.*") (emphasis added).

230. *See supra* notes 103-106 and accompanying text.

231. *New York Univ.*, 165 L.R.R.M. at 10; *see also Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160; *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 254-55 (Fanning, M., dissenting).

232. *NLRB v. Town & Country*, 516 U.S. at 90 (quoting American Heritage Dictionary 604 (3d. ed. 1992)).

film, and compete with other athletes under the direction and supervision of the school's athletic department and coaches. In return, athletes receive scholarships covering tuition, fees, books, and room and board.[233] Thus, the consideration they receive is usually not in monetary form, but rather payment in kind.[234] It is nonetheless consideration. The absence of academic credit, a degree, grades, or examinations in return for participation in intercollegiate athletics is additional support that athletes' activities are performed in exchange for consideration.[235] The Board in *Boston Med. Ctr.* identified two other factors indicative of employee status under the Act. First, the Board focused on whether the individuals worked for an "employer" within the coverage of the Act. In the case of colleges and universities, the answer would almost certainly be answered in the affirmative.[236] Second, the Board found it important that the house staff spent significant amounts of time engaging in activities on behalf of the hospital.[237] Under NCAA Division I guidelines, athletes are limited to twenty hours of practice per week,[238] but in actuality, players spend up to sixty hours per week on their sport.[239] When they practice, work out, or compete against other schools, they do so on behalf of their college or university. Thus, there is strong evidence that student-athletes meet the criteria set forth in *Boston Med. Ctr.*

There are however, circumstances surrounding the relationship between student-athletes and universities that weigh against finding athletes to be "employees" within the meaning of the Act. Board cases have found the employer's withholding of federal and state taxes, contribution to social security, provision of insurance, vacation, and sick leave are indicative of "employee" status.[240] Clearly, colleges and universities do not provide these fringe benefits to student-athletes or engage in the withholding of any taxes. The Board also distinguished

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233. *See supra* note 110 and accompanying text.

234. Student-athletes receive a cash stipend for room and board expenses only if they live off-campus. NCAA DIVISION I MANUAL, *supra* note 20, § 15.2.2.1.

235. *See New York Univ.*, 165 L.R.R.M. at 10; *see also Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 256 (Fanning, M., dissenting) (finding that house staff were employees because they did not receive a degree, grades, or examinations in return for the services provided at the hospital).

236. *See supra* notes 144-47 and accompanying text.

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

238. NCAA DIVISION I MANUAL, *supra* note 20, § 17.1.5.1.

239. *Hearings*, *supra* note 15 at 28 (statement of Hon. Tom Osborne); *see also* A CALL TO ACTION, *supra* note 31 at 16 ("Flagrant violation of the NCAA's rule restricting the time athletes must spend on their sport to 20 hours a week is openly acknowledged. The loophole most used is that of so-called 'voluntary' workouts that don't count toward the time limit.").

240. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160; *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 255-56 (Fanning, M., dissenting).

house staff from students by identifying activities commonly found in the academic setting – e.g., paying tuition and student fees, taking examinations in a classroom setting, receiving grades, and registering for classes.[241] Student-athletes do engage in these types of activities. Both of these factors weigh against a finding that student-athletes are employees.

Applying the "compensated services" test to student-athletes yields an uncertain result. Some factors identified by the NLRB support a finding of employee status, while other factors weigh against. However, there are policy reasons for concluding that student-athletes are covered by the NLRA. The Supreme Court has supported the broad interpretation of "employee" in close cases to further the overriding purposes of the Act.[242] Furthermore, as the Board stated in *Boston Med. Ctr.*, unionism and collective bargaining are dynamic institutions that should adjust to all sectors of the changing economy.[243]

C. "Primary Purpose" Test

Although the Board recently adopted the "compensated services" test for determining whether students are employees within the meaning of Section 2(3) of the Act, it is foreseeable that the Board could revert back to the "primary purpose" test. Even if the NLRB made such a move, however, there remains a plausible argument that student-athletes are not "primarily students" and thus excluded from the Act's coverage.

In several cases relying on the "primary purpose" test, the Board focused on whether the student work was performed as part of an academic curriculum or in pursuit of a degree or professional certification.[244] In the case of student-athletes, however, their participation in athletics clearly is not in furtherance of a degree, part of an academic curriculum, or in furtherance of a professional license. The Board applied the "primary purpose" test in *Leland Stanford Junior Univ.*, and found persuasive the fact that Stanford did not closely monitor the RAs' tasks

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241. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 161.

242. *NLRB v. Town & Country*, 516 U.S. at 90. The literal interpretation of "employee" is "consistent with. . .the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference,' . . . and 'encouraging and protecting the collective-bargaining process." *Id.* (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 798 (1945) and *Sure-Tan, Inc.*, v. NLRB 467 U.S. 883, 892 (1984)).

243. *Boston Med. Ctr.*, 330 N.L.R.B. at 165.

244. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. at 253 (finding that an internship was a requirement for the examination for licensing and residency and fellowship programs were required to qualify for certification in specialties and subspecialties); *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1002 (the services rendered by the individuals "are directly related to – and indeed constitute an integral part of – their educational program").

and time of performance.[245] College athletics, however, are closely supervised by coaches and trainers.[246] Most relevant to the situation of student-athletes are those cases in which "students are employed by their own educational institutions in a capacity unrelated to their course of study."[247] In those cases, the Board has reasoned that "employment is merely incidental to the students' primary interest of acquiring an education, and in most instances is designed to supplement financial resources."[248] Unfortunately, this rationale does not apply to scholarship athletes. If graduation rates are a reliable indication, men's basketball and football players are not playing sports with the primary interest of acquiring an education.[249] In 2001, the Knight Foundation Commission[250] found that, "Athletes are often admitted to institutions where they do not have a reasonable chance to graduate. They are athlete-students, brought into the collegiate mix more as performers than aspiring undergraduates."[251] Therefore, even if the Board were to revert back to the "primary purpose" test, there is strong evidence suggesting that student-athletes are not primarily students pursuing their education, but rather, athlete-students pursuing professional athletic careers. That conclusion could result in a finding that student-athletes are employees within the meaning of Section 2(3) of the Act.

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245. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 623.

246. *Hearings*, *supra* note 15 at 28 (statement of Hon. Tom Osborne) (". . .an athlete is only allowed 20 hours a week at practice. We have to document that. I mean we could not have 4 hour practices. We never practiced more than 2 hours. And that included the weight room. That included anything that you did.").

247. *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. at 1001.

248. *Id.*

249. NCAA, *Division I Graduation Rates Reach New Plateau*, at http://www.ncaa.org/releases/makepage.cgi/research/2002092601re.htm (Sept. 26, 2002). In a NCAA report issued in September 2002, Division I football student-athletes graduated 52 percent of the time while male basketball players graduated 43 percent of the time. *Id.* However, Division I-A male basketball players only graduate at 36 percent rate, and African-American male basketball student-athletes graduate 28 percent of the time. *Id.*

250. A CALL TO ACTION, *supra* note 31 at 8-10. In 1989, the John S. and James L. Knight Foundation created a Commission on Intercollegiate Athletics in response to its concern that athletics abuses threatened the integrity of higher education. *Id.* The Foundation was asked to propose a reform agenda for college sports. *Id.* It created three reports in the early 1990s, and issued its most recent report, A CALL TO ACTION, in June 2001. *Id.*

251. *Id.* at 16.

VI. CONCLUSION

The case for protecting student-athletes under the NLRA is largely "equitable." It is not fair for Chris Webber to have to forego lunch when his athletic talent is generating thousands of dollars for the University of Michigan. It is not fair that student-athletes are awarded full grants-in-aid valued at less than the cost of attendance for non-student-athletes. It is not fair for the NCAA to discipline a student-athlete for accepting groceries when the monthly stipend runs out. Student-athletes are the labor force driving big-time college athletics, and yet they are physically and financially vulnerable because NCAA policies fail to protect their interests.

At this point, it is uncertain whether the Board would extend NLRA protection to student-athletes as "employees" within the meaning of Section 2(3). The arguments in favor of coverage under both the "compensated services" test and the "primary purpose" test have been noted. But for every argument in favor of NLRA coverage, there are factors weighing against it. The NLRB's treatment of student-athletes may ultimately depend on whether the Board believes student-athletes merit protection. Unfortunately, on-the-field cockiness and showboating, and off-the-field academic and legal troubles, do not engender sympathy for today's college athletes. In an era when fifty-two percent of Division I-A institutions are censured, sanctioned, or put on probation for major NCAA violations that presumably benefit student-athletes,[252] there is more than a little doubt whether the Board would protect student-athletes. Furthermore, it is not clear whether traditional unionization would even benefit student-athletes. The ultimate economic weapon of striking is not an option, because the athletes need to play in order to develop themselves as players and gain media exposure that will increase their draft potential. USWA President Leo Gerard believes that public exposure of the NCAA is one weapon to combat the inequities in college sports.[253] Others disagree. James Duderstadt, former President of the University of Michigan, would join the CAC if he were a student-athlete today. He said, ". . .to get a mule to move, you gotta whack it over the head with a two-by-four to get its attention. And maybe collective bargaining, or at least

252. *Id.* at 12.

253. *60 Minutes*, *supra* note 84, Interview by Lesley Stahl with Leo Gerard, President, United Steelworkers of America.

the threat of it, is the way to get the attention of these programs and these institutions."[254]

The inequities suffered by student-athletes may be just one symptom of a larger problem with collegiate athletics. College athletics have become "an obsession with winning and moneymaking that is perverting the noblest ideals of both sports and education in America."[255] The United States is the only country in the world that combines school and sports.[256] Thus, college athletic programs function as developmental leagues for aspiring professional athletes.[257] Tom McMillen of the Knight Foundation believes that NCAA self-reform will not cure the problems faced by intercollegiate athletics.[258] Instead, he proposes that Congress grant the NCAA an antitrust exemption, allowing the NCAA to govern member institutions, and distribute revenues based on gender equity and academic values, not wins and losses.[259] This proposal would reduce coaches' salaries consistent with prevailing salaries in higher education and focus attention on academics rather than athletics.[260] Others are not willing to give the NCAA any leeway. Rep. Shelley Berkley from Nevada describes the NCAA as having "a monopoly and a strangle hold on the fate of college programs across the country."[261] She believes that coaches and NCAA member institutions are unwilling to speak out against the NCAA, for fear of retribution in the form of investigations and sanctions against their athletic programs.[262] In testimony before a Congressional subcommittee she said, "I believe we need a watchdog to watch over the NCAA."[263] A labor union is one possibility.

254. *60 Minutes*, *supra* note 84, Interview by Lesley Stahl with James Duderstadt, former President, University of Michigan.

255. John Updike, *FOUL!*, TIME, April 3, 1989, at 54.

256. *Hearings*, *supra* note 15, at 41 (testimony of Tom McMillen).

257. *Id.*

258. *Id.*

259. *Id.* at 52.

260. *Hearings*, *supra* note 15, at 52.

261. *Id.* (testimony of Hon. Shelley Berkley).

262. *Id.* at 8.

263. *Id.*